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Reconsidering the Question of the Link between the Parties in Unjust Enrichment Claims

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Abstract

Much of the current debate in unjust enrichment scholarship revolves around two distinct problems. The first problem is identifying the kind of connection between claimant and defendant that suffices to support an unjust enrichment claim. The second problem is defining the scope and internal organisation of the rules and principles governing unjust enrichment as a unified part of English private law. These problems have tended to be considered in relative isolation from one another. The resulting picture is one of persisting uncertainty about the kind of connection supporting unjust enrichment claims and increasing scepticism about the convenience of treating the rules and principles governing these claims as forming a unified part of the law.

This thesis is an attempt to bring these problems together. Its main argument is that important differences between the scenarios where unjust enrichment claims have been recognised compel reconsideration of the conventional view that a single test may explain the qualifying connection in every possible case. Instead, it is suggested that English law will benefit from adopting a differentiated approach distinguishing situations where any of a diverse set of links may be enough to establish the requirements of a claim. By guiding our attention to the particularities of these situations without renouncing the benefits of an overall view of the rules and principles governing them, this approach may help dispel the uncertainty surrounding the scope of unjust enrichment liability and overcome some of the difficulties identified by detractors of the unjust enrichment analysis.

Lay Summary

Unjust enrichment is a branch of English private law concerned with cases where a defendant is ordered to make restitution of the value of benefits obtained at the claimant's expense under circumstances deemed to be unjust. The cases forming this branch of the law were traditionally dealt with through seemingly unrelated concepts and doctrines supposed to belong to other, different branches of the law. During the second half of the twentieth century, a unified analytical framework was devised for approaching the problems raised by these cases in a systematic manner. Among other things, this framework was designed to focus attention on the kind of connection or link between claimant and defendant which may be sufficient for concluding that the defendant's enrichment was obtained at the claimant's expense.

Finding a test reflecting the circumstances under which the required connection can be established has proved to be a particularly contentious issue. The lack of a conclusive solution to this problem has produced significant uncertainty about the way in which unjust enrichment cases should be handled by the courts. This uncertainty, in turn, has reinforced the misgivings of those who are sceptical about the convenience of adopting the unified unjust enrichment analytical framework. Recent developments seem to have driven the law of unjust enrichment to a point where leading scholars feel compelled to doubt or deny its very existence.

This thesis provides a critical assessment of the way in which English law answers the question about the link between the parties. Its main argument is that this link is recognised in situations revealing features which cannot be conveniently captured by a single test. A failure to recognise these features lies behind some of the difficulties underlying contemporary calls for renouncing the unified unjust enrichment analytical framework. The thesis argues that English law will benefit from adopting a differentiated approach distinguishing situations whereby a set of diverse links may be identified. Such an approach may help preserving the advantages of the overall analysis achieved through the unified framework while avoiding some of the difficulties identified by its detractors.

Declaration

According to the Postgraduate Assessment Regulations for Research Degrees, Regulation 34, I hereby declare that this thesis has been composed solely by myself and that it has not been submitted, in whole or in part, in any previous application for a degree. Except where states otherwise by reference or acknowledgment, the work presented is entirely my own.

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List of Abbreviations

A.	Atlantic Reporter (Second Series)
A.C.	Law Reports, Appeal Cases
All E.R.	All England Law Reports
A.L.R.	Australian Law Reports
B.C.L.C.	Butterworths Company Law Cases
Bing. N.C.	Bingham's New Cases
B.T.R.	British Tax Review
B.U.L.Rev.	Boston University Law Review
Burr.	Burrow's King's Bench Reports
Cass. Ass. Plén.	Cour de Cassation, Assemblée Plénière (full court), France
Ch.	Law Reports, Chancery Division
Civ. 1re	Cour de Cassation, Première Chambre Civile, France
Civ. 3e	Cour de Cassation, Troisième Chambre Civile, France
C.J.L.J.	Canadian Journal of Law and Jurisprudence
C.L.J.	Cambridge Law Journal
C.L.P.	Current Legal Problems
C.L.R.	Commonwealth Law Reports
Cowp.	Cowper's King's Bench Reports
C & P	Carrington and Payne's Reports
Edin.L.R.	Edinburgh Law Review
E.R.	English Reports
EWCA Civ	Court of Appeal of England and Wales Decisions (Civil Division)
EWHC (Comm)	High Court of England and Wales Decisions (Commercial Court)
Ex	Exchequer Reports

GP	Gazette du Palais
G.W.D.	Green's Weekly Digest
Harv.L.Rev.	Harvard Law Review
HCA	High Court of Australia
I.C.L.Q.	International and Comparative Law Quarterly
I.R.L.R.	Industrial Relations Law Report
J.R.	Juridical Review
K.B.	Law Reports, King's Bench
La.L.Rev.	Louisiana Law Review
Leg. Stud.	Legal Studies
L.J. Ex.	Law Journal, Exchequer
L.M.C.L.Q.	Lloyd's Maritime and Commercial Law Quarterly
L.Q.R.	Law Quarterly Review
McGill L.J.	McGill Law Journal
M.L.R.	Modern Law Review
M & W	Meeson and Welsby's Exchequer Reports
N.Z.L.Rev.	New Zealand Law Review
O.J.L.S.	Oxford Journal of Legal Studies
P. & C.R.	Property and Compensation Reports
Q.B.	Law Reports, Queen's Bench
Req.	Cour de Cassation, Chambre des Requêtes, France
R.I.D.C.	Revue Internationale de Droit Comparé
R.L.R.	Restitution Law Review
R.T.D.Civ.	Revue Trimestrielle Droit Civil
S.	Recueil Sirey
S.C.	Session Cases
Scot Law Com DP	Scottish Law Commission Discussion Paper
S.C.R.	Supreme Court Reports, Canada
S.L.T.	Scots Law Times

S.T.C.	Simon's Tax Cases
Tex.L.Rev.	Tex.L.Rev.
Tul.L.Rev.	Tulane Law Review
UKHL	House of Lords, United Kingdom
UKPC	United Kingdom, Privy Council
UKSC	United Kingdom, Supreme Court
U.W.A.L.Rev.	University of Western Australia Law Review
Vill.L.Rev.	Villanova Law Review
W.L.R.	Weekly Law Reports
Yale L.J.	Yale Law Journal

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Introduction

The aim of this thesis is to critically assess the way in which English law answers the question about the link between the parties in unjust enrichment claims. Its main argument is that this link is recognised in situations revealing features which cannot be conveniently captured by a single test. A failure to recognise these features lies behind some of the difficulties underlying contemporary calls for renouncing a systematic analytical framework for approaching the issues raised by unjust enrichment claims. This thesis argues that a nuanced answer to the question of the link between the parties may help preserving the advantages of the overall analysis achieved through this framework without committing English law to overgeneralised tests of liability.

This introduction is divided in three parts. The first part explains the main problem this thesis aims to resolve and its importance. The second part identifies some basic assumptions underlying the thesis. The third part outlines the structure of the argument developed in the thesis and summarises the main points discussed in each of its chapters.

The Question of the Link between the Parties

In English private law, unjust enrichment is a source of rights and obligations ranking next to contracts and torts¹. The kind of rights triggered by unjust enrichment are usually restitutionary, in the sense that they allow the right-holder to pursue a remedy designed to return to him or her a benefit obtained by the defendant². Restitutionary remedies can be personal or proprietary. Personal restitutionary remedies are orders forcing the defendant

¹ *Lipkin Gorman (a firm) v Karpnale Ltd.* [1991] 2 A.C. 548 (“*Lipkin Gorman*”), 559–560 (Lord Templeman), 572, 578 (Lord Goff); *Woolwich Equitable Building Society v IRC* [1993] A.C. 70 (“*Woolwich*”), 154 (Lord Keith); *Banque Financière de la Cité v Parc (Battersea) Ltd.* [1999] A.C. 221 (“*BFC*”), 227 (Lord Steyn) and 234 (Lord Hoffmann).

² Courts may also grant remedies designed to prevent unjust enrichment from arising, for example, by enforcing some insurer’s subrogation rights. C. Mitchell and S. Watterson, *Subrogation: Law and Practice* (Oxford 2007), [10.04]–[10.06].

to pay a sum representing value received from the claimant³. Personal restitutionary rights and remedies arising from unjust enrichment should be distinguished from personal restitutionary right and remedies arising from torts, breaches of contract, or equitable wrongs⁴. Unlike these other restitutionary rights and remedies, those arising from unjust enrichment do not seek the disgorgement of gains made by the defendant, but the reversal of value subtracted from the claimant⁵.

Much of the current debate in unjust enrichment scholarship revolves around two distinct problems following from these general definitions. The first problem concerns the legal test or tests which should be adopted to identify the kind of connection or link between the parties in situations where value can be considered to have been subtracted from the claimant and received by the defendant. Suppose that X mistakenly pays £1,000 into Y's bank account. Without noticing the mistake, but encouraged by his improved financial situation, Y decides to make a gift of £1,000 from a different account to Z. It is relatively uncontroversial that mistaken payments of money give rise to a personal claim for value received. But can we conclude that the £1,000 received by Z corresponds to the value subtracted from X? In other words, can we conclude that X and Z are sufficiently closely connected for the purposes of recognising an unjust enrichment claim?

The second problem concerns the scope and internal organisation of the rules and principles governing unjust enrichment as a discrete source of rights and obligations ranking next to contracts and torts. It is relatively uncontroversial that, apart from cases involving mistaken payments of money, a personal remedy for value should be available against the defendant who knowingly receives trust money from a claimant's trustee

³ A. Burrows, *The Law of Restitution*, 3rd ed. (Oxford 2011), 14–15. The author offers as examples of personal restitutionary remedies the award of money had and received, money paid to the defendant's use, *quantum meruit* and *quantum valebat*.

⁴ *Sempra Metals Ltd. v IRC* [2007] UKHL 34, [2008] 1 A.C. 561, at [116] (Lord Nicholls), [230]–[231] (Lord Mance).

⁵ Burrows, *The Law of Restitution*, p. 63; C. Mitchell, P. Mitchell and S. Watterson (eds.), *Goff and Jones on the Law of Unjust Enrichment*, 9th ed. (London 2016), [6-01]; J. Edelman and E. Bant, *Unjust Enrichment*, 2nd ed. (Oxford 2016), 32.

acting in breach of trust⁶, or against the defendant whose liability to a third party is discharged by the jointly and severally liable claimant⁷. Less clear is whether all these remedies should be treated as effecting personal restitutionary rights arising from unjust enrichment and examined through a common analytical framework. Many people believe that the rules and principles governing the claims available in these situations are better expounded in distinct units belonging to other parts of the law⁸. Despite the unambiguous recognition by the highest appellate courts of unjust enrichment as discrete branch of English law, there is still significant uncertainty as to which are the specific liabilities making it up and how should they be arranged within the subject's overall framework.

In civilian jurisdictions, the analysis of the connection between the parties in restitutionary claims and the division and ordering of the law governing them have evolved hand in hand. In Germany, for example, the difficulties in identifying the proper claimant in some three-party scenarios was the turning point leading to the adoption of the Wilburg-von Caemmerer typology which provides the structure of mainstream accounts of the German law of unjustified enrichment⁹. In France, the lack of an appropriate restitutionary remedy in some three-party scenarios led to the judicial recognition of a general action in unjustified enrichment applicable beyond the scope of restitutionary claims arising from failed contracts and undue payments¹⁰. Until recently, common lawyers examined the qualifying connection between the parties in relative isolation from considerations about the division and ordering of the law of unjust enrichment¹¹. But

⁶ D. Hayton, P. Matthews and C. Mitchell (eds.), *Underhill and Hayton on the Law of Trusts and Trustees*, 19th ed. (London 2016), [98.2], [98.11], [98.33] and [98.35].

⁷ C. Mitchell, *The Law of Contribution and Reimbursement* (Oxford 2003), [1.11].

⁸ See, for example, S. Hedley, *Restitution: Its Division and Ordering* (London 2001), ch. 9; P. Jaffey, *Private Law and Property Claims* (Oxford 2007), ch. 8; P. Watts, "Unjust Enrichment—the Potion that Induces Well-meaning Sloppiness of Thought" (2016) 69 C.L.P. 289.

⁹ S. Meier, "Enrichment 'At the Expense of Another' and Incidental Benefits in German Law" in H. Scott and A. Fagan (eds.), *Private Law in a Changing World: Essays for Danie Visser* (Claremont 2019), 458.

¹⁰ E. Descheemaeker, "The New French Law of Unjustified Enrichment" [2017] R.L.R. 77, 87–88.

¹¹ For example, P. Birks, "At the Expense of the Claimant: Direct and Indirect Enrichment in English Law" in D. Johnston and R. Zimmermann (eds.), *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge 2002), 496. However, hints of the importance of analysing these problems together can be traced to P. Birks, *An Introduction to the Law of Restitution*, rev. ed. (Oxford 1989), 16–17: "The words 'at the expense of another' are far more important than they seem. They contain an ambiguity on which a major division of the subject rests".

contemporary writers are increasingly aware that the two problems are intimately related¹².

Overlooking this point has led unjust enrichment scholarship to put itself in a difficult position. At least since the pivotal decision of the House of Lords in *Lipkin Gorman*, English courts have explicitly recognised unjust enrichment claims in situations revealing very different features¹³. However, the link between the parties underlying all these situations has consistently been explained through a single abstract test¹⁴. The combined effect of these attitudes has been an increasing ambiguity regarding the limits of the proposed tests and the kind of situation where unjust enrichment claims should be available. Understandably, this uncertainty has prompted an emerging consensus about the need to narrow down the scope of unjust enrichment liability¹⁵. But it has also provided a convenient backdrop for the argument that the systematic analytical framework for examining the elements of unjust enrichment claims is fundamentally flawed and should be abandoned¹⁶.

Unfortunately, the urge for restricting the scope of unjust enrichment liability has not dispelled the uncertainty surrounding the kind of link between the parties required for this form of liability to arise. Instead, it has encouraged courts and commentators to focus on a “directness” analysis which is unable to explain the key features defining what

¹² A. Burrows, “‘At the Expense of the Claimant’: A Fresh Look” [2017] R.L.R. 167, 171; H. Scott, “Comparative Taxonomy: An Introduction” in E. Bant, K. Barker and S. Degeling (eds.), *Research Handbook on Unjust Enrichment and Restitution* (Cheltenham 2020), 165–166; S. Watterson, “At the Claimant’s Expense” in E. Bant, K. Barker and S. Degeling (eds.), *Research Handbook on Unjust Enrichment and Restitution* (Cheltenham 2020), 271.

¹³ See, for example, *BFC, Niru Battery Manufacturing Co. v Milestone Trading Ltd. (No. 2)* [2004] EWCA Civ 487, [2004] 2 All E.R. (Comm) 289; *Benedetti v Sawiris* [2013] UKSC 50, [2014] A.C. 938 (“*Benedetti*”).

¹⁴ See, for example, P. Birks, *Unjust Enrichment*, 2nd ed. (Oxford 2005), 98; S. Watterson, “‘Direct Transfers’ in the Law of Unjust Enrichment” (2011) 64 C.L.P. 435, 448; E. Ball, *Enrichment at the Claimant’s Expense* (Oxford 2016), 211.

¹⁵ Watterson, “At the Claimant’s Expense”, p. 269.

¹⁶ See especially R. Stevens, “The Unjust Enrichment Disaster” (2018) 134 L.Q.R. 574; L. Smith, “Restitution: A New Start?” in P. Devonshire and R. Havelock (eds.), *The Impact of Equity and Restitution in Commerce* (Oxford 2019).

happens between the parties beyond the simplest unjust enrichment scenarios¹⁷. Meanwhile, the main objections against the adoption of a unified analytical framework for approaching unjust enrichment claims remain unresolved. Taking these objections seriously require us to confront the fact that the denounced shortcomings may not be remedied only by tighten up the meaning we attach to each of the elements of this framework. A different way of thinking about them is required.

This thesis seeks to contribute to the solution of these problems by proposing a nuanced way of answering the question of the link between the parties in unjust enrichment claims. Its main argument is that important differences among the scenarios where unjust enrichment claims have been recognised make it necessary to reconsider the conventional view that a single test may explain the qualifying connection in every possible case. Instead, it is suggested that English law will benefit from adopting a differentiated approach distinguishing situations where different kinds of link may be enough to make up a claim. Understanding why requires us to review structural definitions at the basis of the English approach to unjust enrichment, including the way we conceive unity among restitutionary claims and the kind of advantages which we should expect from subjecting them to a common analytical framework. This thesis is an attempt to reconsider the question of the link between the parties from this broader perspective.

Underlying Assumptions

This is not the first scholarly work devoted to examining the kind of link between the parties supporting unjust enrichment claims¹⁸. Unlike previous works, however, this thesis benefits from the important decision rendered by the UK Supreme Court in *Investment Trust Companies v HMRC*¹⁹. Apart from providing extensive analysis of substantive issues which will be discussed in the following chapters, this decision cleared some

¹⁷ See, for example, *Prudential Assurance Co. Ltd. v HMRC* [2018] UKSC 39, [2019] A.C. 929, at [71] (Lord Reed, Lord Hodge and Lord Mance) and A. Burrows, “In Defence of Unjust Enrichment” [2019] C.L.J. 521, 537.

¹⁸ See, for example, Mitchell et al, *Goff and Jones*, chs. 6 and 7 and Ball, *Enrichment*, especially ch. 4.

¹⁹ [2017] UKSC 29, [2018] 1 A.C. 275 (“*ITC*”).

methodological issues troubling other studies of the law of unjust enrichment²⁰. In line with *ITC*, this thesis relies on assumptions that can be identified at the outset.

First, this thesis assumes that the idea of unjust enrichment describes a body of law made up by rules and principles derived from legal authority. Unjust enrichment is not a vague principle of justice, but an organising concept grouping together categories of cases sharing common features. As it will become apparent in the following chapters, the way in which commonality among these features is defined is subject to considerable debate. Yet the discussion proceeds on the basis that our central concern in this area is identifying legal rights and obligations determined by rules of law, and not only moral principles²¹.

Secondly, the search for the legal rules and principles applicable to the cases grouped together under the organising concept of unjust enrichment is frequently approached through a unified analytical framework formed by a series of general questions: Has the defendant been enriched? Was the enrichment at the claimant's expense? Was the enrichment unjust? Are there any defences?²² *ITC* confirmed that these questions should not be understood as legal tests but rather as signposts towards areas of inquiry involving different legal requirements²³. In accordance with this position, this thesis is not an exercise in exegesis of any of the proposed formulas expressing the question of the link between the parties, but an investigation of the requirements of different unjust enrichment claims as laid down in decided cases.

²⁰ For example, A. Lodder, *Enrichment in the Law of Unjust Enrichment and Restitution* (Oxford 2012), 8–10; Ball, *Enrichment*, pp. 1–11.

²¹ *ITC*, at [39] (Lord Reed). Further support for this view can be found in *Woolwich*, 196–197 (Lord Browne-Wilkinson); *Kleinwort Benson Ltd. v Birmingham City Council* [1997] Q.B. 380, 386 (Evans LJ); *Gibb v Maidstone and Tunbridge Wells NHS Trust* [2010] EWCA Civ 678, [2010] I.R.L.R. 786, at [26]–[27] (Laws LJ); and the Australian decision of *Mann v Paterson Constructions Pty. Ltd.* [2019] HCA 32, (2019) 373 A.L.R. 1, at [213] (Nettle, Gordon and Edelman JJ).

²² *BFC*, p. 227 (Lord Steyn); *Benedetti*, at [10] (Lord Clarke); *Menelaou v Bank of Cyprus UK Ltd.* [2015] UKSC 66, [2016] A.C. 176, at [18] (Lord Clarke).

²³ *ITC*, at [41] (Lord Reed).

Thirdly, the cases grouped together under the organising concept of unjust enrichment may involve both personal and proprietary restitutionary remedies. Unlike personal restitutionary remedies—which, as explained above, correspond to orders forcing the defendant to pay a sum representing value received—proprietary restitutionary remedies (sometimes referred to as remedies for “specific restitution”) correspond to orders declaring that the claimant has a new ownership or security interest in an asset held by the defendant²⁴. These remedies turn on special considerations and only exceptionally will be awarded in unjust enrichment cases²⁵. This thesis does not examine the special considerations which may justify the award of a proprietary restitutionary remedy, so it should be understood as concerned only with personal unjust enrichment claims²⁶.

Fourthly, this thesis assumes that considering the structural arrangements adopted across different jurisdictions to deal with restitutionary problems is useful to identify the strengths and weaknesses of the different approaches advocated for English law²⁷. However, it is not conceived as a comparative study. Its main purpose is to identify the kind of link between the parties required by English law to support unjust enrichment claims, not to compare how English and other legal systems respond to the question of linking the parties for the purposes of enrichment liability. As such, it is not subject to the methodological constraints imposed by comparative legal analysis²⁸. In the fashion of many works of unjust enrichment scholarship, this thesis relies on the experience of other

²⁴ The notion of “specific restitution” is used to emphasise that a variety of legal mechanisms can be understood as achieving this restitutionary function. These mechanisms may include trusts, rescission, rectification and subrogation: Lodder, *Enrichment*, p. 64.

²⁵ Burrows, *The Law of Restitution*, p. 14; Mitchell et al, *Goff and Jones*, [36-05], [37-01] and [37-03]; Edelman and Bant, *Unjust Enrichment*, p. 36.

²⁶ As is the analysis developed in *ITC*, at [38] (Lord Reed).

²⁷ See generally D. Visser, “Unjustified Enrichment in Comparative Perspective” in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, 2nd ed. (Oxford 2019), 962; and Scott, “Comparative Taxonomy”, p. 166.

²⁸ As typically illustrated by comparative law functionalism. See, for example, K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 3rd ed. by T. Weir (tr.) (Oxford 1998), 32–47; R. Michaels, “The Functional Method of Comparative Law” in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, 2nd ed. (Oxford 2019), 345.

jurisdictions when appropriate to illustrate a point or exemplify the advantages or disadvantages of different approaches to English law²⁹.

Finally, this thesis assumes that the distinction between “top-down” or purely prescriptive and “bottom-up” or purely descriptive legal scholarship is not particularly helpful to assess acceptable forms of legal reasoning in the private law context³⁰. An account of the law might attempt to reveal an intelligible order of the decided cases without either relying exclusively on first principles or becoming a mere description of posited rules³¹. Similarly, the ambition of this thesis is not to develop a purely theoretical explanation of the kind of link underpinning unjust enrichment liability, nor to provide an exhaustive description of all the decided cases. In line with the abundant unjust enrichment scholarship existing between these two extremes, this thesis seeks to propose a way of looking at the cases which may help to overcome some of the difficulties posed by the conceptual tools used to analyse them.

Structure

This thesis is divided in seven chapters. Chapter one provides an overview of the main tests proposed in English law to answer the question of the link between the parties in unjust enrichment claims. It shows that each of these tests suffers from significant shortcomings which explain the uncertainty surrounding their application in judicial decisions. Against this background, the chapter introduces the approach adopted by Lord Reed in *ITC*, a central feature of which is distinguishing different situations where the link between the parties may be established. It is argued that this approach provides a basis on which a more precise answer to the question of the link between the parties may be worked out.

²⁹ A prominent example is Birks, *Unjust Enrichment*, pp. 102ff. A similar approach is adopted in the collection of essays published as E. Bant, K. Barker and S. Degeling (eds.), *Research Handbook on Unjust Enrichment and Restitution* (Cheltenham 2020).

³⁰ As described, for example, in the Australian decision of *Roxborough v Rothmans of Pall Mall (Australia) Ltd.* [2001] HCA 68, (2001) 208 C.L.R. 516, at [72]–[73] (Gummow J).

³¹ C. Conte, “From Only the ‘Bottom-up’? Legitimate Forms of Judicial Reasoning in Private Law” (2015) 35 O.J.L.S. 1, 16.

Chapter two considers an important objection which may be raised against the approach adopted in *ITC*. According to this objection, when we approach claims for restitution of unjust enrichment in terms of a set of common questions, we are compelled to proceed as if all these claims should be subject to the same conditions of liability, and to recognise claims under circumstances where it seems evident that no liability should arise. The chapter argues that these difficulties are not necessarily a consequence of analysing unjust enrichment claims through a set of common questions. They follow from overemphasising the role of abstract considerations about the purpose of the law of unjust enrichment in establishing the requirements of specific claims. In order to avoid these difficulties, it is suggested that the approach adopted in *ITC* should be adjusted to reflect the features accounting for the link between the parties in the specific situations identified by the judgment.

Chapter three discusses the link existing between the parties in the most frequent situations identified by *ITC*: those where the parties have dealt directly with one another through the payment of money or the provision of goods and services, and those where the defendant receives the claimant's property. Based on the distinctive features of these situations, it is argued that the link between the parties in unjust enrichment claims may take two basic forms. Under the first form, which is apparent in situations described as *conferrals*, the relevant enrichment is brought about through an intentional act of the claimant which is accepted by the defendant. Under the second form, which is apparent in situations described as *takings*, the relevant enrichment results from the defendant's interference with an asset to which the claimant retains some form of entitlement.

Chapter four continues the work of chapter three by discussing the kind of link existing between the parties in the less frequent situations identified in *ITC*: those where the claimant discharges a debt owed by the defendant to a third party, and those where a set of related transactions operating in a co-ordinated way is treated as forming a single scheme or transaction between the parties. Based on the distinctive features of these situations, it is argued that the link between the parties in unjust enrichment claims may

take at least two further forms. Under the first form, which is apparent in situations described as *discharges of another's debt*, the relevant enrichment is brought about either through the payment of the claimant to a creditor in respect of a debt which was also owed by the defendant, or through the payment of a debt owed by the defendant to a third party with money traceably received from the claimant. Under the second form, which is apparent in situations described as *co-ordinated transactions*, the relevant enrichment is brought about through an arrangement of the claimant with a third party which results in a non-intended benefit to the defendant.

If unjust enrichment claims are premised upon such a variety of links between claimant and defendant, it may be tempting to conclude that there is no point in analysing them through a unified framework of common questions. Chapter five evaluates this proposition through a comparison of the way in which the German and French legal systems have arranged their rules and principles governing claims for restitution of unjustified enrichment. The comparison suggests that renouncing the possibility of analysing restitutionary claims as part of a coherent whole leads to difficulties at least as serious as those following from implementing a unified framework. It is argued that such a framework does not need to assume that all restitutionary claims are recognised for the same reasons and subject to the same requirements to yield important advantages.

Considered together, chapters one to five show that the answer we give to the question of the link between the parties must be general enough to provide a structure where unjust enrichment claims can be analysed side by side, and at the same time be focused enough to reflect the significant differences existing among the situations where these claims are recognised. Chapter six argues that reconciling these objectives is not only possible, but necessary to respect the rationale underlying the approach adopted in *ITC*. It is suggested that this decision may provide an authoritative basis on which English materials could be arranged by distinguishing different situations where the question of the link between the parties may receive a different answer. This kind of nuanced answer

would allow future cases to be decided on an incremental basis, without committing English law to overgeneralised tests of liability.

When we distinguish different situations providing the required link between claimant and defendant, the issues arising in each of the main phases of the unjust enrichment analysis—“enrichment”, “at the expense of” and “unjust factors”—reveal themselves as somewhat different across the proposed categories. Chapter seven focuses on some of the most noticeable of these differences to suggest that the kind of link existing between the parties determines the kind of issues arising in each of the stages of the unjust enrichment analysis. It is argued, however, that this conclusion should not lead us to collapse the distinct stages into a single inquiry about the existence of a qualifying link.

Finally, a conclusion summarises the main contribution of the thesis and identifies some unresolved questions.

Chapter 1 A Sufficiently Close Connection

In 2017, the UK Supreme Court delivered an important decision for the law of unjust enrichment. The main issue addressed by the court was the nature of the link that should exist between claimant and defendant to establish the requirements of personal claims in unjust enrichment. Not long before the decision, this question had received relatively little attention. Commentators assumed that in most cases the answer was obvious¹. Judicial dicta were sparse and not particularly insightful as the problem had rarely been openly presented to the courts². But then, as if the time had finally become ripe for its proper consideration, the question began occupying an increasingly noticeable place in academic literature and case law, to the point that today it ranks among the most pressing unjust enrichment problems³. The decision of the Supreme Court marks an important milestone as it offers the most comprehensive judicial analysis of the problem in English law.

Some context is required to appreciate the significance of this decision. The objective of this chapter is to provide such context by unpacking the main difficulties involved in answering the question about the link between the parties in personal unjust enrichment claims. It will proceed in four parts. The first part introduces the question and explains its place in the unjust enrichment analysis. The second part describes the main approaches proposed in English law to answer this question. The third part describes the difficulties faced by the proposed approaches. The fourth part explains why the position taken by the Supreme Court offers an answer which avoids these difficulties.

¹ P. Birks, *Unjust Enrichment*, 2nd ed. (Oxford 2005), 86.

² C. Mitchell, “Unjust Enrichment” in A. Burrows (ed.), *English Private Law*, 3rd ed. (Oxford 2013), [18.44].

³ See, for example, A. Burrows, “In Defence of Unjust Enrichment” [2019] C.L.J. 521, 537; H. Scott, “Change and Continuity in the Law of Unjust Enrichment” in H. Scott and A. Fagan (eds.), *Private Law in a Changing World: Essays for Danie Visser* (Claremont 2019), 470–475.

1.1 Investment Trust Companies

*Investment Trust Companies v HMRC*⁴ is a case arising from the payment of Value Added Tax (“VAT”) which was not due. For years, the claimants paid VAT on the price of some services provided by a firm of investment managers. According to the applicable legislation, the managers in turn paid VAT across to the Commissioners of HMRC, the defendants. It transpired that the services in question were exempt from VAT under the relevant European Union directive, and thus that the taxes levied by the defendants had been mistakenly paid. Under section 80 of the Value Added Tax Act 1994, the managers were allowed to recover from the defendant. They did so, and subsequently paid the recovered VAT back to the claimants. But the claimants ended up receiving less than they had originally paid. Among other reasons, this was because the managers were only able to recover, and thus pay across to the claimants, the VAT collected within the limitation period imposed by section 80 of the VAT Act 1994, which did not cover all the time during which the purported taxable services were supplied⁵. In order to recover the amounts paid outside this limitation period, the claimants sought to bypass the managers—whose right to recover was subject to the aforementioned limitation period—and brought a claim in unjust enrichment directly against the defendants.

The most important issue raised by this case was whether the VAT paid by the managers outside the limitation period could be considered to have been received by the defendants at the claimants’ expense⁶. Unlike most unjust enrichment cases, the relevant benefit did not arise as a consequence of direct dealings between the claimants and the defendants. If the benefit came from the claimants, it was only through the hands of the

⁴ [2017] UKSC 29, [2018] A.C. 275 (“*ITC*”).

⁵ There was another reason why the claimants were left out of pocket. In pursuance to applicable legislation, the managers had deducted from the VAT paid to the defendants, VAT previously paid to its own third-party suppliers. The managers recovered from the defendants, and thus paid across to the claimants, the VAT paid after the applicable deductions. This issue is not further considered as the Supreme Court concluded that the defendants could only have been enriched by the VAT effectively paid by the managers, and that the question for the link between the parties was relevant only in respect of such amount. *ITC*, at [25]–[31] (Lord Reed).

⁶ Another question presented was whether the VAT Act 1994, s. 80 excluded an unjust enrichment claim and whether such exclusion would be compatible with European Union law. *ITC*, at [75]–[94] (Lord Reed). This issue is not further considered as it is specific to claims for restitution of overpaid tax.

managers, who paid it across to the defendants. The claimants argued that there was no restriction against recovery, as the starting point for establishing the required connection between the parties was a flexible causal test between the claimant's loss and the defendant's gain⁷. The defendants accepted that the law exceptionally allowed recovery in indirect enrichment cases, but argued that unjust enrichment claims will generally lie only where the claimant provides a benefit directly to the defendant⁸. By the time the case reached the Supreme Court, the outcome of the case turned on a purely legal question: which should be the test to identify the qualifying connection between the parties to an unjust enrichment claim?

The importance of establishing a sufficiently close connection between claimant and defendant was clear long before the facts of *ITC* came before the Supreme Court. An explicit formulation of this requirement could be traced at least to *Re Byfield*, where it was noted that, in order to recover in unjust enrichment, the claimant had to demonstrate a "compelling nexus" with the defendant⁹. To similar effect were remarks by Morritt LJ in *Kleinwort Benson Ltd. v Birmingham City Council*, who concluded that unjust enrichment claims required the claimant to be the "immediate source" of the defendant's enrichment¹⁰. In the years immediately before the decision of *ITC*, several appellate decisions relied on these observations to characterise the requirement¹¹. Apart from the

⁷ *Investment Trust Companies v HMRC* [2012] EWHC 458 (Ch), [2012] S.T.C. 1150 ("*ITC HC*"), at [66] (Henderson J).

⁸ *ITC HC*, at [51] (Henderson J).

⁹ *Re Byfield* [1982] Ch. 267, [1982] 2 W.L.R. 613, 276 (Goulding J). The question specifically addressed in the decision was whether the claimant bank could be regarded as entitled to stand in the shoes of its bankrupt client's creditors via subrogation where these creditors were benefited as the result of a mistaken payment by the bank to the mother of the bankrupt client who subsequently paid the creditors, and not directly by a mistaken payment from the claimant bank to the creditors.

¹⁰ [1997] Q.B. 380, 400 (Morritt LJ). The question specifically addressed in the decision was whether payments made under void interest rate swap contracts by a claimant who had entered hedging arrangements with third parties to cover any losses under the contracts could be considered to be at the claimant's expense.

¹¹ For example, *ITC HC*, at [68] (Henderson J); *Menelaou v Bank of Cyprus UK Ltd.* [2015] UKSC 66, [2016] A.C. 176 ("*Menelaou*"), at [27] (Lord Clarke); *Relfo Ltd. (In Liquidation) v Varsani* [2014] EWCA Civ 360, [2015] 1 B.C.L.C. 14, at [95] (Arden LJ).

indisputable fact that some kind of link was required, however, the cases remained remarkably silent as to how such link should be established.

Scholarly discussion was not particularly helpful either. Until recently, it was often assumed that the existence of a sufficient link between the parties would in most cases be an entirely uncontroversial implication of the “at the expense of” element of the unjust enrichment analysis¹². The rare cases in which this connection was perceived as problematic were sometimes marginalised into narrow categories¹³ and other times skipped altogether, with the result that for many years the leading textbooks devoted little attention to the issue¹⁴. This may come as a surprise as, in hindsight, it is clear that the way we define the connection between the parties has deep implications for the unjust enrichment analysis.

According to a widely accepted opinion, unjust enrichment is one of the main causative events giving rise to personal rights of a claimant (or, correspondingly obligations of a defendant), along with manifestations of consent (like contracts) and wrongs (like torts and breaches of fiduciary duties)¹⁵. As a causative event, unjust enrichment is usually described as a defective subtraction of value from the claimant which benefits the defendant, as it happens in the paradigmatic example of mistaken payments between the payer and payee¹⁶. Personal rights arising from unjust enrichment are not available to recover any loss, nor it is their purpose to undo every gain. The

¹² P. Birks, *An Introduction to the Law of Restitution*, rev. ed. (Oxford 1989), 133; A. Burrows, *The Law of Restitution* (London 1993), 16; G. Virgo, *The Principles of the Law of Restitution* (Oxford 1999), 105.

¹³ See, for example, Birks, *Introduction*, pp. 138–139, where the only area of difficulty identified are the cases of “interceptive subtraction”.

¹⁴ P. Birks, “‘At the Expense of the Claimant’: Direct and Indirect Enrichment in English Law” in D. Johnston and R. Zimmermann (eds.), *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge 2002), 494. This is no longer the case. See A. Burrows, “‘At the Expense of the Claimant’: A Fresh Look” [2017] R.L.R. 167, 167.

¹⁵ P. Birks, “Definition and Division: A Meditation on Institutes 3.13” in P. Birks (ed.), *The Classification of Obligations* (Oxford 1997), 19. Some cases like *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.* [1964] A.C. 465 assume that a breach of contract amounts to a tort. But breaches of contract present important particularities which make it better to treat them separately. See, for example, A. Beever, *Rediscovering the Law of Negligence* (Oxford 2007), pp. 284–298.

¹⁶ Birks, *Unjust Enrichment*, pp. 5–9.

claimant's right and the defendant's duty underpinning the claim for restitution are only triggered when an enriching subtraction of value is identified¹⁷. As long as this enriching subtraction is not identified, there can be no obligation arising from unjust enrichment¹⁸.

The process of identifying the parties to this enriching subtraction is sometimes referred to as "attribution" in unjust enrichment¹⁹. But the language of attribution is slightly misleading as it may suggest that finding the connection between the parties to unjust enrichment claims is somehow analogous to deciding issues of remoteness of damage in claims based on wrongs as breach of contract and torts²⁰. The issues are in fact quite different. Where the basis of the claim is a wrong, the issue of whether the law attributes some loss to the wrongdoing can be distinguished from the previous issue of identifying a proper link between the parties²¹. If there is no contract between the parties, or no duty imposed to the defendant in respect of the claimant, there will normally be no breach of contract or tort providing the basis of the claim²². If, on the other hand, a contract or duty can be identified, the claimant and defendant would be already connected in the relevant sense even if a breach of such contract or duty cannot be seen as sufficiently connected to any damage suffered by the claimant²³.

¹⁷ "It is well established that the cause of action for the recovery of money paid under a mistake of fact accrues at the time of payment". *Kleinwort Benson Ltd. v Lincoln City Council* [1999] 2 A.C. 349, 385 (Lord Goff). See further P. Birks, "Rights, Wrongs, and Remedies" (2000) 20 O.J.L.S. 1, 28.

¹⁸ *Menelaou*, at [23] (Lord Clarke); C. Mitchell, P. Mitchell and S. Watterson (eds.), *Goff and Jones on the Law of Unjust Enrichment*, 9th ed. (London 2016), [6-01].

¹⁹ A. Simester, "Correcting Unjust Enrichments" (2010) 30 O.J.L.S. 579, 595; E. Ball, *Enrichment at the Claimant's Expense* (Oxford 2016), 1, 211.

²⁰ For example, Ball proposes a counterfactual test for identifying the link between the parties in unjust enrichment inspired in Hart and Honoré's analysis of causation as a means for generalising the attribution of responsibility in the law of torts. Ball, *Enrichment*, pp. 124–125; 181. For an account of remoteness as a rule identifying the kind of loss which can be fairly attributed to the defendant in cases of breach of contract or torts, see J. Cartwright, "Remoteness of Damage in Contract and Tort: A Reconsideration" [1996] C.L.J. 488.

²¹ The tests for answering these questions in contracts and torts are discussed, for example, in *Hadley v Baxendale* (1854) 9 Ex 341 and *Overseas Tankship (UK) Ltd. v Morts Dock and Engineering Co. Ltd. (The Wagon Mound No. 1)* [1961] A.C. 388, respectively.

²² Birks, "Rights, Wrongs, and Remedies", pp. 5, 22; A. Burrows (2019), *Remedies for Torts, Breach of Contract, and Equitable Wrongs*, 4th ed. (Oxford 2019), 5–6.

²³ S. Smith, *Atiyah's Introduction to the Law of Contract*, 6th ed. (Oxford 2005), 416; T. Weir, *An Introduction to Tort Law*, 2nd ed. (Oxford 2006), 71.

Important practical consequences follow. As noted many times, without identifying the link between the parties it is not possible to be sure who is the proper claimant and who the proper defendant in unjust enrichment²⁴. This is particularly the case given the broad terms in which the defendant's enrichment is usually defined. Take three examples. (1) X mistakenly pays a sum of money to Y, thereby discharging a debt owed by Z. (2) X mistakenly hires Y and instructs him to provide a service for Z. (3) X mistakenly pays a sum of money to Y, enabling Y to make a gift to Z. Without a stable definition of what kind of link between the parties is required by unjust enrichment claims, in these and many other situations we can never be sure who should be the claimant and who the defendant²⁵.

More fundamentally still, without defining the proper link between the parties it is difficult to know how far we can depart from the simplest cases before losing touch with the rationale inspiring unjust enrichment claims. Many would agree that such a claim should lie where the claimant mistakenly pays money to the defendant in performance of a non-existent obligation²⁶. With little enough trouble, it could be argued that a similar claim should be recognised where the mistaken payment is made not directly by the claimant, but by a third party acting as an agent for the claimant²⁷. If pressed to do so, we could even admit that a similar claim should also be recognised where the claimant mistakenly pays money to a third party, thus releasing that party's prior-ranking security over an asset where the defendant holds an interest²⁸. When we get to this point, however, it is not obvious that a similar claim should be rejected where the claimant mistakenly invests resources in obtaining a judgment which subsequently allows the defendant to

²⁴ L. Smith, "Three-party Restitution: A Critique of Birks's Theory of Interceptive Subtraction" (1991) 11 O.J.L.S. 481, 481. In *Chase Manhattan N.A. v Israel-British Bank (London) Ltd.* [1981] Ch. 105, 125 (Goulding J), it was concluded that "[u]njust enrichment cannot be a complete cause of action in itself, for [...] it does not identify the plaintiff".

²⁵ S. Watterson, "Direct Transfers' in the Law of Unjust Enrichment" (2011) 64 C.L.P. 435, 436.

²⁶ As in *Kelly v Solari* (1841) 9 M & W 54, [1835-42] All E.R. 320.

²⁷ As in *Niru Battery Manufacturing Co. v Milestone Trading Ltd. (No. 1)* [2002] EWCA Civ 1446, [2004] Q.B. 935.

²⁸ As in *Banque Financière de la Cité v Parc (Battersea) Ltd.* [1999] A.C. 221 ("BFC"), 236-237 (Lord Hoffmann).

recover from a third party²⁹. While the question for the link between the parties may at first appear relatively trivial, particularly when compared to other issues like identifying the relevant enrichment or applicable unjust factor, it seems that its answer is intimately related to the limits we set for liability in unjust enrichment³⁰.

When *ITC* reached the Supreme Court, the decided cases demonstrated uncertainty as to the tests which should be applied to identify the qualifying link. Different criteria were proposed by commentators, which were weighted differently by the authorities³¹. The case offered the court the valuable opportunity to lay down in clearer terms the position of English law in one of the least developed issues of the law of unjust enrichment. This required assessment of alternative approaches which often led to incompatible results. Before getting into the details of the decision it is useful to consider why.

1.2 Conflicting Approaches

Three basic approaches can be identified. The first approach holds that, in principle, the qualifying link cannot be established where the defendant receives a benefit from a party other than the claimant. The second approach holds that, in principle, the link may be established as long as the position of claimant and defendant can be connected through a causal analysis. Both approaches recognise a general rule and possible exceptions. In contrast, the third approach focuses on a variety of considerations which should guide the recognition of the qualifying link in the different factual circumstances where the issue may arise. Each of these approaches will be considered in turn.

²⁹ As in *TFL Management Services Ltd. v Lloyds TSB Bank Plc* [2013] EWCA Civ 1415, [2014] 1 W.L.R. 2006 (“*TFL*”).

³⁰ Birks, *Unjust Enrichment*, p. 73; Mitchell et al, *Goff and Jones*, [6-27]; Burrows, “A Fresh Look”, p. 169; W. Day, ““At the Expense of” in Unjust Enrichment: Casual, Direct or Intentional Transfers of Value?” [2017] L.M.C.L.Q. 588, 590.

³¹ Mitchell et al, *Goff and Jones*, [6-02].

1.2.1 Direct Providers Only

The prevailing view among commentators seems to be that the question for the link between the parties should generally receive a strict answer. In most situations, unjust enrichment claims could only succeed against the direct recipient of a benefit³². It may occasionally be the case that the required link is established despite the lack of direct dealings between the parties, as happens, for example, where an agent of the claimant provides a benefit to the defendant. As a general rule, however, only direct providers should be entitled to restitution of an unjust enrichment³³.

Several pragmatic considerations can be pressed into service in support of this rule. Allowing a claimant to sue third parties beyond the direct recipient of a benefit may pose a threat to transactional security as transferees would have to remain permanently vigilant against claims by unidentified previous transferors³⁴. It may contradict contractual arrangements and undermine basic principles of the insolvency regime, as transferors will have a tool for wriggling around the risk of insolvency inherent in contracts with direct transferees³⁵. It may also stimulate disputes involving many possible claimants and defendants, with increased risks of double recovery and double liability. Many of these complications can be, if not completely avoided, at least significantly reduced by a “direct providers only” rule³⁶.

Perhaps more significantly, it is not clear whether the logic inspiring restitution of unjust enrichment holds equally well in cases involving direct and remote recipients. It has been argued that it is not possible for both the direct and indirect provider of a benefit to be have been subtracted of the same benefit enriching the defendant³⁷. Moreover, where the defendant lawfully receives a benefit from a third party who was previously benefited

³² Birks, “At the Expense of the Claimant”, p. 493.

³³ A. Burrows, *The Law of Restitution*, 3rd ed. (Oxford 2011), 70; G. Virgo, *The Principles of the Law of Restitution*, 3rd ed. (Oxford 2015), 105.

³⁴ S. Meier, “Mistaken Payments in Three-party Situations: A German View of English Law” [1999] C.L.J. 567, 599.

³⁵ Birks, *Unjust Enrichment*, p. 90.

³⁶ Mitchell et al, *Goff and Jones*, [6-16].

³⁷ Smith, “Three-party Restitution”, p. 483.

by the claimant, it has been argued that the defendant's enrichment would not be unjust even if the claimant provided the benefit under the circumstances indicated by one of the recognised unjust factors³⁸. These and similar arguments have led some commentators to conclude that, apart from cases where a benefit is directly provided by the claimant, the defendant's enrichment will necessarily be at the expense of another party, and not the claimant³⁹.

This conclusion seems to draw support from the decision of *Uren v First National Home Finance Ltd*⁴⁰. In this case, the claimant paid to Arrish Limited part of the purchase price of two flats in a real estate development which was financed mostly through loans provided by the defendant bank. Arrish defaulted on these loans, so receivers were appointed who sold the real estate development at auction to Pitchcott Limited, a subsidiary of the defendant bank. The claimant proceeded to pay the remaining balance of the purchase price to Pitchcott, which also obtained additional loans from the defendant bank. Eventually, the defendant bank demanded repayment of the loans, took over the real estate development and sold it to LSI, a company experienced in managing time-shares. The claimant's payments allowed the real estate development to be substantially completed, thus enabling the defendant bank to sell it and obtain both repayment of its loan and further business opportunities with LSI. But Mann J concluded that, because the direct recipients of the claimant's payment were Arrish and Pitchcott, the defendant bank's enrichment could not have been at the expense of the claimant⁴¹.

³⁸ A. Tettenborn, "Lawful Receipt—A Justifying Factor?" [1997] R.L.R. 1, 5.

³⁹ B. McFarlane, "Unjust Enrichment and Indirect Recipients" [2009] R.L.R. 37, 38.

⁴⁰ [2005] EWHC 2529 (Ch) ("*Uren*").

⁴¹ *Uren*, at [26] (Mann J). Virgo, *The Principles*, p. 105, argues that further judicial support for this approach can be found in *MacDonald Dickens and Macklin v Costello* [2011] EWCA Civ 930, [2012] Q.B. 244 ("*MacDonald*"), at [20]–[22] (Etherton LJ) and *Armstrong DLW GmbH v Winnington Networks Ltd.* [2012] EWHC 10 (Ch), [2013] Ch. 156, at [97] (Stephen Morris QC, sitting as a deputy High Court judge). But see Mitchell et al, *Goff and Jones*, [6-12] note 30 and [8-23], noting that the first decision does not address the rule, and that the second decision is subject to important difficulties which render it unsafe authority.

1.2.2 Causal Analyses

An alternative view holds that unjust enrichment claims are in principle available against indirect or remote recipients provided that some form of causal connection between the claimant's loss and the defendant's gain can be established. The implications of this apparently straightforward position may be obscured by the fact that a causal analysis has also been proposed as an answer to other unjust enrichment problems, like explaining the relation between the defendant's enrichment and the applicable unjust factor⁴², or showing that value has passed along a chain of substitutions for the purpose of tracing the proceeds of an asset⁴³. It is important to bear in mind that the specific issue we are concerned with here is the nature of the link existing between the position of the claimant and the position of the defendant in personal unjust enrichment claims. A causal analysis provides the rationale for at least three different approaches to this issue.

Under a first causal approach, the required link between the parties will be established every time it is shown that “but for” the claimant's loss, the defendant's gain would not have been brought about. What matters in order to connect the parties in the relevant sense is to demonstrate a causally related plus and minus⁴⁴. This broad starting point is often qualified by exceptions, particularly where between the claimant and the direct recipient of the benefit there is a valid contract⁴⁵. In stark contrast with the “direct providers only” rule, however, this version of the causal analysis may lead to recognising the required link in cases where the claimant's action merely caused the state of affairs which ended up benefiting the defendant⁴⁶.

⁴² G. Virgo, “Causation and Remoteness within the Law of Unjust Enrichment” in S. Degeling and J. Edelman (eds.), *Unjust Enrichment in Commercial Law* (Pymont 2008), 149; J. Edelman and E. Bant, *Unjust Enrichment*, 2nd ed. (Oxford 2016), 189.

⁴³ C. Mitchell, “Liability Chains” in S. Degeling and J. Edelman (eds.), *Unjust Enrichment in Commercial Law* (Pymont 2008), 134.

⁴⁴ Birks, “At the Expense of the Claimant”, p. 518; Birks, *Unjust Enrichment*, pp. 89–98; C. Mitchell and S. Watterson, *Subrogation: Law and Practice* (Oxford 2007), [5.15].

⁴⁵ Birks, “At the Expense of the Claimant”, pp. 522–524.

⁴⁶ For example, Professor Birks was ready to conclude that, in the case of an upper floor tenant defendant who is benefited by the heat rising from the flat of the lower floor neighbour claimant, the defendant could be counted as being enriched at the claimant's expense. Birks, *Unjust Enrichment*, p. 158. See further Burrows, “A Fresh Look”, p. 172.

A second causal approach adopts a still broader starting point. Under this view, the required link between the parties will be established every time the claimant's loss and the defendant's gain reveal a counterfactual connection between each other, in the sense that the gain will occur every time the loss does too. This approach extends the range covered by the relevant link to include situations where the claimant's loss and the defendant's gain are collateral effects of a common cause, even if they cannot be seen as causally related to each other⁴⁷. If a retailer pays money to HMRC as VAT collected from a customer, the benefit received by HMRC may not be causally linked to any loss for the customer. This will be the case, for example, where VAT is accounted for by the retailer after the taxable services are supplied but before their price is paid by the customer. Once the customer pays the price of the taxable services, however, his or her loss and HMRC's gain can be seen as collateral effects of a common cause: if VAT had not been applied to the services, there would have been neither loss to the customer nor gain to HMRC. Under this approach, customer and HMRC would be linked in the required sense because loss and gain would be counterfactually connected⁴⁸.

The third causal approach adopts a narrower starting point. Not every causal or counterfactual "but for" connection between loss and gain would suffice. To qualify as a proper link, the causal analysis must connect a transaction explaining the claimant's loss with a transaction explaining the defendant's gain⁴⁹. While the notion of transaction is very broadly defined, it allows identification of the party against whom an action is addressed, as opposed to the party who may happen to be incidentally benefited as a consequence of this action⁵⁰. Still, this approach accepts that the qualifying connection may be established where the claimant confers a benefit through a transaction with a third

⁴⁷ Ball, *Enrichment*, pp. 126–134.

⁴⁸ Ball, *Enrichment*, p. 128.

⁴⁹ Mitchell, "Liability Chains", pp. 142–144; Watterson, "Direct Transfers", p. 448; Mitchell et al, *Goff and Jones*, [6-09], [6-27] and [6-28]; Edelman and Bant, *Unjust Enrichment*, pp. 89–90.

⁵⁰ Edelman and Bant, *Unjust Enrichment*, p. 92.

party, thus enabling that party to confer a benefit through a transaction with the defendant⁵¹.

All three versions of the causal analysis are supported by similar reasons. First, a strict “direct providers only” rule could leave deserving claimants without an appropriate remedy, especially when the direct recipient is insolvent or otherwise out of the reach of the claimant⁵². Secondly, there is no theoretical impossibility in accepting that the direct and indirect providers of a benefit can each be considered to have been subtracted of the amount enriching the defendant⁵³, nor is it obvious that every enrichment lawfully received from a third party can never provide the basis for an unjust enrichment claim by its remote provider⁵⁴. Thirdly, the acceptance of a broad starting point does not necessarily lead to the uncontrollable expansion of unjust enrichment claims, as other elements of the analysis—and in particular unjust factors and defences—offer appropriate means of containing liability⁵⁵.

