

that the courts award restitution is a means of solving “residual” problems.⁴ Moreover, it is clearly true that the operation of the English law of unjust enrichment is affected by the operation of other legal doctrines, and that the effect of these doctrines can be to nullify rights generated for a claimant by the law of unjust enrichment. Nevertheless, we do not believe that it is helpful to characterise the relationship between the law of unjust enrichment and other sources of rights and obligations in private law as one of “subsidiarity” and “primacy”.

2-04 One problem is that this terminology is unstable. Lawyers from common law systems, lawyers from civilian and mixed legal systems, and comparative lawyers have all used the language of “subsidiarity” to express a number of different ideas about the reasons why a claimant might be debarred from relying on rights generated by one part of the law because his relationship with the defendant is also affected by rules emanating from another part of the law.⁵ Another problem is that the language of “subsidiarity” suggests that English law maintains a hierarchy of rights under which rights generated by the law of unjust enrichment are invariably placed at the bottom.⁶ Although English law does frequently subordinate rights in unjust enrichment to rights generated by other sources, it does not always do so, and we share Stephen Waddams’ view that the relationship between mutually interdependent bodies of law such as contract and unjust enrichment is more complex and more subtle than is suggested by the concept of a hierarchy of rights.⁷ For these reasons we consider that the language of subsidiarity is best avoided when analysing the interplay between the law of

⁴ *Niru Battery Manufacturing Co v Milestone Trading Ltd (No.1)* [2003] EWCA Civ 1446; [2004] Q.B. 985 at [192].

⁵ See e.g. B. Nicholas, “Unjust Enrichment and Subsidiarity” in F. Santoro Passarelli and M. Lupoi (eds), *Scintillae Iuris: Studi in Memoria di Gino Gorla* (Milan: A. Giuffrè, 1994), 2037; B. Nicholas, “Modern Developments in the French Law of Unjustified Enrichment”, in P.W.L. Russell (ed.), *Unjustified Enrichment: A Comparative Study of the Law of Restitution* (Amsterdam: Vrije Universiteit, 1996), 77, pp.87–95; L. Smith, “Property, Subsidiarity, and Unjust Enrichment” in D. Johnston and R. Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge: CUP, 2002), 588; J. Beatson and E.J.H. Schrage (eds), *Cases, Materials and Text on Unjustified Enrichment* (Oxford: Hart Publishing, 2003), Ch.7; G.E. van Maanen, “Subsidiarity of the Action for Unjustified Enrichment—French Law and Dutch Law: Different Solutions for the Same Problem” (2006) 14 E.R.P.L. 409; N.R. Whitty, “*Transco plc v Glasco v City Council*: Developing Enrichment Law after *Shilliday*” (2006) 10 Edinburgh Law Rev. 113, pp.122–132; D. Visser, “Unjustified Enrichment” in J.M. Smits (ed.), *Elgar Encyclopedia of Comparative Law* (Cheltenham: Edward Elgar, 2006), 767, pp.771–772.

⁶ Grantham and Rickett, “On the Subsidiarity of Unjust Enrichment” is a case in point. At pp.273–274, they rightly state that “the extent or strength of the subsidiarity of unjust enrichment will depend upon the proper construction of the primary doctrine, and in particular whether in denying the plaintiff a claim the primary doctrine continues, by negative implication, to regulate the relationship”; but this qualification is lost from view as their argument proceeds.

⁷ S. Waddams, “Contract and Unjust Enrichment: Competing Categories, or Complementary Concepts?” in C. Rickett and R. Grantham (eds), *Structure and Justification in Private Law* (Oxford: Hart, 2008), 167. Stephen Smith, in his article on “Concurrent Liability in Contract and Unjust Enrichment: the Fundamental Breach Requirement” (1999) 115 L.Q.R. 245, takes an even stronger position and claims that, in principle, the relationship between contract and unjust enrichment should be “the same as the relationship between contract and tort, namely there would be ‘general’ concurrent liability in each case.” However, he concedes that there are formidable difficulties to the acceptance of this view, not the least being that the House of Lords (now the Supreme Court) would have to accept that a claim in unjust enrichment would lie even though the breach of contract is not so fundamental as to enable the claimant to elect to terminate the contract.

unjust enrichment and other sources of rights that might generate overriding justifications for the defendant’s enrichment at the claimant’s expense.