On the other hand, all three versions of the causal analysis rely heavily on the fact that some of the cases frequently presented as involving unjust enrichment claims cannot be explained without accepting a causal link between the parties. *Butler v Rice*⁵⁶ is frequently offered as an example. In this case, the claimant lent some money to Mr. Rice on the condition that a charge over a house would be granted to secure repayment. Mr. Rice used the money to pay off a previous charge over the house, but was unable to grant the lender a new charge, as the owner of the house was his wife, who refused to do so. Although the lender had had no direct dealings with Mrs. Rice, he was recognised as having a right to take over the previous charge upon Mrs. Rice’s house. Under an unjust enrichment analysis, this decision seems to confirm that a claim may be available where

⁵¹ Mitchell et al, *Goff and Jones*, [6-28].

⁵² Mitchell, “Liability Chains”, p. 137; Watterson, “Direct Transfers”, p. 437.

⁵³ Burrows, *The Law of Restitution*, p. 72.

⁵⁴ Birks, “At the Expense of the Claimant”, p. 524.

⁵⁵ Mitchell et al, *Goff and Jones*, [6-23]; Ball, *Enrichment*, pp. 109, 181ff.

⁵⁶ [1910] 2 Ch. 277 (“*Butler*”).

the claimant provides a benefit to a third party, thus causing that party to provide a benefit to the defendant⁵⁷.

This conclusion was endorsed by a majority of the Supreme Court in *Menelaou*. In this case, the claimant bank had a charge over a house owned by Mr. and Mrs. Menelaou, who decided to sell it to purchase a second house in the defendant's name as a gift. The Menelaous asked the claimant bank to release its charge over the first house, offering a substitute charge over the second house. The claimant bank agreed, the charge was released and the first house was sold. But the second charge eventually received by the claimant bank turned out to be invalid and the defendant ended up as the unencumbered proprietor of the second house. The Supreme Court held that the claimant bank was entitled to be subrogated to the unpaid vendor's lien over the second house as a remedy to reverse the defendant's unjust enrichment as its expense. This result was possible even though the claimant bank did not directly provide any benefit to the defendant. Lord Clarke said:

“As I see it, whether a particular enrichment is at the expense of the claimant depends on the facts of the case. The question in each case is whether there is a *sufficient causal connection*, in the sense of a sufficient nexus or link, between the loss to the [claimant bank] and the benefit received by the defendant (...)”⁵⁸.

1.2.3 Policy Considerations

The previous approaches assume that most of the cases should be governed by a general rule. In contrast, one could imagine an approach aiming not at identifying a single rule but a range of considerations relevant in the decision of the difficult cases. This approach has been advocated in other jurisdictions, where a list of principles and policy justifications

⁵⁷ Birks, *Unjust Enrichment*, p. 97; Mitchell, “Liability Chains”, pp. 143–144; Burrows, *The Law of Restitution*, p. 79. Cf. McFarlane, “Indirect Recipients”, pp. 49–50. As noted by Dawson, the recognition of restitutionary claims in cases where money had been lent to borrowers in their own names but used for paying the debts of third persons was precisely the result that German commentators initially intended to preclude by introducing a requirement of “directness” to unjustified enrichment claims. J. Dawson, “Indirect Enrichment” in E. von Caemmerer, S. Mentschikoff and K. Zweigert (eds.), *Ius Privatum Gentium: Festschrift für Max Rheinstein*, vol. 2 (Tübingen 1969), 792–793.

⁵⁸ *Menelaou*, at [27] (Lord Clarke), emphasis added.

have been proposed as a flexible guide to assessing whether the parties are linked in the required sense⁵⁹.

Perhaps unsurprisingly, the considerations identified include many which are not unfamiliar to English lawyers. Among them are the importance of enforcing the contractual arrangements between the parties, reducing the risk of double recovery and double liability, preserving transactional security and protecting the insolvency regime⁶⁰. There are many examples of English cases where the importance of similar considerations is explicitly or implicitly acknowledged⁶¹. In fact, recent decisions can be read as revealing a trend to avoid rules of universal application and relying instead on a list of diverse criteria⁶².

This strategy seems to explain the way *ITC* was decided before the High Court and the Court of Appeal. In his first instance judgment, Henderson J rejected the possibility of identifying a “bright line requirement” providing the solution for the “infinite variety of possible factual circumstances” in which the question about the link between the parties may arise⁶³. Instead, the answer should be found in a number of different considerations, including:

“a) the need for a close causal connection between the payment by the claimant and the enrichment of the indirect recipient; b) the need to avoid any risk of double recovery often coupled with a suggested requirement that the claimant should first be required to exhaust his remedies against the direct recipient; c) the need to avoid any conflict with contracts between the parties, and in

⁵⁹ N. Whitty, “Indirect Enrichment in Scots Law” [1994] J.R. 200, 239–240; D. Visser, “Searches for Silver Bullets: Enrichment in Three-party Situations” in D. Johnston and R. Zimmermann (eds.), *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge 2002), 531–532.

⁶⁰ Cf. Visser, “Silver Bullets”, pp. 531–532 and Mitchell et al, *Goff and Jones*, [6-16]. For a detailed analysis of these considerations in Dutch and English law, see H. Verhagen, “The Policies against Leapfrogging in Unjust Enrichment: A Critical Assessment” (2018) 22 Edin.L.R. 55.

⁶¹ For example, *BFC*, p. 234 (Lord Hoffmann); *Pan Ocean Shipping Co. Ltd. v Creditcorp Ltd. (The Trident Beauty)* [1994] 1 W.L.R. 161, 166 (Lord Goff). It has been argued that in *MacDonald* the notion of directness is used to avoid disturbing “existing corporate, contractual, and insolvency regimes”. E. Ball, “At the Claimant’s Expense” (2015) 130 L.Q.R. 13, 17.

⁶² Mitchell et al, *Goff and Jones*, [6-34].

⁶³ *ITC HC*, at [67] (Henderson J).

particular to prevent ‘leapfrogging’ over an immediate contractual counterparty in a way which would undermine the contract; and d) the need to confine the remedy to disgorgement of undue enrichment, and not to allow it to encroach into the territory of compensation or damages”⁶⁴.

The same emphasis in weighting different considerations was endorsed in *Relfo Ltd (In Liquidation) v Varsani*⁶⁵. Mr. Gorecia, a director of the claimant company, improperly caused an amount to be paid from this company’s bank account in London to a bank account in Latvia. On the same day, the equivalent of such amount in a different currency was paid from another bank account in Lithuania to the defendant’s bank account in Singapore. During the trial, it was established that Mr. Gorecia had intended to bring about a transfer of funds from the claimant company’s account to the defendant’s account. In light of this circumstance, the Court of Appeal was ready to admit that the series of transactions taking place between the different bank accounts was in substance equivalent to a payment from the claimant company to the defendant. While considering if this conclusion was consistent with the nature of the connection between the parties as recognised in the decided cases, Arden LJ said:

“Any principle for unjust enrichment against indirect recipients will have to be refined in later cases. For now, the criteria identified by Henderson J will no doubt be of assistance. They identify important policy considerations for the application of the law in this area”⁶⁶.

1.3 Limits of the Available Approaches

All the approaches discussed above played a part in the *ITC* litigation. None of them were ultimately adopted by the Supreme Court. In fact, during the litigation it became clear that

⁶⁴ *ITC HC*, at [68] (Henderson J). Cited with approval in *Investment Trust Companies v HMRC* [2015] EWCA Civ 82, [2015] S.T.S. 1280 (“*ITC CA*”), at [67] and [69] (Patten LJ).

⁶⁵ [2014] EWCA Civ 360, [2015] 1 B.C.L.C. 14 (“*Relfo*”).

⁶⁶ *Relfo*, at [96] (Arden LJ). The criteria referred to are those identified by Henderson J in his first instance decision of *ITC* considered above. See also *Menelaou*, at [77] (Lord Neuberger), where Henderson J’s judgment was praised as containing “a thoughtful and valuable approach, while rightly not laying down rigid principles”.

each of these approaches faced important difficulties and could not be relied entirely to identify the qualifying link between the parties. Considering these difficulties is important to understand the position ultimately taken by the Supreme Court and its significance. They are explained in what follows.

1.3.1 The Misleading Simplicity of a Directness Analysis

The main appeal of a “direct providers only” rule is that it promises to serve as a simple standard to identify situations where it seems indisputable that the defendant’s enrichment came from the claimant. But even in the simplest case of a payment of money from claimant to defendant, the notion of directness may be stretched to cover a variety of factual settings. It most certainly will be taken to include the relatively rare situation where the claimant hands over coins and bank notes to the defendant. But it can be also construed to include situations where the claimant pays the defendant through a bank transfer or through the interposition of agents, which inevitably involve dealings with third parties⁶⁷. The fact that directness has no natural or agreed meaning in this context means that, even in relatively simple cases, the line between qualifying and not qualifying links is highly unstable⁶⁸.

Things get increasingly complicated as we move away from the simplest cases. When the benefit received by the defendant is the provision of a service, it is sometimes assumed that the claimant’s time and labour passes to the defendant just as money would⁶⁹. But while this metaphor may be adequate for some purposes, it certainly sits oddly with a restriction of liability based on the directness of the dealings between the parties. Consider the case of a garage which, acting in pursuance of a contract with an insurance company, repairs the defendant’s car⁷⁰. Without introducing additional considerations, the notion of directness may lead us to diametrically different

⁶⁷ Some of the implications of these different meanings of a “directness” requirement are discussed in Day, “At the Expense of”, pp. 592, 595–596.

⁶⁸ Watterson, “Direct Transfers”, p. 439.

⁶⁹ Birks, *Introduction*, pp. 126–127, 129, 232.

⁷⁰ As discussed, for example, in *Brown and Davis v Galbraith* [1972] 1 W.L.R. 997.

conclusions⁷¹. We may be tempted to say that the repair service was directly provided by the garage to the defendant. But it could be contended that while *factually* the service was directly provided by the garage, *legally* it was directly provided by the insurance company, who contractually procured the garage to provide the benefit to the defendant⁷². A “direct providers only” rule offers no guidance in this and other services situations⁷³.

It may be argued that this kind of problem could be solved by narrowing the meaning of directness for the purposes of linking the parties in unjust enrichment claims. This seems to have been the approach taken at some point by German lawyers, who once subjected unjustified enrichment claims to a strict directness requirement⁷⁴. Spelling out the specific meaning of directness in this context, German courts concluded that it required the claimant to show that his or her loss and the defendant’s gain had been produced by the same event⁷⁵. But it soon became clear that even this narrow definition was unable to provide unambiguous answers. For example, where the claimant mistakenly paid another’s debt, it could be equally argued that the claimant’s payment was the single event producing the creditor’s repayment *and* the debtor’s discharge from liability, both of whom could be considered as direct recipients⁷⁶. This and other difficulties led German lawyers ultimately to renounce a directness requirement⁷⁷.

On the other hand, it is uncontroversial that English law recognises claims based in unjust enrichment in situations which cannot be squared with any sensible notion of

⁷¹ The point is nicely illustrated by the different outcomes reached by Scottish and South African courts in similar “garage cases” scenarios. Cf. Whitty, “Indirect Enrichment”, pp. 205–206 and J. Du Plessis, *The South African Law of Unjustified Enrichment* (Claremont 2012), 49–50.

⁷² Birks, *Unjust Enrichment*, pp. 89–93.

⁷³ Other conceptual difficulties involved in linking the parties in services cases are discussed in J. Harris, “Doctrine, Justice, and Home-Sharing” (1994) 19 O.J.L.S. 421, 441.

⁷⁴ For the evolution of this requirement in German law see generally K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 3rd ed. by T. Weir (tr.) (Oxford 1998), 542–543; and G. Dannemann, *The German Law of Unjustified Enrichment and Restitution: A Comparative Introduction* (Oxford 2009), 22.

⁷⁵ Dawson, “Indirect Enrichment”, p. 793.

⁷⁶ R. Zimmermann and J. Du Plessis, “Basic Features of the German Law of Unjustified Enrichment” [1994] R.L.R. 14, 31–32.

⁷⁷ Dawson, “Indirect Enrichment”, pp. 795–796.

directness. An obvious example is the situation illustrated by *Butler* and discussed above, where the claimant provides a loan to a third party which enables that party to discharge a debt of the defendant⁷⁸. Depending on the notion of directness adopted, other examples can be found in cases where the claimant's property is transferred by a third party to the defendant; where the claimant mistakenly provides a benefit to an undisclosed agent acting for the defendant; or where the defendant receives a benefit from a third party being legally or factually certain that, had it not been for the defendant's interception, the benefit would have been received by the claimant⁷⁹. There is substantial disagreement as to the extension of the list of exceptions to a directness restriction⁸⁰. What it seems clear, however, is that a "direct providers only" rule does not reflect accurately the position of English law⁸¹.

It should therefore come as no surprise that the "direct providers only" rule was found of little help to decide the issue presented in *ITC*. As noted above, in his first instance judgment Henderson J concluded that this rule could not be accepted as imposing a bright line requirement ruling out claims for indirect enrichment⁸². The Court of Appeal confirmed this view, concluding that the insufficiency of a "direct providers only" rule was clear as a matter of authority at the Court of Appeal level⁸³. A similar position was expressed in the Supreme Court decision of *Menelaou*, where Lord Clarke rejected the rule as too rigid⁸⁴. By the time the *ITC* litigation reached the Supreme Court, it was well established that focusing on a directness requirement could not provide a clear-cut answer to the question of the link between the parties.

⁷⁸ See section 1.2.2 above.

⁷⁹ A list of the most commonly accepted exceptions to the "direct providers only" rule can be found in A. Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford 2012), 49–52.

⁸⁰ Compare Birks, *Unjust Enrichment*, pp. 87–88, 89–93; Burrows, *The Law of Restitution*, pp. 75ff; Virgo, *The Principles*, pp. 105ff; Mitchell et al, *Goff and Jones*, [6-19]. In *Relfo*, Arden LJ noted at [80] that the recognised exceptions were a "motley collection" which do not reflect principles carved out from the direct providers only rule.

⁸¹ Including the landmark decisions of *Lipkin Gorman (a firm) v Karpnale Ltd.* [1991] 2 A.C. 548 and *BFC*.

⁸² *ITC HC*, at [67] (Henderson J).

⁸³ *ITC CA*, at [66] (Patten LJ).

⁸⁴ *Menelaou*, at [27] (Lord Clarke).

1.3.2 The Expansive Nature of a Causal Analysis

A causal analysis can certainly claim to solve the shortcomings of a narrow rule based on directness. But difficulties are doubled when it comes to finding the limits to the wide starting point it assumes. These difficulties are particularly apparent in two of the causal analyses discussed above.

The decision of the Court of Appeal in *TFL* provides a good example. The claimant brought an unjust enrichment claim aimed at recovering from the defendant the costs incurred in previous legal proceedings conducted by the claimant against a third party. In these earlier proceedings, it was found that the third party owed the defendant, not the claimant. Relying on this decision, the defendant obtained repayment from the third party. The claimant argued that but for the litigation costs incurred in the proceedings which resulted in the recognition of the third party's debt, the defendant would have not been able to subsequently obtain repayment, or at least not without incurring significant litigation costs. The Court of Appeal declined summary dismissal of the claim on the basis that the third party's repayment to the defendant was a benefit causally linked to the claimant's expenditure on the earlier proceedings. In the majority's opinion, the defendant's enrichment could be in principle considered to have been at the claimant's expense⁸⁵.

At least under the first two causal approaches previously discussed, in reaching this conclusion the court should have been on safe ground. A causal test between the claimant's loss and the defendant's gain indeed leads to the conclusion that the parties were connected in the required sense. The same is true of a counter-factual test: both the claimant's loss and the defendant's gain were collateral consequences of the claimant conducting legal proceedings against the third party. Yet it is now clear that *TFL* was wrongly decided. It has been argued that the facts of the case cannot be distinguished from other fact patterns where it seems uncontroversial that no unjust enrichment claim should

⁸⁵ *TFL*, at [54] and [64] (Floyd LJ).

lie⁸⁶. More importantly, the result of the causal analysis adopted by the court cannot be reconciled with previous authorities denying the recovery of benefits accruing to the defendant as a consequence of the claimant acting in its own interest⁸⁷. Mere causation or counterfactual connection between claimant’s loss and defendant’s gain may set up a starting point for the unjust enrichment analysis, but as a sufficient test for the connection it is much too wide⁸⁸.

It could be argued that these objections do not apply to a causal analysis connecting transactions between claimant and defendant. As noted above, the main thrust of this approach is to narrow the scope of qualifying links so to exclude situations where the defendant’s enrichment is an incidental consequence of the claimant’s action⁸⁹. But this approach comes with its own problems. Most noticeably, it relies on a broad notion of transaction covering a range of very different situations, including simple cash payments from claimant to defendant, multiple bank transfers taking place between intermediate parties, and even theft⁹⁰. While it may be helpful to prevent the most extreme implications of a causal analysis, the notion of transaction does not take us far in explaining what renders special the link between the parties in all these different situations.

During the *ITC* litigation, the claimants argued that no directness requirement was imposed by English law to unjust enrichment claims, and pointed to cases where the link between the parties could be explained in causal terms⁹¹. Yet a pure causal analysis was rejected both at first instance and before the Court of Appeal⁹². Not long after these decisions, this rejection was confirmed in *Relfo*, where the implications of a causal

⁸⁶ F. Wilmot-Smith, “Taxing Questions” (2015) 131 L.Q.R. 531, 534; P. Watts, “‘Unjust Enrichment’—the Potion that Induces Well-meaning Sloppiness of Thought” (2016) 69 C.L.P. 289, 324.

⁸⁷ *Ruabon Steamship Co. Ltd. v London Assurance (The Ruabon)* [1900] A.C. 6. In *TFL*, at [39] Floyd LJ departed from this authority on the basis that the House of Lords “was not looking at the case through the eyes of the modern law of unjust enrichment”.

⁸⁸ Mitchell et al, *Goff and Jones*, [6-27]; Burrows, “A Fresh Look”, pp. 169, 177.

⁸⁹ See section 1.2.2 above.

⁹⁰ Edelman and Bant, *Unjust Enrichment*, p. 92. Burrows, “A Fresh Look”, p. 168, note 7 argues that this approach may involve using the idea of transaction in forced or inconsistent senses.

⁹¹ Particularly to *Filby v Mortgage Express (No. 2) Ltd.* [2004] EWCA Civ 759, [2004] 2 P. & C.R. DG16 (“*Filby*”). See *ITC HC*, at [60] (Henderson J).

⁹² *ITC HC*, at [67]–[68] (Henderson J); *ITC CA*, at [68] (Patten LJ). Mitchell et al, *Goff and Jones*, [6-32].

analysis based on transactions were specifically considered. The court discussed the case of a claimant who mistakenly enters into a transaction with a third party, thus causing that party to enter into a subsequent transaction with the defendant. Against the views sometimes advanced by supporters of a causal analysis based on transactions, Arden and Floyd LJ concluded that, in these circumstances, the law would refuse to recognise a sufficiently close connection between claimant and defendant⁹³.

1.3.3 The Malleability of a Policy Considerations Analysis

The approach focusing on policy considerations seems to find a middle ground between two objectionable extremes. It is flexible enough to cover cases which are excluded by the “direct providers only” rule. But it does not require us to assume a wide starting point leading to the recognition of unjust enrichment claims in unreasonable scenarios. Unfortunately, this approach rests on assumptions which are subject to equally challenging complications.

To begin with, this approach begs the question of what should count as a relevant policy consideration for the purposes of finding the qualifying link. The list proposed by Henderson J has been criticised both as too restrictive for excluding the whole range of reasons which should help identify a deserving claimant⁹⁴, and as too permissive in leading to an unwarranted expansion of liability⁹⁵. But even if we agreed on the list of considerations which should be applied, the way in which such considerations should be weighted would still be open to considerable debate. So, for example, it has been noted that focusing on the need for a close causal connection between claimant’s loss and defendant’s gain—Henderson J’s consideration (a)—may lead us to overlook the

⁹³ *Relfo*, at [78] (Arden LJ) and [114] (Floyd LJ).

⁹⁴ Mitchell et al, *Goff and Jones*, [6-45].

⁹⁵ Virgo, *The Principles*, p. 109. It is to be noted that in *TFL*, [55] and [57], Floyd LJ praised Henderson J’s considerations as relevant to guide the decision of whether an indirect benefit was conferred at the claimant’s expense.

contractual relations existing between the claimant and intermediate parties—Henderson J’s consideration (c)⁹⁶.

Perhaps the most serious difficulty of this approach is that policy considerations are often formulated in a way so closely tied to the facts of a case that it may be difficult to assess how exactly they bore on its decision. The role played by this approach in *ITC* nicely illustrates the point. After acknowledging that English law did not recognise a clear directness requirement, Henderson J proceeded to explain how, on the facts presented, none of the identified considerations militated against the claimants’ case. When it came to identify the reasons which positively recommended the recognition of a claim, however, the decision turned to the “common sense proposition” that:

“[T]he nexus between the consumer and HMRC could hardly be closer or stronger, and in economic terms the person at whose expense unlawful VAT is paid to HMRC is indubitably the consumer”⁹⁷.

The reasons behind Henderson J’s conclusion can be readily explained. While in *ITC* the claimant had not paid tax directly to the defendant, the applicable legislation was designed to place upon the claimant the burden of VAT payments made by the supplier of taxable services, as VAT is a tax on the consumer which is only collected by the supplier⁹⁸. Being a special feature of the case, however, this circumstance was hardly captured by the policy considerations presented by the judgment as a guide to identify the link between the parties. Unsurprisingly, subsequent decisions relying on Henderson J’s analysis only pay

⁹⁶ *ITC CA*, at [69] (Patten LJ). Dicta in *Menelaou*, at [32] (Lord Clarke) and *TFL*, [57] (Floyd LJ) suggest that Henderson J’s considerations should be all equally applied in a flexible manner, but Mitchell et al. *Goff and Jones*, [6-46] to [6-48] argue that the need for a close causal connection is a necessary condition to be satisfied in all the cases, while the need to avoid double recovery and exhaust all available remedies is open to debate.

⁹⁷ *ITC HC*, at [72] (Henderson J).

⁹⁸ *ITC HC*, at [19]–[22] (Henderson J); *ITC CA*, at [44] (Patten LJ). As explained by Professor Mitchell, “this is borne out by the rule in VATA, s 80(3), which provides that taxable persons can only recover money paid as VAT that is not due if they have entered legally binding arrangements to return the money back up the chain of payments to their customers, where the customers have borne the cost of paying the money”. C. Mitchell, “Restitutionary Claims by Indirect Taxpayers” in S. Elliott, B. Häcker and C. Mitchell (eds.), *Restitution of Overpaid Tax* (Oxford 2013), p. 122, note 58.

lip service to the importance of these policy considerations before turning to the difficult notion of “commercial reality” to answer the question for the existence of a qualifying link⁹⁹.

By the time the *ITC* litigation reached the Court of Appeal, it was clear that Henderson J’s approach could not provide sufficient guidance. Commentators were already awake to the difficulties involved in relying on an open list of potentially relevant criteria¹⁰⁰, which were confirmed by cases approving this approach only to find the qualifying link on a broad causal connection between claimant’s loss and defendant’s gain¹⁰¹. In concluding that the considerations identified by Henderson J were “relevant” and that he had been right in finding a “sufficient economic connection” between claimant and defendant, the Court of Appeal did not depart significantly from other recent appellate decisions using vague language to dodge the question of what made this connection sufficient¹⁰². This time, however, the scene was finally set for the Supreme Court to address the issue directly.

1.4 Distinguishing Situations

The single judgment of the Supreme Court in *ITC* was given by Lord Reed, with whom Lord Neuberger, Lord Mance, Lord Carnwath and Lord Hodge agreed. In the face of the significant uncertainty produced by recent decisions, Lord Reed acknowledged the court’s responsibility to lay down in clearer terms the position of English law¹⁰³. It was noted, however, that the “at the expense of” element of the unjust enrichment analysis was not a statutory provision, but a pointer guiding the careful legal analysis of individual cases. It

⁹⁹ For example, *Relfo*, at [92], [96], [97] (Arden LJ), [103] (Gloster LJ) and [105] (Floyd LJ); *Menelaou*, at [31] (Lord Clarke) and [73] (Lord Neuberger). This notion can be traced to *BFC*, p. 227 (Lord Steyn) and *Filby*, at [46] (May LJ). For criticism, see Virgo, *The Principles*, p. 109; Mitchell et al, *Goff and Jones*, [6-38].

¹⁰⁰ Mitchell, “Indirect Taxpayers”, p. 122; Ball, “At the Claimant’s Expense”, pp. 14–15.

¹⁰¹ *TFL*, at [57] (Floyd LJ); *Menelaou*, at [31] (Lord Clarke).

¹⁰² *ITC CA*, [46]–[47], [65] and [67] (Patten LJ).

¹⁰³ *ITC*, at [37] (Lord Reed).

was in the features of such cases that the whole range of situations covered by the qualifying link should be found¹⁰⁴.

In line with these general definitions, the judgment identified a number of situations where the required link had been established in previous cases. Three broad categories can be distinguished. First, the judgment referred to the relatively common situations in which the claimant pays a sum of money or provides goods or services to the defendant, or, without mediating any payment or provision from the claimant, the defendant receives the claimant's property¹⁰⁵. Secondly, the judgment referred to the less common situations in which the claimant discharges a debt owed by the defendant to a third party, or a set of co-ordinated transactions are treated as forming a single transaction between claimant and defendant. Thirdly, the judgment referred to situations where the interposition of a third party is not significant from the point of view of an unjust enrichment analysis, as where the dealings between the parties are conducted through an agent; where the right to seek restitution from the defendant is assigned to the claimant by a third party; or where the interposition of the third party is a sham created to conceal the arrangements existing between claimant and defendant¹⁰⁶.

All these situations had been discussed in previous decisions. Unlike those decisions, however, the judgment did not present them as a "motley collection" of instances where the required link may be established¹⁰⁷. Instead, they were used as illustrations of what would be legally relevant about the relationship between the parties in cases giving rise to unjust enrichment claims. Identifying this relationship required consideration of the situations in light of the purpose of the law of unjust enrichment,

¹⁰⁴ *ITC*, at [41]–[42] (Lord Reed). This understanding of the "at the expense of" element of the unjust enrichment analysis can be traced to the decision of the Court of Appeal, where Patten LJ said "scholars have had a decisive influence leading to the recognition of restitutionary claims based on unjust enrichment as a separate category of private law (...) notwithstanding that influence and the analytical force of many of their arguments, it is the authorities which are the sources of the law, and for that reason, we consider that they, rather than the large number of publications put before us, must be our starting point". *ITC CA*, at [47] (Patten LJ).

¹⁰⁵ *ITC*, at [46] (Lord Reed).

¹⁰⁶ *ITC*, at [48] (Lord Reed).

¹⁰⁷ See footnote 80 above.

which according to the judgment was to correct “normatively defective transfers of value”¹⁰⁸. When considered from this perspective, the identified situations revealed themselves as sharing a common feature. In all these situations:

“The reversal of unjust enrichment, usually by a restitutionary remedy, is premised on the claimant’s also having suffered a loss through his provision of the benefit”¹⁰⁹.

The factual pattern involved in *ITC* did not match with any of the situations identified by the judgment. Yet this should not have been a problem in and of itself. The judgement emphasised that other situations could be found to be equivalent if no substantive or real difference warranted treating them otherwise¹¹⁰. The problem with the situation presented in this case was different. The claimants suffered a loss by making some payments. The defendants received a benefit in the form of unlawfully levied tax. But the payments by the claimants and the receipt of unlawfully levied tax by the defendants were independent of one another, so the situation existing between the parties could involve no “loss through gain”.

As explained above, the claimants paid the managers a sum including VAT in performance of their obligations under the contract for the supply of investment management services¹¹¹. On the other hand, the defendants received the payments from the managers in compliance of the manager’s statutory obligation to account for VAT,

¹⁰⁸ The notion of “transfer of value” is widely used in the unjust enrichment literature. See, for example, Burrows, *The Law of Restitution*, p. 66 and Mitchell et al, *Goff and Jones*, [6-03]. Cf. J. Penner, “Value, Property, and Unjust Enrichment: Trusts of Traceable Proceeds” in R. Chambers, C. Mitchell, and J. Penner (eds.), *Philosophical Foundations of The Law of Unjust Enrichment* (Oxford 2009), pp. 306–312.

¹⁰⁹ *ITC*, at [43] (Lord Reed), echoing *BFC*, p. 237 (Lord Hoffmann). The same formula is used in Dawson, “Indirect Enrichment”, p. 789. It is important to note that in this context “loss” is intended to include all the situations where the claimant’s gives up something of economic value, including the provision of services. See *ITC*, at [45] (Lord Reed).

¹¹⁰ *ITC*, at [50] (Lord Reed).

¹¹¹ *ITC*, at [70] (Lord Reed) notes that there was no evidence that the managers were expected to keep the part of the claimants’ payment corresponding to VAT separate from their other funds, so the claimants “must be taken to have intended to part with any interest in the money, rather than to have impressed it with a special purpose trust”.

which arose irrespectively of the payments made by the claimants¹¹². While the net result of the situation was that the claimants were worse off and that the defendants better off, the relationship existing between claimants and managers and between managers and defendants could not be collapsed into a single sequence where the claimants suffered a loss through the provision of a benefit to defendants. In the absence of this key feature, the situation presented in *ITC* could not be considered as equivalent to those identified by the judgment as supporting unjust enrichment claims¹¹³.

It has been suggested that in so deciding the Supreme Court merely adopted a directness restriction¹¹⁴. This conclusion finds support in the distinction made in the judgment between direct and indirect provision of benefits¹¹⁵, and in the language used in subsequent decisions to explain Lord Reed’s analysis¹¹⁶. It is important to note, however, that the decision does not commit itself to a strict notion of directness. On the contrary, it adopts a broad definition able to accommodate the range of situations identified, and explicitly recognises that other situations providing the required link between the parties may be identified¹¹⁷. While the “direct providers only” rule is accepted as a useful starting point, the court does not rely on any precise notion of directness to decide the case¹¹⁸.

Nor does the court endorse a causal analysis. The judgment states unambiguously that a causal connection between the claimant’s loss and the defendant’s gain is not sufficient to constitute the required link¹¹⁹. It follows that the parties will not be linked in

¹¹² *ITC*, at [5] (Lord Reed) it is noted that the obligation to account for VAT arises whether or not tax is charged on the supply of services or paid by the customer: it is the supply, rather than the payment by the customer, which triggers the supplier’s liability.

¹¹³ *ITC*, at [71] (Lord Reed).

¹¹⁴ R. Shah, “Indirect Enrichment in the Supreme Court” [2017] C.L.J. 490, 490; T. Cutts, “Modern Money Had and Received” (2019) 38 O.J.L.S. 1, 20.

¹¹⁵ *ITC*, at [46]–[47].

¹¹⁶ *Prudential Assurance Co. Ltd. v HMRC* [2018] UKSC 39, [2019] A.C. 929 (“*Prudential*”), at [68] (Lord Reed, Lord Hodge and Lord Mance): “as a general rule, a cause of action based on unjust enrichment is only available in respect of a benefit which the claimant has provided directly to the defendant”.

¹¹⁷ *ITC*, at [50] (Lord Reed).

¹¹⁸ Lord Reed’s acceptance of the language of “directness” is criticised in Day, “At the Expense of”, pp. 592–593.

¹¹⁹ *ITC*, at [52] (Lord Reed).

the required sense where the defendant receives a benefit as an incidental or collateral consequence of the reason why the claimant incurs an expenditure. It also follows that the Court of Appeal was wrong in not summarily dismissing *TFL*¹²⁰. Although the judgment does not expressly reject a causal analysis focused on transactions, it does not mention it either while discussing situations involving a series of transactions¹²¹. Be it as it may, it seems clear that the main thrust of Lord Reed’s analysis is excluding the expansive implications of a causal analysis¹²².

Finally, the judgment also departs from the emerging judicial trend of treating the link between the parties as a matter of weighing different policy considerations. The list proposed by Henderson J is only briefly mentioned before the judgment turns to the legal principles which should provide “more precise criteria”¹²³. This preference for legal principle over policy considerations is reflected in Lord Reed’s rejection of the notion of commercial or economic reality. It will be remembered that previous decisions relying on Henderson J’s approach had in common the approval of an inquiry about whether the claimant bore the economic burden of the defendant’s enrichment¹²⁴. Lord Reed dismisses such an inquiry as inconsistent with the purpose of unjust enrichment claims, which is not to compensate economic burdens, but to reverse defective transfers of value¹²⁵. The importance of Henderson J’s considerations is not denied. But the judgment can be read as bridling a policy-oriented inquiry through the application of legal principles.

¹²⁰ *ITC* at [57] (Lord Reed).

¹²¹ *ITC*, at [48] and [61] (Lord Reed). At [72], after concluding that there is no question of the transactions between claimants and managers and between managers and defendant being a sham or part of a single scheme, the judgment adds “[t]he first transfer did not even bring about the second transfer as a matter of causation”. This suggests that for the court a causal connection between transactions is a rather low threshold insufficient in itself to establish the required link.

¹²² A. Burrows, “Narrowing the Scope of Unjust Enrichment” (2017) 133 L.Q.R. 537, 540.

¹²³ Cf. *ITC*, [34] and [38] (Lord Reed).

¹²⁴ See section 1.3.3 above.

¹²⁵ *ITC*, [59]–[60] (Lord Reed).

Lord Reed’s analysis has been praised by commentators¹²⁶ and endorsed by recent cases¹²⁷. It offered a reasoned solution to an issue which had previously remained relatively unnoticed, and it did so without incurring the main difficulties faced by the three basic approaches that had been advanced in English law. In bringing forward this issue, however, Lord Reed brought to light broader concerns about the law of unjust enrichment which lurked on the margins of the main accounts of the subject. *ITC* may have provided a convincing answer for the question about the nature of the link between the parties. But as the next chapter will explain, it also stimulated significant scepticism about the convenience of asking this question altogether.

¹²⁶ For example, Burrows, “Narrowing”, pp. 541–542; Shah, “Indirect Enrichment”, p. 492; Cutts, “Modern Money”, p. 20.

¹²⁷ For example, *Lowick Rose Llp v Swynson Ltd.* [2017] UKSC 32, [2018] A.C. 313, at [56], [58], [67], [89], [114]–[115], [117], [120] (Lord Sumption); *Prudential*, at [68] and [102] (Lord Reed, Lord Hodge and Lord Mance).

Chapter 2 Structural Flaws

An outside observer may be forgiven for assuming that the framework adopted in *Investment Trust Companies v HMRC*¹ for analysing unjust enrichment claims is as firmly established in English law as those used to explain other claims arising in contracts or torts. In fact, since its relatively recent inception, this framework had previously been criticised for leading to an increasing extension of liability beyond the scope of traditional heads of recovery². To an important extent, Lord Reed’s analysis in *ITC* seems to react to these concerns by qualifying and restricting the kind of situations where unjust enrichment claims should be available. Far from silencing dissenting voices, however, the judgment seems to have given new impetus to the debate. The best proof is perhaps the acute criticism of the unjust enrichment framework articulated by Professors Robert Stevens and Lionel Smith in the wake of the decision³.

An important part of Stevens’ and Smith’s arguments rests in the shared belief that analysing restitutionary claims through a set of common questions produces untenable results. This belief leads them to criticise Lord Reed’s analysis, not because of the solution it provides to the specific issue arising in *ITC*, but for assuming that this solution would follow from a general requirement governing the link between the parties in every unjust enrichment case. The importance of this point is difficult to overstate. If Stevens and Smith are right, the problems posed by the link between the parties in unjust enrichment claims may not only be a consequence of the specific approaches which Lord Reed’s analysis is

¹ [2017] UKSC 29, [2018] A.C. 275 (“*ITC*”).

² S. Hedley, “Unjust Enrichment as the Basis of Restitution—An Overworked Concept” (1985) 5 *Leg. Stud.* 56; and more recently, P. Jaffey, “Unjust Enrichment and Contract” (2014) 77 *M.L.R.* 983; P. Watts, “Unjust Enrichment—the Potion that Induces Well-meaning Sloppiness of Thought” (2016) 69 *C.L.P.* 289; S. Hedley, “Farewell to Unjustified Enrichment? A Common Law Response” (2016) 20 *Edin.L.R.* 326.

³ R. Stevens, “The Unjust Enrichment Disaster” (2018) 134 *L.Q.R.* 574; L. Smith, “Restitution: A New Start?” in P. Devonshire and R. Havelock (eds.), *The Impact of Equity and Restitution in Commerce* (Oxford 2019).

designed to overcome, but the inevitable result of accepting this question as a guide to the decision of cases involving restitutionary claims.

This chapter evaluates Stevens' and Smith's criticism and explores its consequences for the analysis offered by *ITC*. It proceeds in four parts. The first part explains the main arguments advanced by Stevens and Smith. The second part reviews the significance of the unjust enrichment framework in the work of Peter Birks, one of its main advocates. The third part suggests that the critical step leading to the difficulties denounced by Stevens and Smith is not accepting the unjust enrichment framework, but exaggerating its role in identifying what makes unjust enrichment cases normatively significant. The fourth part shows how this assumption underlies the problems evidenced in *ITC* and outlines a plan to avoid them.

2.1 The Methodological Objection

Although their views are not identical, Stevens and Smith share a central concern which can be roughly summarised as follows. Unjust enrichment cases frequently accept that different restitutionary claims can be analysed through a set of common questions: is the defendant enriched? is the enrichment "at the expense of" the claimant? is the enrichment unjust? is there a defence? When we approach restitutionary claims through these questions, however, we are compelled to accept that the claims are recognised for the same reasons. This would cause two related difficulties, which for ease of exposition will be referred to as the problem of "unwarranted analogies", and the problem of "overgeneralisation". Both difficulties are present in the analysis of the link between the parties offered by *ITC*.

2.1.1 Unwarranted Analogies

The problem of unwarranted analogies consists in proceeding as if all the cases which could be analysed in terms of unjust enrichment's general questions should be subject to the same conditions of liability. According to Stevens and Smith, when we subject cases to these common questions, we are tempted to assume that because some circumstances

are not considered as relevant in one kind of case, they should not be considered to be relevant in another. Similarly, we are tempted to assume that because the legal response triggered in one kind of case is qualified in some manner, this same qualification should equally apply in another kind of case. But unjust enrichment's questions are broad enough to fit a wide range of cases, in many of which the defendant's liability might be, and indeed has historically been, subject to quite different rules⁴.

Consider the case of a trustee who transfers trust property to a third party in breach of trust. It seems uncontroversial that, apart from the specific claim for the return of the property itself, the beneficiary may be afforded a personal claim against the third party for a sum of money corresponding to the value of the property⁵. When considered in light of unjust enrichment's common questions, it is tempting to conclude that this personal claim for value is not significantly different from the personal claim available against the recipient of a mistaken payment. This has led some commentators to argue that if the success of the personal claim available in cases of mistaken payment is not dependent on demonstrating the recipient's fault, nor should it be the success of the personal claim available in cases involving the receipt of trust property⁶. It has been shown many times, however, that personal claims afforded in these cases require the defendant to have known at some point that the property received was transferred in breach of trust, which seems to involve some measure of fault⁷.

⁴ Stevens, "Disaster", p. 577; Smith, "A New Start?", p. 90.

⁵ D. Hayton, P. Matthews and C. Mitchell (eds.), *Underhill and Hayton on the Law of Trusts and Trustees*, 19th ed. (London 2016), [98.2], [98.11], [98.33] and [98.35].

⁶ P. Birks, "Persistent Problems in Misdirected Money: a Quintet" [1993] L.M.C.L.Q. 218, 228–229. This position was qualified in P. Birks, "Receipt" in P. Birks and A. Pretto (eds.), *Breach of Trust* (Oxford 2002), 213, 223, where it was argued that there would be two possible personal claims in the breach of trust scenario: a strict liability unjust enrichment claim and a fault-based claim in wrongs.

⁷ See, for example, L. Smith, "Unjust Enrichment, Property, and the Structure of Trusts" (2000) 116 L.Q.R. 412, 412 and W. Swadling, "The Nature of 'Knowing Receipt'" in P. Davies and J. Penner (eds.), *Equity, Trusts and Commerce* (Oxford 2017), 311. This seems to be the position adopted in *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch. 437, 456 (Nourse LJ). But see Hayton et al, *Underhill and Hayton*, [98.37], noting that the fault-based personal liability to account as a constructive trustee may be distinguished from the strict liability to repay the value of the benefit received.

Consider further a case where two parties are jointly and severally liable to a creditor, and upon demand for repayment one of them pays the creditor thus discharging the other party's debt. It seems uncontroversial that the payer may be afforded a personal claim against the discharged party to recover a sum of money reflecting the extent to which this party should have borne the burden of paying the creditor⁸. Again, in light of unjust enrichment's common questions, this claim does not appear as significantly different from the personal claim available against the recipient of a mistaken payment. So it is frequently accepted that, just as happens in mistaken payments, the discharged party might oppose to the payer's claim a defence of change of position⁹. It is seldom explained, however, why a defence designed to make sure that the defendant is no worse off by having to make restitution should allow the discharged party to escape a liability which he or she should have borne anyway¹⁰.

This kind of reasoning seems to have played a central role in justifying some of the approaches proposed in the literature to describe the link between the parties. As noted in the last chapter, causal analyses frequently rely on the fact that some unjust enrichment cases reveal a causal relation between the position of claimant and defendant to suggest that a causal analysis provides the best explanation for the link between the parties in every unjust enrichment case¹¹. Yet this argument only makes sense if we assume that the link between the parties is the same in all the cases analysed through the unjust enrichment questions, which include cases as different as *Kelly v Solari* and *Butler v Rice*. This is the argumentation pattern challenged by Stevens and Smith.

⁸ C. Mitchell, *The Law of Contribution and Reimbursement* (Oxford 2003), [1.11].

⁹ A. Burrows, *The Law of Restitution*, 3rd ed. (Oxford 2011), 438.

¹⁰ Burrows, *The Law of Restitution*, pp. 544–547. The author notes that the extent to which change of position would be a relevant defence outside cases involving mistaken payments and cases following the model of *Lipkin Gorman (a firm) v Karpnale Ltd.* [1991] 2 A.C. 548 is subject to debate, but he does not discuss its application in contribution and reimbursement cases.

¹¹ See section 1.2.2 above.

2.1.2 Overgeneralisation

The problem of overgeneralisation consists of being compelled to recognise unjust enrichment claims under circumstances where it seems evident as a matter of authority and common sense that no liability should arise¹². Consider the case of an upper floor tenant who is benefited by the heat rising from the flat of the claimant, the lower floor neighbour. If we analyse this scenario through unjust enrichment's common questions, we might arrive at the conclusion that the defendant is enriched at the expense of the claimant. Yet courts and commentators have long acknowledged that no liability should arise in this kind of scenario¹³. A similar paradox can be found in the situation where claimant and defendant each own rare and valuable stamps, and the claimant mistakenly destroys his or her stamp causing the defendant's stamp to significantly increase its value¹⁴.

Different explanations have been advanced by unjust enrichment scholars to elucidate why no liability should arise in these hypotheticals. For example, Birks argued that in the rising heat scenario the benefit received by the defendant should be treated as a grudging gift by the claimant¹⁵. But we can easily modify the hypothetical to rule out this explanation. Suppose that the claimant would have lowered the thermostat had he or she known that the flat was losing heat through an insufficiently insulated ceiling. Here, the benefit resulting for the defendant could be understood as caused by the kind of mistake of fact which provides a reason for restitution in most common unjust enrichment scenarios¹⁶.

Another strategy is focusing on the fact that the benefit received by the defendant is only incidental to a loss which the claimant would have incurred anyway while acting in his or her own interest¹⁷. Yet there are plenty of cases where restitution is awarded to

¹² Stevens, "Disaster", p. 578; Smith, "A New Start?", pp. 92–93.

¹³ J. Beatson, E. Schrage and M. Chen-Wishart (eds.), *Cases, Materials and Texts on Unjustified Enrichment* (Oxford 2003), pp. 87–88.

¹⁴ Stevens, "Disaster", p. 578; Smith, "A New Start?", p. 95–96.

¹⁵ P. Birks, *Unjust Enrichment*, 2nd ed. (Oxford 2005), 158–159.

¹⁶ On which, see Burrows, *The Law of Restitution*, pp. 207–208.

¹⁷ A. Burrows, "At the Expense of the Claimant: A Fresh Look" [2017] R.L.R. 167, 171–172; A. Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford 2012), 54–55.

claimants acting in their own interest. As noted by Smith, this seems to be the case of the restitutionary claims recognised where benefits are conferred in pursuance of contracts terminated for breach or frustration, or those recognised where the claimant discharges a debt owed jointly and severally by claimant and defendant¹⁸.

These difficulties may be dismissed as a theoretical conundrum without practical consequences. Yet overgeneralisation seems to be precisely the problem behind some of the most problematic unjust enrichment decisions rendered during the last decade. Consider *TFL Management Services Ltd. v Lloyds TSB Bank Plc*¹⁹. As explained in the previous chapter, in this case the Court of Appeal was confronted with the question of whether a claimant who incurs legal expenses to obtain a judicial decision is sufficiently connected for unjust enrichment purposes with a defendant who later relies on this decision to recover from a third party²⁰. The court considered some authorities suggesting that any benefit merely incidental to an objective pursued by the claimant for a purpose different than enriching the defendant should not be recoverable²¹. But instead of explaining why these authorities should not govern the decision of the case, the majority's opinion seems to have preferred to apply unjust enrichment's common questions directly to the facts presented to conclude that there was no reason to summarily dismiss the claim²². This is exactly the kind of practical consequence troubling Stevens and Smith.

2.1.3 Shortcomings of *ITC*

Both of these difficulties seem to lie behind the reasoning offered in *ITC*. As explained in the previous chapter, in this case the question of the link between the parties in unjust enrichment claims was addressed by identifying a number of situations where the required relationship had been established in previous cases. By proceeding in this way, the

¹⁸ Smith, "A New Start?", p. 94.

¹⁹ [2013] EWCA Civ 1415, [2014] 1 W.L.R. 2006 ("*TFL*").

²⁰ See section 1.3.2 above.

²¹ In particular, *Ruabon Steamship Co. Ltd. v London Assurance (The Ruabon)* [1900] A.C. 6 and *Edinburgh and District Tramways Co. Ltd. v Courtenay* 1909 S.C. 99.

²² *TFL*, at [39] and [45] (Floyd LJ). It is worth noting that the decision was on a striking-out application, which only required the court to consider whether the claimant had established a sufficiently serious question to be tried.

judgment avoided incurring the difficulties presented by the main approaches proposed to answer this question in the past. When we consider the judgment's reasoning in light of Stevens' and Smith's methodological concerns, however, it becomes apparent that it may still be vulnerable to important criticism.

According to the judgment, the key feature defining the link between the parties in all the situations identified is the fact that the claimant suffers a loss through the provision of the defendant's benefit. But the judgment does not explain which of the specific circumstances involved in the identified situations would account for such a key feature. This is a serious shortcoming considering that the relevant situations include scenarios as diverse as those where the claimant pays a sum of money or provides goods or services to the defendant, those where the defendant receives the claimant's property, those where the claimant discharges a debt owed by the defendant to a third party, and those where co-ordinated transactions have been treated as forming a single transaction between claimant and defendant²³. Without further explanation, we are left to wonder whether there is any significant difference among the circumstances giving rise to liability in these scenarios.

On the other hand, the judgment concludes that the rising heat hypothetical and the scenario presented in *TFL* should not give rise to unjust enrichment claims, because the required link between the parties would normally be absent where the provision of a benefit is only an incidental result of the claimant's expenditure²⁴. However, the judgment does not explain why the claimant's intentions should be relevant for the success of a restitutionary claim, nor why in many cases these claims have been recognised despite the lack of an intention of the claimant to benefit the defendant. Without further explanation,

²³ *ITC*, at [46] and [48] (Lord Reed).

²⁴ *ITC*, at [52] and [57] (Lord Reed). A benefit is considered as "incidental" where "the claimant has an objective unconnected with the defendant's enrichment". Burrows, *Restatement*, p. 54.

the judgment's ruling against recovery of incidental benefits seems as ad hoc and difficult to justify²⁵.

Stevens and Smith believe that the cause of these difficulties lies in the acceptance of the “at the expense of” question as a part of a systematic framework to evaluate the requirements of every unjust enrichment claim. In Stevens' view, when the subject is structured according to a set of common questions, cases are inevitably seen as revealing “material similarity based upon unity of reason”²⁶. Likewise, Smith argues that when courts approach different factual scenarios through these common questions, they are in fact acting as if they were applying the requirements of a single cause of action²⁷. Once we get to this point, we are just a step away from assuming that the cases falling within the questions should be subject to the same conditions of liability, and that unjust enrichment claims should be recognised even if as a matter of authority and common sense no liability should arise.

These observations raise troubling questions about the plausibility of *ITC* as a guide for the decision of restitutionary claims based on unjust enrichment. Yet they sit oddly with the analysis deployed by the judgment in an important regard. Lord Reed makes clear that a claim in unjust enrichment is the consequence of legal rights determined by rules of law which are ascertainable and consistently applied²⁸. These rules should not be drawn only from “judicial reasoning based on modern theories of unjust enrichment”, but mainly from relevant authorities²⁹. The same principle is behind the position generally taken by courts and commentators when they conclude that unjust enrichment scenarios do not reveal a single reason for liability, but a diversity of reasons which vary from case to case. This position is clearly stated in the latest edition of *Goff and Jones*:

²⁵ Stevens, “Disaster”, p. 579; Smith, “A New Start?”, pp. 93–95.

²⁶ Stevens, “Disaster”, p. 576. Although the author does not elaborate on this point, the text implies that this is because the scheme assumes commonality among the features of different unjust enrichment claims, and commonality cannot be predicated of claims not bound by a moral or normative principle.

²⁷ Smith, “A New Start?”, p. 93.

²⁸ *ITC*, at [39] (Lord Reed).

²⁹ *ITC*, at [40] (Lord Reed).

“The reasons why the courts have held a defendant’s enrichment to be unjust vary from one set of cases to another, and for this reason the law of unjust enrichment more closely resembles the law of torts (recognising a variety of reasons why a defendant must compensate a claimant for harm) than it does the law of contract (embodying a single principle that expectations engendered by binding promises must be fulfilled)”³⁰.

It therefore seems that something is missing. Stevens and Smith fail to explain why the judgment, and indeed most accounts of the subject, treat the unjust enrichment framework as an organising tool for explaining decisions based on a wide variety of reasons. If it is true that the rules governing unjust enrichment claims should be drawn from authorities, and that the reasons justifying unjust enrichment claims vary from case to case, there must be something else explaining the difficulties of unwarranted analogies and overgeneralisation. Identifying the origin of these difficulties require us to take a step back and consider why reasoning through unjust enrichment common questions may lead us to the important difficulties which the analysis offered in *ITC* admittedly faces.

2.2 Retracing Steps

The adoption of unjust enrichment’s common questions was one of the main features of Professor Peter Birks’ original account of the law of unjust enrichment, and they provide the structure for his analysis of the subject in later works³¹. If in these questions lies the key to understanding the difficulties identified by Stevens and Smith, it seems reasonable to begin looking for the seeds of these difficulties in Birks’ ideas. Of course, Birks’ views changed considerably over time, and it is unlikely that any account could offer a definitive statement of his position on a topic as broad as the significance of unjust enrichment common questions. Yet paying closer attention to the role envisioned for these questions when they were first introduced enables us to see that they were not originally conceived

³⁰ C. Mitchell, P. Mitchell and S. Watterson (eds.), *Goff and Jones on the Law of Unjust Enrichment*, 9th ed. (London 2016), [1-08]. This position is endorsed by the Supreme Court in *Barnes v Eastenders Cash and Carry Plc* [2014] UKSC 26, [2015] A.C. 1, at [102] (Lord Toulson).

³¹ P. Birks, *An Introduction to the Law of Restitution*, rev. ed. (Oxford 1989) 6–7; Birks, *Unjust Enrichment*, p. 39.

as the elements of a cause of action, where the defendant would be necessarily liable if all the elements were made out. This suggests that, contrary to Stevens and Smith's thesis, the cause of unwarranted analogies and overgeneralisation does not necessarily lie in the acceptance of unjust enrichment's common questions, but somewhere else.

2.2.1 Birks' Puzzle

To an important extent, the modern law of unjust enrichment is the product of an intellectual project, the main goal of which was the unification of seemingly dispersed instances of liability. Until recently it was widely assumed that outside contracts and torts there only existed a multiplicity of disparate claims. A significant part of the cases which today are routinely accepted as forming the law of unjust enrichment were explained either as involving an implied contract, or as giving rise to discrete equitable remedies³². During the second half of the last century, Robert Goff and Gareth Jones brought these claims together and presented them as manifestations of a general legal principle, setting in motion a profound reconsideration of the division and ordering of English private law³³. Among the many scholars who engaged in this exercise, no one was as influential as Peter Birks.