In this chapter and the next, we discuss several reasons why the courts might hold that a defendant’s enrichment is justified notwithstanding the claimant’s prima facie right to restitution. In this chapter, we look at statutes, judgments and court orders, and natural obligations; in the next chapter we look at contracts.

Obviously, where a defendant relies on a statute or judgment or contract as a factor justifying his enrichment, the claimant may be able to defeat this argument if he can show some reason why the justifying ground invoked by the defendant should be disregarded. If it simply does not arise on the facts of the case then it will not affect the claimant’s restitutionary right. It may also be that the claimant can attack the underlying validity of the justifying ground, for example by showing that the statute is ultra vires,⁸ or by persuading an appellate court to overturn the judgment, or by showing that the contract is void for illegality. If a claimant seeks to avoid a contract by making an argument based on vitiated consent, for example by arguing mistake, duress or undue influence, then it should not be assumed that the rules governing the question when a contract can be set aside on these grounds are the same as the rules governing the question whether a benefit can be recovered on similar grounds in the law of unjust enrichment. However, detailed consideration of the rules governing the avoidance of contracts lies beyond the scope of the present work, and specialist texts should be consulted on this topic.⁹

2. STATUTES

There are different ways in which a statute might affect rights that would otherwise arise in the law of unjust enrichment. First, the statute might require the claimant to benefit the defendant, so that the defendant’s enrichment is directly justified by the legislation. Secondly, the statute might expressly or impliedly extinguish a claimant’s rights in unjust enrichment. Thirdly, a claim in unjust enrichment might be disallowed in order to avoid stultifying the policy underlying a statute that forbids parties to enter transactions of a certain type.

(a) Statute Requires the Claimant to Benefit the Defendant

Where a statute requires a claimant to transfer a benefit to a defendant the courts can usually be expected to hold that the defendant’s enrichment is justified by the statute, so that no claim in unjust enrichment will lie to recover the benefit, even if the claimant can show that he made a mistake, or transferred the benefit for some other reason that would normally lead the courts to hold that the defendant’s enrichment was unjust. To give a common example, taxpayers often overlook opportunities to arrange their affairs in a more tax-efficient way, and so

⁸ For discussion of the different methods by which a claimant might attack a statute that apparently justifies the defendant’s enrichment, see M. Chowdry and C. Mitchell, “Tax Legislation as a Justifying Factor” [2005] R.L.R. 1, pp.13–18.

⁹ e.g. H. Beale (ed.), *Chitty on Contracts*, 30th edn (London: Sweet & Maxwell, 2008), Chs 5–7.

it still the plaintiff's money? How is it shewn not to be so?", and he gave this answer⁹¹:

"Why, by striving to give effect to a fraud. That is the finding of the jury: the arrest was fraudulent; and the money was parted with under the arrest, to get rid of the pressure. This case differs from all which have been cited as being otherwise decided: in none of those was the *bona fides* negatived, not even in *Marriott v Hampton* . . . for, in default of evidence to the contrary, the party there might have believed the debt to be due. But here the jury find that the defendant did know that he had no claim."

2-35 Revisiting these cases three years later in *Wilson v Ray*, Lord Denman drew the same distinction⁹²:

"[The] principle established in *Marriott v Hampton* . . . [is] that what a party recovers from another by legal process, without fraud, the loser shall never recover back by virtue of any facts which could have availed him in the former proceeding. Money so recovered was . . . received to the use of the successful party by authority of law. If any error was committed in the former proceeding, still the plaintiff is estopped from proving it after failing to do so at that time. If this were otherwise, the rights of parties could never be finally settled by the most solemn proceeding; and verdicts and judgments might be rendered nugatory by evidence which, if produced at the proper season, might have received a complete answer. The *Duke de Cadaval's* case was not intended to be, nor is it, inconsistent with this doctrine. It turned on fraud and extortion practised by an abuse of *ex parte* legal process by one who knew that he had no right to the money he obtained."