Birks' main concern was identifying a simplified conceptual scheme able to capture the common features of the assortment of cases identified by Goff and Jones. He noted that in cases involving contracts or torts, lawyers agreed on the main issues which should be addressed to identify the applicable rules. Similarly, the analysis of unjust enrichment cases must also be subject to a stable set of large questions intended to reveal the significant legal issues. Four questions were proposed: is the defendant enriched? If so, is he or she enriched at the claimant's expense? If so, is there any factor calling for restitution? If so, is there any reason why restitution should none the less be withheld?³⁴

³² D. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford 2001), 284–293.

³³ A. Burrows, E. McKendrick and J. Edelman, *Cases and Materials on the Law of Restitution*, 2nd ed. (Oxford 2006), 2. The reference is, of course, to R. Goff and G. Jones, *The Law of Restitution* (London 1966).

³⁴ Birks, *Introduction*, p. 7.

Birks proposed the common questions as a way of making explicit the similarities between different causes of action³⁵. He frequently argued that this was important because like cases should be treated alike³⁶. Unfortunately, Birks was not clear about what he meant by “like cases”. It has been argued that the only meaningful way in which different sets of facts could be alike for legal purposes is regarding the reasons explaining the imposition of a common legal response. Thus, if Birks’ questions were intended to make explicit the similarities between unjust enrichment cases, they must have assumed that in these cases similar reasons justified restitution³⁷.

This reasoning seems to confirm Stevens’ and Smith’s conclusion that accepting the common questions leads us to treat all restitutionary claims as based on the same reasons. Yet it is hardly consistent with Birks’ own ideas about unjust enrichment. Despite his interest in showing similarity among restitutionary claims, Birks repeatedly described unjust enrichment as an area of the law encompassing a variety of different causes of action. He deliberately omitted to articulate the reasons justifying restitutionary claims, because he was persuaded that these reasons were manifold and should be looked for in the decided cases³⁸.

This feature of Birks’ account of unjust enrichment has produced considerable confusion³⁹. It has been argued that he was deceived by a conceptual trap, hoping to identify likeness among cases without considering the only meaningful sense in which

³⁵ Birks, *Introduction*, p. 20.

³⁶ P. Birks, “Equity in the Modern Law: An Exercise in Taxonomy” (1996) 26 U.W.A.L.Rev. 1, 5, 17, 27, 95.

³⁷ C. Webb, “Treating Like Cases Alike: Principle and Classification in Private Law” in A. Robertson and T. Hang Wu (eds.), *The Goals of Private Law* (Oxford 2009), 233 and, more recently, C. Webb, *Reason and Restitution: A Theory of Unjust Enrichment* (Oxford 2016), 43.

³⁸ “[J]ust as conversion is a specific cause of action within the familiar generic terms ‘tort’ or ‘wrong’, so failure of consideration is a specific cause of action within the still somewhat less familiar genus ‘unjust enrichment’”. P. Birks, *Restitution: The Future* (Sydney 1992), 1. See also P. Birks, “Unjust Enrichment—A Reply to Mr Hedley” (1985) 5 Leg. Stud. 67, 70; Birks, *Introduction*, pp. 17–19; Birks, “Equity in the Modern Law”, p. 66.

³⁹ See, for example, J. Dietrich, “What Is ‘Lawyering’? The Challenge of Taxonomy” [2006] C.L.J. 549; E. Sherwin, “Legal Positivism and the Taxonomy of Private Law” in C. Rickett and R. Grantham (eds.), *Structure and Justification in Private Law: Essays for Peter Birks* (Oxford 2008); Webb, “Treating Like Cases Alike”; P. Watts, “Taxonomy in Private Law—Furor in Text and Subtext” [2014] N.Z.L.Rev. 107.

cases can be alike⁴⁰. Yet Birks' writings show that he was not deceived, but concerned about a different kind of likeness, one which did not require the acceptance of unity of reason.

2.2.2 Causes of Action and Legal Categories

Birks' interest in unjust enrichment was underpinned by a broader interest in the taxonomy of the law. He often said that private law scholarship had to reconnect with the nineteenth-century lawyers who engaged in the task of mapping the structure of the English law of obligations⁴¹. It is indeed tempting to draw parallels between what these lawyers achieved and Birks' own ambitions⁴². But there is an important feature in his approach to the division of obligations which is not immediately apparent in earlier efforts to map English private law. Like Pollock, Maitland and Winfield, Birks thought that categories from the civilian systems could help identifying the way in which the different parts of the law fitted together⁴³. Unlike these authors, however, Birks departed from the traditional common law approach focusing on analogies among fact patterns and adopted a view closer to that of the abstract civilian categories. This feature may explain in part the confusion surrounding his unjust enrichment scheme.

It is frequently accepted that the common law arranges legal materials around causes of action⁴⁴. Causes of action are assemblages of facts necessary for supporting a claim⁴⁵. To determine which facts possess such quality, fact patterns which have given rise to claims recognised by decided cases are generalised into broader expressions, resulting in what is known as the elements of a cause of action. These elements encapsulate what is legally relevant about the circumstances under which the law

⁴⁰ Webb, "Treating Like Cases Alike", pp. 236–237; Sherwin, "Legal Positivism", p. 122.

⁴¹ P. Birks, "Definition and Division: A Meditation on Institutes 3.13" in P. Birks (ed.), *The Classification of Obligations* (Oxford 1997), 3–4.

⁴² See, for example, R. Stevens, "Is There a Law of Unjust Enrichment?" in S. Degeling and J. Edelman (eds.), *Unjust Enrichment in Commercial Law* (Pyrmont 2008), 11–22.

⁴³ Birks, "A Reply to Mr Hedley", p. 70; Birks, "Equity in the Modern Law", pp. 4–5; Birks, "Definition and Division", pp. 34–35; P. Birks (ed.), *English Private Law* (Oxford 2000), xxix.

⁴⁴ Smith, "A New Start?", pp. 87–88.

⁴⁵ *Letang v Cooper* [1965] 1 Q.B. 232, pp. 242–243.

recognises a claim⁴⁶. While categories like contracts and torts provide broad headings where these causes of actions could be organised for different purposes, the guidance to decide cases is not in the broad headings, but in the elements of the different causes of action. In this sense, causes of action are a product of the common law's distinct approach to legal reasoning⁴⁷.

The legal categories of civilian systems provide an interesting contrast. In these systems, the main function of legal categories is not grouping together fact patterns which reveal similar reasons for supporting a claim, but mediating between fact patterns involving a legal issue and the abstract concepts through which the solution to such issue is expressed⁴⁸. Legal categories act as a bridge between the concrete level of facts and the abstract level of legal reasoning by providing a generic formulation of the facts which trigger the application of a given legal regime. Unlike what happens with the elements of the causes of action, the generic formulation of civilian categories is not a generalised form of real-life fact patterns, but a concise expression of what is considered to be the nature of the legal category involved⁴⁹. When the facts of a given real-life situation fit the generic formulation of a legal category, the analysis turns to the legal regime applicable to such category, which in principle contains the solution to every issue falling within the category⁵⁰.

These different approaches reflect a different way of thinking about legal issues. The traditional common law approach to the question of whether a claim should be granted

⁴⁶ L. Smith, "Defences and the Disunity of Unjust Enrichment" in A. Dyson, J. Goudkamp and F. Wilmot-Smith (eds.), *Defences in Unjust Enrichment* (Oxford 2016), 31. See also P. Legrand, "European Legal Systems Are Not Converging" (1996) 45 I.C.L.Q. 52, 70.

⁴⁷ G. Samuel and J. Rinkes, *The English Law of Obligations in Comparative Context* (Nijmegen 1991), 13–14; G. Samuel, *The Foundations of Legal Reasoning* (Antwerp 1994), 73.

⁴⁸ G. Samuel, *The Law of Obligations* (Cheltenham 2010), 3; X. Bioy, "Quelles Lectures Théoriques de la Qualification?" in M. Nicod (ed.), *Les Affaires de la Qualification Juridique* (Toulouse 2015), 11.

⁴⁹ M. Cumyn, "Les Catégories, la Classification et la Qualification Juridiques: Réflexions sur la Systématique du Droit" (2011) 52 *Les Cahiers de Droit* 351, 368–369; M. Cumyn and F. Gosselin, "Les Catégories Juridiques et la Qualification: une Approche Cognitive" (2016) 62(2) *McGill L.J.* 329, 347.

⁵⁰ Legrand, "European Legal Systems", p. 66. A useful illustration of the series of distinctions required by this process in B. Markesinis, W. Lorenz and G. Dannemann, *The German Law of Obligations. Vol. 1: The Law of Contracts and Restitution: A Comparative Introduction* (Oxford 1997), 16–19.

is by looking for other fact patterns where courts have granted claims, and then see if the reasons justifying those claims could also support a claim in the facts of the case at hand. Causes of action are critical in this exercise because their elements facilitate the process of drawing analogies. The usual civilian approach to this question is different. It first asks which legal categories are involved in the relationship arising from the facts, and then reasons through the applicable legal regime until finding the rule covering the specific issue presented. Legal categories are critical in this exercise because their generic formulation indicate which legal regime should be looked upon to find the applicable rule.

Usually each approach leads to similar results. There is, however, an important difference in the way they conceive similarity among cases. In the logic of the common law's cause of action, similarity is usually assessed in terms of the reasons justifying the recognition of a claim. Different fact patterns give rise to a single cause of action when it is concluded that the same reasons justify a claim in all of them. In the logic of the civilian legal categories, similarity is usually assessed more abstractly, as a matter of systematic division of legal concepts. Fact patterns are treated under the same legal regime when they fit conceptual schemes developed quite apart from the many reasons which may justify a claim under specific circumstances. Certainly, the rules governing these claims are shaped by all kind of considerations, including those invoked by common lawyers as justifying causes of action⁵¹. But as the rules are considered only after the case presented is translated into the relevant legal category, the reasons underpinning such rules play a lesser role in deciding which fact patterns should be treated alike⁵².

2.2.3 Abstract Likeness

For Birks, the starting point was the assortment of claims grouped together by Goff and Jones. His goal was to find the “simplest structure” on which the material could be

⁵¹ Cumyn, “Les Catégories”, p. 371.

⁵² While still widely accepted, the view of civilian reasoning as a technique of logical deductions from abstract categories has been the target of important objections. See, for example, J. Stone, *Legal System and Lawyers' Reasonings* (London 1964), 217–219. The point is not that legal reasoning is essentially different in common law and civilian systems, but that likeness among cases is generally considered from a different perspective.

explained. This structure, however, was not to be found in the reasons justifying claims, or “the pattern of good sense already in the cases”. Birks explicitly acknowledged that he was proposing a radical departure from the approach taken in *Goff and Jones*. His ambition was to identify an analytical scheme, not developed *from* the cases, but intended to be imposed *upon* the cases to reveal the “skeleton of principle” holding them together⁵³.

In Birks’ work, the search for principle was closely related to the systematic exposition of legal concepts. Understanding could not be separated from rational classification. He thought that a systematic exposition of the law required its organisation in a hierarchical arrangement recognising different levels of generality. Key questions should be identified to proceed logically from general principles to specific rules. He proposed the following example:

“[C]ontract and tort are categories which emerge when we ask from what events obligations arise. One level further down, sale is a specific contract, a species of that generic causative event. Running back up the hierarchy, sale is one contract, contract is one source of obligations, obligations form one category of rights, and rights are the subject-matter of private law”⁵⁴.

In this structured understanding of the law, “unjust enrichment at the expense of another” was conceived as an analytically distinct category of obligations, encompassing different events giving rise to restitution. The common questions expressed the elements of the category, which was often identified as a “generic conception” of these different events. According to Birks, this generic conception captured at a high level of generality “the common quality of apparently different events”, including the various fact patterns giving rise to the restitutionary claims grouped together by Goff and Jones. Importantly, however, such qualities were not seen as a generalisation of certain features present in

⁵³ Birks, *Introduction*, pp. 1–4.

⁵⁴ Birks, *English Private Law*, p. xli. Birks frequently praised Gaius’ institutional scheme for its “commitment to abstract rationality”.

concrete fact patterns. Instead, they were deduced from what Birks saw as the abstract nature of the category itself:

“It is important that this generic conception should not be thought to have been induced from the members just listed [the fact patterns giving rise to restitutionary claims]. That would be an impressionistic exercise whose results would depend on the members selected by the observer. (...) In fact this generic conception is deduced from the definition of restitution itself. Its species—that is to say its particular manifestations (...) are only recognised and admitted subsequently, and on an objectively fixed basis”⁵⁵.

Birks’ questions were not intended to reflect specific fact patterns, so they could have hardly reflected the specific reasons borne in mind by courts for recognising restitutionary claims. This was never their purpose. Birks was not looking for the elements of a cause of action, but for a concise expression of what he assumed existed at the level of “abstract rationality” as a conceptually distinct category of obligations. He understood that at a lower level of generality the recognition of claims would involve a variety of reasons. This was not a problem for him, because he was not proposing a single theory of liability, but a structured overview of the law⁵⁶.

This does not mean that Birks’ scheme was “banal” or “inert” as some authors have suggested⁵⁷. The organisation of precedents in terms of common questions was intended to have an impact in the way cases were decided. It promoted the rejection of what Birks viewed as misleading technicalities developed to explain restitutionary claims in terms of implied contracts or equitable discretion. Further, it provided an analytical structure where the relevant precedents could be drawn together and examined side by

⁵⁵ Birks, *Introduction*, p. 17.

⁵⁶ Birks, *Introduction*, p. 27: “What is proposed here is a scheme for better ordering the specific instances which Lord Diplock recognises. The generic conception of the event which triggers restitution adds nothing to the existing law and effects no change except what comes from better understanding of what is there already”. See also Birks, “A Reply to Mr Hedley”, p. 75.

⁵⁷ R. Stevens, *Torts and Rights* (Oxford 2007), 285; Sherwin, “Legal Positivism”, p. 119.

side. Birks' ambition was that in time well-defined legal concepts would emerge to mediate between the abstract categories and the low-level rules required to decide cases⁵⁸.

From this perspective, Birks' scheme does not seem incoherent or confused. In his account, like cases were those which involved obligations arising from the same causative event. Causative events were not fact patterns distinguishable in light of some "material reason", but conceptual devices intended to classify, at an abstract level, the specific instances of liability as recognised in the precedents. If this is correct, the adoption of the unjust enrichment common questions cannot be solely blamed for the difficulties described by Stevens and Smith. It is true, however, that Birks' radical conceptualism played an important part in making these difficulties possible, to which we shall turn next⁵⁹.

2.3 Unity of Reason

Birks' notion of unjust enrichment as an abstract causative event eventually revealed itself as incapable of providing any concrete criteria to explain why different restitutionary claims should be brought together as a unified part of the law. The gap was filled by assuming that unjust enrichment was a category organised around a single principle of liability, and that Birks' questions were the ingredients of unjust enrichment claims. Applied in this way, however, the questions ceased to be just signposts towards areas of inquiry. They were increasingly conceived as the elements of a cause of action. This seems to explain the problems of unwarranted analogies and overgeneralisation denounced by Stevens and Smith.

⁵⁸ Birks, *Introduction*, pp. 20–22, especially note 22. See also Birks, "Equity in the Modern Law" p. 27; P. Birks, "The Law of Restitution at the End of an Epoch" (1999) 28 U.W.A.L.Rev. 13, 48–49.

⁵⁹ On Birks' conceptualism, see C. Saiman, "Restating Restitution: A Case of Contemporary Common Law Conceptualism" (2007) 52 Vill.L.Rev. 487 and S. Hedley, "Looking Outward or Looking Inward? Obligations Scholarship in the Early 21st Century" in A. Robertson and T. Hang Wu (eds.), *The Goals of Private Law* (Oxford 2009).

2.3.1 The Law of Defective Transfers of Value

Birks argued that what bound unjust enrichment claims together was the abstract source of the defendant's obligation to make restitution. He thought that this way of thinking about legal categories was embedded in the common law tradition⁶⁰. In fact, this was a rather unconventional approach among common lawyers, who have traditionally shown distrust for abstractions⁶¹. Somehow, however, Birks managed to convince courts and commentators that his views reflected the "established principles of unjust enrichment"⁶². This remarkable success owes much to a part of the theory which Birks would later reject as mistaken.

As noted above, Birks presented his scheme as a summarised view of the structure binding together the assortment of restitutionary claims grouped by Goff and Jones. This structure relied on the assumption that all claims enforced an obligation originating in a distinct abstract source, which Birks referred to as "causative events". He was initially inclined to explain all restitutionary claims as enforcing obligations originating in the same causative event, so he argued that "restitution and unjust enrichment identify exactly the same area of the law"⁶³. Despite all the abstract reasoning which led to this conclusion, the conclusion itself could be expressed in fairly concrete terms: unjust enrichment was the law of claims justifying a restitutionary response. Common lawyers were not entirely unfamiliar with this way of grouping claims, and they did not have much trouble in accepting Birks' scheme as summarising the main elements of a response-based category⁶⁴.

⁶⁰ Birks, *English Private Law*, p. xlv. See also P. Stein, *Legal Institutions: The Development of Dispute Settlement* (London 1984), p. 125.

⁶¹ Samuel, *The Foundations*, p. 195.

⁶² See, for example, *Banque Financière de la Cité v Parc (Battersea) Ltd.* [1999] A.C. 221, 226–227 (Lord Steyn), citing Birks.

⁶³ Birks, *Introduction*, p. 17.

⁶⁴ Stevens, "Is There a Law of Unjust Enrichment?", pp. 14–15.

Yet Birks was not interested in response-based categories⁶⁵. His concern was explaining concrete claims in the language of abstract rationality, a language which required drawing clear analytical lines and avoiding overlaps between categories. If an obligation originated in unjust enrichment, his logic required the conclusion that it did not originate in consent or wrongs. Birks realised that the law often recognised restitutionary claims to enforce obligations arising from these other causative events, as where restitution was awarded to enforce an express promise or to reverse the effects of a profitable wrong. So he was forced to conclude that the law of restitution was larger than the law of unjust enrichment, and thus to recant his initial position: the quadrature of unjust enrichment and restitution was not perfect⁶⁶.

This posed a dilemma for common lawyers. If unjust enrichment was not a category defined by its relation with a distinctive legal response, what then made it special? In Birks' approach, the answer to this question should not be looked upon at the concrete level of facts giving rise to claims, but at the abstract level of legal categories. The distinctiveness of unjust enrichment as a legal category was not defined by some common feature present on concrete fact patterns, but as a matter of principle⁶⁷. Yet for many this did not make any sense. If commonality among unjust enrichment claims was not based on the kind of legal response, it should be based on unity of reason⁶⁸. This unity of reason was found by introducing a subtle but significant twist to unjust enrichment's common questions.

Birks considered that the questions were a structured way of thinking about the issues raised by obligations originating in unjust enrichment. While looking for unity

⁶⁵ Birks, "Definition and Division", pp. 29–31; P. Birks, "Misnomer" in W. Cornish, R. Nolan, J. O'Sullivan and G. Virgo (eds.), *Restitution: Past, Present & Future* (Oxford 1998), 22–23.

⁶⁶ Birks, "Misnomer", p. 7. See also Birks, *Unjust Enrichment*, pp. 2–5.

⁶⁷ Birks, "Misnomer", p. 9: "It is in the nature of things that there are different factual bases of liability and that the different factual bases of liability generate different liabilities (...). The four categories of causative event are the four great factual bases of liability". See also Birks, *Unjust Enrichment*, p. 8.

⁶⁸ L. Smith, "Restitution: The Heart of Corrective Justice" (2001) 79 *Tex.L.Rev.* 2115, 2133; Stevens, "Is There a Law of Unjust Enrichment?", p. 15; Sherwin, "Legal Positivism" p. 122; D. Sheehan, "The Property Principle and the Structure of Unjust Enrichment" [2011] *R.L.R.* 138, 155.

among unjust enrichment cases, however, commentators saw Birks' questions as the common features of legally significant fact patterns. Instead of being used as a structured guide to the answers that should be sought in the precedents, the questions were interpreted as the elements revealing what was normatively distinct in every unjust enrichment claim. This led to the conclusion that unjust enrichment was a category organised around a single principle of liability "whose members respond to the same normative concerns and share the same normative justification"⁶⁹. It was increasingly accepted that unjust enrichment was the law of defective transfers of value.

2.3.2 The Ingredients of a Claim

This new emphasis had profound implications. Accepting that the questions embodied what made unjust enrichment cases normatively significant led to their being considered as general statements of the conditions under which a claim should lie. It became orthodox to think about the questions as the "ingredients" of unjust enrichment claims⁷⁰. This is the view behind the decision of *TFL*, where Floyd LJ justified the rejection of an incidental benefits restriction as follows:

"If a claimant confers a benefit on a defendant in circumstances where he is acting in his own self-interest, but labouring under a mistake so that he is actually conferring a benefit on someone else, I do not see why a court should deny a remedy simply on the ground that the benefit is not identical to that which the claimant intended to confer on himself. *Everything depends on whether the other ingredients of a cause of action in restitution are present.*"⁷¹

To be sure, courts and commentators generally agreed that these ingredients should not be interpreted as if they had statutory force⁷². Rather, they had to be considered as signposts

⁶⁹ L. Smith, "Unjust Enrichment: Big or Small?" in S. Degeling and J. Edelman (eds.), *Unjust Enrichment in Commercial Law* (Pymont 2008), 35.

⁷⁰ Burrows, *The Law of Restitution*, p. 26; Mitchell et al, *Goff and Jones*, [1-09].

⁷¹ *TFL*, at [45] (Floyd LJ). Emphasis added.

⁷² See, for example, *Uren v First National Home Finance Ltd.* [2005] EWHC 2529 (Ch), at [16] and [18] (Mann J); *Investment Trust Companies v HMRC* [2012] EWHC 458 (Ch), [2012] S.T.C. 1150, at [39] (Henderson J).

guiding a structured analysis of the “black letter law” laid down in the precedents⁷³. But if the questions expressed the legally relevant characteristics of the facts patterns where unjust enrichment claims had been recognised, analogical reasoning led to the conclusion that in every case where the characteristics were met a claim ought to be recognised⁷⁴. In practice, the questions were applied as the elements of a cause of action⁷⁵.

*Menelaou v Bank of Cyprus UK Ltd*⁷⁶ provides an illuminating example. It will be remembered that in this case the Menelaou family owned a house subject to a charge to a bank, the claimant. The Menelaous decided to sell this house to buy another house, which was to be transferred as a gift to their daughter, the defendant. To do so, they asked the claimant bank to release the charge over the first house, offering a substitute charge over the second house. The claimant bank agreed, and instructed a firm of solicitors to deal with the operation. The solicitors paid for the second house with the deposit received from the sale of the first house. Then they sent the claimant bank a new charge over the second house, and the claimant bank released its original charge over the first house. It later transpired that this new charge was defective, as the signature of the Menelaous’ daughter, the new owner of the second house, had been forged. The claimant bank argued that the Menelaous’ daughter had been unjustly enriched at its expense, and requested to be subrogated to an unpaid vendors’ lien over the second house.

In his judgment, Lord Clarke approached the case through the unjust enrichment questions. He acknowledged that these questions should be interpreted only as broad headings for ease of exposition, purportedly of the rules laid down in the authorities⁷⁷. But

⁷³ Burrows, *The Law of Restitution*, p. 27.

⁷⁴ Discussing the neighbour principle in the tort of negligence, Lord Diplock explained this form of reasoning as a process where first the facts of the decided cases are generalised to a set of common characteristics, and then the facts of the case for decision are “analysed to ascertain whether they possess each of these characteristics. If they do the conclusion follows that a duty of care does arise in the case for decision”. *Home Office v Dorset Yacht Co. Ltd.* [1970] A.C. 1004, 1058–1060 (Lord Diplock). Interestingly, in the same decision Lord Reid concluded at 1026 that the neighbour principle “is not to be treated as if it were a statutory definition”.

⁷⁵ Smith, “Defences and the Disunity of Unjust Enrichment”, p. 40.

⁷⁶ [2015] UKSC 66, [2016] A.C. 176 (“*Menelaou*”).

⁷⁷ *Menelaou*, at [18]–[19] (Lord Clarke), citing Burrows, *The Law of Restitution*, p. 27, which reads: “In seeking to link the black letter law laid down in the cases to the cause of action of unjust enrichment, the

instead of focusing on how the authorities dealt with the issues raised by the facts presented, Lord Clarke centred his analysis on whether the facts allowed an affirmative answer to the unjust enrichment questions. Once he concluded that this was the case, he had no trouble in accepting that subrogation could be awarded as a remedy to reverse the defendant's unjust enrichment⁷⁸. He noted that the authorities governing the availability of subrogation to the unpaid vendor's lien generally required the claimant to show that the purchase money had been paid off by use of the claimant's own money. But the application of this requirement was circumvented by concluding that "a claim in unjust enrichment does not need to show a property right"⁷⁹.

This seems a good example of the problem of unwarranted analogies described by Stevens and Smith. After concluding that the claim was based on unjust enrichment, Lord Clarke was persuaded that the existence of the claimant's property rights in the purchase money was not relevant because in other unjust enrichment cases property rights were not relevant. Likewise, he was persuaded that subrogation could be granted as a remedy, because in other cases subrogation was granted to reverse unjust enrichment. Though it may be tempting to explain these analogies in the endorsement of Birks' structured analysis, this is not the source of Lord Clarke's problem. The proof is in the judgment given by Lord Carnwath in the same decision.

Unlike Lord Clarke, Lord Carnwath approached the case through the analysis of what he described as "the traditional rules of subrogation"⁸⁰. He presented a more detailed analysis of the authorities and concluded that they required the claimant to show a tracing link to the money used to purchase the new property. To support his conclusion, however, he turned to the academic discussion on the availability of proprietary remedies for unjust enrichment. By focusing on the "at the expense of" question, he showed that the rule laid

most rational approach is to analyse any claim for restitution of an unjust enrichment in terms of four distinct questions".

⁷⁸ *Menelaou*, at [23]–[24], [50] (Lord Clarke).

⁷⁹ *Menelaou*, at [39]–[38] (Lord Clarke).

⁸⁰ *Menelaou*, at [107] (Lord Carnwath). Although at par. 109 he said "it is surely time for the principles of restitution or unjust enrichment to be allowed to stand in their own feet".

down by authorities regarding the link that should exist between the claimant and the defendant's enrichment varies in different scenarios. Under the facts presented, the applicable authorities required the claimant to show a tracing link to the money used to purchase the new property⁸¹.

Two approaches to Birks' questions can be distinguished. Lord Clarke understood the questions as the features that should be looked for in the facts presented to see whether the case at hand could be treated like other unjust enrichment cases. Lord Carnwath understood the questions as a guide to the different issues raised by unjust enrichment cases, and through them to the specific rules applicable in the case at hand. Both judgments arrived at the same conclusion regarding the availability of the requested remedy. But only Lord Clarke's judgment does so through unwarranted analogies⁸².

2.3.3 The Generalisation Cycle

Birks accepted that his scheme was a simplified account which had to be kept under constant review⁸³. The most important refinements he expected should have come in the form of distinctions aimed at bridging the gap between the abstract level of legal categories and the concrete level of rules applicable in different scenarios. Birks made this clear many times:

“There is another kind of work to do. This Chapter draws a line at the level in the taxonomic hierarchy represented by the fourfold classification between contracts, wrongs, unjust enrichments, and other events. The need for good taxonomy does not stop there. There must be good classification at the lower levels too. For example, unjust enrichment at the expense of the plaintiff is a generic event. We need to know exactly what sub-species there

⁸¹ *Menelaou*, at [130]–[132] (Lord Carnwath). It is worth noting that Lord Carnwath avoided structuring his reasoning in terms of the unjust enrichment common questions. However, his conclusions are consistent with the unjust enrichment analysis offered in leading accounts of the subject. See Mitchell et al, *Goff and Jones*, [7-05].

⁸² A similar point is made in F. Wilmot Smith, “A Prudent Decision” (2019) 135 L.Q.R. 195, 197, about the way in which unjust enrichment common questions are applied in *Benedetti v Sawiris* [2013] UKSC 50, [2014] A.C. 938, at [10] (Lord Clarke).

⁸³ Birks, *Introduction*, p. 1.

are. Exactly on what facts is an enrichment at the expense of another unjust?”⁸⁴.

Yet once it was accepted that the questions were the ingredients of a claim, the task of developing these distinctions was for the most part abandoned. The focus shifted from narrowing down the issues raised by different scenarios, to finding definitions comprehensive enough to describe every possible unjust enrichment case. In the context of the common law, where legal concepts develop incrementally from the decided cases, this meant that the scope of the questions was constantly adjusted to encompass new fact patterns where unjust enrichment claims were recognised. This has led unjust enrichment liability to a process of increasing expansion.

The question for the link between the parties provides an interesting example of this trend. *Goff and Jones* introduces the “at the expense of” element of the unjust enrichment analysis as follows:

“This deceptively simple expression reflects the principle that the law of unjust enrichment’s essential concern is not with the disgorgement of gains made by defendants, nor with the compensation of losses sustained by claimants, but with the reversal of transfers of value between claimants and defendants. Whether a qualifying transfer has occurred is not a question of fact but a question of combined fact and law”⁸⁵.

As explained in the last chapter, until recently the prevailing view was that, in principle, this element limited the availability of unjust enrichment claims to scenarios where a benefit was directly conferred from claimant to defendant⁸⁶. Commentators noted that in

⁸⁴ Birks, “Definition and Division”, p. 23. Birks’ hierarchical understanding of legal concepts resonates with the traditional presentation of legal categories in civilian systems. Cf. Birks, *Introduction*, pp. 106–107 and Cumyn, “Les Catégories”, p. 370.

⁸⁵ Mitchell et al, *Goff and Jones*, [6-01]–[6-02].

⁸⁶ G. Virgo, *The Principles of the Law of Restitution*, 2nd ed. (Oxford 2006), 105–107; B. McFarlane, “Unjust Enrichment and Indirect Recipients” [2009] R.L.R. 37, 38; Burrows, *The Law of Restitution*, pp. 69–85.

many cases the relationship between the parties did not take this form⁸⁷. To reflect these cases, the qualifying standard was expanded to a “but for” causal connection test between a loss on the side of the claimant and a gain on the side of the defendant⁸⁸. This test was endorsed by courts in scenarios involving an increasingly vague link between the claimant and the defendant’s enrichment⁸⁹. In light of these cases, it was even proposed that the “but for” test should be further expanded to include not only causal connections, but also counterfactual connections between loss and gain⁹⁰. In the years immediately before *ITC*, the emerging judicial trend seems to have been treating the link between the parties as a matter of weighting different policy considerations, which eventually led to accepting that a claim should lie every time claimant and defendant were related as a matter of “commercial reality”⁹¹. In the course of a single decade, the qualifying link required to bring an unjust enrichment claim expanded from “direct conferrals” to “commercial reality”.

This expansive cycle explains to an important extent the problem of overgeneralisation noted by Stevens and Smith. If we end up discussing hypotheticals like the case of rising heat, it is because at some point we assume that every time the claimant shows that the defendant was enriched at his or her expense an unjust enrichment claim should lie. This conclusion does not follow from accepting Birks’ questions as a framework for the analysis of restitutionary claims, but from conceiving them as general requirements of liability.

⁸⁷ C. Mitchell, “Liability Chains” in S. Degeling and J. Edelman (eds.), *Unjust Enrichment in Commercial Law* (Pyrmont 2008), 143–145; S. Watterson, ““Direct Transfers’ in the Law of Unjust Enrichment” (2011) 64 C.L.P. 435, 440.

⁸⁸ C. Mitchell, P. Mitchell and S. Watterson, *Goff and Jones on the Law of Unjust Enrichment*, 8th ed (London 2011), [6-05], [6-07]. In the ninth edition, the editors further qualify this test by requiring the existence of a “transaction” between claimant and defendant.

⁸⁹ See, for example, *TFL*, at [57] (Floyd LJ).

⁹⁰ E. Ball, *Enrichment at the Claimant’s Expense* (Oxford 2016), 126–128.

⁹¹ See, for example, *Relfo Ltd. (In Liquidation) v Varsani* [2014] EWCA Civ 360, [2015] 1 B.C.L.C. 14, at [92], [96], [97] (Arden LJ), 103 (Gloster LJ) and 105 (Floyd LJ); *Menelaou*, at [31] (Lord Clarke), [73] (Lord Neuberger).

2.4 Shifting the Emphasis

A deeper understanding of the assumptions behind the problems of unwarranted analogies and overgeneralisation enables us to better assess what may have gone wrong in *ITC*. As noted above, the explanation provided by Stevens and Smith sits oddly with the analysis developed in *ITC*, as the judgment explicitly rejects the view that unjust enrichment is a single cause of action the scope of which should be determined in light of its normative foundations. On the contrary, Lord Reed underlines that the unjust enrichment framework should be applied as an organising tool for better understanding existing legal decisions:

“Although judicial reasoning based on modern theories of unjust enrichment is in some respects relatively novel, there are centuries’ worth of relevant authorities, whose value should not be underestimated. The wisdom of our predecessors is a valuable resource, and the doctrine of precedent continues to apply (...) The structured approach provided by the four questions does not, therefore, dispense with the necessity for a careful legal analysis of individual cases”⁹².

But *ITC* does not seem to follow this methodological premise to its conclusion. After identifying the situations involved in the relevant individual cases, the judgment attempts to isolate the key feature explaining the link between the parties in all of them. Critically, this feature is not looked upon the circumstances giving rise to liability in the cases identified, but deduced from what is seen as the purpose of the law of unjust enrichment:

“[I]t is important to have at the forefront of one’s mind the purpose of the law of unjust enrichment. As was recognised in the *Menelaou* case (...) it is designed to correct normatively defective transfers of value, usually by restoring the parties to their pre-transfer positions (...) The nature of the various legal requirements indicated by the ‘at the expense of’ question follows from that principle of corrective justice. They are designed to ensure that there has been a transfer of value, of a kind which may have been normatively defective (...) The reversal of unjust enrichment, usually by a restitutionary remedy, is premised on the

⁹² *ITC*, at [40] and [42] (Lord Reed).

claimant's also having suffered a loss through his provision of the benefit"⁹³.

This, and not accepting unjust enrichment's common questions, seems to be the misstep explaining the judgment's difficulties. By looking for an abstract feature defining the link between the parties in all the identified situations, the judgment implies that the circumstances giving rise to liability in all of them would not be significantly different. Further, by laying down a general answer for the question about the link between the parties in every unjust enrichment case, the judgment puts itself in a position where it needs to recognise ad hoc limiting factors to deal with unlikely hypotheticals, including the rising heat scenario. But these difficulties only arise if we accept that the "at the expense of" question must embody a single feature defining the kind of link involved in all the identified scenarios. If we take it instead as a pointer to the features of the relationship between the parties in the identified situations, it is not difficult to see that the circumstances explaining liability may be different, and that the rising heat example does not fit any of them.

It follows that the judgment's endorsement of the unjust enrichment framework does not necessarily lead to unwarranted analogies and overgeneralisation. Yet the fact that the judgment's reasoning is vulnerable to Stevens and Smith's methodological objection is deeply troubling. As explained in the last chapter, *ITC* is the most successful attempt so far to avoid the complications faced by previous approaches to the link between the parties advanced in English law. If we are to rely on this case to guide the decision of future cases, as other appellate decisions seem to have already done⁹⁴, it is crucial that we find a way to protect it from further criticism.

Fortunately, the judgment itself lays down a template for advancing this task. It expressly acknowledges that the "at the expense of" question should not be applied as a

⁹³ *ITC*, at [42]–[43] (Lord Reed).

⁹⁴ *ITC* has been cited with approval in *Lowick Rose Llp v Swynson Ltd.* [2017] UKSC 32, [2018] A.C. 313, at [56], [58], [67], [89], [114]–[115], [117], [120] (Lord Sumption); and *Prudential Assurance Co. Ltd. v HMRC* [2018] UKSC 39, [2019] A.C. 929, at [68] and [102] (Lord Reed, Lord Hodge and Lord Mance).

legal test, but as a signpost guiding the analysis of individual cases⁹⁵. These cases are also pinpointed in the judgment, which identifies a number of situations where the required link had been established by previous authorities. By bringing these situations together and focusing on how they relate to each other, the judgment sets the scene for understanding their similarities, and perhaps more significantly, the way in which they are different. Avoiding the difficulties denounced by Stevens and Smith requires us to shift the analysis away from general considerations applicable to every unjust enrichment claim, and focus instead on the features accounting for the link between the parties in specific situations. As the next chapters will show, this exercise makes clear that to avoid the methodological objection we need to introduce a number of qualifications to the general answer provided by *ITC* to the question of the link between the parties.

⁹⁵ *ITC*, at [41] (Lord Reed).

Chapter 3 A Basic Distinction

*Investment Trust Companies v HMRC*¹ concludes that the link between the parties in unjust enrichment claims is defined by a key feature ensuring that a transfer of value has taken place between claimant and defendant—the defendant receives a benefit from the claimant and the claimant incurs a loss through the provision of that benefit². The conclusion chimes with the widespread view that unjust enrichment claims reverse defective transfers of value³. In line with this view, *ITC*'s analysis seems to imply that the way in which the parties relate to each other in the range of scenarios where unjust enrichment claims may lie would not be significantly different.

This chapter begins exploring these scenarios in the most basic situations identified by *ITC*: those where the claimant pays or provides goods or services to the defendant, and those where the defendant receives the claimant's property. It proceeds in four parts. The first part explains that the kind of transfer of value occurring in each of these situations can be conveniently described as either a *conferral* from claimant to defendant, or a *taking* by the defendant from the claimant. The second part shows that, in conferral situations, the link between the parties usually involves an intentional act of the claimant and its acceptance by the defendant. The third part shows that, in taking situations, the link between the parties usually involves some form of entitlement of the claimant which is interfered with by the defendant. The fourth part concludes that behind *ITC*'s basic illustrations of the connection supporting unjust enrichment claims there are, in fact, two quite different kinds of links between claimant and defendant.

¹ [2017] UKSC 29, [2018] A.C. 275 (“*ITC*”).

² See section 1.4 above.

³ P. Birks, *Unjust Enrichment*, 2nd ed. (Oxford 2005), 73; A. Burrows, *The Law of Restitution*, 3rd ed. (Oxford 2011), 66; E. Weinrib, *Corrective Justice* (Oxford 2012), 190; C. Mitchell, P. Mitchell and S. Watterson (eds.), *Goff and Jones on the Law of Unjust Enrichment*, 9th ed. (London 2016) [6-01].

3.1 Deconstructing Transfers of Value

ITC adopts a distinct strategy to recognise which situations should count as the kind of transfer of value providing a sufficient connection between the parties for the purposes of unjust enrichment claims. It first identifies the most usual unjust enrichment scenarios where this connection has been established by the decided cases, and then asks which other scenarios could be considered as revealing differences “more apparent than real”⁴. Two basic situations lie at the bottom of this exercise: those where the parties have dealt directly with one another through a payment or provision of goods and services, and those where the parties have dealt directly with one another’s property⁵.

This focus on specific situations sets *ITC* apart from the trend shown in previous cases dealing with the question of the link between the parties as an abstract test of liability⁶. But the judgment’s approach is not entirely original. For example, Professor Birks argued that the “at the expense of” inquiry required first to identify a core of familiar scenarios where unjust enrichment claims would undoubtedly lie, and then asking which departures would be possible without losing touch with the logic explaining the right to restitution in the familiar scenarios⁷. Two instances of the old action for money had and received were pressed into service to illustrate the core scenarios: *Kelly v Solari*⁸ and *Holiday v Sigil*⁹.

In *Kelly*, the claimant insurance company mistakenly gave a cheque to the defendant as payment upon a life insurance policy which had lapsed. In *Holiday*, the

⁴ *ITC*, at [47] (Lord Reed).

⁵ *ITC*, at [46] (Lord Reed). The judgment’s focus on the notion of “directness” should not distract us. As shown in sections 1.3.1 and 1.4 above, this notion is inadequate to describe the link between the parties and it is not ultimately relied upon by the judgment to decide the case.

⁶ See section 1.4 above.

⁷ Birks, *Unjust Enrichment*, p. 73.

⁸ (1841) 9 M & W 54, [1835-42] All E.R. 320 (“*Kelly*”).

⁹ (1826) 2 C & P 176, 172 E.R. 81 (“*Holiday*”). It is worth noting that instances of the old action for money had and received are widely understood as the most prominent ancestors of modern unjust enrichment claims. See, for example, D. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford 2001), 269–273. Other ancestors include instances of the actions for *quantum meruit* and *quantum valebat*, as recognised in *Energy Venture Partners Ltd. v Malibu Oil and Gas Ltd.* [2013] EWHC 2118 (Comm), at [281] (Gloster LJ).

claimant accidentally dropped and lost a banknote which was later found by the defendant. In both cases, the claimant was afforded a personal restitutionary remedy for the amount received by the defendant. These decisions did not endorse explicitly the unjust enrichment analysis which eventually gain support from courts and commentators. Yet this did not prevent Birks from presenting them as proof that what happens between the parties in restitution cases involving a payment from claimant to defendant, on the one hand, and the receipt of the claimant's property by the defendant, on the other hand, was not significantly different¹⁰.

Birks' analysis is built upon an interpretation of cases like *Kelly* and *Holiday* which remains controversial. Under this interpretation, the key to understanding the recognition of a personal claim for value received in both cases lies in a defect in the claimant's consent. In *Kelly*, this defect would take the form of a mistake as to the existence of the liability to pay the insurance. In *Holiday*, the defect would follow from the claimant's ignorance or lack of knowledge about the defendant's receipt of the banknotes¹¹. The cases would be analogous because in both a restitutionary claim is premised on the claimant defectively transferring value to the defendant¹².

Decisions may be read in different ways, especially those rendered in a time when courts were less preoccupied with explaining liabilities in distinct categories of substantive rights¹³. It may well be true that Birks' interpretation of cases like *Kelly* and

¹⁰ Birks, *Unjust Enrichment*, pp. 10, 73.

¹¹ P. Birks, *An Introduction to the Law of Restitution*, rev. ed. (Oxford 1989) 140–146. In later works, Birks argued that the crucial question was not whether a positive reason justified restitution, but whether the benefit received by the defendant could be justified on a recognised basis. We do not need to be distracted by this position, as English courts seem to have continued to explain restitution for unjust enrichment by way of the recognised unjust factors. Burrows, *The Law of Restitution*, p. 98.

¹² The importance of the claimant's title to the enriching assets in cases like *Holiday* has led some scholars to argue that the restitutionary claims recognised therein are not unjust enrichment claims, but claims to vindicate property rights. See, for example, G. Virgo, *The Principles of the Law of Restitution*, 3rd ed. (Oxford 2015) 11–17.

¹³ D. Fox, "Legal Title as a Ground of Restitutionary Liability" [2000] R.L.R. 465, 490.

Holiday is perfectly apposite to explain the basis of the defendant's liability¹⁴. In fact, this analysis seems to explain *ITC*'s assumption that situations involving a payment from claimant to defendant and situations involving the receipt of the claimant's property by the defendant could provide the model against which other transfers of value should be measured. It is critical to realise, however, that accepting the plausibility of this interpretation does not require us to accept that there are no significant differences between what happened between the parties in each of these cases.

Consider *Kelly*. Deciding on the claimant's right to recover the money paid by the claimant, Parke B said:

“If, indeed, the money is intentionally paid, without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it; but if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back”¹⁵.

While this observation is usually read as emphasising the claimant's mistake as a reason for restitution, it also tells us something relevant about the link between the parties. We may say that in *Kelly* the claimant's payment to the defendant amounts to an enriching transfer of value. But if we want to avoid diluting the meaning of Parke B's words, it seems important to acknowledge the role played by the intention of the claimant, which explains why the defendant, had it not been for the mistake, would be entitled to retain the money thus received¹⁶.

¹⁴ While not generally recognised by courts yet, the unjust enrichment analysis of restitutionary claims based on the defendant's receipt of the claimant's property is favoured by influential accounts of the law, including Burrows (2011) p. 404 and Mitchell et al, *Goff and Jones*, [8-16].

¹⁵ *Kelly*, p. 59 (Parke B).

¹⁶ See also T. Cutts, “Modern Money Had and Received” (2019) 38 O.J.L.S. 1, 5–6, arguing that the particular transfer of value taking place in *Kelly* was the transfer of title to the monetary asset received by the defendant.

This feature is not apparent in *Holiday*. If finding a banknote can be considered an enriching transfer of value, it seems that it originates independently from any intentional action of the party initially holding a right over the banknote¹⁷. It is perhaps unsurprising that the central issue in most cases presented in support of the unjust enrichment analysis of this kind of scenario has been determining which of the parties held a better right to some contested assets, and not whether the claimant consented to transferring these assets to the defendant¹⁸. We can still say that in this kind of scenario the action for money had and received reverses a transfer of value enriching the defendant. In this context, however, the idea of “transfer” is highly metaphorical and does not seem to reflect any form of conveyance from claimant to defendant¹⁹.

This difference suggests that the basic scenarios identified by *ITC* involve particularities which cannot be readily generalised into a single abstract feature like “loss through gain”. A similar realisation seems to underlie the distinction proposed by Professor Burrows between unjust enrichment cases where the link between the parties assumes the form of a *conferral* from claimant to defendant, and unjust enrichment cases where it assumes the form of a *taking* by the defendant from the claimant²⁰. Unfortunately, drawing the line between these situations is easier said than done. While the distinction enables us to see that unjust enrichment claims may be premised on different kinds of links between the parties, it does not tell us which features should matter for the purposes of classifying a case in each category. If we are to take full advantage of this distinction, we need to go beyond the general labels and identify the features of payments of money

¹⁷ Because of this, Birks was inclined to argue that the unauthorised receipt or substitution of the claimant’s assets enriched the defendant by enabling him or her to usurp the acquisitive opportunities inherent in those assets. P. Birks, “Property, Unjust Enrichment, and Tracing” (2001) 54 C.L.P. 231, 246 (especially note 35).

¹⁸ Burrows, *The Law of Restitution*, p. 410.

¹⁹ Cutts, “Modern Money”, p. 9.

²⁰ A. Burrows, “‘At the Expense of the Claimant’: A Fresh Look” [2017] R.L.R. 167, 170–171. These notions are proposed as terms of art and should not be taken in their literal sense. As it will be explained, “takings” involve situations where the defendant does not receive possession directly from the claimant, but rather asserts a right to an asset to which the claimant retains some form of entitlement.

and provisions of goods or services which would render these scenarios significantly different from those involving the receipt by the defendant of the claimant's property.

3.2 Features of Conferrals Scenarios

Analysing the connection between the parties in cases involving payments of money or provisions of goods and services is significantly complicated by the lack of attention this task has been given by most modern unjust enrichment authorities. The last edition of *Goff and Jones* makes this point clear:

“There has generally been little or no discussion of this question in simple two-party cases involving personal claims to recover the value of money paid or services rendered, because it seems to be obvious that the defendant's enrichment must have been gained ‘at the claimant's expense’ on any sensible view of what this term means”²¹.

There are, however, some rare cases where this seemingly obvious connection has been deemed to be absent despite the existence of a payment of money or provision of goods and services from the claimant. Considering these cases is useful to expose the features explaining why in general these scenarios are sufficient to establish the connection supporting an unjust enrichment claim.

3.2.1 Intention of the Claimant

As explained in chapter one, in *Uren v First National Home Finance Ltd*²² the claimant paid to Arrish Limited part of the purchase price of two flats in a real estate development which was financed mostly through loans provided by the defendant bank. Arrish defaulted on these loans, so receivers were appointed who sold at auction the real estate development to a subsidiary of the defendant bank, Pitchcott Limited. The claimant

²¹ Mitchell et al, *Goff and Jones*, [6-02]. See also Birks, *Unjust Enrichment*, p. 86: “It is usually perfectly obvious who is enriched at whose expense”. Judicial examples of this attitude can be found in *Cobbe v Yeoman's Row Management Ltd.* [2008] UKHL 55, [2008] 1 W.L.R. 1752, at [40] (Lord Scott); *Cressman v Coys of Kensington (Sales) Ltd.* [2004] EWCA Civ 47, [2004] 1 W.L.R. 2775, at [24] (Mance LJ); *Kleinwort Benson Ltd. v Birmingham City Council* [1997] Q.B. 380, 400 (Morritt LJ).

²² [2005] EWHC 2529 (Ch) (“*Uren*”).

proceeded to pay the remaining balance of the purchase price to Pitchcott, who also obtained additional loans from the defendant bank. Eventually, the defendant bank demanded the repayment of the loans, took over the real estate development and sold it to LSI, a company experienced in managing times-shares.

The claimant argued that the payments made to Arrish and Pitchcott allowed the real estate development to be substantially completed, thus enabling the defendant bank to sell it and obtain both repayment of its loans and further profitable business opportunities with LSI. As in *Kelly*, there was a payment of money from the claimant which ended up in a consequential net gain in value to the defendant. This payment, however, was not enough to link the parties in the way required to sustain an unjust enrichment claim. Deciding the case, Mann J concluded that:

“there should be some proper connection between the payment of the money and the enrichment. That is usually achieved in unjust enrichment cases by demonstrating money flowing from A to B, or money flowing from A to B’s benefit because, for example, it has been spent in B’s property. That sort of flow, or something like this, is simply not demonstrated in the present case”²³.

This decision is often used to emphasise that the basic connection between the parties in unjust enrichment claims requires a direct provision of a benefit from claimant to defendant²⁴. But other cases show that what matters for identifying the “sort of flow” referred to by Mann J is not the lack of intermediaries between the parties, but a specific feature of the benefit-conferring act which is not usually found in cases involving consecutive transactions.

A useful illustration can be found in *Re Byfield*²⁵, where the claimant bank made a transfer from a customer’s account to her mother’s account in a different bank, without

²³ *Uren*, at [26] (Mann J).

²⁴ Burrows, *The Law of Restitution*, p. 70; Virgo, *The Principles*, p. 105. This position was endorsed in *Armstrong DLW GmbH v Winnington Networks Ltd.* [2012] EWHC 10 (Ch), [2013] Ch. 156, at [97] (Stephen Morris QC, sitting as a deputy High Court judge).

²⁵ [1982] Ch. 267, [1982] 2 W.L.R. 613 (“*Re Byfield*”).

knowing that a receiving order had been made against the customer, who was bankrupt. After the transfer was completed, the customer's mother made a payment to the defendants, who were creditors of her bankrupt daughter. The claimant bank argued that the defendants had been unjustly enriched at its expense by receiving a payment which was only possible because of the mistaken transfer from the bankrupt client's account. Goulding J concluded that the facts did not show a sufficient connection between the parties because:

“this is not a case in which the bank made a payment *for the express purpose of paying creditors*; the money was the bankrupt's own money, a credit balance, and was paid at her order to her mother. It is not disputed that the mother went on to pay some creditors, but there was no immediate compelling nexus between those payments and the bank's act”²⁶.

A similar analysis can explain the related decisions of *Lloyds Bank Plc v Independent Insurance Co Ltd*²⁷ and *Barclays Bank Ltd v WJ Simms & Son Ltd*²⁸. In *Lloyds Bank*, the claimant bank made payments to the defendant following the instructions of a customer under the mistaken belief that this customer's account was in credit. In fact, the account was significantly overdrawn. The claimant bank sought restitution from the defendant, who was the direct recipient of the payment. In *Barclays Bank*, the claimant's bank paid the defendant in the mistaken belief that it was acting on its customer's behalf. In fact, the customer had countermanded the payment. Again, the claimant bank sought restitution from the defendant, who was the direct recipient of the payment. Unlike *Uren* and *Re Byfield*, in both cases there was no intermediary preventing the court from finding a “compelling nexus” between claimant and defendant. Yet in one of them the claim was granted and in the other it was refused. Why?

The most accepted explanation focuses on the existence of a form of bargain between bank and defendant. According to this explanation, where the defendant accepts

²⁶ *Re Byfield*, 276 (Goulding J).

²⁷ [2000] Q.B. 110 (“*Lloyds Bank*”).