2-36 The general rule, therefore, is that money paid pursuant to a court order is irrecoverable for as long as the order subsists, but there is an exception to this principle in cases where the order has been obtained by fraud⁹³—a situation, it may be noted, in which the claimant may alternatively be entitled to recover compensatory damages for the tort of malicious abuse of process.⁹⁴

2-37 The general rule has been extended to the situation where money is paid following the issue of proceedings which do not proceed to judgment,⁹⁵ and it applies to orders issued by a foreign court as well by the English courts. For example, in *Clydesdale Bank Ltd v Schröder & Co*⁹⁶ the claimants were mortgagees of a ship that was arrested in Chile when the defendants successfully brought proceedings before the Chilean court to assert a lien over the vessel in respect of money lent to the owners and master. To secure the release of the ship

⁹¹ *Duke de Cadaval* at 4 Ad & El. 864–865; 111 E.R. 1010.

⁹² *Wilson v Ray* (1839) 10 Ad. & El. 82 at 88–89; 113 E.R. 32 at 35–36.

⁹³ See too *Pitt v Coomes* (1835) 2 Ad. & El. 459; 111 E.R. 178; *De Medina v Grove* (1846) 10 Q.B. 152 at 171; 116 E.R. 59 at 68; *Ward & Co v Wallis* [1900] 1 K.B. 675.

⁹⁴ *Grainger v Hill* (1838) 4 Bing. N.C. 212; 132 E.R. 769; *Varawa v Howard Smith Co Ltd* (1911) 13 C.L.R. 35; *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 Q.B. 391 at 467–473 (CA).

⁹⁵ *Hamlet v Richardson* (1833) 9 Bing. 644; 131 E.R. 756; *Maskell v Horner* [1915] 3 K.B. 106 at 121–122; *Henderson v Folkestone Waterworks Co* (1885) 1 T.L.R. 329; *William Whiteley Ltd v R.* (1909) 101 L.T. 741; *Sargood Brothers v Commonwealth of Australia* (1910) 11 C.L.R. 258 at 301; *Woolwich* [1993] A.C. 70 at 165. In *Moore v Vestry of Fulham* [1895] 1 Q.B. 399 at 401–402, Lord Halsbury said that "when a person has had an opportunity of defending an action if he chose, but has thought proper to pay the money claimed by the action, the law will not allow him to try in a second action what he might have set up in the defence to the original action."

⁹⁶ *Clydesdale Bank Ltd v Schroder & Co* [1913] 2 K.B. 1.

the claimants paid the amount due under protest, and then sued to recover their payment in the English court. Their claim was rejected by Bray J., who stated that⁹⁷:

"It is quite clear on the authorities that if an action is brought in the English courts against a person and he pays the claim, he cannot afterwards recover the money back although he may have said that he only paid under protest and that he reserved all his rights. If he desires to prove that he is not liable to pay the money, he must defend the action which has been brought for the very purpose of deciding whether the money is payable or not. He cannot by paying under protest reserve his right to raise the question of his liability in some subsequent proceedings. . . . [There] is no difference in principle for this purpose between proceedings in a foreign court and proceedings in this country. . . . If a person is given an opportunity of contesting a claim in a court of law, whether in this country or abroad, and if instead of doing so he pays the claim under protest, he cannot afterwards recover back the money. In both cases the money has been paid under compulsion of law."