²⁸ [1980] Q.B. 677 (“*Barclays Bank*”).

the payment in good faith as discharge of an existing debt, the bank obtains good consideration for its payment and thus can only recover from the discharged customer²⁹. An alternative explanation focuses on the existence of a contract between bank and customer. Where the bank pays a defendant in performance of a contract with its customer, in reality the bank is lending money to the customer, who in turn pays the money to the defendant³⁰. Under both explanations, *Lloyds Bank* and *Barclays Bank* are consistent with each other. In *Lloyds Bank*, although the customer's account was overdrawn, the payment discharged the customer's debt to the defendant. The claim was refused either because the bank obtained what it paid for in the form of the discharge of an existing debt, or because in reality the payment was not made to the defendant but to the customer. In *Barclays Bank*, by countermanding the payment, the customer prevented it from discharging the debt. The claim was granted either because the bank did not obtain what it paid for in the form of the discharge of an existing debt, or because this time the payment was indeed made to the defendant, and not to the customer who had countermanded it. In both interpretations, these cases confirm that the purpose guiding the benefit-conferring act—discharging a debt or performing a contract—is critical in assessing who are the relevant parties to an unjust enrichment claim.

This reasoning is consistent with unjust enrichment cases involving the provision of services. *MacDonald Dickens and Macklin v Costello*³¹ provides an example. In this case, the claimants carried out building work on land owned by the defendants. For tax reasons, the claimants had agreed to receive payments for this work from a company in which the defendants were the only shareholders and directors. A dispute eventually arose between the parties, and the company refused to pay some of the invoices for work done. Restitution was sought directly from the defendants, and not the company, on the basis that the work had enriched them at the claimant's expense. But the claim was rejected. Importantly, the judgment made clear that the link between the parties to unjust

²⁹ This is the explanation adopted in *Barclays Bank*, p. 695 (Goff J).

³⁰ This is the explanation proposed in Birks, *Unjust Enrichment*, pp. 90–91.

³¹ [2011] EWCA Civ 930, [2012] Q.B. 244 (“*MacDonald*”).

enrichment claims will not be satisfied where services are provided by the claimant *because of and in pursuance to* a contract between the claimant and a third party³².

Considered together, these decisions show that in identifying the proper parties to unjust enrichment claims, courts attach importance to the objective behind the claimant's conferral of a benefit. The required link will not be present where the claimant pays money or provides goods and services intending to benefit a third party, who subsequently pays money or provides goods and services to the defendant, as shown by *Re Byfield*³³. Nor will it be present where the claimant pays money or provides goods and services to the defendant intending to benefit a third party, as shown by *Lloyds Bank, Barclays Bank and MacDonald*³⁴. It thus seems that what matters for identifying this link is not the lack of intermediaries between claimant and defendant, but the fact that the enrichment is brought about through an act of the claimant intended to benefit the defendant. This is confirmed by *ITC*, where Lord Reed concluded that even benefits received by the defendant directly from the claimant would not be recoverable in unjust enrichment if they were not intended by the claimant to have been for the defendant³⁵.

3.2.2 Acceptance by the Defendant

Confining our attention to the claimant's intentional act may lead us to overlook another important feature of the link between the parties in conferral situations. Suppose that C leaves a £50 note on D's front door with the purpose of paying a non-existent debt. The note is found by D's visiting friend X who, assuming it had been accidentally dropped by some passer-by, takes it and puts it in her wallet. Feeling particularly generous as a consequence of her good luck, X decides to withdraw a £50 note from her bank account and give it to D as a gift. C eventually realises that there was no debt to repay, and brings

³² *MacDonald*, at [20] (Etherton LJ). It is to be noted, however, that the main reason provided by the judgment was that the parties should honour the way in which they had allocated the consequences of non-performance. *MacDonald*, at [21]–[23].

³³ See also B. McFarlane, "Unjust Enrichment and Indirect Recipients" [2009] R.L.R. 37, 40.

³⁴ See also R. Stevens, "The Unjust Enrichment Disaster" (2018) 134 L.Q.R. 574, 583.

³⁵ *ITC*, at [52] (Lord Reed). This conclusion seems consistent with the position advanced in Stevens, "Disaster", p. 581.

a claim against D for the £50 corresponding to the value of the note left in the front door. Here, D's enrichment would be a consequence of a deliberate act by C originally intended to benefit D. But C would not be able to establish the link required to bring a claim against D following the model of *Kelly*. Why?

A plausible explanation for this difference is that the intervention of a third party prevents the defendant from accepting the payment from the claimant, thus averting a transfer of rights between the parties. This would be so because rights over ascertainable goods or money could not be transferred without the acceptance of the transferee, whose co-operation would be generally required to completing the transfer³⁶. If this is correct, an important difference between what happens in the scenario involved in *Kelly* and the hypothetical proposed above is that only the former could be accurately described as a transfer between the parties. In the latter, despite the existence of C's initial intention of paying D, X's intervention prevents D from accepting the payment of money or provision of goods from the claimant and thus benefiting from its normal effect, which is the transfer of the rights originally held by C to the money or goods³⁷. Under these circumstances, C's defective intention to pay D only plays an anecdotal role in explaining why D is enriched by £50.

This explanation, however, is clearly insufficient to account for what happens between the parties in scenarios involving the provision of services. Here, the defendant is enriched at the claimant's expense even though there is no transfer of rights from claimant to defendant³⁸. To be sure, the importance of the defendant's acceptance in provision of services scenarios has found its way into other elements of the unjust enrichment analysis, most notably the enrichment enquiry³⁹. But for present purposes, the

³⁶ M. Bridge, *Personal Property Law*, 4th ed. (Oxford 2015), 73; D. Fox, *Property Rights in Money* (Oxford 2008), [3.41]–[3.42]; D. Sheehan, *The Principles of Personal Property Law*, 2nd ed. (Oxford 2017), 53.

³⁷ Stevens, "Disaster", p. 582. The author argues that the law generally affords the defendant the possibility or rejecting a transfer. This would be apparent, for example, in the general availability of the defence of tender, which allows the defendant to avoid liability by offering the amount sought by the claimant before the commencement of court proceedings.

³⁸ A. Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford 2012), 45.

³⁹ A. Burrows, "In Defence of Unjust Enrichment" [2019] C.L.J. 521, 533.

relevant question is whether the defendant's acceptance of a service provided by the claimant should be considered as a feature of the kind of relationship between the parties supporting the claim.

An immediate difficulty with this conclusion is that unjust enrichment claims have been sometimes recognised in scenarios where the defendant is effectively impeded from rejecting the service provided by the claimant. For example, in *Greenwood v Bennett*⁴⁰, Harper repaired a car acting under the wrong assumption that he owned it. In fact, the car belonged to a dealership managed by Bennett, who had sent the car to be repaired by the person who sold it to Harper. The Court of Appeal recognised that Bennett had better right to the car, but also that Harper had a right to be paid a sum corresponding to the value of the improvements made to the car, which Lord Denning explained as originating in Bennett's unjust enrichment⁴¹. This judgment has led some commentators to argue that the link between the parties to unjust enrichment claims would be established even where the defendant is benefited by the provision of services which he or she is not given the opportunity to accept or reject⁴².

Yet the kind of link between the parties in cases like *Greenwood* seems to be different from the kind of link involved in payments of money or provision of goods in an important respect. In the *Greenwood* situation, the defendant's enrichment depends on his or her previous rights to the asset improved by the claimant's imposed services⁴³. At the same time, these previous rights constitute the defendant's most obvious defence, neatly expressed in the well-known aphorism: "one cleans another's shoes; what can the other do but put them on?"⁴⁴. The recognition of a restitutionary claim in this kind of situation must balance the claimant's right to be paid for his or her work, and the defendant's

⁴⁰ [1973] Q.B. 195, ("*Greenwood*").

⁴¹ *Greenwood*, p. 202 (Lord Denning MR).

⁴² Burrows, "In Defence", pp. 534–535.

⁴³ The defendant's enrichment will be most evident where, as happened in *Greenwood*, these rights allow the defendant to sell the asset which the claimant had improved or repaired and benefit from the sale proceeds, thus realising the market value of the services provided by the claimant. Mitchell et al, *Goff and Jones*, [4-31].

⁴⁴ *Taylor v Laird* (1856) 25 L.J. Ex. 329, 332 (Pollock CB).

previous rights to the improved asset. Unlike the basic scenario exemplified by *Kelly*, the key element linking the parties in the *Greenwood* situation is that both claimant and defendant can justify some kind of right to this asset⁴⁵.

If every unjust enrichment case involving the provision of services revealed this key feature of the *Greenwood* situation it would be perhaps convenient to draw a line between services and payment of money or provision of goods scenarios⁴⁶. But not all services cases reveal this feature. Interestingly, liability in unjust enrichment in these other services cases is consistently premised on the defendant's acceptance of the services provided by the claimant. This is certainly true of those cases presented in the literature as examples of an "express request"⁴⁷ or "free acceptance"⁴⁸ by the defendant. But it can also be seen in cases not usually analysed under these headings. In *Craven Ellis v Canon Ltd*⁴⁹, for example, the claimant provided services as managing director of the defendant company acting in pursuance of an agreement which turned out to be invalid. When the company refused to pay the agreed remuneration, the claimant sought to recover the value of the services provided through a claim for *quantum meruit*. The Court of Appeal found that:

"there would be nothing to prevent the inference which the law draws from the performance by the plaintiff of services to the company, and the company's acceptance of such services, which,

⁴⁵ Virgo, *The Principles*, p. 76. Some of the special difficulties involved in scenarios of improvements of property are discussed in H. Dagan, *The Law and Ethics of Restitution* (Cambridge 2004), 82–85.

⁴⁶ For example, German lawyers deal with situations involving improvement of the claimant's property through either the special unjustified enrichment category of *Verwendungskondiktion*, or a set of special rules governing the relationship between the owner of a thing and its illegitimate possessor. R. Zimmermann and J. Du Plessis, "Basic Features of the German Law of Unjustified Enrichment" [1994] R.L.R. 14, 30.

⁴⁷ For example, in *Benedetti v Sawiris* [2013] UKSC 50, [2014] A.C. 938 the defendant agreed to compensate the claimant for his services as financial consultant in a takeover deal; and in *Vedatech Corp v Crystal Decisions (UK) Ltd* [2002] EWHC 818 (Ch), the defendant company asked the claimant to do consulting work leading to the introduction of its products into the Japanese market.

⁴⁸ For example, in *Chief Constable of Greater Manchester Police v Wigan Athletic AFC* [2007] EWHC 3095 (Ch), [2007] All E.R. (D) 394 (Dec); reversed [2008] EWCA Civ 1449; [2009] 1 W.L.R. 1580, the defendant football club agreed to pay for a certain level of security services and benefited from the additional services provided by the police.

⁴⁹ [1936] 2 K.B. 403 ("*Craven*").

if they had not been performed by the plaintiff, they would have had to get some other agent to carry out”⁵⁰.

It may be rebutted that in these cases the defendant’s acceptance goes to establish the existence of a relevant enrichment and not to link the parties⁵¹. Yet confining the role of acceptance to the enrichment inquiry may sometimes lead us to counterintuitive results. Consider a case where C, a consultant hired to develop the social media marketing plan of X, mistakenly promotes the business of D, who lacks basic digital literacy skills and neither discovers nor rejects C’s online marketing services. We may say that the lack of acceptance prevents D from being enriched in the required sense⁵². Where the objective value of C’s services is indisputable and they produce a significant increase in D’s income, however, it may be simpler to conclude that, whatever benefit may have followed for D from C’s actions, the lack of acceptance means that this benefit cannot be considered to have been conferred from C to D.

On a normative level, this emphasis on acceptance certainly makes sense. It has been noted that the defendant’s acceptance establishes a state of affairs between the parties which may be reversed through the recognition of a restitutionary claim without affecting the defendant’s autonomy⁵³. Importantly, however, this does not mean that the reason for the defendant’s liability should be based exclusively on his or her acceptance of the enriching benefit. This conclusion would lead us close to admitting that the rationale behind cases like *Kelly* would be the existence of an implied or fictional agreement between the parties⁵⁴. Indeed, it is not difficult to imagine cases where the defendant’s acceptance of the enriching benefit does not seem to play any role in justifying a

⁵⁰ *Craven*, p. 412 (Greer LJ). Emphasis added. While the existence of the invalid contract may provide the most obvious link between the parties, there are compelling reasons to avoid explaining unjust enrichment liability in terms of extinguished or implied agreements between the parties. Birks, *Introduction*, pp. 268–270.

⁵¹ Burrows, “In Defence”, p. 534.

⁵² For example, because the defendant would have only chosen to accept the benefit from the claimant for less than its objective value or for free. Mitchell et al, *Goff and Jones*, [4-20].

⁵³ E. Weinrib, “The Structure of Unjustness” (2012) 92 B.U.L.Rev. 1067, 1072; Stevens, “Disaster”, pp. 581–582; L. Smith, “Restitution: A New Start?” in P. Devonshire and R. Havelock (eds.), *The Impact of Equity and Restitution in Commerce* (Oxford 2019), 98.

⁵⁴ Burrows, “In Defence”, p. 536. See also Virgo, *The Principles*, p. 85.

restitutionary claim⁵⁵. The question whether “free acceptance” can be considered an independent reason for restitution has been intensely debated and does not need to be addressed here⁵⁶. Suffice it to say that, for present purposes, acceptance is relevant only as it emphasises the bilateral nature of the kind of situation which may count as a conferral for identifying the proper parties to claims following the model of *Kelly*⁵⁷.

3.3 Features of Takings Scenarios

Situations involving a payment of money or provision of goods and services are not the only ones where the link supporting unjust enrichment claims may be established. It has been argued that an equivalent link could be demonstrated by showing a “proprietary connection” between the parties, i.e. that the defendant was enriched as a consequence of receiving the claimant’s property. This connection is often described as follows:

“There is one recurrent three-party situation in which the intervention of a third hand makes no difference at all. If the defendant has received the claimant’s property, it does not matter how many intermediate hands it has passed through. There is an illusion of leapfrogging, but in reality there is none”⁵⁸.

This analysis is not unanimously accepted. Some commentators have argued that personal and proprietary claims premised on the claimant demonstrating previous rights to property are recognised to vindicate these rights, and not to reverse the defendant’s unjust enrichment⁵⁹. This remains a highly controversial issue and does not need to be settled

⁵⁵ Consider the case of a claimant who mistakenly transfer funds into the bank account of a defendant who is on holiday in a remote location without phone coverage and thus is unable to check his account balance. Here it seems that liability to make restitution arises from the date of the payment regardless of the defendant’s lack of acceptance. H. Scott, “Change and Continuity in the Law of Unjust Enrichment” in H. Scott and A. Fagan (eds.), *Private Law in a Changing World: Essays for Danie Visser* (Claremont 2019), p. 480.

⁵⁶ The main arguments in this debate are summarised in Burrows, *The Law of Restitution*, pp. 334–339.

⁵⁷ As such, acceptance may involve a relatively weak form of consent on the part of the defendant in this context. For example, the defendant’s authorisation to his bank to accept payments on his behalf would count as an acceptance of the funds mistakenly transferred by the claimant even if the defendant is totally unaware of the transfer. Stevens, “Disaster”, p. 582.

⁵⁸ Birks, *Unjust Enrichment*, p. 86. See also Burrows, *The Law of Restitution*, pp. 75–76 and Mitchell et al, *Goff and Jones*, [6-07] and [6-65].

⁵⁹ W. Swadling, “Ignorance and Unjust Enrichment: A Problem of Title” (2008) 28 O.J.L.S. 627; Virgo, *The Principles*, pp. 11–17, 105–116; Smith, “A New Start?”, p. 102.

here. It is sufficient to note that *ITC* seems to accept the plausibility of the proprietary connection analysis by concluding that the required link between the parties to unjust enrichment claims would include situations where the defendant receives property into which the claimant can trace an interest⁶⁰. This section will thus assume that such an analysis is possible.

3.3.1 Entitlement of the Claimant

The reason why the proprietary connection should be enough to provide the required link to unjust enrichment claims is often presented as self-evident. A common explanation goes like this: where the claimant can trace an interest into the property received by the defendant, any gain following from this receipt should be regarded as a subtraction from the claimant's wealth. Such a subtraction would be equivalent to the one resulting from the claimant's intentionally paying money to the defendant. Hence Professor Burrows describes what he calls the title and tracing exception to a "direct providers only" rule as follows:

"Where C had title to the property prior to D's receipt of it, D's gain was subtracted from C. So if X has stolen C's £100 banknote or bicycle and given it to D, D's enrichment is at C's expense even though directly provided by X. Provided C retains title it does not matter how many hands the £100 banknote or bicycle passes through before reaching D: C, by reason of his title to the property, can establish that D's gain was at C's expense"⁶¹.

The cases offered as illustrations of this kind of subtraction reveal an important difference with mistaken payment cases following the model of *Kelly*: they do not explain restitution in a defect acting upon the claimant's intention to benefit the defendant. The unjust enrichment analysis of these cases relies on the premise that if restitution follows from circumstances indicating an impairment or qualification in the claimant's consent, then

⁶⁰ *ITC*, [46] and [48] (Lord Reed). See further M. Bryan, "No Intention to Benefit" in E. Bant, K. Barker and S. Degeling (eds.), *Research Handbook on Unjust Enrichment and Restitution* (Cheltenham 2020), 367, arguing that modern authorities concerning transfers of property by agents acting without actual or ostensible authority suggest that failure to pass title does not exclude an unjust enrichment claim.

⁶¹ Burrows, *The Law of Restitution*, p. 76. See also Birks, *Unjust Enrichment*, pp. 73, 86.

the complete absence of such consent must, a fortiori, trigger restitution as well⁶². While this analysis is plausible and has recently received express judicial endorsement⁶³, it is important to note that most of the instances used to illustrate the proprietary connection focus on the existence of an entitlement by the claimant over the asset explaining the defendant's enrichment, and not on the claimant's absence of consent to benefit the defendant.

In the simplest scenario, the claimant retains legal title to the asset obtained by the defendant, just as happened in *Holiday*. For example, in *Moffat v Kazana*⁶⁴ the defendant purchased from the claimant a bungalow, where an employee found a significant number of banknotes which the claimant had concealed and forgotten. The employee gave the banknotes to the police and the police returned them to the defendant. The claimant's executors brought proceedings against the defendant, where it was ultimately recognised that the claimant had a right to a sum equivalent to the value of the forgotten banknotes on the basis that title to these banknotes had not passed to the defendant⁶⁵. Similarly, in *Criterion Properties Plc v Stratford UK Properties LLC*⁶⁶, the defendant acquired interest in the claimant company in exceptionally favourable terms agreed by the company's managing director in an improper use of its powers. Lord Nicholls concluded that the law would recognise a personal claim in unjust enrichment for the value of the assets acquired by the defendant. Importantly, this conclusion relied on the assumption that these assets belonged to the claimant's company⁶⁷.

⁶² Birks, *Unjust Enrichment*, p. 154; Mitchell et al, *Goff and Jones*, [8-05].

⁶³ *Relfo Ltd (In Liquidation) v Varsani* [2012] EWHC 2168 (Ch), at [88] (Sales J), affirmed without discussion on the applicable reason for restitution in *Relfo Ltd. (In Liquidation) v Varsani* [2014] EWCA Civ 360, [2015] 1 B.C.L.C. 14.

⁶⁴ [1969] 2 Q.B. 152 ("*Moffat*").

⁶⁵ *Moffat*, p. 157 (Wrangham J). The actual remedy provided for in the decision is not clarified, yet the case is presented as an instance of a personal claim in unjust enrichment in Mitchell et al, *Goff and Jones*, [8-36].

⁶⁶ [2004] UKHL 28, [2004] 1 W.L.R. 1846 ("*Criterion*").

⁶⁷ *Criterion*, at [4] (Lord Nicholls). This assumption is spelt out by Mitchell et al, *Goff and Jones*, [8-37].

A subtler form of entitlement is recognised by the leading case *Lipkin Gorman v Karpnale*⁶⁸. In this case, the claimant firm of solicitors sought to recover in unjust enrichment a sum of cash which one of its partners had withdrawn from the firm's client account to gamble in the defendant casino. During the proceedings, it was recognised that to establish the link between the parties it was required a demonstration that the rogue partner had gambled with money to which the claimant retained a legal title. While applicable authority led to the conclusion that the rogue partner had become the legal owner of the cash upon its withdrawal from the firm's client account⁶⁹, Lord Goff observed that this cash represented the traceable substitute of an asset to which the claimant retained a right: the debt owed to the firm by its bank represented by the credit balance in the firm's bank account. Relying on this conclusion, the judgment recognised that the claimant could choose to assert some form of legal title to the cash in the rogue partner's hands for the purposes of establishing the link supporting an unjust enrichment claim against the defendant casino⁷⁰. This decision has led some commentators to argue that the required link between the parties would be established where the asset in the hands of the defendant is an asset to which the claimant chose to assert a form of inchoate legal title⁷¹.

A further form of entitlement is recognised by those who support an unjust enrichment analysis of the cases recognising an equitable personal liability in "knowing receipt" where trust assets are misapplied by trustees in breach of trust. If the party receiving these assets or their traceable proceeds knew that they were transferred in such

⁶⁸ *Lipkin Gorman (a firm) v Karpnale Ltd.* [1991] 2 A.C. 548 ("*Lipkin Gorman*").

⁶⁹ *Union Bank of Australia Ltd. v McClintock & Co* [1922] 1 A.C. 240; *Commercial Banking Co. of Sydney Ltd. v Mann* [1961] A.C. 1.

⁷⁰ *Lipkin Gorman*, p. 574 (Lord Goff).

⁷¹ Mitchell et al, *Goff and Jones*, [8-98]; Burrows, *The Law of Restitution*, pp. 129–131; Fox, *Property Rights in Money*, [5.96], [5.109]. This position is controversial. For example, Birks thought that the claimant could have shown that the casino was enriched at its expense by establishing a chain of causally linked transactions between the rogue partner's payments to the casino and the withdrawals from the claimant's account. P. Birks, "At the Expense of the Claimant: Direct and Indirect Enrichment in English Law" in D. Johnston and R. Zimmermann (eds.), *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge 2002), 519. Stevens has recently argued that while the rogue partner had title to the money withdrawn, he had not sole title to it, but joint title along with the rest of the firm partners, who therefore had not secondary, but proper legal title to the money paid. Stevens, "Disaster", p. 592.

circumstances, this party will be personally liable to the beneficiaries of the trust for the value of the assets⁷². It remains controversial whether the recipient of the assets should also owe a strict personal liability in unjust enrichment to the beneficiaries of the trust, i.e. a liability arising regardless of the recipient state of knowledge. Those advocating this alternative basis for liability argue that the unjust enrichment analysis may be supported by a proprietary connection between the beneficiaries and the recipient⁷³. If this is correct, the proprietary connection may be also satisfied where the asset in the hands of the defendant is an asset over which the claimant retains equitable title.

Therefore, unlike scenarios involving the payment of money or provision of goods and services, it seems that in the cases where the link between the parties is established through the proprietary connection, the claimant needs to show an entitlement in the form of either legal title over the asset received by the defendant; or a power to assert a form of inchoate legal title to the asset received by the defendant; or perhaps even equitable title to the asset received by the defendant. In any case, showing a form of entitlement to the asset explaining the defendant's enrichment is critical in establishing the link supporting the unjust enrichment claim.

3.3.2 Interference by the Defendant

As noted above, some commentators reinterpret the cases illustrating the proprietary connection as showing that the complete absence of the claimant's consent to benefit the defendant is enough to explain restitution. Considered from the point of view of the defendant, however, these cases offer another important feature which distinguishes them from instances of mistaken payments like *Kelly*. Here, courts have tended to explain what

⁷² D. Hayton, P. Matthews and C. Mitchell (eds.), *Underhill and Hayton on the Law of Trusts and Trustees*, 19th ed. (London 2016), [98.2], [98.11], [98.33] and [98.35].

⁷³ P. Birks, "Misdirected Funds: Restitution from the Recipient" [1989] L.M.C.L.Q. 296; P. Birks, "Receipt" in P. Birks and A. Pretto (eds.), *Breach of Trust* (Oxford 2002); Burrows, *The Law of Restitution*, p. 424.

happens between the parties in terms of an interference by the defendant with the claimant's entitlement⁷⁴.

In two-party cases like *Holiday*, where the defendant receives the same asset over which the claimant retains title, this interference is plain⁷⁵. The main importance of the proprietary connection, however, is that it explains the required link in cases where this interference is not immediately apparent. In fact, in most of the cases where the proprietary connection is invoked the defendant does not receive an asset owned by the claimant, but a different asset treated as its legal extension. In English law, this phenomenon is governed by the rules of tracing, which determine when an asset should be treated for legal purposes as the substitute of the asset in exchange for which it was acquired⁷⁶.

The rules of tracing belong to a highly controversial area of English law. Commentators do not agree on the rationale behind these rules⁷⁷, and it is not entirely clear whether they should be relevant for establishing the elements of an unjust enrichment claim⁷⁸. Even those who accept that these rules are relevant for unjust enrichment purposes disagree about whether their application should be extended to personal unjust enrichment claims or confined to cases involving proprietary remedies⁷⁹. In line with Lord Goff's analysis in *Lipkin Gorman*, however, a frequently accepted position is that the proprietary

⁷⁴ See, for example, Burrows, *The Law of Restitution*, pp. 410–411 and Mitchell et al, *Goff and Jones*, [8-96]ff. discussing cases like *Clarke v Shee and Johnson* (1774) 1 Cowp. 197; *Marsh v Keating* (1834) 1 Bing. N.C. 198; and *Calland v Loyd* (1840) 6 M & W 26.

⁷⁵ Birks, *Unjust Enrichment*, p. 73; Burrows, *The Law of Restitution*, p. 409.

⁷⁶ *Foskett v McKeown* [2001] 1 A.C. 102 (“*Foskett*”), 127 (Lord Millett). See also Mitchell et al, *Goff and Jones*, [7-13].

⁷⁷ These rules may be explained as concerned with showing a continuous flow of value from one asset to another, or as identifying the intention of the parties in a series of consecutive transactions. T. Cutts, “Tracing, Value and Transactions” (2016) 79 M.L.R. 381, 397.

⁷⁸ “The transmission of a claimant's property rights from one asset to its traceable proceeds is part of our law of property, not of the law of unjust enrichment (...). The claimant succeeds if at all by virtue of his own title, not to reverse unjust enrichment”. *Foskett*, p. 127 (Lord Millett).

⁷⁹ Birks argued that there are two measures of restitution for unjust enrichment: value received and value surviving. Birks, *Introduction*, ch. 11. This distinction may suggest that the rules of tracing would be purely concerned with restitutionary claims for value surviving, effected through proprietary remedies like, for example, the declaration of an equitable lien or a trust in respect of substitute property retained by the defendant. K. Barker, “Riddles, Remedies, and Restitution: Quantifying Gain in Unjust Enrichment Law” (2001) 54 C.L.P. 255, 275–278.

connection linking claimant and defendant to personal unjust enrichment claims may be established by identifying an uninterrupted chain of substitutions between the asset to which the claimant is entitled and the asset received by the defendant⁸⁰. As we have seen, in this case the unjust enrichment claim was directed at recovering the value of money which, before reaching the hands of the defendant casino, was the property of a third party, the firm's rogue partner. This sufficed to provide the required link between the parties because, in Lord Goff's authoritative opinion, the money received by the defendant was the traceable substitute for the claimant's property:

“Before [the rogue partner] drew upon the [claimants'] client account at the bank, there was of course no question of the [claimants] having any legal property in any cash lying at the bank. The relationship of the bank with the [claimants] was essentially that of debtor and creditor; and since the client account was at all material times in credit, the bank was the debtor and the [claimants] were its creditors. Such a debt constitutes a chose in action, which is a species of property; and since the debt was enforceable at common law, the chose in action was legal property belonging to the [claimants] at common law. There is in my opinion no reason why the [claimants] should not be able to trace their property at common law in that chose in action, or in any part of it, into its product, i.e. cash drawn by [the rogue partner] from their client account at the bank”⁸¹.

The plausibility of this analysis seems confirmed by *ITC*, where Lord Reed acknowledged the relevance of the rules of tracing to establish the link between the parties to personal unjust enrichment claims:

“There are also situations where the defendant receives property from a third party into which the claimant can trace an interest. Since the property is, in law, the equivalent of the claimant's property, the defendant is therefore treated as if he had received the claimant's property”⁸².

⁸⁰ Burrows, *The Law of Restitution*, pp. 76, 121; Mitchell et al, *Goff and Jones*, [8-18].

⁸¹ *Lipkin Gorman*, pp. 573–574 (Lord Goff).

⁸² *ITC*, at [48] (Lord Reed).

Less clear is whether the claimant may establish the proprietary connection supporting personal unjust enrichment claims where the defendant does not receive the same asset over which the claimant retains title, or an asset over which the claimant can trace an interest. On its face, the answer to this question may appear as obvious. If the defendant does not receive the claimant's property nor its traceable proceeds, no proprietary connection can be established between the parties. Following a recent decision of the Court of Appeal, however, we should qualify this conclusion in an important regard.

In *Relfo Ltd (In Liquidation) v Varsani*⁸³, a director of the claimant company, acting in breach of fiduciary duty, caused this company to pay an amount in pounds sterling into a bank account held by Mirren Ltd in Latvia. On the same day, a corresponding amount in US dollars was paid from the bank account of Intertrade Group LLC in Lithuania to the defendant's bank account in Singapore. There was no evidence of specific transactions linking the two fund transfers. In fact, the payment into the defendant's account in Singapore had taken place before the payment from the claimant's account was completed. Still, it was inferred from the circumstances surrounding the two fund transfers that they were part of a money-laundering operation orchestrated by the director of the claimant company to benefit the defendant. The claimant company sought to recover the value of the payment made into the defendant's account in Singapore under two bases of liability: knowing receipt of assets misapplied in breach of trust, and unjust enrichment.

In his first instance judgment, Sales J found that the claimant company's assets could be traced into the defendant's account to establish his personal liability for knowing receipt⁸⁴. For present purposes, however, the most important part of the decision concerns the alternative basis of liability in unjust enrichment. Sales J concluded that, apart from being personally liable in knowing receipt, the defendant owed the claimant company a strict personal liability in unjust enrichment for the value of the payment made into its

⁸³ [2014] EWCA Civ 360, [2015] 1 B.C.L.C. 14 ("*Relfo*").

⁸⁴ [2012] EWHC 2168 (Ch) ("*Relfo HC*"), at [80] and [84] (Sales J). See also *Relfo*, at [68] (Arden LJ), [101] (Gloster) and [106] (Floyd).

Singapore account. The judgment reasoned that the claimant company would have a right to restitution if funds from its account had been paid to the defendant's account, so the situation could be no different where funds are transferred to the defendant's account by the claimant company's director in breach of his fiduciary duty and acting outside the scope of his authority. Critically, this would be the case even if the claimant company's funds could not strictly be traced into the defendant's account:

“Varsani was clearly enriched by the Intertrade payment at the expense of Relfo. That is so even if the Intertrade payment cannot be identified with the Relfo/Mirren payment according to the rules of tracing”⁸⁵.

This conclusion was affirmed by the Court of Appeal. Arden, Gloster and Floyd LJJ concluded that a sufficient connection between claimant and defendant existed for the purposes of establishing the requirements of a personal claim in unjust enrichment even if tracing was not possible. In their view, the fact that the claimant company's director orchestrated the series of transactions with the purpose of crediting the defendant's account rendered the series of seemingly unconnected transactions, “as a matter of substance”, equivalent to a direct payment from the claimant's company to the defendant's account⁸⁶.

The reasoning behind this conclusion is not easy to follow. A claimant company who does not authorise a transfer of its funds to the defendant seems closer to the situation illustrated by *Holiday*, where the claimant is wholly unaware of the defendant picking up the dropped banknotes, than the situation illustrated by *Kelly*, where the claimant intentionally pays the defendant but its intention is vitiated by a mistake⁸⁷. We have seen that this distinction is important because in situations following the model of *Holiday* the

⁸⁵ *Relfo HC*, at [88] (Sales J).

⁸⁶ *Relfo*, at [95], [97] (Arden LJ); [103] (Gloster LJ); [115] (Floyd LJ).

⁸⁷ A similar point is made in S. Watterson, “At the Claimant's Expense” in E. Bant, K. Barker and S. Degeling (eds.), *Research Handbook on Unjust Enrichment and Restitution* (Cheltenham 2020), 274–275, where the author argues that identifying a purpose oriented payment from claimant to defendant under the facts of *Relfo* would obscure “the substance of the claim, which arises from an intermediary's improper and unauthorised taking from the claimant's assets”.

parties are not linked by a bilateral act reflecting the intention of the claimant and the acceptance of the defendant, and thus the link between the parties must be sought in a proprietary connection between them⁸⁸. Yet *Relfo* seems to accept that where the defendant's enrichment is brought about by the director and controller of the claimant company acting to fraudulently transfer an asset from the claimant company's account to the defendant's account, the required link may be established even if the claimant cannot identify an asset or its traceable substitute into the defendant's hands.

A plausible explanation of this liberalisation of the kind of link required in taking situations can be found the judgment's concern for tackling schemes for misappropriation and laundering of assets⁸⁹. This concern seems to be behind the conclusion that even if no tracing link could be established, the connection required by unjust enrichment claims would be satisfied where intermediate transactions were found to be a façade to disguise the source of the funds enriching the defendant⁹⁰. It thus seems that the kind of interference sufficient to establish the required link between the parties in taking situations is present not only where the defendant asserts a right over the claimant's property or its traceable proceeds, but also where the defendant's enrichment is the result of a sham created to conceal its origin in a subtraction from the claimant's assets⁹¹.

Two final points should be made. First, no interference will take place where the defendant obtains from a third-party money stolen from the claimant or other property to which the claimant retains equitable title if such money or other property is acquired for value, in good faith and without notice of the defects of the third-party's title. Here, the defendant's security of purchase is protected by the recognition of an exception to the general rule that that the third-party cannot pass a better title to property than the title he

⁸⁸ This is why in *Relfo* the claimant was initially forced to argue that a "but for" test was enough to link the parties in the required sense. *Relfo HC*, at [86] (Sales J).

⁸⁹ As confirmed by the Privy Council in *The Federal Republic of Brazil v Durant International Corporation* [2015] UKPC 35, [2016] A.C. 297, at [38] (Lord Toulson).

⁹⁰ *Relfo*, at [121]–[122] (Floyd LJ). The same concern is reflected in the flexible application of the rules of tracing supporting the judgment's conclusion that the claim in knowing receipt should be granted.

⁹¹ *ITC*, at [48] (Lord Reed).

or she possesses⁹². It is often concluded that a defence of bona fide purchase would be available in these circumstances to prevent the claimant to circumventing the protection of the defendant's security of purchase through a personal claim for value based on unjust enrichment⁹³. But if we are ready to accept that the defendant obtained legal title to the acquired asset free of defects, and thus that any entitlement of the claimant was lost, it may be more precise to conclude that no link between claimant and defendant supporting a personal unjust enrichment claim may be established, as opposed to concluding that prima facie liability in unjust enrichment may be defeated by the application of a defence⁹⁴.

Secondly, takings situations do not necessarily amount to conversion or other wrongful interferences with goods⁹⁵. These situations may or may not involve a civil wrong. When they do, the claimant may choose to rely on either the wrong or the defendant's unjust enrichment as a ground for restitutionary liability⁹⁶. But if the claimant chooses to bring an unjust enrichment claim, the reason explaining liability should not be looked for on the wrongful interference with the claimant's property. Here, such interference goes only to establish that the defendant's enrichment was obtained at the claimant's expense⁹⁷.

⁹² Mitchell et al, *Goff and Jones*, [29-01], [29-04], [29-08].

⁹³ Birks, *Unjust Enrichment*, pp. 240–244.

⁹⁴ As, for example, in Burrows, *The Law of Restitution*, p. 404. It is to be noted, however, that this position is supported by *Lipkin Gorman*, where the House of the Lords recognised bona fide purchase as a defence to a personal claim in unjust enrichment, despite ultimately concluding that it did not benefit the defendant, who gave value under what was at the time of decision a void wagering contract. *Lipkin Gorman*, p. 577 (Lord Goff).

⁹⁵ As set forth in the Torts (Interference with Goods) Act 1977.

⁹⁶ *OBG Ltd. v Allan* [2007] UKHL 21, [2008] 1 A.C. 1. As explained by Professor Burrows, “[e]ven if there were always to be a concurrent claim for a civil wrong, that would not undermine the point that there is analytically a separate cause of action (perhaps triggering separate rules on limitation and conflicts of law and with distinct defences) for the taking of a benefit from C by D without C’s consent”. Burrows, “A Fresh Look”, pp. 175–176.

⁹⁷ Burrows, *The Law of Restitution*, p. 119.

3.4 Two Basic Links

At the core of *ITC*'s effort to identify the situations involving the required link in unjust enrichment claims lie two situations: those where the claimant pays or provides goods or services to the defendant, and those where the defendant receives the claimant's property. Reflecting a recurrent idea in unjust enrichment scholarship, the judgment describes what happens between the parties in both situations as a transfer of value. When we focus on the individual scenarios presented in unjust enrichment scholarship as examples of these situations, however, we can see that to identify the proper claimant and the proper defendant the decided cases tend to focus on quite different circumstances. In situations where the claimant pays or provides goods or services to the defendant, the cases tend to rely on the existence of an intentional act of the claimant and its acceptance by the defendant. In situations where the defendant receives the claimant's property, they tend to rely on the existence of an entitlement of the claimant which is interfered with by the defendant.

These features are not often recognised in the literature. Many of the scenarios discussed in this chapter are the object of continuing debates even among those who believe that they involve unjust enrichment claims, and it would not be surprising if the account offered here leaves some of them disappointed. That is all right. The point is not that the features singled out in this chapter offer the only possible explanation for the link between the parties in the identified situations. Rather, it is that these situations reveal features which are significantly different and should not be concealed behind an abstract notion explaining the required link in every unjust enrichment case. As the next chapter will show, other features should be considered as well if we are to explain what happens between the parties in the full range of situations where unjust enrichment claims have been recognised.

Chapter 4 Beyond the Core

Birks conceived unjust enrichment as a category covering a core of simple scenarios raising relatively little doubts, and a periphery of less common scenarios over which reasonable people tend to differ¹. One of the main reasons why the question of the link between the parties in unjust enrichment claims is hard to answer is that it forces us to set limits to this conflict-ridden periphery. Too restrictive an answer risks excluding situations which do not exhibit the features of the scenarios forming the core. Too broad an answer risks extending the scope of the periphery beyond the point where the category loses any form of internal coherence.

The strategy adopted in *Investment Trust Companies v HMRC*² to answer this difficult question reflects a concern for avoiding both extremes. As previously explained, the judgment focuses on the relationship between the parties in the basic scenarios where unjust enrichment claims have been recognised, and then attempts to identify other scenarios involving differences which may be considered “more apparent than real”³. This incremental approach allows the judgment to reason outwards from situations where the parties have dealt directly with one another or with one another’s property, to situations involving what is described as the “indirect provision of a benefit”⁴.

We have seen that two situations can be distinguished behind the basic scenarios discussed in *ITC*. In each of these situations, the link between the parties is defined by features which are not readily generalisable. If the core situations recognised by the judgment reveal different kinds of links, it seems sensible to distrust the conclusion that between these situations and those forming the periphery would be no real difference. Indeed, further and deeper differences emerge when we consider the circumstances on the

¹ P. Birks, *Unjust Enrichment*, 2nd ed. (Oxford 2005), 73.

² [2017] UKSC 29, [2018] A.C. 275 (“*ITC*”).

³ See section 3.1 above.

⁴ *ITC*, at [46]–[47] (Lord Reed).

basis of which the proper claimant and defendant are identified in the situations recognised by the judgment beyond the core.

This chapter continues the work of its predecessor by identifying the features defining the link between the parties in the situations recognised by *ITC* beyond the core scenarios. It proceeds in three parts. The first part describes the kind of cases falling under the main situations referred to in the judgment as indirect provision of a benefit, distinguishing between situations involving *discharges of the defendant's debt* and situations involving *co-ordinated transactions*. The second part shows that situations involving discharges of the defendant's debt may take two forms: payments of another's debt and payments with another's money. It is suggested that in these situations the link between the parties is similar but not identical to the link revealed, respectively, by conferrals and by taking situations. The third part shows that in situations involving co-ordinated transactions, the link between the parties is entirely different from the link supporting unjust enrichment claims in other recognised scenarios.

4.1 Identifying the Relevant Situations

One of the advantages of the approach adopted in *ITC* is that it points to individual cases which are relevant to understand the link between the parties in different categories of situation. Unfortunately, the way some of these situations are described may raise doubts about the specific scenarios which the identified cases are intended to exemplify. This difficulty is accentuated by the disputed plausibility of the unjust enrichment analysis beyond the subject's core cases. This section introduces some distinctions required to understand the scope of the main situations identified by *ITC* beyond conferrals and takings.

4.1.1 Difficult Descriptors

Apart from conferrals and takings, the judgment identifies two main types of situations involving what is referred to as "indirect provision of a benefit". The first type is described as follows:

“A different type of situation is typified by the case where the claimant discharges a debt owed by the defendant to a third party. Although it is the third party creditor who receives the payment from the claimant, the defendant is directly enriched, since the payment discharges his debt: the enrichment is not the payment which the third party receives, but the discharge which the defendant receives”⁵.

The second type is described as follows:

“There have also been cases, discussed below, in which a set of co-ordinated transactions has been treated as forming a single scheme or transaction for the purpose of the ‘at the expense of’ inquiry, on the basis that to consider each individual transaction separately would be unrealistic”⁶.

While the advantages of this incremental approach should be clear by now, the criteria for distinguishing the proposed categories is not easy to follow. The example provided to illustrate the discharge of the defendant’s debt kind of situation is *Burston Finance Ltd v Speirway Ltd*⁷, a case which, according to the judgment, would stand apart from other unjust enrichment cases because the remedy sought by the claimant was subrogation⁸. Confusingly, however, the scenarios involved in co-ordinated transactions situations are illustrated by *Banque Financière de la Cité v Parc (Battersea) Ltd*.⁹; and *Bank of Cyprus UK Ltd v Menelaou*¹⁰, which are also subrogation cases. Moreover, as should become apparent later in this chapter, the set of related transactions involved in *BFC* and *Menelaou* are said to be co-ordinated precisely because they are part of a plan resulting in the claimant discharging another’s debt and thus providing a benefit to the defendant¹¹. It

⁵ *ITC*, at [49] (Lord Reed).

⁶ *ITC*, at [48] (Lord Reed). See also [61].

⁷ [1974] 1 W.L.R. 1648 (“*Burston Finance*”).

⁸ *ITC*, at [49] (Lord Reed). In *Prudential Assurance Co. Ltd. v HMRC* [2018] UKSC 39, [2019] A.C. 929, it was concluded at [68] that “subrogation following the discharge of a debt (...) is arguably based on a different principle” (Lord Reed, Lord Hodge and Lord Mance).

⁹ [1999] 1 A.C. 221 (“*BFC*”).

¹⁰ [2015] UKSC 66, [2016] A.C. 176 (“*Menelaou*”).

¹¹ See section 4.3 below.

therefore seems that both kind of situations may give rise to subrogation, and both involve the discharge of another's debt.

It may be tempting to conclude that the two main categories of indirect provision of a benefit recognised in *ITC* are not significantly different. After all, these situations are discussed in the judgment as examples of situations equivalent to those where the parties deal directly with one another or with one another's property. On closer examination, however, it appears that there is a key difference between the unjust enrichment scenarios underlying each of these categories. To explain this difference some general notions concerning the unjust enrichment analysis of subrogation cases are required.

4.1.2 Varieties of Subrogation

English law has long recognised a variety of situations where the claimant is entitled to “step into the shoes” of a third party and take over some or all of such party's rights against the defendant. This happens, for example, where the claimant indemnity insurer pays its insured in respect of an insured loss which has been caused by a defendant's tortious action. In this situation, the law may recognise in the claimant insurer a right to acquire the insured's subsisting rights against the defendant wrongdoer¹². A similar solution is available where the claimant has a right against an insolvent insured, who in turn has a right against the defendant insurer under a liability policy. In this situation, the law may allow the claimant to take over the insolvent's insured rights against the defendant insurer¹³. The process through which the claimant obtains the third party's rights against the defendant in these and other situations is referred to as “subrogation”¹⁴.

Of particular interest for the present purposes are situations where the defendant owes an obligation to a creditor and either the claimant pays the creditor in respect of the defendant's obligation, or another party pays the creditor using money obtained from the

¹² See, for example, *Caledonia North Sea Ltd v British Telecommunications Plc* [2002] UKHL 4, [2002] 1 All E.R. (Comm) 321, at [11] (Lord Bingham) and [89] (Lord Hoffmann).

¹³ This process is regulated by the Third Parties (Right against Insurers) Acts 1930 and 2010.

¹⁴ C. Mitchell and S. Watterson, *Subrogation: Law and Practice* (Oxford 2007), [1-01].

claimant. If the defendant's debt is discharged as a consequence of the payment, it would be in principle pointless for the claimant to step into the shoes of the creditor. Here, the right of action extinguished by payment cannot be transferred from creditor to claimant because it no longer exists¹⁵. Confusingly, however, it is precisely in this kind of situation where courts most frequently rely on the notion of subrogation to grant the claimant rights equivalent to those previously held by the creditor against the defendant¹⁶. The logic behind this seemingly contradictory operation was explained in what is usually described as one of the landmark decisions of the law of unjust enrichment. In *BFC*, Lord Hoffmann said:

“[S]ubrogation is not a right or a cause of action but an equitable remedy against a party who would otherwise be unjustly enriched. It is a means by which the court regulates the legal relationships between a plaintiff and a defendant or defendants in order to prevent unjust enrichment. When judges say that the [creditor's rights are] ‘kept alive’ for the benefit of the plaintiff, what they mean is that his legal relations with a defendant who would otherwise be unjustly enriched are regulated *as if* the benefit of [the rights] had been assigned to him”¹⁷.

Lord Hoffmann's speech provided an authoritative solution to a notorious problem and a persuasive reason for analysing subrogation to extinguished rights as just another form of unjust enrichment claim¹⁸. Under such analysis, this form of subrogation would be granted by the law to reverse a transfer of value taking place between the claimant who discharges a liability and the defendant who obtains a benefit by being released from that liability¹⁹.

¹⁵ C. Mitchell (2006) “Subrogation: Persistent Misunderstandings” in A. Burrows and A. Rodger, *Mapping the Law: Essays in Memory of Peter Birks* (Oxford 2006), 107.

¹⁶ A. Burrows, *The Law of Restitution*, 3rd ed. (Oxford 2011) 146.

¹⁷ *BFC*, p. 236 (Lord Hoffmann). The judgment refers specifically to a charge in benefit of the creditor, but his reasoning is applicable to both personal and proprietary rights. Mitchell and Watterson, *Subrogation*, [3.31].

¹⁸ C. Mitchell, P. Mitchell and S. Watterson (eds.), *Goff and Jones on the Law of Unjust Enrichment*, 9th ed. (London 2016), [39-11]. In other jurisdictions, the “extinction problem” has been solved by assuming that the claimant's payment does not extinguish the creditor's rights, but constitute the price of a fictional sale. L. Macgregor and N. Whitty, “Payment of Another's Debt, Unjustified Enrichment and ad hoc Agency” (2011) 15 *Edin.L.R.* 57, 71.

¹⁹ This analysis has been endorsed, for example, in *Filby v Mortgage Express (No. 2) Ltd.* [2004] EWCA Civ 759, [2004] 2 P. & C.R. DG16 (“*Filby*”), at [50] and [62] (May LJ); *Day v Tiuta International Ltd*

Yet this analysis produces complications of its own. In fact, as the decision rendered in *BFC* demonstrates, it may lead to the recognition of subrogation to extinguished rights in situations where what happened between the parties could not be explained only as a discharge by the claimant of the defendant's liability²⁰. To avoid inconsistencies, a distinction between two forms which the defendant's enrichment may take is recognised. The most evident of these forms, and the one featured in most subrogation cases, consists in the value of a discharged liability. Where the claimant discharges the defendant's obligation to a third party, the defendant is relieved from an expense which otherwise would have been legally necessary for him or her to bear²¹. This is sometimes referred to as the "primary enrichment" to which subrogation would respond²².

The defendant's enrichment may take a less obvious form where the obligation discharged is guaranteed by a security interest. Here, the position of other parties may also be materially improved as a consequence of the discharge of the secured obligation. Such would be the case, for example, of any other person holding a subordinate interest in the same asset to which the creditor receiving the payment holds a security interest. So where X's obligation to Y is secured by a prior-ranking security over an asset, and X's obligation to D is secured by a subordinate security over the same asset, if C's payment discharges X's obligation to Y, D's interest is improved to the extent that the asset is freed from the incumbrance represented by Y's prior-ranking security. This improvement is sometimes referred to as the "secondary enrichment" to which subrogation may respond²³.

Primary and secondary enrichments are usually presented as alternative forms which the benefit obtained by the defendant may take in the kind of situation giving rise

[2014] EWCA Civ 1246, [2015] 1 P. & C.R. DG10 ("*Day*"), at [43] (Gloster LJ); and *Menelaou*, at [24]–[35] (Lord Clarke), [66]–[67] (Lord Neuberger) and [141] (Lord Kerr and Lord Wilson).

²⁰ This case is further discussed in section 4.3 below.

²¹ *Filby*, at [62] (May LJ). See also the Canadian case *Peel (Regional Municipality) v. Canada* [1992] 3 S.C.R. 762, 792–795 (McLachlin J), where it was concluded that this was a form of uncontroversial enrichment.

²² Mitchell and Watterson, *Subrogation*, [4.03].

²³ Mitchell and Watterson, *Subrogation*, [4.08]; R. Chambers, "Two Kinds of Enrichment" in R. Chambers; C. Mitchell and J. Penner (eds.), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford 2008), 269–270; Mitchell et al, *Goff and Jones*, [5-76] and [39-22].

to subrogation to extinguished rights. Yet these two forms of enrichment are brought about in two types of scenarios which are not necessarily interchangeable. Analysed as a response to the defendant's primary enrichment, subrogation is premised on the discharge of a liability which the defendant should have borne. Analysed as a response to the defendant's secondary enrichment, however, subrogation is premised on the discharge of a liability which a third party, and not the defendant, should have borne.

While *ITC* does not enter into distinctions concerning the unjust enrichment analysis of subrogation, the wedge driven by the judgment between "indirect provision of a benefit" situations seems to coincide with the boundary between cases where subrogation is recognised to reverse the defendant's primary enrichment, and cases where subrogation is recognised to reverse the defendant's secondary enrichment. Appreciating this enables us to describe better the kind of situations envisioned by the court. Both kinds of situations involve the discharge of another's liability and both may give rise to subrogation as a remedy to reverse or prevent the defendant's unjust enrichment. But an important difference between them is that in situations of discharges of the defendant's debt, the defendant's enrichment corresponds precisely to the discharge of the liability, while in co-ordinated transactions situations, the discharge of the liability is just part of the arrangement which ends up enriching the defendant.

4.1.3 Importance of Subrogation Cases

There is another potential source of confusion in the categorisation proposed by *ITC*. As noted above, the cases used by the judgment to illustrate situations of discharges of the defendant's debt and co-ordinated transactions are cases where the remedy sought was subrogation. Most commonly, subrogation operates as a proprietary remedy, that is, it allows the claimant to acquire rights in respect of property to secure repayment from the defendant²⁴. This was the case in *Burston Finance* and *Menelaou*, where the claimant

²⁴ Burrows, *The Law of Restitution*, pp. 149–150; Mitchell et al, *Goff and Jones*, [39-03]. While subrogation is consistently described by courts as a remedy, it seems better to conceive it as a process aimed at acquiring rights, which may be either proprietary or personal. See *Cheltenham & Gloucester Plc v Appleyard* [2004] EWCA Civ 291, [2004] All E.R. (D) 280 (Mar) ("*Cheltenham*"), at [36] (Neuberger LJ). This process does

sought to be subrogated to a lien over property owned by the defendant²⁵. The unjust enrichment analysis of cases where proprietary restitutionary remedies are sought involve special complications, most notably the task of justifying why the claimant should be protected from the defendant's insolvency in preference of the rest of the defendant's creditors²⁶. These special complications have led some commentators to suggest that the rules for identifying a qualifying connection between claimant and defendant in proprietary unjust enrichment claims differ from those governing the qualifying connection in personal unjust enrichment claims²⁷. If this is the case, it could be argued that subrogation cases are unhelpful to understand the kinds of situations where the link between the parties may be established for the purposes of making up the requirements of personal unjust enrichment claims.

At least two explanations for focusing on subrogation cases may be offered. On the one hand, it is not clear whether the link between the parties in personal and proprietary unjust enrichment claims are indeed subject to different sets of rules and principles. The point can be illustrated by reference to the decision of the Supreme Court in *Menelaou*, where the issue was considered without acknowledging the proprietary nature of the remedy sought and without distinguishing the tests applicable in personal and proprietary unjust enrichment claims²⁸. On the other hand, it has been noted that in cases where

not appear as significantly different from the "derivative recourse" mechanisms recognised by some civilian systems. J. Dieckmann, "The Normative Basis of Subrogation and Comparative Law" (2012) 27 *Tulane European and Civil Law Forum* 50, 53.

²⁵ The other main example used by *ITC* to illustrate indirect provision of benefits scenarios, *BFC*, is considered an unusual case as it was concerned with the acquisition by the claimant of a personal right giving him priority as against another creditor of an insolvent debtor. This feature of the case is discussed in *Menelaou*, at [50] (Lord Clarke) and [93] (Lord Neuberger).

²⁶ Consider the right of a surety to be subrogated to a creditor's extinguished rights against a discharged debtor, as set forth in the Mercantile Law Amendment Act 1856, s. 5. Assuming this right to be subrogated arises to avoid the debtor's unjust enrichment, if we are to conclude that it comprises any security interest of the creditor in assets owned by the debtor, we must be ready to explain why should we allow the surety to escape the risk of the debtor's insolvency when this risk was assumed by not contracting for security in the contract of guarantee. Burrows, *The Law of Restitution*, p. 149.

²⁷ See, for example, C. Mitchell, P. Mitchell and S. Watterson (eds.), *Goff and Jones on the Law of Unjust Enrichment*, 8th ed. (London, 2011) [7-01] and [7-02]; and A. Lodder, *Enrichment in the Law of Unjust Enrichment and Restitution* (Oxford 2012), 35, 215–216.

²⁸ As explained in Mitchell et al, *Goff and Jones*, [7-06]–[7-09].

subrogation is available a direct personal claim in unjust enrichment against the defendant should always be recognised²⁹. If this is correct, even if the rules and principles governing personal and proprietary unjust enrichment claims are different, cases involving subrogation to proprietary rights would be useful to understand the kind of situation where a direct personal claim in unjust enrichment might be available³⁰. Be that as it may, the discussion in *ITC* of cases involving subrogation to proprietary rights confirms that these cases cannot be disregarded³¹.

4.1.4 Other “Indirect Provision of a Benefit” Situations

Situations of discharge of the defendant’s debt and co-ordinated transactions are not the only described by *ITC* as involving the indirect provision of a benefit. These other situations include those where the dealings between the parties are conducted through an agent; those where the right to seek restitution from the defendant is assigned to the claimant by a third party; and those where the interposition of the third party is a sham created to conceal the arrangements existing between claimant and defendant³². Unlike situations of discharge of the defendant’s debt and co-ordinated transactions, however, in these other situations the interposition of a third party is generally not significant from the point of view of identifying the qualifying link, and thus are not discussed in detail in this chapter.

This is particularly clear in situations where the right to restitution is assigned to the claimant by a third party. Here, the existence of a qualifying link is a precondition of the restitutionary right assigned to the claimant, and thus an issue which arises before any assignment is possible. This is confirmed by *Equuscorp Pty. Ltd. v Haxton*³³, the example offered by *ITC* to illustrate this kind of situation, where the discussion about the possibility

²⁹ Mitchell and Watterson, *Subrogation*, [1.05], [3.08] and [8.32]; Burrows, *The Law of Restitution*, p. 149; Mitchell et al, *Goff and Jones*, [39-02].

³⁰ This conclusion is not unanimously endorsed. See, for example, R. Gregson, “Is Subrogation a Remedy for Unjust Enrichment?” (2020) 136 L.Q.R. 481, 504.

³¹ But note that the analysis developed in the judgment is concerned with personal unjust enrichment claims only. *ITC*, at [38] (Lord Reed).

³² *ITC*, at [48] (Lord Reed).

³³ [2012] HCA 7, 246 C.L.R. 498 (“*Equuscorp*”).

of assigning a restitutionary right was separated from the previous question about whether this right should be recognised to the assignor³⁴. Similarly, *ITC* discusses situations where the connection between claimant and defendant is concealed by a sham precisely to stress that they should not distract us while considering the nature of this underlying connection³⁵.

Something similar happens with situations involving the interposition of agents between claimant and defendant. *ITC* explains that, by virtue of the law of agency, the dealings between claimant and defendant's agent and between claimant's agent and defendant are legally equivalent to dealings between claimant and defendant³⁶. Certainly, agency relationships may add difficulties to the task of identifying the nature of the connection existing between claimant and defendant. For example, where the claimant mistakenly pays a sum of money to the undisclosed agent of the defendant, it may be difficult to show that the claimant intended to benefit the defendant, as required by the link revealed in conferral scenarios³⁷. Yet the judgment's position reflects the accepted view that agents are conduits for the dealings between principals³⁸. As such, agency relationships should not be understood as forming a special category of situation providing

³⁴ *Equiscorp*, at [26], [45] (French CJ, Crennan and Kiefel JJ) and [159] (Heydon J). A different situation is illustrated by *Pan Ocean Shipping Co. Ltd. v Creditcorp Ltd. (The Trident Beauty)* [1994] 1 W.L.R. 161, where the defendant was the assignee of the benefit of a terminated contract between the assignor and the claimant, and the claimant sought to recover money paid to the defendant assignee in pursuance of this contract. While in this case the assignment indeed played a relevant role in assessing the link between the parties, the decision may be explained in reasons similar to those explained in section 3.2.1 above while discussing *MacDonald Dickens and Macklin v Costello* [2011] EWCA Civ 930, [2012] Q.B. 244, i.e. that the link between the parties to unjust enrichment claims will not be satisfied where the claimant provides a benefit to the defendant in pursuance of a contract between the claimant and a third party. See Burrows, *The Law of Restitution*, pp. 352–353.

³⁵ As explained in section 3.3.2 above, in *Relfo Ltd. (In Liquidation) v Varsani* [2014] EWCA Civ 360, [2015] 1 B.C.L.C. 14 (“*Relfo*”), the example of sham situation offered by *ITC*, the underlying situation between the parties is better seen as a form of taking.

³⁶ *ITC*, at [48] (Lord Reed).

³⁷ This difficulty is noted in W. Day, “‘At the Expense of’ in Unjust Enrichment: Casual, Direct or Intentional Transfers of Value?” [2017] L.M.C.L.Q. 588, 596. As the author explains, however, this may justify the development of a special rule of agency law deeming the undisclosed principal to be the counterparty to the claimant's payment to his or her agent.

³⁸ See, for example, *Portman Building Society v Hamlyn Taylor Neck* [1998] 4 All E.R. 202, 207 (Millett LJ).

the link between the parties, but rather as an alternative form which any of the other recognised situations may take.

4.2 Features of Discharges of the Defendant's Debt Scenarios

As noted above, the first kind of situation involving the indirect provision of a benefit is exemplified by the case where the claimant discharges a debt owed by the defendant to a third party. This description may suggest that the judgment is envisioning a case where the claimant pays a third party, thus enriching indirectly the defendant. This is not what happens in *Burston Finance*, the example chosen by the court to illustrate this kind of situation. Again, clarifying this seeming imprecision requires a review of some general ideas about claims arising from the discharge of another's debt.

In other jurisdictions, claims premised on the discharge of another's debt are often treated as forming one of the established categories of unjustified enrichment as a head of liability³⁹. This analysis is possible because the starting point is that debts are discharged when they are paid by third-parties, even if the payment is not requested by the debtor⁴⁰. The position of common law legal systems is significantly less straightforward. The traditional common law rule is that unauthorised payments only exceptionally discharge another's debt, and thus do not normally give rise to the kind of unrequested benefits providing the basis for an unjust enrichment claim⁴¹.

³⁹ In civilian and mixed legal systems, claims against the discharged debtor for the value of the payment are traditionally dealt with either as a category of unjustified enrichment, or through the related doctrine of *negotiorum gestio*. H. MacQueen, "Payment of Another's Debt" in D. Johnston and R. Zimmermann, *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge 2002), 458, 487–488; Macgregor and Whitty, "Payment of Another's Debt", pp. 66, 70.

⁴⁰ S. Meier, "Performance of an Obligation by a Third Party" in A. Burrows, D. Johnston and R. Zimmermann, *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford 2013), 622.

⁴¹ For example, *Electricity Supply Nominees Ltd v Thorn EMI Retail Ltd* (1992) 63 P. & C.R. 143 ("*Electricity Supply*"), 148 (Fox LJ). But see Mitchell and Watterson, *Subrogation*, [1.07]–[1.08], noting that where the defendant's debt is not discharged, subrogation is sometimes available as prophylactic measure to avoid the unjust enrichment which would follow if the creditor could accumulate recoveries from the claimant and the defendant, or, alternatively, if the defendant could escape a liability which was for his or her to bear.

In the case of English law, the unjust enrichment analysis is often confined to two main groups of situations where payments involving third-parties are consistently recognised to discharge another's debt. In the first group, the claimant pays a creditor in respect of a debt which is also owed by the defendant⁴². In the second group, money traceably received from the claimant is used to pay a debt owed by the defendant to a third party⁴³.

Both situations may give rise to a claim to be subrogated to the creditor's extinguished rights to prevent or reverse the defendant's unjust enrichment. In fact, these situations are usually treated as equivalent and subject to the same unjust enrichment analysis⁴⁴. It is thus understandable that the example proposed by *ITC* is *Burston Finance*, where the relevant debt was not in fact discharged by the claimant, but rather by the defendant himself using money obtained from the claimant⁴⁵. In line with a widespread analysis of these cases, the judgment's notion of discharges of another's debt include both scenarios where the claimant pays a creditor in respect of a debt owed by the defendant, and where the defendant pays his or her own debt with money obtained from the claimant.

If we are to identify the specific features of the relationship between the parties in these situations, however, this general description will not do. To better focus our attention on the features of the different cases which may fit situations of discharges of another's debt as recognised by *ITC*, this chapter proceeds by distinguishing two groups of scenarios: payment of the defendant's debt and payment with money received from the claimant.

⁴² The label "payment of another's debt" is misleading in that it suggests that no claim would be available where there is no payment of money, but only the performance of an act for which the defendant was also liable. This does not appear to be the case. See *Gebhardt v Saunders* [1892] 2 Q.B. 452 and *Macclesfield Corp. v Great Central Railway* [1911] 2 K.B. 528. To keep the analysis simple, however, this chapter will focus only on scenarios involving payments.

⁴³ Mitchell et al, *Goff and Jones*, [5-57].

⁴⁴ Burrows, *The Law of Restitution*, p. 146. But see S. Watterson, "Subrogation" in G. Virgo and S. Worthington, *Commercial Remedies: Resolving Controversies* (Cambridge 2017), 452, distinguishing different contextual categories for classifying subrogation cases.

⁴⁵ This case is further discussed in section 4.2.2.1 below.

4.2.1 Payment of the Defendant's Debt

Where the claimant pays a third party in respect of a debt which is also owed by the defendant, the payment generally discharges the defendant's liability⁴⁶. A common example is the case of a surety who pays a creditor in respect of a guaranteed debt. If the surety's payment extinguishes the creditor's personal or proprietary rights against the principal debtor, the law allows the surety to be subrogated to such rights⁴⁷. In this and analogous cases, subrogation is often explained as a response to the principal debtor's unjust enrichment which follows from his or her undeserved escape from liability⁴⁸. Importantly, in these cases the process of subrogation is generally coupled by other personal rights recognised to the claimant in the form of a right to obtain contribution or reimbursement from the discharged defendant to reverse his or her unjust enrichment⁴⁹. As subrogation and contribution or reimbursement claims rely on the same unjust enrichment reasoning, the cases where the availability of these claims has been considered are all relevant to understand the features of the kind of situation we are concerned with here.

It is tempting to assume that the link between the parties in this kind of situation is not significantly different to the link supporting unjust enrichment claims in other conferrals situations involving more than two parties. We have seen that where C orders

⁴⁶ This is always the case where C and D are jointly or jointly and severally liable to X. Where C and D are only severally liable to X, i.e. each party is liable only for its own specified obligations, there are some significant exceptions to this rule in the law of indemnity insurance, on which see Mitchell and Watterson, *Subrogation*, [2.10].

⁴⁷ In the case of sureties, the right of subrogation is statutorily enshrined in the Mercantile Law Amendment Act 1856, s. 5. Other situations where subrogation has been recognised by courts include the discharge of debts owed by co-sureties, sureties and sub-sureties, joint contractors, partners, as well as cases of joint wrongdoers and several wrongdoers liable for the same damage. Mitchell and Watterson, *Subrogation*, [6.03].

⁴⁸ Birks, *Unjust Enrichment*, pp. 96–98; Burrows, *The Law of Restitution*, p. 166; Mitchell et al, *Goff and Jones*, [6-53], [39-37]. This explanation is not unanimously endorsed. See S. Hedley, *Restitution: Its Division and Ordering* (London 2001), 119–148; C. Rotherham, *Proprietary Remedies in Context* (Oxford 2002), 250.

⁴⁹ C. Mitchell, *The Law of Contribution and Reimbursement* (Oxford 2003), [14.14]; Mitchell and Watterson, *Subrogation*, [6.15]; Burrows, *The Law of Restitution*, pp. 147, 446. Again, this conclusion is not unanimously endorsed. See J. Hilliard, "A Case for the Abolition of Legal Compulsion as a Ground for Restitution" [2002] C.L.J. 551, 556.

X to pay D, it could be argued that, in reality, C is conferring a benefit on D⁵⁰. Similarly, it has been argued that where a surety C pays X to discharge a liability of D, C is conferring a benefit to D⁵¹. Despite the appearances, however, it is important to realise that payment of another's debt situations reveal features which are not shared by other conferral situations involving more than two parties. These particularities can be seen in the position of the claimant and in the position of the defendant.

4.2.1.1 No Intention of the Claimant

In *Niru Battery Manufacturing Co v Milestone Trading Ltd (No. 2)*⁵², money was mistakenly paid on behalf of Niru to Credit Agricole Indosuez (“CAI”) on the basis of the negligent issuance of an inspection certificate by SGS United Kingdom Ltd (“SGS”)⁵³. Judgment was entered against CAI and SGS jointly and severally: CAI was held liable to restitution of its unjust enrichment arising from the mistaken payment, and SGS was held liable to compensation of the damages caused as a consequence of the negligent issuance of the inspection certificate. Niru proceeded to satisfaction of judgment exclusively against SGS, who after being ordered to pay in full, sought to recover the sum paid from CAI. The Court of Appeal concluded that subrogation to Niru's extinguished rights was available to SGS to effect restitution of CAI's unjust enrichment arising from the release of a liability it should have borne⁵⁴.

As previously explained, in cases where the defendant's enrichment is brought about through the payment of money or provision of goods and services, the claimant

⁵⁰ See section 3.2.1 above. See P. Birks, “‘At the Expense of the Claimant’: Direct and Indirect Enrichment in English Law” in D. Johnston and R. Zimmermann (eds.), *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge 2002), 503.

⁵¹ Mitchell and Watterson, *Subrogation*, [5.18]–[5.19]; Burrows, *The Law of Restitution*, p. 148; G. Virgo, *The Principles of the Law of Restitution*, 3rd ed. (Oxford 2015), 106.

⁵² [2004] EWCA Civ 487, [2004] 2 All E.R. (Comm.) 289 (“*Niru*”).

⁵³ Niru had paid the purchase of some lead ingots from Milestone with a letter of credit against presentation of an inspection certificate issued by SGS. Despite having falsified a bill of lading, Milestone obtained the inspection certificate from SGS, which along the letter of credit was presented by CAI to Niru's bank, who therefore made payment of USD\$5.8 million to CAI on Milestone's account.

⁵⁴ *Niru*, at [50] and [63] (Clarke LJ). While this solution is widely seen as correct, the judgment's treatment of the link between subrogation and reimbursement/contribution claims is controversial. Mitchell and Watterson, *Subrogation*, [6.31]; Burrows, *The Law of Restitution*, p. 446.

generally acts intending to confer a benefit to the defendant⁵⁵. This is plainly not the case in the situation illustrated by *Niru*. Here, the claimant paid the creditor to discharge its own liability under the judgment, not to confer a benefit to the defendant. It is debatable whether the defendant may be enriched by the discharge of his or her debt where a voluntary claimant pays the creditor as the result, for example, of some form of mistake⁵⁶. In the kind of situation we are concerned with here, however, the relevant enrichment is brought about as a consequence of the claimant acting in his or her own interest⁵⁷.

This feature poses a challenge to the unjust enrichment analysis. It is widely considered that benefits incidentally conferred by someone acting in self-interest or in accordance with pre-existing legal obligations fall outside the scope of unjust enrichment claims⁵⁸. Yet it is difficult to deny that this is precisely what happens in situations like the one illustrated by *Niru*, where the defendant's enrichment is brought about only as a secondary consequence of the claimant's discharge of previous liabilities. Those favouring an unjust enrichment analysis of these situations have sought to identify in them one of the rare exceptions to the rule preventing recovery of incidental benefits. For example, Professor Mitchell notes that such exception can be traced to the decision of *Ruabon Steamship Co. Ltd. v London Assurance (The Ruabon)*⁵⁹, where it was concluded that the bar against recovery of incidental benefits would not apply if the benefit is conferred as a consequence of the claimant paying an obligation by which both the claimant and the defendant are bound. He relies on the following passage:

“[No principle of the common law requires that a contribution should be payable] where there is nothing in common between the two persons, except that one person has taken advantage of something that another person has done, there being no contract

⁵⁵ See section 3.2.1 above.

⁵⁶ Burrows, *The Law of Restitution*, pp. 149, 463–464; Mitchell et al, *Goff and Jones*, [5-61].

⁵⁷ In fact, it has been argued that in this situation restitution could be explained in the claimant's powerlessness to prevent the conferral of a benefit to defendant. J. Edelman and E. Bant, *Unjust Enrichment*, 2nd ed. (Oxford 2016), 293.

⁵⁸ Birks, *Unjust Enrichment*, pp. 158–160. This is now confirmed by *ITC*, at [52] (Lord Reed).

⁵⁹ [1900] A.C. 6.

between them, [and] *there being no obligation by which each of them is bound*⁶⁰.

But if we admit that the relevant enrichment is an incidental consequence of the claimant's acting for his or her own benefit, it becomes difficult to justify the availability of unjust enrichment liability in the kind of defect negating or qualifying the claimant's consent which provide the reason for restitution in most conferral cases. This circumstance has been noted by Professor Burrows, who explains that where the claimant cuts down trees on his land for his own benefit, and thus gives his neighbour the advantage of a better view, it would make no sense for the claimant to seek restitution on the basis of his defective consent, because he must be taken to intend the consequences of his intentional conduct⁶¹. If this is correct, a second challenge for the unjust enrichment analysis of cases like *Niru* is identifying the precise injustice which would justify subrogation as a restitutionary response to the defendant's enrichment.

No single answer has been given to this issue. Some authors focus on the fact that the claimant's payment discharges a liability which is only secondary to the defendant's liability⁶². Others focus on the pressure of the legal process exerted against the claimant when the creditor demands repayment⁶³. Still others focus on the pre-existing relationship between creditor and defendant which explains why the defendant was liable in the first place⁶⁴. What seems to be out of the question is the assumption that in cases like *Niru* the claimant occupies a position which is not significantly different from the position of claimants in other conferral situations.

⁶⁰ Mitchell, *Contribution and Reimbursement*, [3.30]. While this conclusion is drawn in the context of contribution and reimbursement claims, in principle it should apply to subrogation claims as well, because where there is a right to restitution on the ground of secondary liability, the remedy of subrogation is prima facie available. Mitchell and Watterson, *Subrogation*, [6.14]. See also A. Burrows, "At the Expense of the Claimant: A Fresh Look" [2017] R.L.R. 167, 177.

⁶¹ Burrows, *The Law of Restitution*, p. 108.

⁶² P. Birks, *An Introduction to the Law of Restitution*, rev. ed. (Oxford 1989), 186–188; Mitchell, *Contribution and Reimbursement*, [3.28]; Mitchell and Watterson, *Subrogation*, [6.04].

⁶³ Burrows, *The Law of Restitution*, pp. 436–437.

⁶⁴ L. Smith, "Restitution: A New Start?" in P. Devonshire and R. Havelock (eds.), *The Impact of Equity and Restitution in Commerce* (Oxford 2019), 102–103.

4.2.1.2 No Acceptance by the Defendant

In *Owen v Tate*⁶⁵, the defendant borrowed money from a bank, the repayment of which was secured by a legal mortgage on the property of Miss Lightfoot. She wanted to be released from this mortgage so asked the claimant for advice. The claimant offered to help and, without consulting the defendant, deposited the amount of the loan with the bank, agreeing to guarantee the defendant's debt in exchange for the bank releasing Miss Lightfoot's mortgage. Despite the defendant's opposition to this arrangement, the bank released the mortgage title deeds and eventually called on the claimant's guarantee to discharge the defendant's overdraft. The claimant brought a reimbursement claim against the defendant for the debt paid, which the Court of Appeal rejected laying down what is described as the general rule governing this kind of situation:

“[I]f without an antecedent request a person assumes an obligation or makes a payment for the benefit of another, the law will, as a general rule, refuse him a right of indemnity”⁶⁶.

In conferral situations, the defendant's acceptance of the benefit provided by the claimant seems to be critical in establishing the bilateral relationship supporting an unjust enrichment claim⁶⁷. *Owen* could be read as confirming the importance of the defendant's acceptance in cases following the model of *Niru*⁶⁸. This conclusion would be consistent with the rule applicable if the claimant voluntarily pays the defendant's creditor, where it seems beyond doubt that, in the absence of acceptance by the defendant, no recovery is available⁶⁹. It would also be consistent with the law's general concern for protecting the defendant's autonomy by avoiding that liabilities are imposed behind his or her back⁷⁰.

⁶⁵ [1976] Q.B. 402 (“*Owen*”).

⁶⁶ *Owen*, pp. 411–412 (Scarman LJ). While in this case the claimant sought reimbursement, subrogation to the creditor's extinguished rights should have been available on the same facts. Mitchell and Watterson, *Subrogation*, [6.14].

⁶⁷ See section 3.2.2 above.

⁶⁸ But see P. Birks and J. Beatson, “Unrequested Payment of Another's Debt”, reprinted in J. Beatson, *The Use and Abuse of Unjust Enrichment* (Oxford 1991), 195–196.

⁶⁹ If the payor makes the payment without authority and does not obtain subsequent ratification he normally has no redress against the debtor. *Electricity Supply*, p. 148 (Fox LJ).

⁷⁰ *Falcke v Scottish Imperial Insurance Co* (1886) 34 Ch. D. 234, 248 (Cotton LJ).

Yet this analysis would face several objections. First and foremost, *Owen* is a highly controversial case and, at least in what concerns the availability of subrogation to extinguished rights, it is not clear if it was correctly decided. It has been noted that the decision contradicts both common law authorities and section 5 of the Mercantile Law Amendment Act 1856, which establishes that a surety who has paid off another's debt is entitled to be subrogated to the creditor's extinguished rights against the principal debtor to recover the sum paid⁷¹. Though there may be exceptional circumstances where it is reasonable to deny subrogation to a voluntary surety⁷², it seems that the lack of acceptance by the defendant of the claimant's voluntary incurrance of liability should not be a general bar to subrogation in these circumstances⁷³.

Moreover, beyond the case of sureties it is well established that an acceptance is not necessarily required for recovery where the defendant's debt is discharged by a non-voluntary intervener who pays under the compulsion of a secondary liability⁷⁴. For example, in *Brook's Wharf and Bull Wharf Ltd v Goodman Bros*⁷⁵, the defendant imported some merchandise and stored it in the claimant's warehouse, from where it was stolen without any negligence on the part of the claimant. The removal of the merchandise from the warehouse triggered the customs' right to demand payment of import duties, which were paid by the claimant without consulting the defendant. The Court of Appeal recognised the claimant's right to obtain reimbursement from the defendant, on the basis that:

“The case is analogous to that of a payment by a surety which has the effect of discharging the principal's debt and which, therefore, gives a right of indemnity against the principal (...) The defendants would be unjustly benefited at the cost of the plaintiffs

⁷¹ Burrows, *The Law of Restitution*, pp. 148–149, 451.

⁷² For example, where the surety is a hostile intervener, like in the case decided by the Supreme Court of Vermont *Norton v Haggett*, 85 A.2d 571 (1952) where, after a dispute, the claimant offered a third party to pay the defendant's debt to secure rights against him.

⁷³ Mitchell and Watterson, *Subrogation*, [6.07]. This conclusion is consistent with the fact that voluntary exposure to liability is not an absolute bar to contribution and reimbursement claims. Mitchell, *Contribution and Reimbursement*, [6.39].

⁷⁴ Birks and Beatson, “Unrequested Payment”, p. 195; Burrows, *The Law of Restitution*, p. 466.

⁷⁵ [1937] 1 K.B. 534 (“*Brook's Wharf*”).

if the latter (...) should be left out of pocket by having to discharge what was the defendant's debt⁷⁶.

It therefore seems that, despite what *Owen* may suggest, acceptance by the defendant of the benefit provided by the claimant is not relevant in the most common situations where an unjust enrichment claim is premised on the payment of the defendant's debt⁷⁷. In this respect, the link between the parties appears again as significantly different from the link involved in conferral situations.

4.2.2 Payment with Money Received from the Claimant

It may happen that the defendant discharges a debt with a third party by paying with money traceably received from the claimant. This payment could be the intended consequence of a valid loan from the claimant to the defendant, as happens where a claimant bank lends money to a defendant borrower (or someone borrowing for the defendant) for the purpose of paying a creditor. It can also be the result of the unauthorised use by the defendant (or someone acting for the defendant) of the claimant's money, as happens where a defendant misappropriates the claimant's money and uses it to pay a creditor. In these cases, the law sometimes allows the claimant to be subrogated to the creditor's extinguished rights against the defendant, a response which is explained as reversing the unjust enrichment which would otherwise accrue to the defendant as a consequence of the discharge of his or her debt⁷⁸.

The link between the parties in this kind of situation seems close to the one supporting unjust enrichment claims in taking situations. We have seen that this link is sometimes explained as a "proprietary connection", where the relevant enrichment is a consequence of the defendant receiving the claimant's property, no matter how many

⁷⁶ *Brook's Wharf*, pp. 544–545 (Lord Wright MR).

⁷⁷ In less common situations the point may be even clearer. If subrogation to extinguished rights is available in cases like *Gebhardt v Saunders* [1892] 2 Q.B. 452, where the liability owed by the defendant was discharged by the claimant repairing the drains of a house to abate a nuisance, it could be argued that sometimes the defendant's acceptance is not even possible, as it would necessarily come after the relevant enrichment. R. Stevens, "The Unjust Enrichment Disaster" (2018) 134 L.Q.R. 574, 588.

⁷⁸ Mitchell and Watterson, *Subrogation*, [6.43], [6.58] and [6.81]; Burrows, *The Law of Restitution*, p. 150; Mitchell et al, *Goff and Jones*, [6-53], [8-145] and [39-01].

intermediate hands such property has passed through⁷⁹. Similarly, it has been argued that the connection required to support a subrogation claim will be established where the creditor receives an asset originally held by the claimant or its traceable proceeds⁸⁰. But as it happens with conferrals and payments of the defendant's debt situations, when we focus on the position of the parties we can see that significant differences separate payment with money obtained from the claimant and other taking situations.

4.2.2.1 No Entitlement of the Claimant

Situations where subrogation to extinguished rights has been granted are often described as involving a payment being made by the defendant with money belonging to the claimant. For example, Mitchell and Watterson note that in these cases “the claimant’s money has been used to pay off a defendant’s obligation to a creditor”⁸¹, and Burrows concludes that this kind of subrogation will be available where “a person has discharged (*or his money has been used to discharge*) another’s liability to a third party”⁸². On the face of it, the position of the claimant in this kind of situation may appear as similar to the position of the claimant in takings scenarios, where liability is dependent on his or her entitlement over the asset enriching the defendant⁸³. Yet subrogation to extinguished rights is often recognised in cases where the claimant cannot rely on any subsisting entitlement to the money paid by the defendant to the creditor.

A handy example is provided by *Burston Finance*, the case used in *ITC* to illustrate the situations of discharge of another’s debt⁸⁴. In this case, the claimant lent money to the defendant company to purchase land from a third party on the condition that a charge over this land would be granted. The charge was indeed granted, but it was subsequently rendered ineffective by statute as a consequence of non-registration in the Companies Charge Register as required by section 95 of the Companies Act 1948. The claimant

⁷⁹ See section 3.3 above.

⁸⁰ Birks, *Unjust Enrichment*, pp. 96–98; Mitchell and Watterson, *Subrogation*, [5.20]–[5.21].

⁸¹ Mitchell and Watterson, *Subrogation*, [3.01].

⁸² Burrows, *The Law of Restitution*, p. 146 (emphasis added).

⁸³ See section 3.3.1 above.

⁸⁴ *ITC*, at [49] (Lord Reed).

sought priority in the defendant company's liquidation by requesting to be subrogated to the unpaid vendor's lien, which had been extinguished when the defendant company used the loaned money to purchase the property. This claim was rejected on the basis that, by taking as security the defective charge for which it had bargained, the claimant had waived its right to be subrogated to the unpaid vendor's lien⁸⁵. It has been noted, however, that the mere fact that the lender had initially acquired the charge bargained for should not have disentitled him from asserting a subrogation claim based on unjust enrichment when that charge became ineffective⁸⁶.

In *Burston Finance*, the money used by the defendant to pay the third party was not money belonging to the claimant. Here, the claimant's entitlement to the money was lost when it was intentionally paid to the defendant, because by doing so the claimant was simply performing a binding contractual obligation under the loan agreement⁸⁷. It is generally difficult for a claimant in a similar position to argue that he or she retains some form of entitlement to the money, as debtors unconditionally discharge their debts by affording their creditors the legal and beneficial enjoyment of the money paid⁸⁸. A possible way of doing so would require to show that the money was lent on the basis of an undertaking to be applied only in a specified manner which the borrower did not observe⁸⁹. Yet this is certainly not what happened in *Burston Finance*, where the funds advanced were used just as agreed between lender and borrower.

A different question is whether subrogation may be available where the claimant's intention in advancing the money was to acquire any security paid off with such money.

⁸⁵ *Burston Finance*, p. 1656 (Walton J).

⁸⁶ The same result could have been better explained in a public policy bar to the restitutionary response: allowing subrogation would have intolerably undermined the statutory provision invalidating the non-registered security. Mitchell and Watterson, *Subrogation*, [6.97] and [7.113].

⁸⁷ Because of this, Burrows argues that in this category of subrogation case—which he calls “lender's subrogation rights”—the applicable unjust factor cannot be legal compulsion. Burrows, *The Law of Restitution*, pp. 150–151.

⁸⁸ D. Fox, *Property Rights in Money* (Oxford 2008), [1.97].

⁸⁹ According to the Quistclose principle, in such circumstances the lender may retain beneficial ownership over the money. *Twinsectra Ltd. v Yardley* [2002] UKHL 12, [2002] 2 A.C. 164, at [12]–[13] (Lord Hoffmann).

This assumption seems to have guided the analysis in *Burston Finance*⁹⁰, and it is also behind many subrogation cases involving disappointed lenders⁹¹. But it was specifically rejected as fictional in *BFC*, and it is generally seen as inconsistent with the unjust enrichment explanation of this kind of scenario, which focuses on the claimant's failure of consideration in not being repaid by the defendant⁹². Unlike what happens in other taking scenarios, this explanation assumes that the claimant is no longer entitled to his or her money at the point where the relevant enrichment accrues.

4.2.2.2 No Interference by the Defendant

In *Boscawen v Bajwa Abbey National Plc*⁹³, the claimant agreed to provide a loan to finance the purchase of a house owned by the defendant over which a third party had a charge. The claimant advanced the purchase money to the purchaser's solicitors and then to the defendant's solicitors, who in turn paid off the charge over the house. Before the sale was completed, however, the deal fell through, with the result that the claimant was left out of pocket and without a security to recover the advanced moneys. The Court of Appeal concluded that, as the claimant could trace its money to the moneys used to pay off the charge over the defendant's house, subrogation to that charge could be granted as a remedy to prevent the defendant's unjust enrichment⁹⁴.

Unlike cases like *Burston Finance*, in *Boscawen* the claimant did not advance the moneys in performance of a binding contractual obligation. The defendant's solicitors had held the moneys as trustees for the claimant pending the completion of the sale, and in using the money prematurely to pay off the charge, they had misapplied the trust assets. This feature has led some commentators to explain subrogation in this case on the basis that the claimant's assets were taken without his consent and applied for the defendant's

⁹⁰ *Burston Finance*, p. 1652 (Walton J).

⁹¹ Mitchell and Watterson, *Subrogation*, [3.28] and [6.95].

⁹² Burrows, *The Law of Restitution*, pp. 150–151; Watterson, "Subrogation", p. 454.

⁹³ [1996] 1 W.L.R. 328 ("*Boscawen*").

⁹⁴ *Boscawen*, p. 335 (Millett LJ).

benefit⁹⁵. Under this analysis, the position of the claimant can indeed be described as involving an entitlement to the money used to discharge the defendant's debt: as the solicitors held the moneys in trust for the claimant, when these moneys were used to pay off the charge the claimant still held a proprietary interest over them. But even if the position of the claimant may seem close to that found in other taking situations, the position of the defendant in this kind of case is decidedly different.

Understanding this difference requires us to focus on the form taken by the benefit obtained by the defendant. Unlike taking situations, where this benefit follows from the receipt of an asset belonging to the claimant or its traceable substitute⁹⁶, in the *Boscawen* situation the defendant's benefit follows from using an asset of the claimant or its traceable substitute to discharge a debt to a third party⁹⁷. If both kinds of benefits are comparable, it is because the latter is sometimes explained as the receipt of a "negative asset", which enriches the defendant by saving him or her of incurring an inevitable expense⁹⁸. Yet this explanation is slightly misleading in that it turns our attention away from an important feature of the cases we are concerned with here, where the defendant's benefit takes the specific form of the extinction of the creditor's rights⁹⁹. Obtaining this benefit may require using the claimant's asset or its traceable proceeds, but the benefit itself does not correspond to an asset belonging to the claimant or its traceable substitute.

This feature has been stressed in the context of the debate about the viability of backwards tracing. As explained in the previous chapter, tracing is the process of identifying a new asset as the substitute for the old¹⁰⁰. The question has been raised whether trust funds could be traced through the discharge of a debt into the assets previously acquired by the trustee by incurring the debt. For example, in *The Federal*

⁹⁵ Mitchell and Watterson, *Subrogation*, [5.85] and [6.44]; Mitchell et al, *Goff and Jones*, [39-25]; Watterson, "Subrogation", pp. 452-453.

⁹⁶ See section 3.3.2 above.

⁹⁷ Mitchell and Watterson, *Subrogation*, [6.42].

⁹⁸ Birks, *Introduction*, pp. 84, 93-98, 372-375, 397. From this perspective, both scenarios can be described as bringing about an overall increase in the defendant's net wealth.

⁹⁹ Mitchell and Watterson, *Subrogation*, [4.01].

¹⁰⁰ *Foskett v McKeown* [2001] 1 A.C. 102, 127 (Lord Millett).

*Republic of Brazil v Durant International Corporation*¹⁰¹, the Privy Council had to decide whether bribe money received by the former mayor of a foreign Municipality and paid into a New York bank account could be traced into funds previously paid from the New York bank account to a Jersey bank account. It was clear that the bribe money was held on trust by the mayor for the benefit of the Municipality, so had it been paid first to the New York bank account and only then to the Jersey account, establishing a tracing link between the bribe money received by the mayor and the funds made available in the Jersey bank account would have been relatively straightforward. The problem was that part of the money was paid into the New York bank account *after* the Jersey bank account was credited. Establishing the relevant tracing link required the claimant to overcome the obstacle that part of the trust money was not directly used to finance a transfer of funds into the Jersey bank account, but rather to pay the debt previously incurred with the New York bank for that purpose.

The Privy Council noted that the acquisition of an asset and the extinguishment of a debt should not be conflated. While in the hands of the creditor a debt is an asset which can be substituted for some asset of the claimant, from the debtor's perspective the debt has no asset value and cannot provide the basis for any substitution as it is extinguished when it is paid¹⁰². In the specific situation presented for decision, backwards tracing was accepted as means to outplay a money laundering scheme involving a close coordination between the incurring of a debt and the use of trust funds to discharge it¹⁰³. But the possibility of tracing money used to pay a debt into whatever was acquired in return for the debt was explicitly rejected¹⁰⁴. In support of this conclusion, the Privy Council relied on the work of Professor Conaglen, who has argued that:

“Trust beneficiaries whose money has been wrongly applied in satisfaction of a debt can stand in the position of the satisfied

¹⁰¹ [2015] UKPC 35, [2016] A.C. 297 (“*Durant*”).

¹⁰² *Durant*, at [29] (Lord Toulson).

¹⁰³ *Durant*, at [40] (Lord Toulson).

¹⁰⁴ *Durant*, at [33] (Lord Toulson). The policy consideration behind this conclusion is that, in the absence of special circumstances, the beneficiaries' claim (or the claim of the party relying on the tracing link) should not take precedence over the claims of the trustee's general body of unsecured creditors.

creditor (by subrogation), but it is a step too far, in policy terms, to allow them to stand in the position of the debtor and act as owners of property that the trustee acquired before the debt was paid”¹⁰⁵.

This means that, in situations giving rise to subrogation to extinguished rights like the one illustrated by *Boscawen*, liability cannot be explained only as a consequence of the defendant’s receipt of assets initially belonging to the claimant or their traceable substitutes. This feature may be obscured by the fact that the process of tracing is sometimes invoked as a necessary step in establishing the link between the parties both in takings and some subrogation cases¹⁰⁶. But it is critical to note that tracing plays a very different role in each of these contexts. In taking situations, the process of tracing is used to link assets—an asset initially belonging to the claimant and the asset received by the defendant. In subrogation situations, tracing is used to link the position of persons—the claimant whose money pays the debt and the creditor entitled to repayment from the defendant¹⁰⁷. While what distinguishes the position of the defendant in taking situations is the interference with the claimant’s right over an asset, in the subrogation cases considered here the central feature seems to be the fact that the defendant occupies the place of the debtor of a pre-existing obligation¹⁰⁸. This difference may seem subtle, but ignoring it can have important implications in the analysis of subrogation cases¹⁰⁹.

¹⁰⁵ M. Conaglen, “Difficulties with Tracing Backwards” (2011) 127 L.Q.R. 432, 455, cited with approval in *Durant*, at [31] (Lord Toulson).

¹⁰⁶ It should be remembered that tracing is not necessarily required to establish the link in subrogation cases. See, for example, *Filby*, [62] (May LJ).

¹⁰⁷ L. Smith, “Tracing into the Payment of a Debt” [1995] C.L.J. 290, 305. Smith draws a parallel with the distinction recognised in French law between “real subrogation” (*subrogation réelle*), which is the process through which one asset takes the place of another; and “personal subrogation” (*subrogation personnelle*), which is the process through which one person is allowed to stand in the place of another.

¹⁰⁸ A consistent distinction between tracing and subrogation as “techniques” for linking the parties is adopted in Edelman and Bant, *Unjust Enrichment*, p. 113–114.

¹⁰⁹ For example, Birks argued that subrogation to extinguished rights is no more than an instance of a general restitutionary claim recognised by the law where the claimant can trace value into the defendant’s net wealth. In this view, subrogation “really adds nothing to the number of techniques already identified [within the law of restitution]”. Birks, *Introduction*, p. 93.

4.3 Features of Co-ordinated Transactions Scenarios

It has been noted above that subrogation to extinguished rights is sometimes awarded as a response to unjust enrichment in situations where the position of the parties cannot be explained only as following from the discharge by the claimant or through the claimant's money of the defendant's debt. The case usually in mind here is where a debt secured by a proprietary interest over an asset is discharged in circumstances where there is a second debt guaranteed by a subordinate security over the same asset. In cases of this kind, the relevant enrichment which subrogation is said to prevent is not the discharged party's release from liability, but the benefit accruing to the creditor of the second debt whose position is materially improved when the first creditor's rights are extinguished by payment¹¹⁰. *ITC* relies on two cases to illustrate this kind of situation.

The first case is *BFC*. In this case, the claimant entered a refinancing arrangement structured in a manner intended to avoid the public disclosure of the operation. The claimant would advance funds to a holding company's manager, Herzig, who would in turn lend the same amount to the subsidiary company Parc. In accordance with this arrangement, the claimant would not obtain any form of security over Parc's assets, but a postponement agreement under which Parc's other creditors belonging to the holding company's group would postpone their claims until the claimant was repaid. Using the funds obtained in this way, Parc discharged a debt to a third party secured by a first charge over its property. By doing so, however, it also promoted a second charge held by the defendant, one of Parc's other group creditors against which the postponement agreement turned out to be ineffective. The House of Lords held that the claimant was entitled to be subrogated to the extinguished first charge as far as necessary to secure the priority of its claim to repayment vis-à-vis the defendant.

The second case is *Menelaou*. As explained in previous chapters, in this case the claimant bank had a charge over a house owned by Mr. and Mrs. Menelaou, who decided to sell this house to purchase a second house in the defendant's name as a gift. In order to

¹¹⁰ Mitchell et al, *Goff and Jones*, [39-22].

complete the operation, the Menelaous asked the claimant bank to release its charge over the first house, offering a substitute charge over the second house. The claimant bank agreed, the charge was released and the first house was sold. The second house was then purchased in the defendant's name with the proceedings of the sale, and a new charge over this property was received by the claimant bank. It eventually transpired that this new charge was void, so the defendant ended up as the unencumbered proprietor of the second house. The Supreme Court held that the claimant bank was entitled to be subrogated to the unpaid vendor's lien over the second house which had been discharged with the moneys obtained by the sale of the first house.

On the basis of these decisions, the judgment in *ITC* identified a particular connection between the parties to unjust enrichment claims, where claimant and defendant are linked through a series of co-ordinated transactions forming a single scheme¹¹¹. The notion of co-ordinated transactions, however, is not entirely helpful to understand the distinct features of the link existing between claimant and defendant in these cases¹¹². It could be used to describe a form of composite conferral, where the claimant's intention to benefit the defendant and the defendant's acceptance of such benefit is expressed through separate events forming a unified sequence¹¹³. It could also be used to describe a form of circuitous taking, where a series of transactions result in the defendant interfering with the claimant's entitlements over an asset¹¹⁴. This ambiguity confirms that, once again, if we are to take advantage of this distinction, we need to go beyond general labels and identify

¹¹¹ *ITC*, at [61] (Lord Reed). A case which may also fit this pattern is *Eagle Star Insurance Co. Ltd. v Karasiewicz* [2002] EWCA Civ 940. But this case adopted an explanation of subrogation which did not follow the unjust enrichment analysis endorsed in *BFC*.

¹¹² This difficulty with the notion of "co-ordination" is not new. As noted by Professor Mitchell, Australian courts have often concluded that contribution claims will be available where the claimant and defendant liabilities are "co-ordinate", only to complain "almost as often [of] the difficulty in defining which liabilities meets that description". Mitchell, *Contribution and Reimbursement*, [7.03].

¹¹³ Mitchell et al, *Goff and Jones*, [6-91], arguing that central to *BFC* and *Menelaou*, "were the intentions of the relevant participants, which enabled the sequence to be viewed as a unity—even, a coordinated whole". This view is criticised in F. Wilmot Smith, "Taxing Questions" (2015) 131 L.Q.R. 531, 535 and W. Day "At the Expense of", pp. 598–600.

¹¹⁴ Mitchell et al, *Goff and Jones*, [8-103], arguing that in *Relfo* "it was the director's 'overall design' that led the Court of Appeal (...) to conclude that the case was 'equivalent' to a 'direct' payment of the claimant's money to the defendant". This view is criticised in T. Cutts, "Modern Money Had and Received" (2019) 38 O.J.L.S. 1, 22.

the precise features defining the position of the parties. When we do so, it becomes clear that co-ordinated transactions involve an entirely different kind of relationship between claimant and defendant.

4.3.1 Expectation of the Claimant

The most common explanation of the applicable reason for restitution in *BFC* and *Menelaou* rests on the assumption that in these cases the claimant occupied a position analogous to that of the claimant in conferral cases following the model of *Kelly v Solari*¹¹⁵. As it will be remembered, in *Kelly* the claimant insurance company paid a sum of money to the defendant in the mistaken belief that an insurance policy was valid when in fact it had already lapsed. Similarly, it is often said that in *BFC* and *Menelaou* the claimant would not have agreed to enter the scheme benefiting the defendant had it not been for a mistake as to the conditions under which repayment would be secured¹¹⁶. In *BFC*, the claimant would not have advanced the loaned moneys but for the mistaken belief that it was obtaining a postponement letter which would give him priority over any intra-group indebtedness¹¹⁷. In *Menelaou*, the claimant would not have agreed to release the charge over the first house but for the mistaken belief that it would obtain a valid charge over the second house¹¹⁸. In both cases, the defendant's enrichment is understood as the result of the claimant's intention to confer a benefit on the defendant, and subrogation is explained as a legal response triggered by a defect vitiating such intention.

An important difficulty of this explanation is that, unlike conferral cases, in *BFC* and *Menelaou* the defendant's enrichment was not brought about by a deliberate act of the claimant intended to benefit the defendant. In both cases, the relevant enrichment was the result of an arrangement which, as far as the claimant was concerned, was not designed to

¹¹⁵ (1841) 9 M & W 54, [1835-42] All E.R. 320 (“*Kelly*”).

¹¹⁶ Mitchell and Watterson, *Subrogation*, [6.51]; Burrows, *The Law of Restitution*, pp. 153–154; Mitchell et al, *Goff and Jones*, [39-26] notes 53 and 54.

¹¹⁷ *BFC*, p. 234 (Lord Hoffmann).

¹¹⁸ *Menelaou*, at [21]–[22] (Lord Clarke). An alternative but consistent explanation offered in the decision is that the claimant agreed to release the charge under a condition which subsequently failed.

transfer a benefit to the defendant¹¹⁹. In *BFC*, the claimant's objective in entering this arrangement was advancing a loan to a third party; in *Menelaou*, it was adjusting the conditions under which a third party's debt should be repaid. It follows that, if these cases reveal a mistake explaining liability, this mistake does not work on the claimant's intention to benefit the defendant, but only on his or her intention to participate in the arrangement which incidentally benefits the defendant¹²⁰.

A distinction along this line was recently drawn by the Supreme Court in *Lowick Rose Llp v Swynson Ltd*¹²¹. In this case, Swynson lent money to EMSL to finance the buy-out of a company known as Evo. This operation was based on a due diligence report negligently elaborated by the defendant firm of accountants. EMSL acquired Evo, and soon this company experienced cash flow problems, which caused EMSL to default on its debt to Swynson. The claimant, who was the controller owner of Swynson, was interested in seeing this loan repaid, both to remove a non-performing loan from Swynson's books and for tax reasons. So he personally loaned money to EMSL with the purpose that EMSL could repay Swynson's loan. EMSL did so, but then went into insolvency liquidation, with the result that the claimant's loan was never repaid. Swynson sought to recover damages in negligence from the defendant firm of accountants, but this claim failed because there was no recoverable loss as Swynson's loan had been duly repaid. The claimant argued that, as his loan to EMSL made possible this repayment, the defendant had been enriched at his expense, and sought to be subrogated to Swynson's negated claim against the defendant. The Supreme Court unanimously rejected this claim.

In deciding this case, the court considered the position of the claimant in *BFC* and *Menelaou* and concluded that, while this position indeed may reveal a form of mistake,

¹¹⁹ Mitchell and Watterson, *Subrogation*, [4.08], noting that the kind of enrichment accruing to the defendant in this kind of scenario is better understood as a not-intended by-product of the claimant's conduct.

¹²⁰ The importance of the arrangement in setting the limits for the consequences of the claimant's defective intention is confirmed by the principle that the claimant is not permitted to acquire by subrogation better rights than the rights bargained for. See, for example, *BFC*, pp. 235–237 (Lord Hoffmann); *Cheltenham*, at [41] (Neuberger LJ); *Filby*, [62]–[63] (May LJ).

¹²¹ [2017] UKSC 32, [2018] A.C. 313 (“*Lowick*”).

this mistake is of a very different kind from the one explaining liability in other unjust enrichment cases. Giving the leading judgment, Lord Sumption noted that, in cases like *BFC* and *Menelaou*, the defective intention takes the specific form of a defeated expectation as to the benefit which was the basis of the claimant's consent to participate in the arrangement ultimately enriching the defendant¹²². In *BFC*, this expectation was that the intra-group loans would be postponed to the claimant's loan; in *Menelaou*, it was that the claimant would obtain a valid charge over the new property acquired by the defendant¹²³. The subrogation claim in *Lowick* should not be granted because, unlike *BFC* and *Menelaou*, the claimant expectation was not defeated as he received exactly what he sought by entering the relevant arrangement: EMSL's covenant to repay, the security over EMSL's assets, the removal of a non-performing debt from Swynson's books, and the sought for tax advantage¹²⁴.

This analysis raises interesting questions about the basis for subrogation to extinguished rights and its relation to unjust enrichment¹²⁵. In what matters here, it suggests that, from the point of view of the claimant, the scenarios exemplified by *BFC* and *Menelaou* reveal a feature which not only separates them from other subrogation scenarios, but also from other conferrals and takings situations giving rise to unjust enrichment claims. Unlike any of these other situations, the claimant's position is defined by the existence of an expectation about the result of an arrangement with a third party which is not intended to benefit the defendant.

¹²² *Lowick*, at [30] (Lord Sumption).

¹²³ *Lowick*, at [28]–[29] (Lord Sumption).

¹²⁴ *Lowick*, at [32] (Lord Sumption). It has been noted, however, that Lord Sumption's description of subrogation as a "forward-looking" remedy designed to enforce defeated expectations is inconsistent with the view adopted in *BFC* that subrogation is a "backward-looking" remedy designed to return the defendant to the position he or she formerly occupied. C. Mitchell, "Unjust Factors in Three-Party Cases" [2017] R.L.R. 223, 230.

¹²⁵ For example, Professor Stevens argues that the correct reason for rejecting the claim was that the claimant's money was not used to discharge any liability of the defendants. Stevens, "Disaster", p. 601. But if we assume that *BFC* and *Menelaou* are sound authority as to the scope of subrogation claims, as Lord Reed does in *ITC*, Stevens' view must be wrong. *Lowick* is not a "payment with another's money" kind of situation, but a "co-ordinated transaction" situation, where payment with the claimant's money is not a feature explaining liability.

4.3.2 Consequential Windfall to the Defendant

The position of the claimant is not the only surprising feature of co-ordinated transaction situations. In fact, it is the position of the defendant what makes these situations particularly important for the analysis of the link between the parties to unjust enrichment claims.

When we consider these cases from the defendant's point of view, it becomes immediately apparent that there is no acceptance of the relevant enrichment. Both in *BFC* and *Menelaou*, a central part of the defendant's argument to oppose liability was precisely that such benefit was imposed upon them as a consequence of dealings in which they had not participated. In *BFC*, the relevant enrichment was brought about as the consequence of a re-financing agreement to which the defendant was not a party. In *Menelaou*, the relevant enrichment was possible because the defendant was entirely unaware of the arrangements under which the claimant would receive a charge over her house.

Neither is liability in these situations premised on the defendant interfering with the claimant's previous entitlements over an asset. Though in *BFC* Lord Hoffmann concluded that the claimant's money could be traced into the discharge of the debt guaranteed by the security ranking above the defendant's¹²⁶, it seems uncontroversial that at the time the money was used to discharge that debt, the claimant held no entitlement over the money¹²⁷. Similarly, it was suggested in *Menelaou* that the claimant may have retained a proprietary interest in the money used to purchase the house obtained by the defendant¹²⁸. Yet Lord Clarke and Lord Neuberger agreed that identifying such an interest

¹²⁶ *BFC*, p. 235 (Lord Hoffmann).

¹²⁷ Burrows, *The Law of Restitution*, p. 153, note 48; Stevens, "Disaster", p. 593.

¹²⁸ *Menelaou*, at [102] (Lord Neuberger). This could be done either on the basis that the money obtained from the sale of the first house and used to purchase the second house was the claimant's money beneficially, or on the basis that it was the Menelaous's money beneficially, subject to the claimant's right to require its repayment unless it was used to purchase the second house subject of a valid charge.

was not necessary to establish the required connection between claimant and defendant on which the subrogation claim was based¹²⁹.

It thus seems difficult to avoid the conclusion that in these cases the defendant's enrichment was brought about as a mere causal product of the claimant's performance of an arrangement agreed with a third party¹³⁰. Here, unlike other unjust enrichment cases, the critical link joining claimant and defendant can be properly characterised as a causal connection: but for the claimant performing this arrangement, the defendant would not have been enriched. This is consistent with the analysis of *BFC* and *Menelaou* developed in *Lowick*, where Lord Sumption describes the benefit received by the defendant as a consequential windfall of the claimant's unilateral conduct¹³¹. The fact that a mere causal connection would not generally be enough to establish the required link between the parties only confirms that the features of co-ordinated transaction situations are significantly different from those revealed by other unjust enrichment scenarios¹³².

¹²⁹ *Menelaou*, at [50] (Lord Clarke) and [92], [97] (Lord Neuberger). It is to be noted that Lord Carnwath concluded at [129] and [133] that for the claim to succeed, the claimant had to show via the rules of tracing a proprietary right over the money used to purchase the second house. In this case, this was possible because the proceeds of the sale of the first house were held on a Quistclose trust for the claimant, subject to a power for the Menelaous to use the money to purchase the second house.

¹³⁰ Mitchell and Watterson, *Subrogation*, [5.03] and [5.50]; Watterson, "Direct Transfers' in the Law of Unjust Enrichment" (2011) 64 C.L.P. 435, 459; Mitchell et al, *Goff and Jones*, [6-53]; Cutts, "Modern Money", p. 23; F. Wilmot Smith, "A Prudent Decision" (2019) 135 L.Q.R. 195, 198.

¹³¹ *Lowick*, at [28], [29] and [30] (Lord Sumption). Professor Stevens argues that, if taken seriously, the reasoning supporting *BFC* and *Menelaou* would lead to accept that a claim should be allowed in the example of the two stamps. Stevens, "Disaster", p. 599.

¹³² In *ITC*, at [52], Lord Reed said that a "but for" causal connection between the claimant's being worse off and the defendant's being better off is generally not sufficient to provide the required link, but in *Lowick*, at [30] (Lord Sumption) it was concluded that it would be unwise to try to fit cases like *BFC* and *Menelaou* into any broader category of unjust enrichment.

Chapter 5 Persistent Doubts

Previous chapters have shown that the link between the parties in the situations identified by *Investment Trust Companies v HMRC*¹ cannot be conveniently generalised into a single requirement. Notions like “transfer of value” and “loss through gain” are too abstract to reflect the diverse features explaining the link between the parties in these situations. Once we realise that unjust enrichment claims are premised on different links, it is tempting to assume that there is no point in analysing them through a single framework of common questions. Indeed, it has been suggested that a similar realisation has increasingly led civilian lawyers to disintegrate their law of unjustified enrichment. On this view, even if *ITC* does not necessarily lead to the problems of unwarranted analysis and overgeneralisation, it may still be argued that following its premises to their conclusion entails renouncing a unified approach to unjust enrichment claims.

This chapter takes a comparative perspective to evaluate this proposition. After comparing the German and French approaches to different restitutionary claims, it argues that a unified approach to unjust enrichment does not need to impose a single set of requirements to every restitutionary claim to play an important role in the exposition and development of the law. To do so, the chapter will proceed in four parts. The first part will review a further objection against a unified approach to unjust enrichment claims which draws support from the perceived failures of the German unified law of unjustified enrichment. The second part will describe the French fragmentary approach to some of the restitutionary claims grouped together in German law under a unified unjustified enrichment scheme. The third part will show that the French model does not necessarily offer an easier solution to the problems presented as failures of the German unified approach. Against this comparative background, the fourth part will argue that the German experience should not lead us to downplay the important advantages of analysing restitutionary claims through a unified framework.

¹ [2017] UKSC 29, [2018] A.C. 275 (“*ITC*”).

5.1 The Relevance Objection

It will be remembered that the methodological objection against the analysis offered in *ITC* points to the problems of unwarranted analogies and overgeneralisation which follows from treating the “at the expense of” question as one of the elements of a single cause of action. The previous chapters have proposed distinctions aimed at averting these difficulties by focusing on the specific features of the link between the parties in the situations covered by the judgment. But acknowledging the diverse form which the link between the parties can adopt across different cases may justify another kind of objection to the approach offered in *ITC*. We shall call it the “relevance objection”.

Legal categories may take their unity from a consideration of justice. For example, it is often accepted that contract law claims are based on the principle that legally valid agreements should be enforced. Alternatively, categories may take their unity from the structure or form of the claims they group together. For example, we can distinguish between a category of claims based on rights *in rem* exigible against the rest of the world and a category of claims based on rights *in personam* exigible only against certain individuals. The claims analysed in *ITC* do not seem to take their unity from any of these features. In fact, if what has been argued in previous chapters is correct, it may be that these claims are not even premised on requirements which can be consistently interpreted across different scenarios. This being the case, it may be argued that there is no reason to keep analysing these claims through a unified framework of common questions. If they do not reveal a single reason for liability, nor a single structure, not even a single kind of link between the parties, analysing these claims together may be considered as irrelevant as analysing together claims arising on the same date, or claims between nationals of the same countries².

² Stevens, “The Unjust Enrichment Disaster” (2018) 134 L.Q.R. 574, 576. Other forms of this objection in L. Smith, “Restitution: A New Start?” in P. Devonshire and R. Havelock (eds.), *The Impact of Equity and Restitution in Commerce* (Oxford 2019), 105; S. Hedley, *Restitution: Its Division and Ordering* (London 2001), 228–232.

The relevance objection seems particularly appealing in light of recent developments on the German law of unjustified enrichment, which has long been a point of reference for comparative lawyers. The German unified approach to the subject—which is sometimes simply described as the modern civilian approach³—has been praised as containing the most sophisticated solutions to the issues raised by obligations outside contracts and wrongs⁴, and even as providing a universal map for the comparative analysis of enrichment problems⁵. In an influential article, however, Professor Nils Jansen has argued that German courts and commentators should be abandoning their unified approach to unjustified enrichment on account of the structural differences existing between the claims which this approach aims to group together⁶. Perhaps unsurprisingly, Jansen’s thesis has received particular attention from detractors of the English unjust enrichment analysis, some of whom have invited common lawyers to pay closer attention to the German experience⁷.

The criticism of the German unified approach raises further doubts about the viability of the analysis offered in *ITC*. If it is true that despite centuries of development the predominant civilian model of unjustified enrichment has ultimately proven to be unhelpful, it may be sensible to assume that *ITC* deals with claims which are better expounded in distinct units. Yet this criticism also offers an interesting vantage point to assess the advantages of analysing these claims together. In fact, considered from a wider comparative perspective, the German experience does not seem as unfortunate as Jansen’s account may suggest. To see why, it is useful to consider his arguments against the

³ R. Zimmermann, “Unjustified Enrichment: The Modern Civilian Approach” (1995) 15 O.J.L.S. 403.

⁴ J. Dawson, *Unjust Enrichment: A Comparative Analysis* (Boston 1951), 91–92; B. Nicholas, “Unjustified Enrichment in the Civil Law and Louisiana Law” (1961) 36 Tul.L.Rev. 605, 610; J. Du Plessis, “Towards a Rational Structure of Liability for Unjustified Enrichment: Thoughts from Two Mixed Jurisdictions” (2005) 122 S.A.L.J. 142, 172.

⁵ E. Descheemaeker, “The New French Law of Unjustified Enrichment” (2017) 25 R.L.R. 77, 96.

⁶ N. Jansen, “Farewell to Unjustified Enrichment?” (2016) 20 Edin.L.R. 123.

⁷ Stevens, “Disaster”, p. 601. See also S. Hedley, “‘Farewell to Unjustified Enrichment?’ A Common Law Response” (2016) 20 Edin.L.R. 326.

experience of the other major civilian approach to unjustified enrichment, the one adopted by French law.

5.2 An Alternative Civilian Approach

Jansen's criticism to the German unified approach to unjustified enrichment rests on three related propositions. First, the different legal conceptions inspiring the unified theory of unjustified enrichment—the Roman *condictiones* and the natural law doctrine of restitution—were the basis of fundamentally different claims. Secondly, the situations analysed in German law as cases of “enrichment by transfer” would be better explained as giving rise to remedies governed by different parts of the law of obligations. Thirdly, the notion of unjustified enrichment may offer a general explanation for some claims, but it is too abstract to provide the unifying theme of an integrated field of the law. While these propositions may appear as controversial to some German lawyers, they seem well entrenched in French law, where important distinctions are drawn between the restitutionary claims available in situations which lie at the core of the German law of unjustified enrichment.

5.2.1 Roman *Conditiones* and the Doctrine of Restitution

If we believe Jansen, the modern civilian approach to unjustified enrichment was built upon two distinct intellectual foundations. One was the Roman *condictiones* or actions allowing the claimant to recover money or things in a variety of circumstances where the defendant was bound to return what he or she had received, particularly in cases of undue or failing transfers. The other was the natural law doctrine of restitution, which imposed a duty on the defendant to return any enrichment obtained by the infringement of a claimant's right, particularly a property right⁸.

French authors of the *ancien droit* were not particularly prolific on the topic of unjustified enrichment. Yet there seems to be little doubt that they were exposed to similar

⁸ Jansen, “Farewell”, pp. 125–130.

ideas⁹. This influence is apparent, for example, in the link traditionally recognised by French lawyers between some of the actions inspired in the Roman *condictiones* and an equitable duty sometimes imposed to the defendant to return any enrichment obtained at the expense of the claimant. An interesting example is provided by the *condictio indebiti*, the Roman action for claiming a performance rendered with the objective of fulfilling an obligation which did not in fact exist. This action has long been explained in French law as effecting an obligation similar to that of repaying a loan, or *mutuum*. A proper *mutuum*, however, only involved assets which could be weighted or counted. Money was the prime example. In cases where the claimant's performance did not involve such an asset, the influential writings of Cujas concluded that the *condictio indebiti* could not be assimilated to a *mutuum*, and should adopt instead the form of an equitable action, a *condictio ex bono et aequo*, recognised to reverse the defendant's enrichment¹⁰.

Unlike their German counterparts, French authors never integrated these ideas into a general unjustified enrichment theory. This is often explained by two developments. The first was the elevation by Domat of the notion of “legal basis” or *cause* as a requirement of every contract in French law. In his important works, Domat seems to have made the validity of every contract depend on the existence of a sufficient *cause*, the absence of which would render the contract void and trigger the restitution of all benefits received under it. According to a generally accepted opinion, by doing so he would have effectively superseded most of the Roman *condictiones* dealing with failed transfers, and rendered the development of a unified theory of unjustified enrichment a considerably less pressing issue¹¹. The second development was the casuistic approach taken by Pothier while discussing obligations originating outside contracts and delicts. The fact that this author

⁹ E. Schrage and B. Nicholas, “Unjust Enrichment and the Law of Restitution: A Comparison” in E. Schrage (ed.), *Unjust Enrichment. The Comparative Legal History of the Law of Restitution* (Berlin 1995), 21–22.

¹⁰ J.M. Augustin, “Introduction Historique à l'Enrichissement sans Cause en Droit Français” in V. Mannino and C. Ophèle, *L'Enrichissement sans Cause—La Classification des Sources des Obligations* (Paris 2007), 33.

¹¹ F. Goré, *L'Enrichissement aux Dépens d'Autrui* (Paris 1949), 23–24; C. Filios, *L'Enrichissement sans Cause en Droit Privé Français: Analyse Interne et Vues Comparatives* (Brussels 1999), 42–43; N. Davrados, “Demystifying Enrichment Without Cause” (2018) 78 *La.L.Rev.* 1123, 1234.

focused mainly on the Roman actions of *negotiorum gestio* and *condictio indebiti* has been blamed for the lack of recognition by the French Civil Code of 1804 of unjustified enrichment as a general source of obligations¹².

Neither of these developments was expressly acknowledged by the drafters of the French Civil Code as reasons for rejecting a unified notion of unjustified enrichment. The fact remains, however, that the French Code did not include a general clause on unjustified enrichment, nor any explicit reference to the common foundation of claims which earlier French authors sometimes related to this idea¹³. Apart from recognising the quasi-contracts of *negotiorum gestio* and *condictio indebiti*, and a number of other scattered provisions governing loosely related problems—like improvements on another’s land and payments made to persons lacking capacity—the French Code of 1804 provided no support for accepting broader ideas on enrichment liability. In fact, the approach adopted by such provisions is sometimes described in other civilian jurisdictions as epitomising a more traditional alternative to the integrated unjustified enrichment theory underpinning the German unified approach¹⁴. The Roman *condictiones* and the doctrine of restitution may have played a role in the development of some of the restitutionary claims provided by the French Code of 1804. But they did not crystalize in a general theory providing the basis for a systematically independent area of modern French law.

5.2.2 Different Sets of Rules for Different Claims

The label “enrichment by transfer” identifies an important subset of the restitutionary claims which German law brings together under its unified approach to unjustified enrichment¹⁵. These situations include cases of benefits conferred in pursuance of failed

¹² P. Roubier, “La Position Française en Matière d’Enrichissement sans Cause” in *L’Enrichissement sans Cause – La Représentation dans les Actes Juridiques. Travaux de l’Association Henri Capitant, vol. IV: Journées Néerlandaises* (Paris 1949), 42; Dawson, *Unjust Enrichment*, pp. 95–96; J.M. Augustin, “Les Classifications des Sources des Obligations de Domat au Code Civil” in V. Mannino and C. Ophèle, *L’Enrichissement sans Cause—La Classification des Sources des Obligations* (Paris 2007), 126–127.

¹³ Schrage and Nicholas, “Unjust Enrichment”, p. 22.

¹⁴ R. Feenstra, “Grotius: Doctrine of Unjust Enrichment as a Source of Obligation: Its Origin and Its Influence in Roman-Dutch Law” in E. Schrage (ed.), *Unjust Enrichment. The Comparative Legal History of the Law of Restitution* (Berlin 1995), 236.

¹⁵ Jansen, “Farewell”, p. 136.

contracts and benefits resulting from the discharge of non-existent obligations, which can sometimes take place in settings involving more than two parties. In French law, the restitutionary claims recognised in these situations have been customarily explained through doctrines belonging to different parts of the law of obligations. Three of them seem particularly relevant from a comparative perspective.

The first is the theory of nullity of contracts, or *nullité*. One of the distinctive features of the French approach to restitutionary claims is the difference recognised by French lawyers between the rules dealing with benefits conferred in performance of non-existent obligations generally, and the rules dealing specifically with benefits conferred in pursuance of contracts that are avoided¹⁶. In the case of avoided contracts, particular importance is attached to the fact that the legal ground initially explaining the provision of a benefit to the defendant was an agreement between the claimant and the defendant. This fact would justify the application of different rules governing limitation periods, the subsistence of contractual securities, and some restrictions to the measure of recovery based on the legal capacity of the parties to the contract¹⁷. While the claim available in this kind of situation is referred to as “restitution”, the rules governing this legal response are generally seen as part of the law of contracts¹⁸.

French law deals with other benefits conferred by transfer through the rules of undue payment, or *paiement de l'indu*. Following the model of the Roman *condictio indebiti*, French law explains the duty to return a benefit conferred in performance of an obligation which did not in fact exist as arising from a distinct quasi-contract¹⁹. The rationale behind this quasi-contract is found in the lack of legal ground for the retention of a benefit which cannot be justified as the payment of an existing debt. In light of this feature, it is difficult to deny that a very similar logic underlies the recognition of the

¹⁶ Zimmermann, “Unjustified Enrichment”, p. 409.

¹⁷ A. Sériaux, *Manuel de Droit des Obligations*, 3rd ed. (Paris 2018), 213–214.

¹⁸ French authors often emphasise that the historical origin of the theory of nullity should be traced not to the Roman *condictiones*, but to the doctrine of *restitutio in integrum*. See, for example, Goré, *L'Enrichissement aux Dépens*, p. 24.

¹⁹ Descheemaeker, “The New French Law”, pp. 80–81.

restitutionary claims arising from the quasi-contract of undue payment, and the restitutionary claims afforded by the theory of nullity described above²⁰. Despite the similarities, however, French courts have explicitly concluded that the availability of a restitutionary claim in each of these situations should be the subject of different sets of rules²¹.

Beyond situations falling within the scope of the theory of nullity of contracts and the quasi-contract of undue payment, French law recognises restitutionary claims on the basis of a general action in unjustified enrichment, or *enrichissement injustifié*, which is also known as the action *de in rem verso*. Unlike the claims based on the two previous doctrines, this general action was not originally included in the French Civil Code of 1804, but was developed later by courts and commentators in the years following its enactment²². After the recent Reform to the French Civil Code of 2016, the new Articles 1303 to 1303-4 recognise this action in situations where the law affords no other way of recovering benefits received by the defendant without legal ground²³. To a significant extent, these provisions seem to expand the same principle of liability underlying the narrower action of undue payment, in particular to cover situations involving more than two parties²⁴. However, each of these doctrines is subject to a distinct set of rules, which French lawyers refuse to subsume into a single regime²⁵.

²⁰ J. Carbonnier, *Droit Civil*, Vol. II (Paris, 2004), [1022] and [1220]. This conclusion is not unanimously endorsed. See P. Malaurie, L. Aynès, and P. Stoffel-Munck, *Droit des Obligations*, 10th ed. (Paris 2018) 607–608; Sériaux, *Obligations*, p. 214.

²¹ See, for example, Civ. 1re, 24 September 2002, D. 2003, 369, noted by J.L. Aubert.

²² As explained in section 5.3.1 below, this action was authoritatively recognised by the Cour de cassation in 1892 in the famous *Boudier* case.

²³ An English version of the new provisions by John Cartwright, Bénédicte Fauvarque-Cosson and Simon Whittaker is included as an appendix in J. Cartwright and S. Whittaker (eds.), *The Code Napoléon Rewritten. French Contract Law after the 2016 Reforms* (Oxford 2017), 410.

²⁴ I. Defrenois-Souleau, “La Répétition de l’Indu Objectif” (1989) 88 R.T.D.Civ. 243. See also B. Starck, H. Roland, and L. Boyer, *Droit Civil: Les Obligations. 2. Contrat*, 6th ed. (Paris 1998), [2126].

²⁵ Some of the reasons justifying these singularities are spelt out in P. Rémy, “Des Autres Sources d’Obligations” in F. Terré (ed.), *Pour une Réforme du Régime Général des Obligations* (Paris 2013), 36–37.

5.2.3 A General Maxim

This assortment of rules has not prevented French lawyers from acknowledging a common—diffuse—foundation underpinning restitutionary claims²⁶. This common foundation was noted during the debate preceding the recent Reform to the French Civil Code, and it was relied upon by some commentators to justify the introduction of limited modifications to the rules governing these different claims.

For example, the new Articles 1352 to 1352-9 of the French Civil Code subject the restitutionary claims based on the theory of nullity and those based on the quasi-contract of undue payment to a new unified set of rules governing the measure of the claimant's recovery. Underlying this innovation seems to be the shared restitutionary objective pursued by both doctrines. As noted above, these are usually described as restoring a benefit retained by the defendant without a valid legal ground²⁷. Likewise, the new Article 1302-1 of the French Civil Code effectively removes the requirement of an error on the part of the claimant in most common situations giving rise to an action in undue payment, thus bridging one of the most noticeable differences between this action and the action *de in rem verso*. This modification could be understood as confirming that the action in undue payment, just like the action *de in rem verso*, reflects the law's concern for preventing the defendant's enrichment, and not for reversing every consequence of the claimant's mistake²⁸.

²⁶ See, for example, Malaurie et al, *Droit des Obligations*, pp. 613–614; F. Terré, P. Simler, Y. Lequette, and F. Chénéde, *Droit Civil. Les Obligations*, 12th ed. (Paris 2018), [1803]–[1810]; A. Bénabent, *Droit des Obligations*, 17th ed. (Paris 2018), [475]–[478].

²⁷ Interestingly, these provisions do not apply to the measure of recovery in a general unjustified enrichment claim. O. Deshayes, T. Genicon, and Y.M. Laithier, *Réforme du Droit des Contrats, du Régime Général et de la Preuve des Obligations: Commentaire Article par Article*, 2nd ed. (Paris 2018), 917–922; G. Chantepie and M. Latina, *La Réforme du Droit des Obligations: Commentaire Théorique et Pratique dans l'Ordre du Code Civil*, 2nd ed. (Paris 2018), 944–945.

²⁸ Under the new provisions, the claimant does not need to show an error where there is no debt justifying the payment (*indu objectif*), nor where despite existing a debt, the claimant pays the wrong person (*indu subjectif actif*). The only cases where an error must be demonstrated is those where the claimant pays a person who, despite not being his or her creditor, was owed the debt by another person (*indu subjectif passif*). For commentary, see Terré et al, *Les Obligations*, [1292].

Importantly, however, the French adoption of these limited modifications does not mean that a unified and systematically independent area of the law can be identified with unjustified enrichment. The rules governing these and other restitutionary claims are still presented as belonging to different pockets of the law of obligations, and the idea of unjustified enrichment is predominantly considered as a maxim of justice existing at a very high level of generality. Compared to the unified approach described by Jansen as the one adopted by German law, the complex web of doctrines and rules which in French law may relate to this broad maxim seems indeed fragmentary²⁹.

5.3 The Challenges of Fragmentation

On the basis of the three propositions explained above³⁰, Jansen argues that a unified approach to unjustified enrichment like in Germany produces conceptual difficulties which eventually lead to its dissolution. To substantiate this claim, he points to specific problems faced by German lawyers while applying unjustified enrichment rules in different situations. That no unified approach is required to deal with the restitutionary claims arising in these situations is confirmed by the fact that French lawyers have traditionally analysed them quite separately from general theories of enrichment liability. But this is not the only insight revealed by a comparison of the German and French models. The French experience also shows that renouncing a unified approach may result in difficulties as serious as those troubling German lawyers. This section explores them in three different contexts: restitutionary claims in three-party situations, restitutionary claims following the unwinding of failed contracts, and restitutionary claims arising from quasi-contracts.

5.3.1 Three-party Situations

German courts and commentators have struggled to fit unjustified enrichment rules into some three-party situations. A particularly controversial example is provided by the case

²⁹ For accounts describing the French model as “fragmentary”, see Filios, *L’Enrichissement sans Cause*, p. 47; Du Plessis, “Towards a Rational Structure”, p. 155.

³⁰ See section 5.2 above.

where X gives Y a cheque which is countermanded but is nonetheless paid by bank Z. The conventional treatment of this kind of case in German law, which is an extension of the principles behind restitution of enrichment by transfer in two-party settings, focuses on the performances discharging the underlying debt relationship between the parties: X would normally give the cheque to discharge an obligation towards Y, and Z would normally pay out the cheque to discharge an obligation towards X. If X's obligation does not exist, X may recover from Y. If Z's obligation does not exist, Z may recover from X. If none of these obligations exist, X should recover from Y and Z should recover from X, except if the cheque is paid without a valid order from X, where Z may recover directly from Y. If, however, a valid order once existed but was later countermanded, additional considerations need to be introduced to protect Y's good faith reliance on the validity of payment³¹. According to Jansen, this overly complex and ultimately unpredictable set of rules and exceptions is considerably simplified when the position of the parties is directly analysed in light of what he refers to as general contract law arguments, like the importance of respecting Y's good faith receipt, and the convenience of enforcing X's responsibility for statements made in contractual relationships³².

French law has long recognised this kind of argument dealing with restitutionary claims in similar three-party situations. A clear example can be found in the doctrine of apparent mandate, or *mandat apparent*. Article 1154 of the French Civil Code provides that, as a general rule, the principal will only be liable for acts executed by an agent within the scope of the conferred powers. Where Z purports to pay Y acting on behalf of X but beyond these powers, French law will generally assume that no effective transfer has taken place between Z and Y, and thus that a claim to recover what Y received may be

³¹ Where there is no valid payment order, Z's transfer to Y cannot be properly construed as a performance from X to Y. Until recently, it was widely accepted that if Y receives the payment without knowing of X's countermandate, the restitutionary claim should be brought by X, because Y should not be made responsible for a misunderstanding taking place between X and Z. It should be noted, however, that in 2015 the German Federal Court departed from this position and concluded that a bank paying without a valid mandate should always be afforded a direct claim against the recipient, even if the latter was not aware of a countermandate. On the difficulties posed by this kind of situations, sometimes referred to as "order situations", see S. Meier, "Mistaken Payments in Three-party Situations: A German View of English Law" [1999] C.L.J. 567.

³² Jansen, "Farewell", p. 140.

available³³. But if Y can show that he or she had a legitimate reason to believe that Z was acting within the powers conferred by X, the transfer will be deemed as effective and no claim will lie against Y. Echoing Jansen’s reasoning, French courts have often explained this solution as a way of respecting Y’s good faith³⁴ and enforcing X’s responsibility for statements³⁵.

Unfortunately, this kind of argument seems to have been insufficient to provide adequate solutions in many other three-party restitution scenarios. A conspicuous example is the *Boudier* case, where the claimant sold fertiliser to a tenant farmer. After applying the fertiliser to the land but before paying its price, the tenant farmer became insolvent and was forced to return the fertilised land to the defendant landlord, who as a result received a benefit directly from the tenant farmer but at the expense of the claimant³⁶. In the decades following the enactment of the Code, French lawyers tried to reconcile claims for benefits received in similar three-party situations with the rules provided for the quasi-contract of *negotiorum gestio*, or *gestion d’affaires*, an institution closely related to the contract of mandate³⁷. Eventually, however, they were forced to accept that these rules did not reflect adequately the genuine basis of the claimant’s right, which did not rely on a real or fictional agreement between any of the parties, but exclusively on the equitable maxim forbidding the defendant’s unjustified enrichment. This conclusion paved the way for the judicial recognition of the action *de in rem verso*³⁸.

The recognition of this action took place in a context where there was no general theory explaining the scope and limits of unjustified enrichment claims in less complicated two-party situations. The fragmentary approach of French law to these situations meant that the rules governing other well-known restitutionary claims—and particularly undue

³³ P. Puig, *Contrats Spéciaux*, 7th ed. (Paris 2017), 730–734; H. Kenfack and S. Ringler, *Droit des Contrats Spéciaux* (Paris 2017), 231.

³⁴ Civ. 3e, 15 December 2004, GP 2005, IV, 2732, noted by J.J. Barbiéri.

³⁵ Cass. Ass. Plén., 13 December 1962, D. 63, 277, noted by J. Calais-Auloy.

³⁶ Req. 15 June 1892, S. 1893, I, 281, noted by J.E. Labbé.

³⁷ Filios, *L’Enrichissement sans Cause*, p. 81. On the link between *mandat* and *gestion d’affaires* in French law, see Rémy, “Des Autres Sources d’Obligations”, p. 33.

³⁸ J. Flour, J.L. Aubert, and E. Savaux, *Les Obligations*, vol. II: *Le Fait Juridique*, 14th ed. (Paris 2011), 41.

payment—had not been generalised into considerations applicable to situations not expressly covered by the Code. So instead of carefully extending the conceptual implications of established rules to decide three-party restitution situations like the one presented in *Boudier*, French courts created an original action subject to extremely loose requirements. The Cour de cassation famously noted that this action derives

“[F]rom the principle of equity which forbids enrichment at the expense of another, and since it has been regulated by no provision of the enacted law, its exercise is subject to no precise rules; it is sufficient that the plaintiff allege and undertake to prove that as a result of some sacrifice or act on his part he has procured an advantage to the defendant”³⁹.

That this action was unreasonably broad was soon noted by French authors, who in the following years devised a number of important restrictions. But the somehow inorganic way in which these restrictions were developed resulted in a body of rules riddled with problems. The so-called rule of subsidiarity provides a clear illustration. The traditional view is that one of the main mechanisms keeping the action *de in rem verso* within reasonable boundaries is the requirement that no other action should be open to the claimant to obtain what belongs to or is owed to him or her, and particularly actions arising from undue payment and *negotiorum gestio*⁴⁰. To date, there is significant uncertainty about the kind of cases where this rule is applicable. But in the few cases where the rule unquestionably applies, it allows recovery in circumstances under which in most legal systems, and certainly the German, no recovery would be available. Thus where Y receives a benefit as a consequence of the performance of a contract between Z and X, it seems that the requirement of subsidiarity would be satisfied if, unable to recover from X

³⁹ The translation is from Nicholas, “Unjustified Enrichment”, p. 622. Roman law recognised an *actio de in rem verso*, but this action was not intended to be applied as a general remedy against unjustified enrichment. R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford 1996), 878–879.

⁴⁰ A detailed analysis of this rule can be found in M. Campbell, *The Subsidiarity of Unjust Enrichment: Anglo-Franco-Scots Perspectives*, PhD Thesis (Edinburgh 2019), ch. 3.

due to its insolvency, Z brings a claim directly against Y. Unsurprisingly, this rule has been criticised for undermining the contractual allocation of risks as between X and Z⁴¹.

It may be true that the solutions adopted by German law in three-party restitution situations can be excessively complicated. But the simple renunciation of any unjustified enrichment analysis and the hope that contractual arguments will do all the work does not seem a promising alternative. Reinterpreting the principles underlying claims like the action in undue payment in light of these arguments would further obscure the rules applicable in three-party situations which, as those dealt with by French law through the action *de in rem verso*, cannot be accommodated within a contractual logic. Banished from their place along other better-known instances of restitutionary liability, these situations are likely to be abandoned to judicial discretion or unarticulated notions like the French subsidiarity. This, of course, was no mystery to the drafters of the German Civil Code, whose decision to remove the action *de in rem verso* from German law formed part of a deliberate effort to provide a principled solution to the enrichment issues arising in three-party restitution situations⁴².

5.3.2 Failed Contracts

German law has traditionally drawn a sharp line between cases of restitution after the termination of contracts and cases of restitution after the avoidance of them. In the first group of cases, we are concerned with the unravelling of a contract on the ground of its non-performance; in the second, with the annulment of a contract as a consequence of defects of consent or the lack of other requirement for its validity. In both groups of cases, unwinding the failed contract generally requires the parties to return the benefits received under it. In each of these groups, however, restitution is governed in German law by different rules belonging to different parts of the law. The rules for restitution after

⁴¹ Descheemaeker, “The New French Law”, p. 93. Similar difficulties affect many other of the rules governing critical aspects of the action *de in rem verso*, including the test to define the required link between claimant and defendant and the effect of the claimant’s fault in the measure of recovery.

⁴² E. von Caemmerer, “Problèmes Fondamentaux de l’Enrichissement sans Cause” (1966) 18 R.I.D.C. 573, 588; R. Zimmermann and J. Du Plessis, “Basic Features of the German Law of Unjustified Enrichment” [1994] R.L.R. 14, 18; S. Meier, “Mistaken Payments”, p. 598.

termination are considered to belong to the law of contracts; the rules for restitution after avoidance, to the law of unjustified enrichment⁴³.

According to Jansen, the law of unjustified enrichment has proved inadequate to accommodate considerations of critical importance in cases of restitution after avoidance. Two main reasons are provided. First, unwinding a contract through the recognition of independent unjustified enrichment claims shifts the analysis away from the main challenge in this context, which is to undo reciprocal performances which are mutually connected. Secondly, the abstract logic of unjustified enrichment claims would be blind to policies and considerations like the protection of minors which are particularly relevant while assessing the consequences of avoidance. These inconveniences would have led the German legislature and the majority of commentators to look for solutions outside the law of unjustified enrichment, and particularly among the contractual principles governing restitution after termination⁴⁴.

Unlike the German Civil Code, the original version of the French Civil Code did not include a set of rules dealing specifically with the restitution of benefits conferred in performance of failed contracts. French courts and commentators developed the applicable rules by working out the implications of the principles underpinning the theory of nullity of contracts referred to above. This theory required the rejection of all the consequences following from a non-effective contract, or as French authors would have it, its “retroactive disappearance”⁴⁵. As termination for breach was presented in the Code as a kind of sanction depriving a validly constituted contract of its normal effects (*condition résolutoire*), it was eventually accepted that the principle of retroactive disappearance should govern the destiny of benefits conferred in this context as well⁴⁶.

⁴³ R. Zimmermann, “Restitutio in Integrum” (2005) 10 Uniform Law Review 719, 721; S. Meier, “Unwinding Failed Contracts: New European Developments” (2017) 21 Edin.L.R. 1, 11.

⁴⁴ Jansen, “Farewell”, p. 142.

⁴⁵ Terré et al, *Les Obligations*, [576]–[578].

⁴⁶ See, for example, Civ. 3e, 29 January 2003, JCP 2003, II, 10116, noted by Y.M. Serinet.

As far as avoided contracts were concerned, the retroactive disappearance principle seemed to be appropriate. If the contract was invalid because of a defect existing since its formation, it was reasonable to conclude that, in general, the law had to restore the parties to the same position they occupied before the contract was concluded⁴⁷. Importantly, the acceptance of this principle did not prevent the recognition of exceptions where policy considerations like those invoked by Jansen so required. Thus, unlike their German counterparts, French lawyers did not find many difficulties in tempering the effects of retroactivity where reciprocal restitution between the parties was impossible, or where one of the parties to the avoided contract was a minor. The latter situation is specifically addressed by Article 1352-4 of the French Civil Code, which provides that a minor's liability to make restitution after the avoidance of a contract is limited to money or property received and turned into his or her profit⁴⁸.

French lawyers soon realised, however, that extending the rationale of retroactive disappearance to restitutions following initially valid but terminated contracts produced significant inconveniences. In contrast to what happened in the context of initially defective contracts, forcing the parties to reverse their respective performances in cases where a valid contract was mutually performed over an extended period before being terminated was seldom considered an adequate solution. But once retroactivity was accepted as the default response to non-effective transactions, it was difficult to distinguish between those contractual performances which should be restored and those which should not⁴⁹. Before the Reform, the conventional position was that restitution should not be available in contracts where performance was continuous or in instalments (*contrats à exécution successive*). Today, Article 1229 al. 3 of the French Civil Code limits the availability of restitution to those cases where performance resulted in a “final utility” to the parties (*utilité finale*), as opposed to cases where performance was intended to be

⁴⁷ Bénabent, *Droit des Obligations*, [230]; Malaurie et al, *Droit des Obligations*, [723].

⁴⁸ Terré et al, *Les Obligations*, [577] and [1817].

⁴⁹ T. Genicon, *La Résolution du Contrat pour Inexécution* (Paris 2007), [814].

continuous (*utilité continue*), as would normally happen in contracts of employment or leases⁵⁰.

Such distinctions have long troubled French commentators, and the equivocal way they are presented by the Reform show that they are still not conclusively settled. But they do not appear particularly problematic to Jansen, who seems to believe that civilian systems would be better off by subjecting the cases of restitution after termination and avoidance to the same set of contractual principles. This is not a new idea, nor one which had brought about acceptable solutions in the past. In fact, German lawyers tried for decades to bring the unjustified enrichment rules governing the unwinding of avoided contracts in line with the contractual rules applicable to restitution after termination, only to find out that these contractual rules were unsatisfactory and to replace them completely when the German law of obligations was reformed in 2001. Instead of superseding unjustified enrichment rules, the modifications introduced aimed at coordinating the contractual rules appropriate in the context of restitution after termination, with the unjustified enrichment rules appropriate in the context of restitution after avoidance⁵¹. This seems to be also the current trend across other civilian systems, where recent developments regarding restitution after failed contracts are better described not as a steady replacement of unjustified enrichment rules by contract rules, but as a process of synchronisation of both sets of rules into a special regime⁵².

Since the Reform, a similar thrust can be identified behind the rules on *restitutions* adopted by French Civil Code in the new Articles 1352 to 1352-9. To a significant extent, these rules can be read as a consequence of French lawyers' increasing realisation that a single principle of retroactive disappearance is not always appropriate to explain restitution⁵³. But the path leading to this conclusion has not been free of important

⁵⁰ Terré et al, *Les Obligations*, [105] and [822]. See further, S. Rowan, "Termination for Contractual Non-performance" in J. Cartwright and S. Whittaker (eds.), *The Code Napoléon Rewritten. French Contract Law after the 2016 Reforms* (Hart Publishing, 2017), 325.

⁵¹ Meier, "Unwinding Failed Contracts", p. 12.

⁵² Zimmermann, "Restitutio in Integrum", pp. 727–728; Meier, "Unwinding Failed Contracts", p. 28.

⁵³ Terré et al, *Les Obligations*, [1811].

challenges. If German lawyers had a head start on the current civilian trend towards synchronisation, this seems to have been precisely because their received distinction between the contractual rules of restitution after termination and enrichment-based rules of restitution after avoidance saved them the trouble which French lawyers went through to recognise the different rationales underpinning restitutionary liability in these different contexts.

5.3.3 Quasi-contracts

Unlike German law, French law still classifies a significant part of the obligations arising outside contracts and wrongs under the category of quasi-contracts⁵⁴. It has been noted many times that this category misleadingly suggests that it would bring together claims similar to those originating in contracts, a conclusion described as false, dangerous, and ultimately useless⁵⁵. Although these objections have never been convincingly rebutted⁵⁶, from time to time French courts and commentators press the idea of quasi-contracts into service to justify diverse claims not fitting the other sources of obligations.

A notorious example is provided by a series of decisions by the Cour de cassation recognising a quasi-contractual claim against companies which for publicity purposes made potential clients believe that they had won a lottery. The trick worked as follows. A company sent letters recognising potential clients as the winners of a sum of money, the receipt of which required the clients to provide certain specified information. After proceeding as required, the clients eventually discovered that the letters also said in fine print that the award of the money was conditioned upon the results of an additional lottery. There was little doubt that this practice was reprehensible. But French courts faced significant difficulties in trying to explain the companies' liability on the basis of obligations arising from a contract or a wrong. The Cour de cassation found a handy tool

⁵⁴ E. Descheemaeker, "Quasi-contrats et Enrichissement Injustifié en Droit Français" (2013) R.T.D.Civ. 1.

⁵⁵ H. Vizioz, *La Notion de Quasi-contrat, Étude Historique et Critique* (Bordeaux 1912) 314; F. Zenati-Castaing and T. Revet, *Cours de Droit Civil: Contrats, Théorie Générale-Quasi-contrats*, (Paris 2014), [225].

⁵⁶ But see M. Douchy, *La Notion de Quasi-contrat en Droit Positif Français* (Paris 1997), offering an influential reinterpretation of the notion of quasi-contracts.

for this purpose in the notion of quasi-contract. This allowed it to conclude that a company announcing a gain to an identified client without making clear that obtaining such gain was a matter of chance incurred in a voluntary, yet non-contractual, obligation to deliver on the gain⁵⁷.

This perceived flexibility of the quasi-contractual category recently confronted the different projects for the Reform of the French Civil Code with a dilemma. On the one hand, the notion appeared regularly in judicial decisions and many authors believed it could be helpfully used for the development of the law. On the other hand, the notion had proved to be as vague and indeterminate as any residual category, and could be used to justify a non-voluntary obligation in almost every possible context⁵⁸. The Reform's solution to this dilemma was to preserve the category while attempting to narrow down its scope by making its underlying rationale explicit. Thus, the new Article 1300 of the French Civil Code emphasises that quasi-contracts are events originating "a duty in a person who benefits from them without having a right to do so"⁵⁹.

This rationale is not a novelty among French lawyers. Since the times of the first commentators of the French Civil Code of 1804, quasi-contractual obligations have been explained as effecting a duty to restore benefits obtained without a legal ground at the expense of a person not intending to confer them⁶⁰. Yet this notion was not generally used to guide the application of the rules governing the disparate quasi-contractual claims recognised by French law. Unlike those arising from contracts or delicts, these claims developed quite independently from any unifying theme⁶¹. Because of this, quasi-contracts are still widely regarded as a kind of hybrid category where obligations equivalent to those originating in contracts can be attached to non-contractual settings⁶².

⁵⁷ Cass. Ch. Mixte, 6 September 2002, D. 2002, 2963, noted by D. Mazeaud.

⁵⁸ Terré et al, *Les Obligations*, [1264].

⁵⁹ This solution was proposed in P. Catala, *Avant-projet de Réforme du Droit des Obligations et de la Prescription* (Paris 2005).

⁶⁰ C. Toullier, *Droit Civil Français*, vol. XI, 4 ed. (Paris 1824), [16].

⁶¹ Rémy, "Des Autres Sources d'Obligations", p. 34.

⁶² P. Le Tourneau, "Quasi-contrat" in *Encyclopédie Juridique Dalloz. Répertoire de Droit Civil* (Paris 2018), [52].

Unsurprisingly, from time to time quasi-contractual claims are subject to the kind of fictional reasoning which in English law has been condemned as hopeless⁶³.

This was exactly what happened after the recognition of the quasi-contractual claims arising in the publicity lottery cases referred to above. No agreement between the parties could be identified in these cases. On the contrary, the fine print included in the misleading letters made it plain that the defendant did not agree to confer a benefit upon the claimant. The Cour de cassation was at pains to conclude that the event giving rise to liability was not an agreement, but the voluntary action which induced the claimant to mistakenly assume the existence of an intention on the part of the defendant to confer a benefit. However, some commentators construed the decisions of the Cour as recognising the source of the defendant's obligation in a "quasi-agreement" between the parties⁶⁴. This kind of analysis reflects the old idea according to which quasi-contractual obligations would originate in a fictional contract operating between claimant and defendant⁶⁵.

Jansen acknowledges that the unifying notion of unjustified enrichment helped overcome the undesirable categories of quasi and fictional contracts in German law. He implies that now that these categories are banned there would be no need to recognise a systematically independent law of unjustified enrichment⁶⁶. From the perspective of the systematisation achieved by German lawyers, it may indeed be tempting to believe that renouncing the unitary notion of unjustified enrichment will come at no significant cost. But the French experience suggests that without the discipline imposed by a stable conceptual framework, the analysis of obligations outside contracts and wrongs could easily be carried away by the pressing need to accommodate changing realities. The reluctance of French law to overcome the notion of quasi-contract, despite more than a

⁶³ P. Birks, "Definition and Division: A Meditation on Institutes 3.13" in P. Birks (ed.), *The Classification of Obligations* (Oxford 1997), 18.

⁶⁴ E. Terrier, "La Fiction au Secours des Quasi-contrats ou l'Achèvement d'un Débat Juridique" (2004) 17 *Recueil Dalloz* 1179.

⁶⁵ R. Libchaber, "Le Malheur des Quasi-contrats" (2016) 258 *Droit & Patrimoine* 73. This kind of reasoning can be also found in J. Honorat, "Rôle Effectif et Rôle Concevable des Quasi-contrats en Droit Actuel" (1969) *R.T.D.Civ.* 653.

⁶⁶ Jansen, "Farewell", pp. 144–145, 147.

century of ferocious criticism, should remind us that the risk of going back to fictional reasoning can never be completely eradicated.

5.4 Inconclusive Concerns

The French experience shows that leaving the difficult issues raised by a unified approach to unjustified enrichment to other parts of the law may mean changing one set of problems for another, with the additional inconvenience of opening the door to fictional categories like the French quasi-contracts. To be sure, any legal system may eventually realise there are good reasons for rejecting a unified approach anyway. However, that the notion of unjustified enrichment rests on diverse foundations, or that it works on a high level of generality, do not appear as convincing reasons for taking such a step. In what follows, it will be argued that, despite these circumstances, a unified unjustified enrichment category might play an important role in the exposition and development of the law.

5.4.1 Legal Categories as Integration Devices

Integrating different legal conceptions is a process well-known to civilian lawyers. In fact, this process is traditionally conceived as necessary for rendering comprehensible the collection of dispersed solutions provided by legal materials⁶⁷. To discharge this task, legal scholarship develops principles intended to explain previous decisions and guide the solution of future cases⁶⁸. These principles, in turn, are organised around legal categories, which allow us to present the solutions adopted by the legislature or the courts in particular situations as part of an intelligible order⁶⁹.

Legal categories often integrate solutions previously explained as the consequence of independent ideas. A famous example is provided by the general clause on extra-contractual liability contained in the old Article 1382 and the new Article 1240 of the

⁶⁷ B. Starck, H. Roland, and L. Boyer, *Introduction au Droit*, 5th ed. (Paris 2000), 103; J. Ghestin, “Les Données Positives du Droit” (2002) R.T.D.Civ. 11.

⁶⁸ C. Jamin and P. Jestaz, *La Doctrine* (Paris 2004), 230; S. Pimont, “A Propos de l’Activité Doctrinale Civiliste” (2006) R.T.D.Civ. 707.

⁶⁹ G. Cornu, *Droit Civil. Introduction au Droit*, 13th ed. (Paris 2007), 104. This understanding of the notion of “legal category” is sometimes described as a distinctive feature of legal reasoning in the civilian tradition. See, for example, G. Samuel, *The Law of Obligations* (Cheltenham 2010), 2–3.

French Civil Code. As is well known, this clause sets out the overarching principle underpinning the French law of delict and was one of the few provisions on the basis of which French courts and commentators have developed most of the rules governing claims arising from civil wrongs. The clause's extremely broad terms were deliberately designed to generalise the common features of a number of claims arising from nominate wrongs which Roman law kept clearly separated⁷⁰.

Proceeding in this way is by no means an eccentricity of French law, as shown by the recent evolution of the German rules on liability for the defective performance of contractual obligations. The German Civil Code originally dealt with liability for defective performance through an intricate set of rules which had evolved from ideas originated both in Roman law and the work of the authors of the *ius commune*. Among many other peculiarities, these rules recognised claims applicable to some contracts but not to others, and contemplated separate regimes establishing various forms in which a breach could take place between the parties⁷¹. Eventually, the solutions provided by these rules were assimilated into a common regime inspired by the unifying theme of avoiding a deviation from the original plan of the agreement between the parties⁷². Just like the French category of extra contractual liability, the current German category of breach of contract seem to rest on quite diverse foundations.

A similar propensity to integrate ideas from different origins seems to be at the core of the efforts to harmonise European Private Law. This is particularly clear in the case of restitutionary obligations arising outside contracts and wrongs, where specific differences separate the solutions adopted by different European legal systems. Obvious examples are immediately apparent when we consider how these systems conceptualise the reasons for restitution (unjust factors or absence of legal ground), the measure of

⁷⁰ E. Descheemaeker, *The Division of Wrongs: A Historical Comparative Study* (Oxford 2009), 113, 122–123.

⁷¹ For an overview, see Zimmermann, *The Law of Obligations*, p. 783.

⁷² S. Grundmann and M. Schäfer, “The French and the German Reforms of Contract Law” (2017) 13 *European Review of Contract Law* 459, 475.

recovery (enrichment received or enrichment surviving), and the link between the parties to restitutionary claims (requiring or not a correspondence between enrichment and impoverishment)⁷³. These differences reflect ideas which are not necessarily consistent with one another. But it is difficult to deny that the search for conceptual structures flexible enough to bring these ideas together is not only a commendable project, but one which has already brought about important developments in recent decades⁷⁴.

Jansen suggests that the reason why the German approach to unjustified enrichment must inevitably dissolve is that it rests on legal conceptions which had originally been mutually inconsistent⁷⁵. But in doing so the unified approach to unjustified enrichment does not seem to differ greatly from other conventional approaches to many areas of the law, including the French approach to extra contractual-liability, the German approach to liability for breach of contract, and the comparative approach underlying the efforts to harmonise European Private Law⁷⁶. The process of integrating individual solutions into general categories may sometimes lead to difficulties which justify keeping those categories under permanent revision⁷⁷. Nonetheless, the fact that a category is built over ideas which would once have been considered as inconsistent with one another should not be a problem in and of itself.

5.4.2 Nuanced Generalisations

Jansen suggests that a unified unjustified enrichment category prevents the law from being responsive to the different functions it should serve in different contexts⁷⁸. On its face, French law may appear to confirm this concern. The vague terms in which the general

⁷³ R. Zimmermann, “Comparative Law and the Europeanization of Private Law” in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, 2nd ed. (Oxford 2019), 572–574.

⁷⁴ D. Visser, “Unjustified Enrichment in Comparative Perspective” in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, 2nd ed. (Oxford 2019), 962.

⁷⁵ Jansen, “Farewell”, p. 125.

⁷⁶ The modern law of contracts provides a further illustration of this point. As noted by Professor MacQueen, “underneath and indeed preceding it lay a law of particular contracts, for each of which the substance of the generalisation was not infrequently inapplicable at least in part”. H. MacQueen, “The Sophistication of Unjustified Enrichment: A Response to Nils Jansen” (2016) 20 *Edin.L.R.* 312, 324.

⁷⁷ S. Pimont, “Peut-on Réduire le Droit en Théories Générales?” (2009) *R.T.D.Civ.* 417.

⁷⁸ Jansen, “Farewell”, pp. 124, 148.

action in unjustified enrichment was first recognised by French courts led some commentators to note that the entirety of private law could be replaced by a general rule forbidding unjustified enrichment⁷⁹. Recognising a general action of this broad type, however, is by no means the only form which a unified category could take.

The proof is provided by Jansen himself, who reminds us that the general principles underpinning the German unjustified enrichment category are currently articulated in groups of cases where claims are subject to specific requirements designed to balance the different interests that are at stake. These cases are divided depending on the way the defendant's enrichment is brought about: transfer, infringement upon another person's property, expenditure made on another's property, and payment of another's debt. This differentiated approach allows the law to be interpreted and applied in distinct units without assuming that the same abstract and general criteria should govern the recognition of a claim in every possible situation⁸⁰.

It could be argued that such a nuanced approach would effectively amount to splitting up the unjustified enrichment category into totally independent claims⁸¹. Yet distinguishing types of claims is not the same as accepting fragmentation. The way in which the French model of isolated restitutionary claims has been integrated in recent decades by Spanish lawyers provides a useful illustration. Following the French model, the Spanish Civil Code originally recognised disparate set of rules dealing with restitution in specific situations⁸². Spanish authors eventually realised that these rules were too narrow to cover all the cases where restitution may be appropriate, so the scattered solutions inherited from French law were increasingly organised in groups of cases inspired in the Germany typology⁸³. The resulting groups include rules recognising claims which differ significantly. But approaching these different claims through a unified

⁷⁹ G. Ripert, *La Règle Morale dans les Obligations Civiles*, 4 ed. (Paris 1949), 246.

⁸⁰ von Caemmerer, "Problèmes Fondamentaux", p. 591.

⁸¹ Jansen, "Farewell", p. 135.

⁸² P. Del Olmo and X. Basozabal, "Unjustified Enrichment in Spanish Law" [2017] R.L.R. 104.

⁸³ L. Díez-Picazo, "La Doctrina del Enriquecimiento Injustificado" in L. Díez-Picazo and M. De la Cámara, *Dos Estudios sobre el Enriquecimiento sin Causa* (Madrid 1988), 100, 116, 127.

framework allowed Spanish authors to develop principles that gradually extended beyond the original rules and apply them to situations not previously foreseen by the French Civil Code. These principles have been recognised by the Spanish Tribunal Supremo in discussing claims for the disgorgement of profits arising from an infringement of personality rights, and are also reflected in Article 31.1.6 of the Spanish Law of Unfair Competition (*Ley de Competencia Desleal*), which recognises a claim inspired in the German *Eingriffskondiktion* for the disgorgement of profits⁸⁴. While it may not be immediately apparent, there is a significant difference between the French fragmentary approach and a typological interpretation of the German unified approach to restitutionary claims⁸⁵.

5.4.3 Advantages of a Unified Scheme

Jansen argues that the unjustified enrichment generalisation is so abstract that it cannot play any concrete role in the development of the law⁸⁶. Again, comparing the German and French experiences allow us to see that there are at least three important and concrete advantages of adopting this idea as a unifying theme.

First, recognising unjustified enrichment as a unifying theme may help in extending the scope of existing claims to deserving situations that are not previously covered. Until the recent Reform to the French Civil Code, the action in undue payment was only available in cases where the undue performance consisted in a specific thing or a sum of money, a restriction inherited from the Roman *condictio indebiti*⁸⁷. Understanding this action as part of a body of law preventing the defendant's unjustified enrichment led some French lawyers to suggest that there was no reason for excluding recovery in cases involving benefits provided in other ways⁸⁸. Following indications from

⁸⁴ C. Vendrell, "La Acción de Enriquecimiento Injustificado por Intromisión en los Derechos al Honor, a la Intimidación y a la Propia Imagen" (2012) 65 Anuario de Derecho Civil 1107.

⁸⁵ A similar point is made on the basis of the South African experience in MacQueen, "The Sophistication", pp. 321–322.

⁸⁶ Jansen, "Farewell", pp. 144, 147.

⁸⁷ Zimmermann, *The Law of Obligations*, p. 854.

⁸⁸ Bénabent, *Droit des Obligations*, [461].

authors reasoning along these lines, the Reform extended the scope of the claim in undue payment to cover services and the use value of goods, a solution which is reflected in the new Articles 1352-3, 1352-7 and 1352-8 of the French Civil Code.

Conversely, the recognition of unjustified enrichment as a unifying theme may help to restrict the scope of a recognised claim by identifying situations where liability does not follow a single rationale. Again, the French action in undue payment provides a convenient illustration. A feature of this action is that its measure of recovery depends on whether the defendant knew that he or she was receiving an undue benefit, in which case liability is significantly aggravated: not only must the defendant deliver up the transferred asset or its value, but he or she is also liable for any reduction in the value of the asset, for applicable interest and for all the fruits taken⁸⁹. Noting that this difference cannot be explained only in the existence of an obligation to return an unjustified benefit, some commentators have argued that the French action in undue payment would in fact roll-up two claims into one: a claim based on the defendant's unjustified enrichment, and a claim based on the defendant's wrongful receipt of an undue benefit⁹⁰. Certainly, this distinction only makes sense when we accept that the action in undue payment is not just an independent claim inherited from Roman times, but the expression of broader principles inspiring distinct categories of the law. Although the new Articles 1352-1, 1352-2 and 1352-7 of the French Civil Code fail to give explicit recognition to this distinction, it is relatively uncontroversial that an action in undue payment against the knowing recipient of an undue benefit seeks to compensate the harm caused by his or her fault⁹¹.

Finally, and perhaps more importantly, a unifying theme may stimulate a structured approach to situations which cannot be accommodated within the scope of pre-existing claims. To see why, it is helpful to compare the solutions provided for by German

⁸⁹ M. Douchy-Oudot, "Répétition de l'Indu" in *Encyclopédie Juridique Dalloz. Répertoire de Droit Civil* (Paris 2018), [109].

⁹⁰ Carbonnier, *Droit Civil*, [1219]; Descheemaeker, "Quasi-contrats", p. 20.

⁹¹ Terré et al, *Les Obligations*, [1811]; Deshayes et al, *Réforme du Droit des Contrats*, pp. 928–930, 933–934.

and French law to cases where the defendant obtains a benefit from the infringement of the claimant's rights. While the unjustified enrichment analysis of these cases has caused significant controversies in German law, Jansen acknowledges that the conceptual tools emerging from these controversies have enabled German lawyers to take a systematic approach to the relevant legal issues by asking the right questions⁹². The situation of French law is radically different. In some cases, courts may order the defendant to pay compensatory damages calculated on the basis of the gains arising from the infringement of the claimant's rights, and in other cases the action *de in rem verso* may be used to recover gains obtained by a defendant as a consequence of knowingly receiving a benefit to which the claimant was entitled. But these scattered solutions only confirm that French law lacks a clear framework to analyse the relevant issues arising in this kind of situations. Compared to German law, French law appears as significantly underdeveloped in this regard⁹³.

5.5 Lessons

The preceding discussion is useful to understand the relevance of the unified approach adopted in English cases like *ITC*. In the French context, the lack of a similar approach seems to explain at least in part the uncertainty surrounding situations involving more than two parties, failed contracts, and the miscellaneous circumstances dealt with by French lawyers through the category of quasi-contracts. While it may be true that unjust enrichment is a category resting on quite diverse foundations, or one which is too general to be applied directly to decide difficult cases, this does not mean that a unified framework to analyse restitutionary claims cannot play an important part in enhancing our understanding of the law and guiding our attention towards the critical issues. On the contrary, it is precisely the existence of this kind of framework what seems to explain why German lawyers could approach systematically an area of the law which French lawyers still find so difficult to rationalise.

⁹² Jansen, "Farewell", p. 143.

⁹³ Descheemaeker, "Quasi-contrats", pp. 22–23; Descheemaeker, "The New French Law", pp. 97, 103.

It follows that the particularities revealed by the scenarios discussed in previous chapters should not lead us to downplay the value of the unified framework adopted by *ITC*. To avoid the methodological objection, however, we need to make sure that this framework reflects the distinctive features explaining the connections taking place in the categories of situation identified by the judgment. As the next chapter shows, in the balance between preserving an overall view of these situations and keeping it responsive to their distinctive features may lie the key to some of the problems identified by detractors of the unjust enrichment analysis.

Chapter 6 Striking a Balance

With the benefit of previous chapters, we are now better placed to see that at the heart of the question for the link between the parties in unjust enrichment claims lies a tension. On the one hand, we should avoid relying on abstract tests, as doing so results in ignoring the differences between the features explaining the decision of individual cases. On the other hand, we should avoid renouncing an overall view of the individual cases where the link has been understood to occur, as this would take us back to the unhelpful conclusion that they only form a “motley collection”¹. A workable approach should be general enough to provide a structure where the situations recognised in *Investment Trust Companies v HMRC*² can hang together, and at the same time be focused enough to reflect the significant differences existing among them. As often happens with difficult legal questions, the key seems to be finding a compromise between seemingly inconsistent goals.

It might be thought that this compromise cannot be achieved. In light of the differences explored in previous chapters, it is tempting to give in to the conclusion that any inquiry looking for a description of the kind of link between the parties supporting unjust enrichment claims is misguided. The variety of answers which this question receives in different scenarios would confirm that analysing unjust enrichment claims through a set of common questions is at best pointless and at worst fallacious. By bringing to light the wide variety of situations where these claims have been recognised, *ITC* may be interpreted as a decisive step towards the rejection of the unified unjust enrichment framework.

Yet this view must be resisted. A compromise between an overall analysis showing how the identified situations relate to each other and a detailed account of their distinctive features is not only possible, but indeed necessary to make sense of the judgment’s own

¹ *Relfo Ltd. (In Liquidation) v Varsani* [2014] EWCA Civ 360, [2015] 1 B.C.L.C. 14, at [80] (Arden LJ).

² [2017] UKSC 29, [2018] A.C. 275 (“*ITC*”).

rationale. The goal of this chapter is to explain why. To do so, it will proceed in three parts. The first part will suggest that the significant differences between the situations identified in *ITC* do not justify treating them as giving rise to unconnected claims. The second part will explore a way of answering the question for the link between the parties which does not require accepting that the same kind of link applies to every possible scenario. The third part will explain the main advantages following from this kind of differentiated answer.

6.1 The Formalist Objection

Two possible objections against the kind of unified analysis underlying the main question of this thesis have been considered thus far. It is time to consider a third and final objection which may seem confirmed by the findings of previous chapters. Once again, the views of Professor Robert Stevens are useful to assess its merits. He seems to share a concern voiced by other commentators about the importance of finding a stronger unity for the law of unjust enrichment³. But even if there is a lot to be said for the search of common features among unjust enrichment claims, there are good reasons to be on guard against views which may oversimplify our understanding of the law. This section argues that we should resist the temptation of turning our backs to scenarios not fitting a tightly defined model like the one proposed by Stevens.

6.1.1 Forms and Reasons

Apart from the arguments provided in support of what has been called the methodological and the relevance objections, Stevens raises a final and perhaps more fundamental concern about the unjust enrichment analysis. This concern may be summarised as follows. Even accepting that unjust enrichment claims may be recognised for a variety of reasons, and that a unified approach to these claims may result in some sort of advantage, the significant differences between the relations giving rise to these claims should necessarily lead us to

³ See, for example, L. Smith, “Restitution: The Heart of Corrective Justice” (2001) 79 *Tex.L.Rev.* 2115, 2139–2140; S. Smith, “A Duty to Make Restitution” (2013) 26 *C.J.L.J.* 157, 179; C. Webb, *Reason and Restitution* (Oxford 2016), 17.

give up on analysing them through a single framework. Persisting in this analysis would be inherently mistaken, as it would result in justifying private law claims for reasons he depicts as presenting “the wrong form”. We will call this the “formalist objection”.

This objection originates in a broader effort to explain private law in terms of the structure of the relations between individuals that comprise it. According to Stevens, private law can be distinguished by the fact that these relations involve duties over which other individuals have control. The persons to whom private law duties are owed may consent to the duty’s non-performance and even release the obligor altogether⁴. This specific form of relation imposes constraints on the kind of reasons that can justify the recognition of a private law claim: they must be bilateral in form and tie a particular right-holder to a particular duty-bearer. In the law of torts, for example, this would explain why reasons like compensation or deterrence cannot justify claims in negligence. As they do not relate a particular claimant to a particular defendant, these reasons, if taken seriously, would justify replacing the tort of negligence by a clearing house system where all negligent tortfeasors pay a fine to a central fund which compensate all victims⁵.

What is true of torts is also true of unjust enrichment. Not every relation between claimant and defendant may support the kind of reasons justifying the recognition of a proper unjust enrichment claim. These reasons, which ought to be bilateral in form and tying a particular right-holder to a particular duty-bearer, are necessarily premised on a performance rendered by the claimant and accepted by the defendant⁶. This specific form of relation is plainly not the one supporting restitutionary claims in the situations described by previous chapters as takings, discharges of the defendant’s debt and co-ordinated transactions. Stevens implies that they should be treated as freestanding claims pertaining

⁴ R. Stevens, “Private Law and the Form of Reasons” in A. Robertson and J. Goudkamp (eds.), *Form and Substance in the Law of Obligations* (Oxford 2019) 122. So, for example, the criminal law duty not to commit murder would be different from a private law duty in that is not owed to an individual entitled to consent to the duty’s non-performance. In a previous work, the author identifies the ability to waive private law rights as an indication of the premium placed by the law in protecting the autonomy of individuals. See R. Stevens, *Torts and Rights* (Oxford 2007), 339.

⁵ Stevens, “Form of Reasons”, p. 124.

⁶ Stevens, “Form of Reasons”, pp. 130–131.

to an entirely different—presumably anomalous—area of private law⁷. Understandably, his conclusion is that the unjust enrichment framework of common questions should not be applied across these different situations⁸.

6.1.2 The Temptation of Elegance

The notion of conceptualism describes a particular way of thinking about the law which is helpful to understanding some aspects of the formalist objection. Though there are several different meanings that one may attach to this way of thinking, a salient theme seems to be the importance of identifying ideal types of relations among individuals as the basis for the analysis of legal materials⁹. The work of Professor Ernest Weinrib provides a prominent example. He begins with the assumption that private law rights and duties have a unifying structure indicated by the bipolar nature of the relation between a particular claimant and a particular defendant¹⁰. On this basis, he argues that corrective justice reflects what unites and distinguish any private law relationship, as it provides a single and coherent justificatory structure for the rights and duties between two parties¹¹. This enables him to draw specific conclusions about, among other areas of the law, the law of unjust enrichment:

“[A]s an instantiation of corrective justice, liability for unjust enrichment should exhibit the correlative structure of the parties’ relationship, vindicate the plaintiff’s right as against the defendant, and affirm the parties’ freedom and equality”¹².

⁷ Stevens, “Form of Reasons”, p. 133. Stevens admits that not all of private law can be explained in the kind of relations and reasons he proposes. This will be the case, for example, of the rules imposing limitation periods, and those recognising the defences of illegality and *volenti non fit iniuria*. It is not clear, however, whether he believes that unjust enrichment claims not fitting the “acceptance of performance” model should be arranged next to these rules.

⁸ Stevens, “Form of Reasons”, p. 147.

⁹ D. Priel, “Two Forms of Formalism” in A. Robertson and J. Goudkamp (eds.), *Form and Substance in the Law of Obligations* (Oxford 2019), p. 166. See further C. Saiman, “Restating Restitution: A Case of Contemporary Common Law Conceptualism” (2007) 52 *Vill.L.Rev.* 487, 488.

¹⁰ E. Weinrib, *The Idea of Private Law*, rev. ed. (Oxford 2012), 1–2.

¹¹ Weinrib, *The Idea of Private Law*, pp. 56–57.

¹² E. Weinrib, *Corrective Justice* (Oxford 2012), 188.

Two features frequently related to conceptualist thinking derive from its interest in ideal types of relations. First, conceptualist approaches typically propose models based on single organising ideas as the benchmark against which the solutions governing a multitude of very different situations should be evaluated¹³. For example, the bipolar justificatory structure provided by corrective justice enables Weinrib to explain what defines the rules making up the entire domain of private law liability, including the law of contracts, torts and unjust enrichment¹⁴. Secondly, conceptualist approaches tend to rely on ideas about the law whose pertinence is judged independently from the position taken in cases decided at any particular time and place¹⁵. Thus, Weinrib argues that corrective justice reflects an immanent rationality of the law which “transcends society and historicity”¹⁶.

Hints of both features can be recognised in Stevens’ formalist objection. His “acceptance of performance” model is underpinned by the broader assumption that every private law duty corresponds to a specific kind of right, the recognition of which is premised on reasons bilateral in form¹⁷. Based on this assumption, Stevens considers the claim arising from mistaken payments and extracts the criteria for identifying the kind of relation behind every possible unjust enrichment scenario. He acknowledges that such criteria are not satisfied in many other scenarios understood to give rise to unjust enrichment claims¹⁸, and even that the account he proposes does not fit with the position taken by English courts in a number of important cases¹⁹. But this does not prevent him from concluding that his account “not only should be the law, but always has been”²⁰.

This suggests that the formalist objection is driven by a particular way of conceiving how the cases are best understood. The unjust enrichment analysis must be

¹³ Saiman, “Restating Restitution”, p. 488.

¹⁴ Weinrib, *The Idea of Private Law*, p. 20.

¹⁵ Priel, “Two Forms”, pp. 167–168.

¹⁶ E. Weinrib, “Legal Formalism: On the Immanent Rationality of Law” (1987) 97 *Yale L.J.* 949, 1000.

¹⁷ Stevens, “Form of Reasons”, pp. 122, 124.

¹⁸ Stevens, “Form of Reasons”, p. 131.

¹⁹ R. Stevens, “The Unjust Enrichment Disaster” (2018) 134 *L.Q.R.* 574, 574.

²⁰ Stevens, “Form of Reasons”, p. 146.

wrong, because it has led English courts to explain as private law claims some claims recognised in situations where rights and duties are difficult to justify in reasons applicable only to relations bilateral in form. In contrast, the “acceptance of performance” model promotes a structured and neat method for identifying the situations where unjust enrichment claims can be reconciled with the reasons justifying liability in the ideal private law relation. The fact that this model may not reflect the reasoning or results of leading cases should not distract us. As Stevens notes while explaining the model he proposes for torts law, “[b]eauty is, or at least tends to be, truth”²¹.

6.1.3 Indefensible Implications

It thus seems that the basic contention behind the formalist objection is that rejecting the unjust enrichment analysis promotes a coherent vision of the law. This contention should not be taken lightly. The search for coherence is one of the main goals of legal analysis generally and perhaps the central driver behind the unjust enrichment analysis in particular. Looking for consistency and boiling down into intelligible statements what would otherwise be a disorganised mass of isolated decisions are critical tasks in common law jurisdictions, where the conceptual system the courts apply to resolve disputes acts as an important constrain to judicial discretion²².

Yet the search for coherence cannot be the only aim of legal analysis. Common law judges tend to distrust conceptualist theories for a reason: abstract propositions rarely capture the details explaining the practical solutions adopted in individual cases²³. In this, Stevens “acceptance of performance” model is not different from other conceptualist models. By turning its back to the variety of scenarios where unjust enrichment claims have been recognised in the decided cases, it invites us to leave out of the analysis a

²¹ Stevens, *Torts and Rights*, p. 348.

²² P. Sales, “The Common Law: Context and Method” (2019) 135 L.Q.R. 47, 48–49. See further B. Simpson, “The Common Law and Legal Theory” in B. Simpson (ed.), *Oxford Essays in Jurisprudence* (Oxford 1973), 95.

²³ Examples of this attitude can found in *Lissenden v CAV Bosch Ltd.* [1940] A.C. 412, 435 (Lord Wright); *Attorney General v Guardian Newspapers Ltd (No. 2)* [1990] 1 A.C. 109, 286 (Lord Goff); and *Customs and Excise Commissioners v Barclays Bank Plc* [2006] UKHL 28, [2007] 1 A.C. 181, at [51] (Lord Rodger).

significant part of the decisions which make up the law. There is a number of reasons to reject this possibility.

First, and most obviously, proceeding in this way would contradict many leading cases concluding that the different situations identified in *ITC* may support unjust enrichment claims, and thus the position of English law as it currently stands²⁴. This exposes Stevens' analysis to the kind of criticism which has led the High Court of Australia to reject the unjust enrichment analysis as an entirely "top-down" and thus illegitimate approach²⁵. Though it is probably true that the distinction between top-down and bottom-up reasoning is not entirely useful to discern legitimate approaches to common law materials²⁶, an account which plainly contradicts the position taken in the decided cases could hardly expect to provide a good, let alone the best, explanation for them.

Secondly, by forcing us to focus exclusively on a relatively narrow category of scenarios, the "acceptance of performance" model hinders our chances of understanding the whole range of reasons behind the recognition of unjust enrichment claims. Conceptualist explanations of the law of negligence provide a familiar illustration of this problem. Take the case of Weinrib, who has advocated disregarding reasoning based on what he describes as "desirable goals independent of tort law" to preserve the duty of care as a systematic and coherent concept²⁷. While this view may appear sensible in theory, there seems to be little doubt that this kind of policy-based reasoning is a central feature,

²⁴ For example, *Lipkin Gorman (a firm) v Karpnale Ltd.* [1991] 2 A.C. 548 ("Lipkin Gorman"); *Banque Financière de la Cité v Parc (Battersea) Ltd.* [1999] A.C. 221; *Niru Battery Manufacturing Co. v Milestone Trading Ltd. (No. 2)* [2004] EWCA Civ 487, [2004] 2 All E.R. (Comm) 289; *Menelaou v Bank of Cyprus UK Ltd.* [2015] UKSC 66, [2016] A.C. 176.

²⁵ See especially *Roxborough v Rothmans of Pall Mall (Australia) Ltd.* [2001] HCA 68, (2001) 208 C.L.R. 516, at [72]–[74] (Gummow J); *Farah Constructions Pty Ltd. v Say-Dee Pty Ltd.* [2007] HCA 22, (2007) 230 C.L.R. 89, at [151] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); *Bofinger v Kingsway Group Ltd.* [2009] HCA 44, (2009) 239 C.L.R. 269, at [90] (Gummow, Hayne, Heydon, Kiefel and Bell JJ).

²⁶ C. Conte, "From Only the 'Bottom-up'? Legitimate Forms of Judicial Reasoning in Private Law" (2015) 35 O.J.L.S. 1, 10.

²⁷ E. Weinrib, "The Disintegration of Duty" in M. Madden (ed.), *Exploring Tort Law* (Cambridge 2005), 177. In a similar vein, Stevens has argued that considering policy factors to decide torts cases is unacceptable as judges lack the political and technical competence to weigh competing policy claims which are incommensurable. Stevens, *Torts and Rights*, pp. 308–310.

perhaps *the* central feature, of the judicial development of the law of negligence²⁸. An account focusing exclusively on the conceptual issues posed by the notion of duty of care will be incomplete and to a certain extent clearly incomplete²⁹. The same can be said about the law of unjust enrichment: focusing on the scenarios which happen to fit an ideal model of relation between the parties and hiving off the others into unspecified parts of the law is a rather poor way of promoting their understanding³⁰.

Thirdly, accepting the formalist objection would require a radical reconsideration of the position adopted in recent decisions. It has been noted many times that the common law evolves by incremental steps which tend to be anticipated in previous case law³¹. There is a strong presumption that earlier decisions should be followed³². While the range of scenarios where unjust enrichment claims may be available is still a much debated issue, English courts undoubtedly recognise these claims beyond the situations falling within the “acceptance of performance” model. Stevens suggests that *ITC* would mark a tipping point in the development of the law of unjust enrichment³³. But even if this is correct, accepting the formalist objection amounts to endorsing a drastic departure from recent cases and thus threatens to disturb the incremental development of the law.

Certainly, there is nothing wrong with developing conceptual schemes intended to explain the decision of any group of cases. On the contrary, these schemes are important in enhancing our understanding of the law and promoting predictable and transparent

²⁸ J. Morgan, “Policy Reasoning in Tort Law: The Courts, the Law Commission and the Critics” (2009) 125 L.Q.R. 215, 215. See further J. Stapleton, “Duty of Care Factors: A Selection from the Judicial Menu” in P. Cane and J. Stapleton (eds.), *The Law of Obligations: Essays in Honour of John Fleming* (Oxford 1998) 59; and A. Robertson, “Rights, Pluralism and the Duty of Care” in D. Nolan and A. Robertson (eds.), *Rights and Private Law* (Oxford 2012), 435.

²⁹ This is, to the extent that the law is made up of decisions taken by judges exercising considerable discretion in a wide range of different contexts. S. Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (Cambridge 2003), 205.

³⁰ K. Barker, “Theorising Unjust Enrichment Law: Being Realist(ic)?” (2006) 26 O.J.L.S. 609, 625.

³¹ See, for example, *Kleinwort Benson Ltd. v Lincoln City Council* [1999] 2 A.C. 349 (“*Kleinwort*”), 378 (Lord Goff).

³² *Willers v Joyce* [2016] UKSC 44, [2018] A.C. 843, at [4]–[9] (Lord Neuberger). See further N. Duxbury, *The Nature and Authority of Precedent* (Cambridge 2008), 183.

³³ Stevens, “Form of Reasons”, p. 147.

decision-making. To be helpful as an interpretation of the decided cases, however, any such scheme must be flexible enough to reflect the scenarios involved in these cases in all their untidy complexity³⁴. In the context of the link between the parties in unjust enrichment claims, this implies at least reflecting the variety of situations identified by *ITC*. The next section will attempt to show how this objective may be achieved.

6.2 Accommodating Differences

The disparities between the situations giving rise to unjust enrichment claims do not entitle us to disregard the common framework adopted by English courts to analyse them. The challenge we face is finding a way of reflecting their distinct features within the accepted framework. This task is admittedly complicated by the conclusion adopted in *ITC* that the differences between the variety of situations identified would be “more apparent than real”³⁵. Yet behind this conclusion lies an assumption which seems inconsistent with the judgment’s own premises. The present section suggests that this tension may be resolved by arranging the situations identified in *ITC* into separate but related categories.

6.2.1 The Single Connection Assumption

We have seen that *ITC* departs from previous decisions in making clear that the “at the expense of” element of the unjust enrichment analysis should not be interpreted as a statutory provision, but as a pointer guiding the “careful legal analysis of individual cases”³⁶. This enables the judgment to present the most detailed judicial description to date of the situations involving the kind of connection supporting unjust enrichment claims in the decided cases. At the same time, however, the judgment concludes that in all these situations the purpose of the law of unjust enrichment would require the claimant to suffer a loss through the provision of the defendant’s benefit, a feature which would render only apparent the differences between the identified situations. This is a puzzling

³⁴ R. Goff, “The Search for Principle” (1983) 69 Proceedings of the British Academy 169, 174.

³⁵ *ITC*, at [47] (Lord Reed).

³⁶ *ITC*, at [42] (Lord Reed).

move. The judgment seems to go to great lengths in distinguishing the scenarios involved in individual cases only to conclude that these differences are irrelevant. Why?

The explanation may be related to an assumption underlying much of the English judicial and academic discussion of the link between the parties in unjust enrichment claims. From a comparative perspective, one of the particularities of the English unjust enrichment analysis is that it proceeds on the basis that the “at the expense of” question should receive the same answer in every possible scenario³⁷. This assumption can be perceived in the work of Professor Birks. As has been noted earlier in this thesis, he concluded that the “at the expense of” question was designed to identify a range of permissible variations upon the connection existing between the parties in the core case of a mistaken payment³⁸. On this point, Birks’ views are consistent with orthodox approaches to the question for the link between the parties in English law³⁹. These approaches differ in the way they define the qualifying link, but all agree that this link may be identified through a general test applicable across different unjust enrichment scenarios.

Spelling out this assumption is useful to understand an inconsistency in the reasoning offered by *ITC*. The judgment underlines that the application of the unjust enrichment analysis to “a number of different types of claim” should not entitle courts to disregard the details of the reasoning developed by the relevant authorities⁴⁰. Therefore, unlike previous unjust enrichment cases, it avoids engaging with general tests and instead grounds the discussion on specific situations. Like Birks, however, it goes on to assume that the question for the link between the parties should receive a single answer in each of these specific situations. So instead of isolating the features of the different kinds of

³⁷ S. Meier, “Enrichment ‘At the Expense of Another’ and Incidental Benefits in German Law” in H. Scott and A. Fagan (eds.), *Private Law in a Changing World: Essays for Danie Visser* (Claremont 2019), 454.

³⁸ P. Birks, *Unjust Enrichment*, 2nd ed. (Oxford 2005), 73.

³⁹ For example, an entire monograph has been recently devoted to a demonstration that the different unjust enrichment cases revealed a connection between loss of the claimant and enrichment of the defendant, the essence of which was that one cannot arise but for the other. E. Ball, *Enrichment at the Claimant’s Expense* (Oxford 2016), 141, 212.

⁴⁰ *ITC*, at [40] (Lord Reed).

connections revealed by the authorities, the judgment uses the identified situations to illustrate the full range of scenarios comprised by the *single connection* supporting unjust enrichment claims. Unsurprisingly, it is forced to express this single connection in very general terms to cover the variety of scenarios identified.

The conclusion that the differences between the identified situations would be “more apparent than real” is therefore misleading. It rests on the assumption that the question for the link between the parties can only receive an unqualified answer. Yet this assumption contradicts the judgment’s own premise that the features explaining the decision of individual cases are important and should not be disregarded in the name of modern theories of unjust enrichment. The emphasis on distinct situations is precisely what sets *ITC* apart from previous judicial analyses of the question and renders the decision a particularly useful template for considering other scenarios. This suggests that a reconsideration of the single connection assumption would be consistent with the judgment’s rationale and conducive to amplifying its main advantages. In considering this possibility, the experience of other jurisdictions may provide useful insights.

6.2.2 The Multiple Connections Assumption

The recent history of the Scots law of unjustified enrichment can be told as a story of challenging received assumptions. Not long ago, the law was arranged in a way which may appear as unrecognisable to a contemporary observer. The old law of quasi-contract, which was how the subject was previously known, was formed by three distinct actions oriented to the reversal of specific benefits: *repetition*, aimed at the return of a sum of money; *restitution*, aimed at the return of property other than money; and *recompense*, aimed at the reversal of gains obtained at the expense of another in a variety of circumstances outside those covered by other claims⁴¹. Each of these actions was subject to their own set of idiosyncratic rules, much in the fragmented way in which French law

⁴¹ H. MacQueen, “Peter Birks and Scots Enrichment Law” in A. Burrows and A. Rodger (eds.), *Mapping the Law: Essays in Memory of Peter Birks* (Oxford 2006), 402–403.

deals with restitutionary claims until the present day⁴². No overarching framework explained how these rules hanged together⁴³.

This situation would change dramatically in the space of a few decades. In two influential articles, Birks forcefully argued that the lack of commitment to an organising principle led to incoherence and uncertainty in Scots law⁴⁴. Moreover, the decision of the House of Lords in *Woolwich Equitable Building Society v IRC*⁴⁵ forced Scots lawyers to ask themselves where they would fit a claim for the return of payments made to a public body after an *ultra vires* demand⁴⁶. Academic interest in the subject grew hand in hand with an increasing awareness in the Scottish Law Commission that the old law of quasi-contract had to be reformed⁴⁷. Three major cases set out the basis for the future development of the Scots law of unjustified enrichment⁴⁸. In one of them, Lord Rodger said:

“As the law has developed, it has identified various situations where persons are to be regarded as having been unjustly enriched at another’s expense and where the other person may accordingly seek to have the enrichment reversed. The authorities show that some of these situations fall into recognisable groups or categories”⁴⁹.

⁴² See section 5.2.2 above. Some of the parallels between the old Scots law of quasi-contracts and French law are explored in H. MacQueen, “Unjustified Enrichment, Subsidiarity and Contract”, in V. Palmer and E. Reid (eds.), *Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland* (Edinburgh 2009), 324–326.

⁴³ It is to be noted, however, that the actions of repetition, restitution and recompense were long held to effect obligations structurally different to the obligations arising from contracts. This led Birks to praise Scots Law as featuring a “systematic and structured approach in which enrichment law, divided into two major sub-categories of ‘restitution’ and ‘recompense’, was long established and clearly distinguished from contract”. MacQueen, “Peter Birks and Scots Enrichment Law”, p. 403.

⁴⁴ P. Birks, “Restitution: A View of the Scots Law” (1985) 38 C.L.P. 57 and P. Birks, “Six Questions in Search of an Answer: Unjust Enrichment in a Crisis of Identity” [1985] J.R. 227.

⁴⁵ [1993] A.C. 70 (“*Woolwich*”).

⁴⁶ MacQueen, “Peter Birks and Scots Enrichment Law”, p. 408.

⁴⁷ M. Hogg, “Unjustified Enrichment in Scots Law Twenty Years On: Where Now” [2006] R.L.R. 1, 3.

⁴⁸ *Morgan Guaranty Co of New York v Lothian Regional Council* 1995 S.C. 151; *Shilliday v Smith* 1998 S.C. 725 (“*Shilliday*”); *Dollar Land (Cumbernauld) Ltd. v CIN Properties Ltd.* 1998 S.C. (H.L.) 90.

⁴⁹ *Shilliday*, p. 727 (Lord Rodger).

By the turn of the century, it could no longer be doubted that a single principle unified the old actions of repetition, restitution and recompense, which were re-characterised as unjustified enrichment remedies available in different fact situations exemplified by the Roman *condictiones*⁵⁰. But acknowledging that an area of the law is underpinned by a general principle is one thing, and another is deciding how the different parts making it up should be arranged. Birks had argued that Scots law could be structured according to the plan he initially envisioned for English law⁵¹. While this proposal found some initial support, Scots lawyers were all too aware of the importance of understanding native sources before adopting a framework conceived in such general terms⁵². Instead of focusing on abstract criteria, it was suggested that the way forward required further investigating the recognisable groups or categories of situations referred to by Lord Rodger as making concrete the general principle against unjustified enrichment in Scots law⁵³. A more appropriate tool for this purpose was found in the Wilburg-von Caemmerer typology generally accepted among German lawyers.

As has been briefly touched upon earlier in this thesis, the Wilburg-von Caemmerer typology distinguishes different situations where the general unjustified enrichment clause of the German Civil Code may support the recognition of specific claims⁵⁴. Four situations are recognised, depending on the manner in which the defendant's enrichment is brought about: performance by the claimant (where a claim known as the *Leistungskondiktion* may be available); unauthorised interference by the defendant with the claimant's rights (where a claim known as the *Eingriffskondiktion* may be available); unauthorised expenditure by the claimant on the defendant's property (where a claim known as the *Verwendungskondiktion* may be available); and discharge by the claimant of the defendant's debt (where a claim known as the *Rückgriffskondiktion*

⁵⁰ Hogg, "Twenty Years On", p. 4; MacQueen, "Unjust Enrichment, Subsidiarity and Contract", p. 342.

⁵¹ Birks, "Restitution: A View of the Scots Law", pp. 65 ff.

⁵² See, for example, Scottish Law Commission, *Recovery of Benefits Conferred under Error of Law* (Scot Law Com DP No 95, vol. 1, 1993), at [3.23].

⁵³ R. Evans-Jones, *Unjustified Enrichment, vol. 2: Enrichment Acquired in Any Other Manner* (Edinburgh 2003), [1.51] and [2.02].

⁵⁴ See section 5.4.2 above.

may be available)⁵⁵. Similarly, a consensus emerged among Scots academic lawyers that the law of unjustified enrichment should be divided according to the manner in which the enrichment is acquired⁵⁶. Professor Robin Evans-Jones, for example, distinguishes situations where the enrichment is acquired as the result of a deliberate conferral of a benefit by the claimant upon the defendant; where it follows from an interference by the defendant with the claimant's property or analogous rights; where it is imposed by the claimant upon the defendant; and where it results from the claimant's discharge of the defendant's debt to a third party⁵⁷.

The assumption underlying this division is that the common foundation in a general principle does not mean that the requirements of the claims recognised in each of these situations ought to be identical. In sharp contrast with Birks' approach to the "at the expense of" question, a differentiated approach like the one adopted by German and Scots lawyers allows the link between the parties to be determined according to criteria specific to different categories of case, which is particularly helpful while dealing with difficult scenarios⁵⁸. Critically, this tolerance of difference is not considered a flaw compromising the coherence of the approach but one of its great attractions. By accommodating the diversity of circumstances in which an unjustified enrichment claim may be recognised, it makes possible the kind of nuanced analysis required to make sense of a complex area of the law⁵⁹.

⁵⁵ G. Dannemann, *The German Law of Unjustified Enrichment and Restitution: A Comparative Introduction* (Oxford 2009), 21–25; 87–88.

⁵⁶ Evans-Jones, *Unjustified Enrichment*, vol. 2, [2.06]. This position has been endorsed, for example, in M. Hogg, *Obligations*, 2nd ed. (Edinburgh 2006), ch. 4; H. MacQueen, *Unjustified Enrichment*, 3rd ed. (Edinburgh 2013), 16; and H. MacQueen and Lord Eassie (eds.), *Gloag and Henderson: The Law of Scotland*, 14th ed. (London 2017) [24.01] ff.

⁵⁷ Evans-Jones, *Unjustified Enrichment*, vol. 2, [2.02].

⁵⁸ N. Whitty, "Rationality, Nationality and the Taxonomy of Unjustified Enrichment" in D. Johnston and R. Zimmermann, *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge 2002), 695; Meier, "At the Expense", pp. 458–461.

⁵⁹ H. MacQueen, "The Sophistication of Unjustified Enrichment: A Response to Nils Jansen" (2016) 20 Edin.L.R. 312, 321–322.

6.2.3 A Qualified Answer

To be sure, the differentiated approach adopted by German and Scots law is not new to English scholars. For example, Birks considered the possibility of adopting a bifurcated analysis to the link between the parties distinguishing “performance” scenarios and scenarios involving enrichments obtained “in other modes”. He recognised the potential for such an approach to tidy up the English thinking on the matter, but ultimately rejected it as based on what he considered to be a structurally alien language. He said:

“It is a difficult question, and one of great importance to the common law, whether rationality ultimately requires this distinction between enrichment by performance and enrichment in other modes. Suffice it to say here that, without any equivalent text on which to hang it, English law has not so far found it necessary to draw any such line. If and so long as it is not insisted upon, the discussion of the essential link between the claimant and the defendant must focus immediately on ‘at the expense of’”⁶⁰.

What is interesting about the Scottish experience, however, is that it shows how a differentiated approach to the question for the link between the parties can be adopted without upsetting native sources. While discussing the convenience of adopting a division inspired in the German typology, Scottish authors were wary of disturbing the historical foundations and structure of Scots law of unjustified enrichment⁶¹. It is true that Lord Rodger’s dictum in *Shilliday* noted earlier provided an authoritative basis over which an analysis distinguishing categories of situations may be developed. But his opinion could also be interpreted as committing Scots law to an unjust factors approach similar to the one advocated by Birks for English law⁶². Much of the success of the typological scheme in Scotland is due to the work of academics showing that the decisions of courts and

⁶⁰ P. Birks, “‘At the Expense of the Claimant’: Direct and Indirect Enrichment in English Law” in D. Johnston and R. Zimmermann (eds.), *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge 2002), 496. He went on to argue that critical division in English law was between ordinary and interceptive subtractions, but this distinction has proven controversial. See section 6.3.3 below.

⁶¹ Whitty, “Rationality, Nationality and the Taxonomy of Unjustified Enrichment”, p. 661; Evans-Jones, *Unjustified Enrichment*, vol. 2, [2.35].

⁶² Hogg, “Twenty Years On”, pp. 7, 10.

authoritative writings of institutional authors can be made to fit the scheme without being distorted⁶³.

This kind of work is by no means impracticable in English law. In fact, it seems to have already started. For example, Professor Burrows has argued that the German typology is helpful to distinguish concrete factual ways in which the connection supporting unjust enrichment may occur⁶⁴. Similarly, Professor Lionel Smith's criticism against the English unjust enrichment analysis considered previously in this thesis seems to rest on the realisation that "the link between claimant and defendant is different in different kinds of case"⁶⁵. Like *Shilliday* in the context of Scots law, *ITC* may provide an authoritative basis on which the English materials could be analysed distinguishing categories of situations revealing different links between the parties to unjust enrichment claims. If what has been argued in previous chapters is correct, at least four kinds of situations may be identified.

First, situations involving conferrals from the claimant to the defendant⁶⁶. In these situations, establishing the link between the parties would typically require to show the existence of an intentional act of the claimant and its acceptance by the defendant. The cases falling within this category usually involve payments of money or provisions of goods and services taking place between claimant and defendant, but may also involve more complex relations including payments through or by agents, or services provided through third parties. The cases identified by Stevens through his "acceptance of performance" theory may be accommodated in this category.

⁶³ H. MacQueen, "Review of Robin Evans-Jones, *Unjustified Enrichment, Volume 2: Enrichment Acquired in any other Manner*" (2015) 19 *Edin.L.R.* 147, 149.

⁶⁴ A. Burrows, "'At the Expense of the Claimant': A Fresh Look" [2017] *R.L.R.* 167, 170–171.

⁶⁵ L. Smith, "Restitution: A New Start?" in P. Devonshire and R. Havelock (eds.), *The Impact of Equity and Restitution in Commerce* (Oxford 2019), 109–110. See also L. Smith, "Defences and the Disunity of Unjust Enrichment" in A. Dyson, J. Goudkamp and F. Wilmot-Smith (eds.), *Defences in Unjust Enrichment* (Oxford 2016), 50–51; B. Häcker, "Fog on the Channel? Six Comparative Lessons in Unjust(ified) Enrichment" [2017] *R.L.R.* 61, 70; and R. Stevens, "The Unjust Enrichment Disaster" (2018) 134 *L.Q.R.* 574, 576.

⁶⁶ See section 3.2 above.

Secondly, situations involving takings by the defendant from the claimant⁶⁷. In these situations, establishing the link between the parties would typically require to show the existence of an entitlement of the claimant which is interfered with by the defendant. Cases falling within this category usually involve the receipt by the defendant of an asset (usually from a third party) into which the claimant can trace an interest⁶⁸.

Thirdly, situations involving discharges of the defendant's debt. These situations may take two distinct forms. In some discharges of the defendant's debt scenarios, establishing the link between the parties would typically require to show that the claimant paid a creditor in respect of a debt which was also owed by the defendant⁶⁹. In other discharges of the defendant's debt scenarios, establishing the link between the parties would typically require to show that money traceably received from the claimant was used to pay a debt owed by the defendant to a third party⁷⁰. Cases falling within this category may or may not involve payments of money taking place between claimant and defendant, or the receipt by the defendant of an asset into which the claimant can trace an interest.

Finally, situations involving co-ordinated transactions forming a single scheme⁷¹. While these scenarios may be described both as a form of composite conferral or as a form of circuitous taking, in reality they involve an entirely different kind of relationship between claimant and defendant. In these scenarios, establishing the link between the parties would typically require to show an arrangement between the claimant and a third party which results in an unintended benefit for the defendant. Cases falling within this category do not involve payments of money or provisions of good and services taking

⁶⁷ See section 3.3 above.

⁶⁸ As noted in section 3.3.2 above, takings situations do not necessarily amount to conversion or other wrongful interferences with goods. When they do, the claimant may choose to rely on either the wrong or the defendant's unjust enrichment as a ground for restitutionary liability. This possibility was labelled by Birks as "alternative analysis". P. Birks, *An Introduction to the Law of Restitution*, rev. ed. (Oxford 1989), 44, 314.

⁶⁹ See section 4.2.1 above.

⁷⁰ See section 4.2.2 above.

⁷¹ See section 4.3 above.

place between the parties, nor the receipt by the defendant of an asset into which the claimant can trace an interest.

To the extent that the claims recognised in these situations can be seen as the means by which the law pursues the abstract purpose of correcting defective transfers of value, their differences may indeed be described as “more apparent than real”. But as much as in Scots law, a statement of this generality cannot provide a safe guide to identify the requirements of concrete claims. To understand these requirements, we would be well advised to distinguish groups of situations and focus on their specific features⁷². Though this differentiated approach to the link between the parties is not expressly recognised by *ITC*, it is inconsistent neither with the judgment’s methodological premises⁷³, nor with English law’s preference for affording restitutionary claims in recognised categories of case⁷⁴.

6.3 Advantages

A nuanced answer to the question about the link between the parties like the one proposed above promotes a balance between two goals which are implicit in the reasoning developed by *ITC*. On the one hand, it ratifies the importance of the kind of overall analysis which is achieved through the unjust enrichment common questions. On the other hand, it focuses our attention on the features of the individual cases where unjust enrichment claims have been recognised. This balanced approach would allow future cases to be decided on an incremental basis, without committing English law to overgeneralised tests of liability.

⁷² Evans-Jones, *Unjustified Enrichment*, vol. 2, [2.02]–[2.03].

⁷³ W. Day, “‘At the Expense of’ in Unjust Enrichment: Casual, Direct or Intentional Transfers of Value?” [2017] L.M.C.L.Q. 588, 605. The author argues that when the implications of *ITC* are worked through, the single connection assumption “may start to be challenged”.

⁷⁴ *Deutsche Morgan Grenfell Group Plc v IRC* [2006] UKHL 49, [2007] 1 A.C. 558, at [21] (Lord Hoffmann); *Patel v Mirza* [2016] UKSC 42, [2017] A.C. 467, at [246] (Lord Sumption).

6.3.1 Cohesion of Thought

We have seen that the integration of discrete rules into broader principles organised around categories play a central role in civilian legal systems⁷⁵. This is also true of common law legal systems, at the heart of which lies reasoning by analogy. It has been shown many times that this form of reasoning rests on general propositions providing the criteria to assess similarity between factual scenarios which are never exactly alike⁷⁶. These propositions help to distil the rules adopted in the cases to their essential components and express them through broader principles applicable to clusters of situations, a task which is critical in understanding how these rules relate to each other⁷⁷. Various practical reasons suggest that this task is as important in common law jurisdictions as it is in civilian jurisdictions⁷⁸.

The unjust enrichment analysis provides a framework useful to distil the rules adopted in a variety of seemingly disparate cases and focuses our attention on systemic aspects of an area of the law which until recently remained unexplored. As noted earlier in this thesis, a significant part of the cases which today are explained as forming the law of unjust enrichment were previously understood as giving rise to anomalous contract claims or isolated incidents of equitable doctrine⁷⁹. Approaching these cases through a single framework helped to understand the relationship between them and develop a common set of concepts to articulate the distinct issues they raise. Consideration of these issues resulted in reasoned answers to questions which previously received rather dogmatic answers—like whether money paid under a mistake of law should be

⁷⁵ See section 5.4.1 above.

⁷⁶ For example, C. Sunstein, “On Analogical Reasoning” (1993) 106 Harv.L.Rev. 741, 745; Duxbury, *The Nature and Authority of Precedent*, pp. 175–176.

⁷⁷ J. Stone, *Legal System and Lawyers’ Reasonings* (London 1964), 185. Courts have repeatedly underlined the important implications of classifying specific rules into broader categories. See, for example, *Henderson v Merrett Syndicates Ltd.* [1995] 2 A.C. 145, 184–185 (Lord Goff); *Attorney General v Blake* [2001] 1 A.C. 268, 290–291 (Lord Steyn); *Foskett v McKeown* [2001] 1 A.C. 102, 129 (Lord Millett); *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20; [2019] A.C. 649, at [77] (Lord Reed) and [109] (Lord Sumption).

⁷⁸ *Kleinwort*, p. 378 (Lord Goff). In fact, it may be argued that, at least outside statutory law, this task is even more important in common law jurisdictions, where there is no code providing stability. See further H. Smith, “Restating the Architecture of Property” in B. McFarlane and S. Agnew (eds.), *Modern Studies in Property Law*, vol. 10 (Oxford 2019), 22, 27.

⁷⁹ See section 2.2.1 above.

recoverable⁸⁰—or no answer at all—like whether payments of tax levied without Parliamentary authority should be recoverable⁸¹. Critically, it set in motion a process of reconsideration of the features of claims which until that point were widely seen as forming a “backwater of the law”⁸².

If correct, the conclusion that unjust enrichment claims may be supported by different kinds of links between the parties would be just another fruit borne by the unjust enrichment analysis. It would confirm, rather than deny, the utility of a framework which enabled us to see that restitutionary claims did not originate in fictional contracts and prompted us to scrutinise the cases in search for answers. By accommodating the different links identified within the framework of common questions, an approach like the one suggested above preserves the unity of the subject and avoids deporting some restitutionary claims to a miscellaneous category where their features may be harder to understand⁸³.

6.3.2 Sensitivity to Differences

Preserving the unity of the unjust enrichment analysis cannot be achieved at any cost. In particular, it should not lead us to turn our backs to the features of individual cases. The approach proposed here enables us to take into consideration the significant differences between the situations identified in *ITC* which have been discussed in previous chapters. For the purposes of this thesis, this is especially relevant as it provides a solution to the problems of unwarranted analogies and overgeneralisation.

⁸⁰ Goff, “The Search for Principle”, p. 177. The mistake of law bar to restitution was removed in *Kleinwort*.

⁸¹ In *Woolwich*, p. 177 Lord Goff concluded that “money paid by a citizen to a public authority in the form of taxes or other levies paid pursuant to an ultra vires demand by the authority is prima facie recoverable by the citizen as of right”.

⁸² J. Dietrich, “What Is ‘Lawyering’? The Challenge of Taxonomy” [2006] C.L.J. 549, 549. It is worth noting that not so long ago the law of “quasi-contract” was described as a “territory which is more useful for the deportation of undesirable ideas than for colonization”. See P. Mitchell, *A History of Tort Law 1900-1950* (Cambridge 2015), 21. As noted in section 5.3.3 above, this is still the situation in France.

⁸³ A similar point is made in A. Burrows, “In Defence of Unjust Enrichment” [2019] C.L.J. 521, 523–524; and H. Scott, “Change and Continuity in the Law of Unjust Enrichment” in H. Scott and A. Fagan (eds.), *Private Law in a Changing World: Essays for Danie Visser* (Claremont 2019), 488–489.

On the one hand, distinguishing between categories of situations is useful to limit the range of scenarios among which analogies can be safely drawn. The fact that some circumstance is not considered as relevant for the recognition of a claim in a scenario falling within one category does not mean that this circumstance would not be relevant in a scenario falling within another category. For example, the fact that recipient's fault is not relevant in assessing the availability of a claim in a mistaken payment scenario—which according to this thesis belongs to the conferrals category—should not lead us to the conclusion that no measure of fault is required to make up a personal claim in a receipt of trust property scenario—which, if considered an unjust enrichment claim, should be classified in the takings category. Similarly, the fact that a defence of change of position has been recognised in a scenario like the one involved in *Lipkin Gorman*—which according to this thesis belongs to the takings category—should not lead us to conclude that the same defence should be recognised in a scenario like the one involved in *Niru*—which belongs to the discharges of another's debt category.

This does not mean that analogies can never be drawn between the rules adopted in scenarios falling within different categories. There may be good reasons to conclude, for example, that a defence of change of position should be available in scenarios belonging to more than one of the categories proposed in this thesis⁸⁴. The common set of concepts resulting from considering unjust enrichment cases alongside each other provide a useful starting point for the analysis of new scenarios, preventing the courts from reinventing the wheel every time⁸⁵. The point is rather that analogies should not rest on the mere fact that, on a higher level of generality, scenarios falling within different categories can be seen as giving rise to claims based on unjust enrichment.

On the other hand, distinguishing between categories of situations is helpful to avoid extending the scope of unjust enrichment claims to unreasonable scenarios like

⁸⁴ E. Bant, *The Change of Position Defence* (Oxford 2009), 198.

⁸⁵ C. Mitchell, "Other Reasons for Restitution" in E. Bant, K. Barker and S. Degeling (eds.), *Research Handbook on Unjust Enrichment and Restitution* (Cheltenham 2020), 383.

those involved in the rising heat or destroyed stamp hypotheticals⁸⁶. Importantly, it provides a tool for doing so without incurring the kind of ad hoc reasoning adopted in *ITC* in this regard⁸⁷. In light of the features of the situations identified in this thesis, the best explanation why the rising heat or destroyed stamp hypotheticals do not give rise to an unjust enrichment claim, is that in these hypotheticals the parties are not linked in the required way. There is no conferral, no taking, no discharge of the defendant's debt and no co-ordinated transaction between them⁸⁸. Unlike the explanation offered by *ITC*, which assumes that an unjust enrichment claim can be never available where it is only an incidental result of the claimant's expenditure, this approach is consistent with the fact that in discharges of the defendant's debt and co-ordinated transaction scenarios unjust enrichment claims have been recognised despite the lack of an intention of the claimant to benefit the defendant⁸⁹.

6.3.3 Incrementalism

The approach proposed here has the additional advantage of allowing an incremental refinement of the situations where unjust enrichment claims may be recognised. There is no need to attempt complete rationalisations of the law which may involve taking long jumps into deep waters⁹⁰. Nor is there any need to conclude that all the cases not fitting certain ideal situation should be moved to the rubbish bin of the law⁹¹. In the preferred common law fashion, the features indicating the boundaries between different situations can be gradually adjusted to present a clearer overall picture.

⁸⁶ See section 2.1.2 above.

⁸⁷ See section 2.1.3 above.

⁸⁸ A similar point is made in Smith, "A New Start?", p. 96 and Dannemann, *The German Law of Unjustified Enrichment and Restitution*, p. 196.

⁸⁹ See sections 4.2.1.1 and 4.3.1 above.

⁹⁰ J. Dawson, *Unjust Enrichment: A Comparative Analysis* (Boston 1951), 100 describes in these terms the recognition by the French Cour de cassation of the action *de in rem verso*.

⁹¹ See S. Hedley, *Restitution: Its Division and Ordering* (London 2001), 228, describing the instances of liability grouped together by unjust enrichment scholars as making up "the miscellaneous rubbish of the law".

Leaving this possibility open is particularly relevant as there are situations not considered by *ITC* which may give rise to unjust enrichment claims⁹². Take situations where it would have been legally or factually inevitable for the claimant to be enriched by a third party had it not been for the defendant receiving the enriching benefit. The principal example is provided by an old line of cases where a claim for money had and received was recognised against a defendant usurping the office of the claimant and thus receiving payments from a third-party to which the claimant was entitled⁹³. Birks argued that in this scenario an “interceptive subtraction” between claimant and defendant provided a sufficient connection for the purposes of recognising unjust enrichment claims⁹⁴. This interpretation has been forcefully criticised⁹⁵, and it is still controversial whether the idea of interceptive subtraction may play a part in explaining a number of scenarios⁹⁶. Should this interpretation find purchase among modern judges, however, it could be accommodated within the proposed framework without distorting our understanding of the features defining other situations⁹⁷.

Consider further situations where the enrichment is imposed upon the defendant through the unrequested expenditure of the claimant in the defendant’s property. An example can be found in *Greenwood v Bennett*⁹⁸, where Harper repaired a car thinking he was its owner, when in fact the owner was Bennett, who sought to repossess the repaired car. Assuming an unjust enrichment claim is available to recover the value of the improvements made to the car in this kind of scenario, it seems that the link between the

⁹² *ITC*, at [50] (Lord Reed). The judgment acknowledges that it would be unwise at this stage of the law’s development to exclude other scenarios where the qualifying link may be present.

⁹³ See, for example, *King v Alston* (1848) 12 Q.B. 971, 116 E.R. 1134.

⁹⁴ Birks, *Introduction*, pp. 133–134; Birks, *Unjust Enrichment*, pp. 75–78.

⁹⁵ L. Smith, “Three-party Restitution: A Critique of Birks’s Theory of Interceptive Subtraction” (1991) 11 O.J.L.S. 481; A. Burrows, *The Law of Restitution*, 3rd ed. (Oxford 2011), 81–82; Burrows, “A Fresh Look”, p. 171.

⁹⁶ C. Mitchell, P. Mitchell and S. Watterson (eds.), *Goff and Jones on the Law of Unjust Enrichment*, 9th ed. (London 2016), [6-101].

⁹⁷ For example, it has been suggested that the link between the parties in these situations could be understood as a form of interference by the defendant with the claimant’s right to obtain the benefit from the third party. S. Watterson, “At the Claimant’s Expense” in E. Bant, K. Barker and S. Degeling (eds.), *Research Handbook on Unjust Enrichment and Restitution* (Cheltenham 2020), 288–289.

⁹⁸ *Greenwood v Bennett* [1973] Q.B. 195, (“*Greenwood*”).

parties supporting this claim cannot be equated to the link revealed by any of the situations discussed above⁹⁹. While this situation is not discussed in *ITC*, English law may eventually conclude that it reflects a special link between the parties justifying the recognition of a distinct group of cases where the claimant in good faith imposes a benefit on the defendant without the latter's consent or knowledge¹⁰⁰. Again, this addition to the proposed framework could help us to understand better the features of some rare cases which are difficult to reconcile with the features of more common unjust enrichment scenarios¹⁰¹.

Importantly, the task of refining categories of situations where the required link between the parties is satisfied is not supposed to be an easy one. The law of negligence provides a useful illustration of the kind of challenges involved in identifying categories guiding the recognition of a duty of care¹⁰². While sensible in principle, this approach has been criticised for pre-judging the range of factors which may be legally relevant for the decision of particular cases¹⁰³. Similarly, adopting the approach proposed here entails the risk of attempting to pigeon-hole every possible unjust enrichment case into too narrowly defined categories of relationship between the parties¹⁰⁴. While this thesis cannot expect to present a solution to this potential problem, two points may be noted at this stage. First, similar challenges have not deterred courts from usefully approaching the question about the duty of care in the law of negligence by distinguishing distinct categories of

⁹⁹ As explained in section 3.2.2 above, the key element linking the parties in the *Greenwood* situation seems to be that both claimant and defendant can justify some kind of right to the improved asset.

¹⁰⁰ This is arguably the position adopted by modern Scots law. See Evans-Jones, *Unjustified Enrichment*, vol. 2, [5.01], [5.22–5.23]. Cf. B. Häcker, “Unjust Factors versus Absence of Juristic Reason (Causa)” in E. Bant, K. Barker and S. Degeling (eds.), *Research Handbook on Unjust Enrichment and Restitution* (Cheltenham 2020), 301, arguing that in German law a case like *Greenwood* would be dealt with through special rules governing the relationship between the owner of a thing and its illegitimate possessor.

¹⁰¹ Another example may be the mistaken payment cases involving bank transfers where the defendant is unaware that his account has been credited. See section 3.2.2 above, especially footnote 55.

¹⁰² An approach adopted, for example, in *Caparo Industries Plc v. Dickman* [1990] 2 A.C. 605, 617–618 (Lord Bridge) and *Stovin v. Wise* [1996] A.C. 923, 949 (Lord Hoffmann).

¹⁰³ J. Stapleton, “In Restraint of Tort” in P. Birks (ed.), *The Frontiers of Liability*, vol. 2 (Oxford 1994), 85–86.

¹⁰⁴ For example, it may be argued that this approach risks disregarding the considerations of fiscal prudence which were factored in the assessment of the link between the parties in the scenario involved in *ITC*. On these considerations, see Scott, “Change and Continuity”, p. 490.

situations¹⁰⁵. Secondly, an approach focusing on groups of situations is arguably better placed than an abstract test to identify the variety of considerations explaining the decision of individual cases¹⁰⁶. It would not be surprising if such an approach resulted in a richer understanding of the range of people, relationships and interests protected by the law through the recognition of unjust enrichment claims.

¹⁰⁵ S. Deakin and Z. Adams, *Markesinis and Deakin on Tort Law*, 8th ed. (Oxford 2019), 102.

¹⁰⁶ D. Visser, *Unjustified Enrichment* (Cape Town 2008), 73–74.

Chapter 7 Phases of a Structured Analysis

We have seen that the unjust enrichment analysis approaches the cases through a set of common questions¹. These questions are intended to break down into easily recognisable phases of inquiry the many problems arising in scenarios involving restitution for unjust enrichment. Such a structured approach to the cases is conceived as a sequential process, where each of the questions is considered separately and in turn. For example, Professor Birks formulates the questions as follows:

“Was the defendant enriched? *If so*, Was he enriched at the plaintiff’s expense? *If so*, Was there any factor calling for restitution?”².

The first phase of inquiry focuses on the defendant’s enrichment. This question brings to our attention cases involving payments of money, rendering of services, transfer of goods or land and discharges of debts to unveil the different rules underlying the identification and quantification of valuable benefits. Principles of general application are drawn from this exercise. It is thus concluded, for example, that a benefit may count as an enrichment only if it has financial value; that this financial value is primarily indicated by its objective market value; and that sometimes the defendant may “subjectively devalue” the benefit if he or she would not have chosen to obtain it for its objective market value³.

Once we identify an enrichment capable of being the subject matter of a claim, the second phase of the analysis leads us to consider the circumstances under which this enrichment may be seen as coming from the claimant. Two distinct problems arise in this

¹ See section 2.1 above.

² P. Birks, *An Introduction to the Law of Restitution*, rev. ed. (Oxford 1989) 7. Emphasis added. Birks proposed two additional questions: “Was there any reason why restitution should none the less be withheld?” and “What measure of restitution should the plaintiff have?”. These questions are regularly interpreted as pointing to the availability of a defence—i.e. a reason why liability should not arise, or arise in full, even if all the elements of an unjust enrichment claim are present—and the pertinence of the remedy sought. They will not be considered in this chapter.

³ These general principles are explained in C. Mitchell, P. Mitchell and S. Watterson (eds.), *Goff and Jones on the Law of Unjust Enrichment*, 9th ed. (London 2016), ch. 4.

phase. The first is the main subject of this thesis, i.e. the problem of identifying a sufficiently close connection between the claimant and the enriched party. The second is about deciding whether some form of correspondence is required between the enrichment obtained by the defendant and a loss on the part of the claimant. We have seen that courts and commentators typically assume that the question of the link between the parties may be answered by applying a single test⁴. Something similar happens with the correspondence question, which is frequently asked in general terms, as a matter of determining in the abstract whether the value transferred between the parties should be assessed by calculating the extent to which the defendant's gain exactly corresponds to the claimant's loss⁵.

Once we are satisfied that the defendant's enrichment can be considered to be at the claimant's expense, the third phase of the inquiry centres our attention on the reasons rendering this enrichment recoverable. In English law, these reasons are traditionally expressed through one of the recognised "unjust factors", or grounds calling for restitution⁶. Unlike the two previous phases of the analysis, which tend to proceed in general and abstract terms, the unjust factor inquiry focuses on distinct categories of cases revealing narrower principles⁷. Yet these principles are usually presented as if they could equally be applied to any situation revealing an enrichment at the expense of the claimant

⁴ See section 1.2 above.

⁵ See, for example, M. McInnes, "At the Plaintiff's Expense: Quantifying Restitutionary Relief" [1998] C.L.J. 472, 472.

⁶ The term "unjust factor" was introduced by Professor Birks and has gained recognition among English courts. See, for example, *Test Claimants in the FII Group Litigation v HMRC (No. 1)* [2012] UKSC 19, [2012] 2 A.C. 337, at [81] (Lord Walker); and *Menelaou v Bank of Cyprus UK Ltd.* [2015] UKSC 66, [2016] AC 176 ("Menelaou"), at [21] (Lord Clarke). The origins of this approach can be traced back to *Moses v Macferlan* (1760) 2 Burr. 1005, 97 E.R. 676. See B. Häcker, "Unjust Factors versus Absence of Juristic Reason (Causa)" in E. Bant, K. Barker and S. Degeling (eds.), *Research Handbook on Unjust Enrichment and Restitution* (Cheltenham 2020), 294.

⁷ *Woolwich Equitable Building Society v IRC* [1993] A.C. 70, 172 (Lord Goff); *Deutsche Morgan Grenfell Group Plc v IRC* [2006] UKHL 49, [2007] 1 A.C. 558, at [21] (Lord Hoffmann); *Lowick Rose LLP v Swynson Ltd.* [2017] UKSC 32, [2018] A.C. 313, at [22] (Lord Sumption).

in the sense indicated by the previous phases of the inquiry⁸. For example, Professor Burrows writes:

“The benefit issue can be and, for the sake of clarity, should be, cleanly isolated from the question of whether the enrichment is unjust. That is, the tests of benefit set out above are designed to fit with various unjust factors”⁹.

This thesis has been mainly concerned with only part of the “at the expense of” phase of the inquiry. Considered from this perspective, the argument developed in previous chapters may be seen as consistent with recent scholarship advocating for a more nuanced understanding of each of the different phases of the unjust enrichment analysis¹⁰. However, accepting the differentiated approach proposed here may have implications beyond the “at the expense of” phase of the inquiry. When we distinguish categories of situations providing the required link between claimant and defendant, the questions arising in each of the phases reveal themselves as somewhat different across the proposed categories. Certainly, there are rules and considerations of general application which may be usefully taken as a starting point throughout the analysis¹¹. But it seems that these general rules and considerations need to be consistently narrowed down to deal with the distinct issues arising in each category.

If this is correct, it may be better to rearrange the order in which the phases of the inquiry are considered. The question of the link between the parties should be separated from the correspondence question and brought to the beginning of the sequence. Thus, before considering the issues arising in connection with the kind of benefit enriching the

⁸ The “enrichment” and “at the expense of” phases are understood as forming a preliminary stage of the analysis which should be dealt with before turning to the question of whether the facts reveal an unjust factor. Birks, *Introduction*, pp. 99, 109, 139.

⁹ A. Burrows, *The Law of Restitution*, 3rd ed. (Oxford 2011), 62.

¹⁰ See, for example, R. Chambers, “Two Kinds of Enrichment” in R. Chambers; C. Mitchell and J. Penner (eds.) *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford 2008), 242; A. Burrows, “‘At the Expense of the Claimant’: A Fresh Look” [2017] R.L.R. 167; M. Chen-Wishart and R. Gregson, “Impaired Intention Unjust Factors?” in E. Bant, K. Barker and S. Degeling (eds.), *Research Handbook on Unjust Enrichment and Restitution* (Cheltenham 2020), 314.

¹¹ C. Mitchell, “Other Reasons for Restitution” in E. Bant, K. Barker and S. Degeling (eds.), *Research Handbook on Unjust Enrichment and Restitution* (Cheltenham 2020), 382.

defendant, the need for correspondence between loss and gain, and the existence of a reason calling for restitution, we should ask ourselves whether we are dealing with a conferral, a taking, or one of the other recognised situations.

The work of reorganising the relevant materials in this way is certainly beyond the possibilities of this thesis. However, the remainder of this chapter will focus on some hints suggesting that this work may be worth the effort. It will proceed in four parts. The first three parts will consider in turn some differences in the way the issues indicated by the “enrichment”, “correspondence” and “unjust factors” phases of the analysis arise in situations revealing a different kind of link between the parties. The fourth part will explain that the influence exerted by the kind of link over the scope of these phases should not lead us to collapse them into a single inquiry.

7.1 Enrichment

As noted above, the enrichment inquiry aims at identifying and valuing the benefit providing the subject matter of a claim. The underlying idea is that focusing on cases involving different kinds of benefit would enable courts and commentators to recognise common concerns underpinning the law. Among these concerns are the importance of limiting claims to situations involving benefits with financial value—as opposed to cultural, emotional or intellectual value—and the importance of protecting the defendant’s autonomy¹². To respect these concerns better, the principles laid down in the cases are sometimes expressed in terms of general tests applicable to every scenario. For example, Professor McInnes proposes two general tests to identify a relevant enrichment: “incontrovertible benefit” and “exercise of choice”¹³.

These tests are certainly consistent with conferral situations, where the defendant obtains a benefit in the form of a payment of money or provision of goods and services from the claimant. The leading cases frequently considered in the enrichment inquiry

¹² Mitchell et al, *Goff and Jones*, [4-03] and [4-19].

¹³ M. McInnes, “Enrichment” in E. Bant, K. Barker and S. Degeling (eds.), *Research Handbook on Unjust Enrichment and Restitution* (Cheltenham 2020), 244.

illustrate variations upon this situation. In *Sempre Metals Ltd v IRC*¹⁴, the defendant obtained the payment of Advance Corporation Tax from the claimant sooner than was legally required. In *Cressman v Coys of Kensington (Sales) Ltd*¹⁵, the defendant obtained the right to a personalised car number plate through an administrative error incurred in the context of an auction instructed by the claimants. In *Benedetti v Sawiris*¹⁶, the defendant was rendered services by the claimant in pursuance of an agreement which was subsequently abandoned. In line with general tests like those proposed by McInnes, the main questions raised by these cases were whether the benefit received by the defendant was so obviously beneficial that no person could deny that he or she had been benefited¹⁷, and whether the defendant could be seen as choosing to accept the risk of financial responsibility for the benefit obtained¹⁸.

When we move to taking situations, the questions considered in the enrichment inquiry are somewhat different. As we have seen, in these situations the claimant retains a form of entitlement over the asset explaining the defendant's enrichment. Unsurprisingly, the fact that the claimant retains a right over the asset makes it difficult to explain the exact nature of the benefit received by the defendant. For those who accept that these situations may give rise to unjust enrichment claims, reconciling the persistence of the claimant's entitlement with the defendant's enrichment poses the main challenge of this phase of the analysis¹⁹. Some commentators suggest that in these cases the defendant's enrichment must be the earning opportunities inherent in the asset²⁰. Others suggest that

¹⁴ [2007] UKHL 34, [2008] 1 A.C. 561 ("*Sempre*").

¹⁵ [2004] EWCA Civ 47, [2004] 1 W.L.R. 2775 ("*Cressman*").

¹⁶ [2013] UKSC 50, [2014] A.C. 938 ("*Benedetti*").

¹⁷ In *Sempre*, the main question was whether the use value of money paid by the claimant should be considered as an incontrovertible benefit; in *Benedetti*, whether conditions decreasing the market value of a service provided to a reasonable person in the position of the defendant should be considered to assess the value of such service.

¹⁸ In *Cressmann*, the main question was whether the retention by the defendant of a readily returnable benefit amounted to an exercise of his choice to be enriched by this benefit.

¹⁹ Detractors of this analysis have argued that there can be no enrichment without passing of title from claimant to defendant. See, for example, W. Swadling, "Ignorance and Unjust Enrichment: The Problem of Title" (2008) 28 O.J.L.S. 627; G. Virgo, *The Principles of the Law of Restitution*, 3rd ed. (Oxford 2015), pp. 11–17.

²⁰ M. McInnes, "Interceptive Subtraction, Unjust Enrichment and Wrongs—A Reply to Professor Birks" [2003] C.L.J. 697, 713; A. Burrows, "The Relationship between Unjust Enrichment and Property: some

the relevant enrichment must be a fraction of the asset's exchange value reflecting the fact that possession gives the defendant a right against everyone but the owner and other persons with a better possessory title²¹. Be that as it may, it seems that in taking cases the central enrichment questions are about distinguishing kinds of benefits following from the possession of an asset²².

Beyond conferrals and takings situations, the issues arising in the enrichment inquiry take an even more specific form. Consider the scenarios of payments of another's debt. Here, the existence of an enrichment on the part of the defendant depends on showing that the defendant's debt was discharged²³. Courts often conclude that in these circumstances the defendant obtains a "negative benefit": despite not receiving anything from the claimant, the relief of a legally necessary expense enables him or her to spend the value of the discharged liability elsewhere²⁴. But identifying and valuing this negative benefit raises specific difficulties which are not present in other unjust enrichment scenarios. These difficulties stem from the fact that the extent of the defendant's enrichment ultimately turns on his or her special relationship with the creditor. For example, it may be that the defendant could have settled with the creditor for less than the amount of the liability, or could have relied on a set-off against the creditor to reduce such liability. In these situations, the defendant may reasonably argue that his or her negative enrichment is less than the nominal value of the debt discharged by the claimant's payment²⁵. Unlike other unjust enrichment scenarios, the central enrichment questions in

Unresolved Issues" in S. Degeling and J. Edelman (eds.), *Unjust Enrichment in Commercial Law* (Sydney, 2008), 335.

²¹ Mitchell et al, *Goff and Jones*, [5-32]; J. Edelman and E. Bant, *Unjust Enrichment*, 2nd ed. (Oxford 2016) 58–59.

²² A similar conclusion seems to underpin professor Chambers' influential distinction between enrichment by the receipt of value and enrichment by the receipt of rights. Chambers, "Two Kinds of Enrichment", p. 267. It is to be noted, however, that Chambers' distinction is aimed at explaining cases involving proprietary restitution, as opposed to monetary or personal restitution. In line with the approach taken in *Investment Trust Companies v HMRC* [2017] UKSC 29, [2018] 1 A.C. 275 ("ITC"), the takings category identified in this thesis is intended to explain cases where personal restitution may be available.

²³ Mitchell et al, *Goff and Jones*, [5-54], [5-74].

²⁴ See for example, *Filby v Mortgage Express (No. 2) Ltd.* [2004] EWCA Civ 759, [2004] 2 P. & C.R. DG16, at [62] (May LJ) and the Canadian case of *Peel (Regional Municipality) v. Canada* [1992] 3 S.C.R. 762, 790 (McLachlin J).

²⁵ C. Mitchell, *The Law of Contribution and Reimbursement* (Oxford 2003), [3.16].

discharges of another's debt scenarios are specifically about working out the consequences of changes in the legal relations between the claimant, the defendant and third parties²⁶.

Something similar happens in co-ordinated transactions situations, which also involve a rather particular form of enrichment. In these situations, the defendant's benefit is brought about as a consequence of an arrangement agreed by the claimant with a third party. For example, in *Banque Financière de la Cité v Parc (Battersea) Ltd.*²⁷ the arrangement sought to discharge a debt secured by a proprietary interest in an asset over which there was a subordinate proprietary interest securing a debt owed to the defendant. As explained earlier in this thesis, in cases of this kind the relevant enrichment is not the discharged party's release from liability, but the benefit accruing to the creditor of the second debt, whose position is materially improved when the first creditor's rights are extinguished by payment²⁸. Quite distinct questions arise from this special form of enrichment. For example, if at the time of discharge of the higher-ranking security the value of the asset is not enough to repay the defendant, he or she could argue that the discharge did not result in any actual financial benefit for him or her. In this regard, the defendant's enrichment seems to turn, not on any of the considerations reviewed above, but primarily on the value of the asset to which the defendant holds a right improved by the arrangement entered into by the claimant²⁹.

²⁶ Dr. Lodder proposes a distinction between factual enrichment, or the receipt of a benefit with economic value, and legal enrichment, which includes a change in the juridical relations between the parties, particularly because the claimant discharged an obligation of the defendant. A. Lodder, *Enrichment in the Law of Unjust Enrichment and Restitution* (Oxford 2012), 39–40, 141–148. In Lodder's thesis, however, cases involving legal enrichments in the form of discharged obligations always trigger a specific restitutionary response: the reinstatement of the released obligation and recognition of the claimant of the correlative power to enforce it, as occurs in some subrogation cases.

²⁷ [1999] A.C. 221 (“*BFC*”).

²⁸ See section 4.1.2 above.

²⁹ This consideration was articulated by Morritt LJ in the Court of Appeal's decision of *BFC*. See C. Mitchell and S. Watterson, *Subrogation: Law and Practice* (Oxford 2007), [4.14].

7.2 Correspondence

Apart from the question about the link between the parties, the other question considered in the “at the expense of” inquiry is whether there must be a correspondence between the gain forming the subject matter of an unjust enrichment claim and some form of loss on the part of the claimant³⁰. Two basic positions can be identified. The first position holds that a claim in unjust enrichment provides a basis of recovery only to the extent of the claimant’s loss. This is because, unlike a claim founded on a wrong, restitution of unjust enrichment aims at restoring wealth received by the defendant from the claimant, and not at disgorging gains³¹. The second position holds that no correspondence is required provided that the claim is directed at reversing an enrichment which came “from” the claimant, this is, obtained under circumstances comprising a “transfer of value” between the parties³². Both positions approach this issue as a matter of deciding whether the purpose of the law of unjust enrichment would be better served by capping the measure of recovery to the lower amount of the claimant’s loss and the defendant’s gain. But when we distinguish categories of links between the parties, it becomes clear that the recognition of a correspondence requirement turns on specific questions which are consistently different.

Services offer the typical example where the correspondence question arises in conferral situations. Suppose that the claimant mistakenly renders repair services worth £100 which prevent the defendant’s cattle worth £1 million from crossing a defective fence and falling over a cliff³³. Assuming an unjust enrichment claim may be available in

³⁰ While it is not entirely clear what “loss” means in this context, it certainly bears a different meaning than the notion of loss in the law of damages. As explained by in *ITC*, at [45] (Lord Reed), the gratuitous provision of a service may involve a loss for the purposes of establishing an unjust enrichment claim.

³¹ McInnes, “At the Plaintiff’s Expense”, p. 473; A. Trotter, “The Double Ceiling on Unjust Enrichment: Old Solutions for Old Problems” [2017] C.L.J. 168, 171.

³² P. Birks, *Unjust Enrichment*, 2nd ed. (Oxford 2005), 78–86; Burrows, *The Law of Restitution*, pp. 68–69; Edelman and Bant, *Unjust Enrichment*, pp. 90–91.

³³ The example is taken from R. Stevens, “Three Enrichment Issues” in A. Burrows and A. Rodger (eds.) *Mapping the Law: Essays in Memory of Peter Birks* (Oxford 2006), 53. A similar scenario was involved in the Scottish case *Corrie v Craig* 2013 G.W.D. 1–55, where the pursuer owner of a farm instructed a third party to build a dyke intended to separate animals from the defenders adjoining farm. The case is discussed in M. Hogg (2013) “Continued Uncertainty in the Analysis of Unjustified Enrichment” 15 S.L.T. 111.

this kind of scenario, the correspondence question requires us to decide whether the measure of recovery should be the price obtained for the spared cattle, or the market value of the rendered services. At least in English law, it seems uncontroversial that the measure of recovery in this scenario would be the market value of the rendered services³⁴. This position has been explained in the purpose of unjust enrichment liability, which should be confined to reversing benefits transferred from the claimant, as opposed to gains subsequently made by the defendant³⁵. Once we conclude that services are valued at their market price considered at the point of receipt, no further correspondence inquiry is required: this value represents both the defendant's gain and the claimant's loss, and thus the benefit which unjust enrichment liability is intended to reverse³⁶.

A somewhat different problem underlies the correspondence question in taking situations. Typical examples where the question arises in this context involve the use or profitable exchange by the defendant of an asset to which the claimant retains some form of entitlement. Suppose that while the claimant is on holidays the defendant uses without authorisation the claimant's otherwise idle horse, returning it not only undamaged, but in better shape as a consequence of the exercise³⁷. Or that after receiving trust money taken by the claimant's trustee in breach of fiduciary duty, the defendant uses that money to buy shares which increase significantly in value³⁸. Assuming an unjust enrichment claim may be available in these scenarios, there are at least two ways of quantifying the extent of the defendant's liability. We could either conclude that it should cover all the gains made by the defendant, including the expense saved from not having to rent a horse and the full increase in the shares' value. Or we could conclude that it should be capped by the loss effectively suffered by the claimant, which in the case of the horse may be considered to be non-existent, and in the case of the shares may be confined to their exchange value.

³⁴ Mitchell et al, *Goff and Jones*, [6-111]–[6-112].

³⁵ Lodder, *Enrichment*, p. 198.

³⁶ E. Ball, *Enrichment at the Claimant's Expense* (Oxford 2016), 90–91.

³⁷ The example was proposed by Lord Mansfield in *Hambly v Trott* (1776) 1 Cowp. 371, 98 E.R. 1136.

³⁸ The example is based on the facts of *Trustee of the Property of FC Jones and Sons (A Firm) v Jones* [1997] Ch. 159, where a third party transferred money from the claimant's bank account to the defendant, who multiplied its value fivefold by speculating in potato futures.

Many commentators are inclined towards the first alternative³⁹. Yet this position is often justified in considerations which are very different from those relevant in conferral situations. Professor Stevens explains this point as follows:

“That the potential of property to be improved, exploited, or traded is to be attributed to the property owner is also seen in those cases where the owner is the claimant, rather than defendant. Where the defendant’s enrichment is a product of the claimant’s property, the claimant is entitled to strip the defendant of the gains he has made. Where the defendant’s enrichment comes from the claimant’s property, it is unnecessary for the claimant to show a correlative loss, but not in any other case”⁴⁰.

A still different problem is behind the correspondence question in payment of another’s debt scenarios. It is conceivable that in these scenarios the claimant discharges the defendant’s liability for less than its nominal value. Say the claimant persuades the creditor to take less than full value to settle his or her claim against the defendant⁴¹. Assuming an unjust enrichment claim may be available in this scenario, the correspondence question requires us to decide whether the claimant should recover the nominal value of the discharged liability, or the lesser amount actually paid by the claimant to discharge the defendant’s liability. There is some authority supporting the view that the claimant may not recover more than the amount of his or her actual payment to the defendant’s creditor⁴². To provide a complete assessment of the measure of recovery in this context, however, this rule needs to be considered alongside many other rules potentially applicable in this situation, including those allowing the defendant to reduce his or her liability to the claimant by showing the availability of a partial defence to the

³⁹ Birks, *Unjust Enrichment*, p. 79; Burrows, *The Law of Restitution*, p. 64; Edelman and Bant, *Unjust Enrichment*, p. 92.

⁴⁰ Stevens, “Three Enrichment Issues”, p. 54. Similarly, German scholarship generally accepts that the “at the expense of” requirement in interference-based claims turns on the question of how the law allocates or attributes the economic value residing in the interfered right. Häcker, “Unjust Factors”, p. 299.

⁴¹ The example is taken from Mitchell, *Contribution and Reimbursement*, [3-21].

⁴² For example, introducing the Civil Liability (Contribution) Act 1978, Lord Scarman explicitly recognised that a claimant who settles with a creditor and then looks to a defendant for a contribution cannot “recover a higher amount (...) than that which he has agreed to pay”. This and other authorities are discussed in Mitchell et al, *Goff and Jones*, [6-115].

creditor's claim⁴³. As such, it is probably better explained not as a general requirement of every unjust enrichment claim, but as part of a complex body of law concerned with making each party bear an appropriate share of the burden of paying the creditor in light of the nature of their relationships with one another⁴⁴.

If one category of the identified situations should be analysed in terms of a general correspondence requirement, this would probably be co-ordinated transactions. Unlike all the other scenarios identified in this thesis, in this context it is difficult to avoid the conclusion that the defendant's enrichment is brought about as a mere causal product of the claimant's performance of an arrangement agreed with a third party⁴⁵. If this is the case, a correspondence requirement may be rightly advocated on the basis that there is no justification for forcing the defendant to give up gains beyond the amount actually lost by the claimant⁴⁶, or that scarce judicial resources should not be wasted to allocate windfalls between two equally undeserving parties⁴⁷. A general correspondence restriction makes sense in this context because a mere causal connection between defendant's gain and claimant's loss may extend the scope of unjust enrichment claims too far⁴⁸. Importantly, however, this danger does not seem to arise in the other situations, where the link between the parties is governed by stringent requirements.

7.3 Unjust Factors

As noted above, the most accepted view requires a positive reason showing the unjustness of the defendant's enrichment as a necessary element of unjust enrichment claims. Much debate has followed Birks' controversial proposal that English law would be better understood as adopting a form of "absence of basis" approach, where the unjustness of the defendant's enrichment would depend not on the existence of a particular factor calling

⁴³ Mitchell et al, *Goff and Jones*, [20-18], [20-37].

⁴⁴ Mitchell, *Contribution and Reimbursement*, [3-29].

⁴⁵ See section 4.3.2 above.

⁴⁶ McInnes, "At the Plaintiff's Expense", pp. 476-477.

⁴⁷ This justification is proposed in the Australian decision of *Roxborough v Rothmans of Pall Mall (Australia) Ltd.* [2001] HCA 68, (2001) 208 C.L.R. 516, at [118] (Kirby J).

⁴⁸ Burrows, *The Law of Restitution*, p. 65.

for restitution, but on the lack of a legal basis justifying the enrichment's acquisition⁴⁹. One of the reasons given in favour of this approach is its purported aptitude to express in simple terms the common rationale behind all the recognised grounds of restitution⁵⁰. But this conclusion is misleading. When we distinguish categories of situations providing the required link between the parties, we can see that the grounds of restitution are consistently different in scenarios falling under the different categories⁵¹.

Among the unjust factors typically recognised by English courts, those pointing to the claimant's impaired or qualified consent play a central role. Mistake and failure of consideration (or failure of basis) are arguably the reasons for restitution of unjust enrichment of most practical and theoretical importance⁵². Whether these unjust factors should be conceived as exclusively concerned with the claimant's impaired intention is subject to debate⁵³. But if we are to look for a reason explaining restitution in conferral situations, where establishing the link between requires showing the existence of an intentional act of the claimant, these unjust factors offer a natural starting point⁵⁴.

Something different happens in takings situations. Here, there is no intentional action of the claimant behind the defendant's enrichment, so impaired and qualified consent unjust factors are clearly inadequate⁵⁵. To explain the award of restitution in these

⁴⁹ Birks, *Unjust Enrichment*, pp. 40–45.

⁵⁰ Birks, *Unjust Enrichment*, pp. 116, 160. See also R. Stevens, "Is There a Law of Unjust Enrichment?" in S. Degeling and J. Edelman (eds.), *Unjust Enrichment in Commercial Law* (Pymont 2008), 11.

⁵¹ Even in German law, which seems to have been the model Birks had in mind when proposing the "absence of basis" approach to English law, commentators usually accept that the reason for restitution is tied to the link between the parties. See, for example, S. Meier, "Enrichment 'At the Expense of Another' and Incidental Benefits in German Law" in H. Scott and A. Fagan (eds.), *Private Law in a Changing World: Essays for Danie Visser* (Claremont 2019), 468.

⁵² A. Burrows, "Conditional Intention as an Unjust Factor" in E. Bant, K. Barker and S. Degeling (eds.), *Research Handbook on Unjust Enrichment and Restitution* (Cheltenham 2020), 345.

⁵³ See, for example, C. Mitchell, "Unjust Factors in Three-Party Cases" [2017] R.L.R. 223 and Chen-Wishart and Gregson, "Impaired Intention Unjust Factors?", p. 342.

⁵⁴ Burrows, "A Fresh Look", p. 175. This is not intended to mean that unjust factors pointing to impaired or qualified consent are the *only* reasons calling for restitution in conferral scenarios. The so-called "policy based" unjust factors, including those applicable in cases where money is paid as tax that is not due, will typically apply in conferral scenarios as well. Häcker, "Unjust Factors", p. 297.

⁵⁵ This is particularly clear in cases where the defendant receives the enriching asset from a third party. A. Tettenborn, "Lawful Receipt—A Justifying Factor?" [1997] R.L.R. 1, 5.

scenarios, English scholars have focused on the complete absence of the claimant's consent, expressed either in his or her ignorance about the defendant's receipt of the enriching asset⁵⁶, or the want of authority of the third party transferring the asset to the defendant⁵⁷. These unjust factors were not originally drawn from the decided cases, so their place in English law is understandably a controversial issue⁵⁸. But those who advocate for their recognition usually admit that their application is properly confined to scenarios falling within takings situations⁵⁹.

Neither impaired consent nor absence of consent unjust factors apply in payment of another's debt scenarios. Here, some commentators have attempted to explain restitution in a form of compulsion affecting the claimant's intention to benefit the defendant. According to this view, where a legal rule enables the creditor to seek repayment from either the claimant or the defendant, the claimant's discharge of the defendant's debt is not freely intended⁶⁰. In many cases, however, the reason why the creditor is enabled to demand repayment from the claimant is that the claimant voluntarily assumed the obligation, as happens when it acts as guarantor or insurer of the obligation assumed by the defendant. Therefore, a more convincing explanation of the reason

⁵⁶ Birks, *Introduction*, pp. 140–146; Burrows, *The Law of Restitution*, pp. 403–404.

⁵⁷ Mitchell et al, *Goff and Jones*, [8-02]. This label describes the applicable unjust factor in situations where, despite knowing about the enriching transaction, the claimant cannot prevent it as the defendant receives the enriching asset from a third party who owns it or controls it subject to the duty to deal with it for the benefit of the claimant.

⁵⁸ Absence of consent unjust factors were recognised by commentators as a logical consequence of those cases where restitution was justified in a defect in the claimant's consent. Burrows, *The Law of Restitution*, pp. 403–405. In *Relfo Ltd (In Liquidation) v Varsani* [2012] EWHC 2168 (Ch), at [88] (Sales J), it was accepted that a proper ground for a personal claim in unjust enrichment was established when the claimant company's director diverted funds in breach of his fiduciary duty and acting outside the scope of his authority. This decision was affirmed by the Court of Appeal without express discussion of the ground for restitution.

⁵⁹ Mitchell et al, *Goff and Jones*, [8-01]; Burrows, "A Fresh Look", pp. 175–176; M. Bryan, "No Intention to Benefit" in E. Bant, K. Barker and S. Degeling (eds.), *Research Handbook on Unjust Enrichment and Restitution* (Cheltenham 2020), 364. See further B. Häcker, "Fog on the Channel? Six Comparative Lessons in Unjust(ified) Enrichment" [2017] R.L.R. 61, 70, note 87, arguing that in taking situations "the claimant's knowledge or attitude cannot be the sole determining factor for deciding whether or not the defendant's enrichment is unjustly obtained at the claimant's expense. The crucial question has instead to be whether the legal system ascribes the particular benefit to the claimant in the first place".

⁶⁰ Birks, *Introduction*, pp. 185–193; G. Virgo, *The Principles of the Law of Restitution*, 3rd ed. (Oxford 2015) 233; Edelman and Bant, *Unjust Enrichment*, pp. 293–298.

justifying restitution in these scenarios focuses on the need of ensuring that the defendant bears his or her burden in paying the creditor⁶¹. The applicable unjust factor, sometimes labelled as “secondary liability”, seems to reflect distinct policy objectives which are unique to this context⁶².

None of the unjust factors referred to above are easy to square with the cases illustrating co-ordinated transactions. In *BFC*, Lord Hoffmann explained the defendant’s liability in the fact that the claimant would have not entered the refinancing arrangement had not been for the mistaken assumption that it would have priority over intra-group indebtedness⁶³. Similarly, in *Menelaou* Lord Clarke said that the claimant would not have released its charge had it not being acting under the mistaken assumption that it would obtain a new valid security⁶⁴. But these explanations are controversial. In *Lowick* it was concluded that the reasons justifying liability in *BFC* and *Menelaou* were in many respects *sui generis*⁶⁵. As noted earlier, Lord Sumption preferred to explain the outcomes of these cases in a defeated expectation of the claimant while entering the arrangements which enriched the defendant⁶⁶. Though this explanation may also be open to debate⁶⁷, it certainly shows that the unjust factors applicable to other situations do not sit comfortably in co-ordinated transactions.

7.4 A Single Normative Sequence?

These differences suggest that the kind of link existing between the parties determines the kind of issues we will find in each of the stages of the unjust enrichment analysis. In this

⁶¹ Mitchell et al, *Goff and Jones*, [19-01].

⁶² Mitchell, “Other Reasons for Restitution”, pp. 389–390.

⁶³ *BFC*, p. 234 (Lord Hoffmann). Burrows notes that this conclusion is problematic, because the relevant mistake seems to have been a mistake of law and not fact, and at the time the decision was rendered, mistakes of law did not allowed restitution. Burrows, *The Law of Restitution*, p. 154, note 49.

⁶⁴ *Menelaou*, at [22] (Lord Clarke). Virgo notes that this conclusion is problematic, because the relevant mistake did not refer to existing facts, but rather expressed a misprediction as to what should have occurred in the future. G. Virgo, “Restitution and Unjust Enrichment in the Supreme Court: Reflections on Bank of Cyprus UK Ltd v Menelaou” (2016) University of Cambridge Faculty of Law Research Paper No. 10/2016, p. 11.

⁶⁵ *Lowick*, at [30] (Lord Sumption).

⁶⁶ See section 4.3.1 above.

⁶⁷ See, for example, R. Stevens, “The Unjust Enrichment Disaster” (2018) 134 L.Q.R. 574, 593.

sense, the conclusion that the stages of the inquiry are intertwined seems sound⁶⁸. Approaching unjust enrichment cases through a structured framework should not lead us to assume that each of the common questions may be answered in complete isolation.

But there is another sense in which the stages of the inquiry may be considered to be related. It has been suggested that separating the issues arising in the “enrichment”, “at the expense of” and “unjust factors” phases is unhelpful. According to this opinion, in claims following the rationale of the core unjust enrichment cases, the different elements of the analysis are better viewed as an indivisible unity. For example, Professor Stevens writes:

“We cannot distinguish ‘enrichment’ and ‘at the expense of’ as separate elements of this kind of claim: they are the same thing looked at from one side or the other. The same justifying reason for restitution (the performance for which there is no reason) applies to both parties concurrently. The elements of the claim form a single normative sequence and cannot be separated one from another”⁶⁹.

The reasons for reducing unjust enrichment claims to those involving a performance from claimant to defendant have been already considered and rejected⁷⁰. But even in this narrower context—scenarios falling under what in this thesis is referred to as conferrals situations—collapsing the distinct phases of the unjust enrichment analysis may lead to muddling the principles laid down in previous cases. The decision of the Supreme Court in *Prudential Assurance Co. Ltd. v HMRC*⁷¹ offers a useful illustration. In this case, the claimant paid Advance Corporation Tax on dividends received on overseas portfolio investments. At the time tax was paid, these dividends constituted an income taxable in accordance with a less favourable regime than the one applicable to dividends received from UK companies. The Court of Justice of the European Union (formerly known as the

⁶⁸ L. Smith, “Restitution: A New Start?” in P. Devonshire and R. Havelock (eds.), *The Impact of Equity and Restitution in Commerce* (Oxford 2019), 110.

⁶⁹ Stevens, “Disaster”, p. 582. See also F. Wilmot Smith, “A Prudent Decision” (2019) 135 L.Q.R. 195, 198.

⁷⁰ See section 6.1.3 above.

⁷¹ [2018] UKSC 39, [2019] A.C. 929 (“*Prudential*”).

European Court of Justice) eventually held that this different treatment breached European Union legislation on freedom of movement of capital. Relying on this decision, the claimant sought restitution from HMRC in the form of an award for interest reflecting the use-value of the amount paid as tax not lawfully due.

The claimant's position drew support from the decision of the House of Lords in *Sempra*, where it was held that English law recognised an unjust enrichment claim to recover interest as a measure for the use-value of mistakenly paid tax. In that case, Lord Nicholls reasoned that a mistaken payment of undue tax involved not only the transfer of the amount of tax mistakenly paid, but also the opportunity for the recipient to use that money. Because of this, reversing the defendant's enrichment required an award of interest (which depending on the facts may be compound) reflecting the use value of the money⁷².

Prudential rejected this reasoning as inconsistent with recent judicial treatment of the "at the expense of" phase of the unjust enrichment analysis. According to the judgment, in *ITC* it was established that unjust enrichment claims would be premised on the existence of a transfer of value, which would generally involve the direct provision of a benefit from the claimant to the defendant⁷³. When money is paid by mistake as undue tax, the only transfer of value between the parties is the provision from claimant to defendant of the amount mistakenly paid. The opportunity to use the money is only a consequence of that transfer of value, and it does not constitute an independent transfer of value affording the basis for an unjust enrichment claim⁷⁴. Thus, contrary to what was concluded in *Sempra*, the use-value of a mistakenly paid amount could not be considered as a benefit obtained at the claimant's expense in the required sense⁷⁵.

⁷² *Sempra*, at [26], [36] (Lord Hope) and [102], [112] (Lord Nicholls).

⁷³ *Prudential*, at [68] (Lord Reed, Lord Hodge and Lord Mance).

⁷⁴ *Prudential*, at [71] (Lord Reed, Lord Hodge and Lord Mance).

⁷⁵ *Prudential*, at [79] (Lord Reed, Lord Hodge and Lord Mance).

One can readily understand the reasons for reconsidering the rule adopted in *Sempra*. Apart from the disruption it caused to public finances, the rule raised difficult questions of principle, including why failure to repay any debt should not give rise to an independent unjust enrichment claim for the use-value of the owed amount⁷⁶. Yet *Prudential* does not offer conclusive reasons for separating the conferral of an asset and the conferral of the use-value of the asset for the purposes of establishing the required link between claimant and defendant. While the judgment attributes this distinction to *Sempra*, Lord Nicholls' reasoning in that case did not identify two distinct transfers, but rather two distinct benefits arising from a single transfer taking place between the parties. Both benefits had to be separated from benefits derived to the defendant as consequence of subsequent handling of the money, which according to *Sempra* were not recoverable through an unjust enrichment claim⁷⁷. *Prudential* blurs this distinction by assuming that every benefit different from the paid amount itself cannot but be a consequential and thus irrecoverable benefit⁷⁸.

Much weight is given in the judgment to the conclusion that only the amount itself can be “directly transferred” from claimant to defendant. But this conclusion is exposed to at least two objections. First, as explained earlier in this thesis, the notion of “directness” does not have a stable meaning and has proved to be unhelpful to determine the kind of connection supporting unjust enrichment claims. While it is admittedly used in *ITC*, we have seen that this case was not decided on the basis of any precise notion of directness,

⁷⁶ *Prudential*, at [65] (Lord Reed, Lord Hodge and Lord Mance).

⁷⁷ *Sempra*, at [117] (Lord Nicholls), describing these benefits as fruits yielded by the money, rather than benefits transferred from the claimant. Say C mistakenly pays D £1,000 as tax. C discovers the mistake and brings a claim for restitution, which is granted. Under the distinction adopted in *Sempra*, C is entitled to £1,000 plus interest representing the use value of the money in the period going from the day of the mistaken payment to the day of repayment, say £200. But any further gain made from that money, including the opportunity to use the £200 awarded as use-value of the mistakenly paid money, would not be considered to have been transferred from C. See A. Burrows, “In Defence of Unjust Enrichment” [2019] C.L.J. 521, 540–541.

⁷⁸ The decision may be read as endorsing a narrow view of unjust enrichment claims, the objective of which would be restoring the very asset transferred between the parties, as opposed to its value. In this light, the judgment's unqualified rejection of consequential gains as a measure of recovery in unjust enrichment is not difficult to understand. Even confining the analysis to conferral situations, however, this narrow view is difficult to square with unjust enrichment cases involving the provision of services, where no asset is transferred between the parties.

and that it explicitly recognised that unjust enrichment claims may be available in scenarios involving no direct dealings between the parties⁷⁹. Secondly, there is no reason to exclude the possibility that the use-value of an asset could be conferred from claimant to defendant as the main benefit transferred, as opposed to a mere consequence of another transfer taking place between them. Say claimant and defendant public authority enter into a contract in pursuance of which the claimant confers the retention and use of a building to the defendant. If the contract turns out to be void because the defendant was acting ultra vires, the claimant may have an unjust enrichment claim for the value of the right of possession and use of the building, even where the property itself was not transferred⁸⁰. In this situation, the only transfer of value providing the required link between the parties would be the transfer of the use-value of the asset⁸¹.

The judgment's approach seems to have been inspired by Stevens' criticism of *Sempra* for failing to identify the proper performance taking place between the parties⁸². Interestingly, however, there was a way of departing from the rule adopted in *Sempra* which did not require to rely on a directness requirement or assume that the conferral of the use-value of a benefit could never be at the expense of the claimant. In line with the phases of the unjust enrichment analysis reviewed above, the judgment could have separated the question for the link between the parties from the question about the identification and valuation of the benefit enriching the defendant. In considering the first question, the approach taken in *ITC* should have led to the conclusion that the parties were linked in the required sense: as previously explained, the payment of money from claimant to defendant provides the paradigmatic example of a conferral situation. In considering

⁷⁹ See section 1.4 above.

⁸⁰ This hypothetical is based on *School Facility Management Ltd. v Governing Body of Christ the King College* [2020] EWHC 1118 (Comm), where Foxton J concluded at [437] that "where the benefit conferred is not the transfer of property outright, but the transfer of the right of possession (and the concomitant right of use) of property which the transferor is entitled to terminate at will, it is appropriate to treat each period during which the right of possession and use subsists as an independent transfer of value".

⁸¹ There may be other scenarios, in particular those involving the provision of goods, where denying recovery of the use-value of a benefit may leave the defendant unjustly enriched. See Burrows, "In Defence", pp. 539, 540.

⁸² Stevens, "Disaster", p. 596. The influence of Stevens' ideas in the judgment is noted by Burrows, "In Defence", p. 538, note 72.

the second question, the judgment might have concluded that there were important reasons to reconsider the method for identifying and valuating the relevant gain in the scenario at hand⁸³. As noted in the judgment, there was an increasing awareness among commentators that the method adopted in *Sempra* could lead to unrealistic and unfair results⁸⁴. Instead of returning to the difficult notion of directness and casting a doubt over the possibility of recovering the use-value of benefits in scenarios outside the mistaken payment of tax, the judgment could have simply adjusted the rules on identification and valuation of the relevant enrichment involved in this particular scenario⁸⁵.

Nothing here is intended to deny that there may be significant overlaps between the issues arising in the different phases of the unjust enrichment analysis⁸⁶. But it must be remembered that the main purpose of this analysis is providing a guide to address the relevant issues as consistently as possible. The risk of confusing them is significantly increased when we collapse the phases of analysis into a single question about the existence of a qualifying transfer between the parties. The experience of other jurisdictions suggests that, no matter how refined we may think that doctrinal constructions like “transfer of value” or “performance” are, they cannot provide the solution to the variety of problems arising in situations where unjust enrichment claims are relevant⁸⁷. Failing to

⁸³ As has happened, though in the opposite sense, with the method for identifying and valuating the relevant loss in cases of compensation for breach of trust. For example, in *Watson v Kea Investments Ltd.* [2019] EWCA Civ 1759, [2019] 4 W.L.R. 145, the Court of Appeal concluded that where a trustee misapplies trust funds, the courts have discretion to award interest reflecting returns the beneficiary would have obtained had the trust funds been invested appropriately. Under this analysis, the beneficiary’s loss includes not only the nominal value of the assets misapplied, but also the cost for the beneficiary of not obtaining the expected returns.

⁸⁴ The judgment cites Professor Burrows explaining how applying compound interest from the date of receipt on all mistaken payments of tax seems equivalent to assuming that, had the payment not been made, HMRC would have borrowed the same amount at a compound interest rate for the same period of time. *Prudential*, at [80] (Lord Reed, Lord Hodge and Lord Mance). Similar concerns are raised in D. Visser, “Littlewoods Ltd v HMRC: Compound Interest—Not so Simple in Unjust Enrichment Cases?” [2018] B.T.R. 209, 214–215.

⁸⁵ Burrows, “In Defence”, p. 540; McInnes, “Enrichment”, p. 248.

⁸⁶ As recognised in *Investment Trust Companies v HMRC* [2012] EWHC 458 (Ch), [2012] S.T.C. 1150, at [39] (Henderson J).

⁸⁷ D. Visser, “Searches for Silver Bullets: Enrichment in Three-party Situations” in D. Johnston and R. Zimmermann (eds.), *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge 2002), 527–528; Häcker, “Unjust Factors”, p. 306.

maintain the discipline of structuring the analysis on more manageable parts might render us victims of that familiar irony of bringing about precisely the uncertainty we profess to fear⁸⁸.

⁸⁸ Birks, *Introduction*, p. 20. In *ITC*, Lord Reed concluded at [41] that if the common questions are not separately considered, “there is a risk that courts will resort to an unstructured approach driven by perceptions of fairness, with consequent uncertainty and unpredictability”. See also *Skandinaviska Enskilda Banken AB v Conway* [2019] UKPC 36, [2019] 3 W.L.R. 493, at [79]–[80] (Lord Reed, Lord Lloyd-Jones and Lord Briggs), and the Australian decision of *Mann v Paterson Constructions Pty. Ltd.* [2019] HCA 32, (2019) 373 A.L.R. 1, at [212] (Nettle, Gordon and Edelman JJ).

Conclusion

This thesis has argued that English law will benefit from adopting a differentiated approach distinguishing situations where diverse links may be enough to make up an unjust enrichment claim. At least four kinds of situations may be identified: conferrals from the claimant to the defendant; takings by the defendant from the claimant; discharges of the defendant's debt; and co-ordinated transactions. In each of these situations, the link between the parties is premised on different features which cannot be conveniently generalised into a single test. When we distinguish these situations, it becomes apparent that the kind of link existing between the parties determines the kind of issues arising in each of the main phases of the unjust enrichment analysis.

Significance of the Findings

It was noted at the outset that considerable uncertainty had resulted from the adoption of the main tests proposed in the literature to recognise the kind of link supporting unjust enrichment claims. This uncertainty seemed to confirm the misgivings of those advocating the rejection of a unified analytical framework. The position presented in this thesis contributes to dispel the uncertainty surrounding the question of the link between the parties, and thus to overcome some of the difficulties identified by detractors of the unjust enrichment analysis.

On the one hand, the approach proposed here avoids the shortcomings suffered by the tests previously proposed by unjust enrichment scholarship. By focusing on recognised categories of situations, it provides a basic guide to identify the kind of scenario where the required link may be established. It does so without relying on a directness analysis, which is unstable and cannot reflect what happens between the parties in many of the recognised scenarios. Nor does it rely exclusively on a causal analysis, which has proved to be inherently expansive, or on an open list of policy considerations, which provide little guidance beyond the specific facts of the cases where these considerations have been identified.

On the other hand, the thesis offers a solution to the problems of unwarranted analogies and overgeneralisation denounced by detractors of the unjust enrichment analysis. By shifting the emphasis to the specific features accounting for the link between the parties in identified situations, the approach proposed here does not require us to assume that the scenarios falling under each of these situations cannot be significantly different. Further, it does not compel us to extend unjust enrichment liability to unlikely hypotheticals beyond the identified situations. We can safely conclude that scenarios like the one involved in the rising heat or destroyed stamp hypotheticals do not reveal the features of any of the situations where unjust enrichment claims have been recognised in the decided cases.

Critically, the approach proposed here is not incompatible with recognising the important advantages of analysing unjust enrichment claims through a unified framework. The comparison of the German and French approaches to restitutionary claims shows that this kind of framework plays an important part in enhancing our understanding of the law and guiding our attention towards the important issues. By suggesting a way of accommodating the differences between the identified situations without renouncing an overall view of them, this thesis offers a way of preserving the unity of the subject and avoids deporting some restitutionary claims to a miscellaneous category where they may be harder to understand.

Finally, the approach proposed here offers a way of thinking about the link between the parties which promotes an incremental refinement of the situations where unjust enrichment claims may be recognised. In the preferred common law fashion, the features indicating the boundaries between the identified situations can be gradually adjusted to present a clearer overall picture. Further, the common set of concepts resulting from the analysis of unjust enrichment cases through a unified framework may guide the recognition of new situations beyond those identified in this thesis. These new situations could be accommodated alongside the ones already identified without distorting our understanding of the defining features of any of them.

Unresolved Questions

This thesis has sought to reconsider the question of the link between the parties from a broader perspective than the one taken by previous scholarly works on the subject. By doing so, it has been able to expose structural difficulties faced by these works and to suggest an approach designed to avoiding them. But the account presented here is incomplete in a number of important ways. It can only expect to offer a plausible way of approaching the question, not a comprehensive answer to the question itself. Providing such a comprehensive answer will require overcoming at least the following limitations of this work.

First, this thesis has attempted to show that each of the identified situations providing the link between the parties reveals features which are significantly different from each other. But these features are described in terms which are admittedly tentative. The point of offering such a tentative description is not to present a definitive restatement of the law, but rather to show why the features of the identified situations should not be concealed behind an abstract notion explaining the required link in every unjust enrichment case. A more precise answer to the question of the link between the parties would require to delve deeper into these situations and test the proposed descriptions against the whole range of cases which may fall under each of them.

Secondly, this thesis has attempted to show that a unified framework for analysing unjust enrichment claims is not inconsistent with accepting that different normative concerns may be behind the recognition of these claims in different situations. However, no attempt has been made to spell out what these concerns may be. If the identified situations are to be relied upon to provide appropriate guidance in the decision of future cases, more work is needed in understanding the justifications for recovery in each of them.

Thirdly, this thesis has left open the possibility that links involved in additional situations may be sufficient to establish the requirements of unjust enrichment claims. It has been noted that these additional situations might include those described as

interceptive subtractions or enrichments by imposition, none of which have been explicitly recognised by English courts as giving rise to unjust enrichment claims. Nonetheless, a fuller answer to the question of the link between the parties should include an assessment of whether they should play a role in explaining some of the decided cases or guiding the decision of future ones.

Fourthly, this thesis has suggested that the kind of link existing between the parties determines the kind of issues arising in each of the main phases of the unjust enrichment analysis. To substantiate this claim, the thesis has pointed to some differences in the way the issues indicated by the “enrichment”, “at the expense of” and “unjust factors” phases arise in each of the identified situations. But little has been said about the issues indicated by the “defences” and “remedies” phases. A detailed consideration of this part of the analysis might provide additional insights into the features defining the link between the parties in different scenarios. This exercise may be particularly relevant in the case of coordinated transactions, which have been invariably recognised in cases involving the remedy of subrogation.

Finally, and perhaps more importantly, this thesis has attempted to bring together the debate about the link between the parties with the broader debate about the division and ordering of the law of unjust enrichment. As noted at the outset, this effort is consistent with the increasing awareness shown by common lawyers that the two discussions are closely related. Yet there is still much work to be done to clarify the place of unjust enrichment in the map of English private law. The answer we give to the question of the link between the parties must be kept under permanent revision to reflect structural definitions about the scope of the subject. The experiences of jurisdictions like Germany and France suggest that this process will continue to spark controversy in years to come.

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