The rule that money paid pursuant to a court order is generally irrecoverable 2-38
in an action for unjust enrichment applies even if there are good reasons for thinking that the court has made a mistake. The court has jurisdiction to decide wrongly as well as rightly,⁹⁸ and if it makes a mistake, then the mistake is conclusive between the parties unless and until it is corrected by an appellate court.⁹⁹ The unsuccessful party can appeal from the court's order, and if the appeal is successful then he will be entitled to recover the benefit that he transferred to the recipient.¹⁰⁰ But "once the time for appealing has elapsed, the respondent who was successful in the court below is entitled to regard the judgment in his favour as being final".¹⁰¹

This suggests that the judgment will continue to operate as a justifying factor 2-39
as between the parties to the case even if it is later overruled in a separate case. However, in these circumstances the unsuccessful party might conceivably argue that he should be entitled to recover his money on the ground that it was paid under a "retrospective mistake of law" of the kind that was recognised by the House of Lords in *Kleinwort Benson v Lincoln CC*.¹⁰² Disallowing recovery would mean that the unsuccessful party was treated differently from other payors who were not parties to the litigation, but who also paid money to a recipient in the belief that they were legally required to do so under the rule established by the case in which the claimant was ordered to pay. However, we consider that the principle of finality in litigation is sufficiently important to override this consideration. Support for this conclusion can be drawn from parts of Croom-Johnson J.'s judgment in *Sawyer v Window Brace Ltd*,¹⁰³ although that case was decided at a time when the bar against recovery on the ground of mistake of law was in place.¹⁰⁴

⁹⁷ *Schroder* [1913] 2 K.B. 1 at 5.

⁹⁸ *Philips v Bury* (1694) Skin. 447 at 485; 90 E.R. 198 at 216.

⁹⁹ *Meyers v Casey* (1913) 17 C.L.R. 90 at 115.

¹⁰⁰ See Ch.26.

¹⁰¹ *Norwich & Peterborough Building Society v Steed* [1991] 1 W.L.R. 449 at 454.

¹⁰² *Kleinwort Benson v Lincoln CC* [1999] 2 A.C. 349, discussed at paras 9–71–9–94.

¹⁰³ *Sawyer v Window Brace Ltd* [1943] K.B. 32 at 35–36.

¹⁰⁴ See para.9–71.

unimpaired” despite their position on rescission,¹⁵³ the assumption that rescission for breach operates ab initio was an absolutely fundamental part of the courts’ analysis, and must cast considerable doubt on its potential application in England today.

3-49 The Court of Appeal of Queensland applied the reasoning from *Renard Constructions* in *Iezzi Constructions Pty Ltd v Watkins Pacific (Qld) Pty Ltd*.¹⁵⁴ There, a contract between a subcontractor and main contractor stated that the subcontractor was only to be paid once the main contractor had “already actually received” payment from the proprietor in respect of the subcontractor’s work. The subcontractor had completed a very large amount of work, and had received some payment, but the proprietor then went into liquidation and the main contractor refused to make any further payments to the subcontractor. A majority of the court held that the term in the subcontract applied only to progress payments, but the court went on to hold, unanimously, that, had the term applied to final payment for the work, it would not have affected a quantum meruit claim. Significantly, the court saw the question in terms of whether the parties intended that the term was to continue to govern their relationship after termination of the contract.¹⁵⁵ Concluding that there was no such intention, the court indicated that it would be inappropriate to give effect to the term indirectly, by introducing a limitation to the quantum meruit claim. As can be seen from the facts of the decision, it was not concerned with an attempt to recover an amount in unjust enrichment that exceeded the contract price. Rather, the case concerned an attempt to limit recovery by reference to contractual terms governing how the price was to be paid.

3-50 The most recent consideration of the issue, by the Court of Appeal of Victoria in *Sopov v Kane Constructions Pty Ltd (No.2)*,¹⁵⁶ reluctantly endorsed the approach taken in these two earlier cases. The Court took the view that a quantum meruit claim should not be available as an alternative to damages for breach of contract, and that the decision in *Lodder v Slowey* was based on the misunderstanding that termination for breach had the effect of rescinding the contract ab initio. However, the current position was so well entrenched that only the High Court of Australia could alter it.¹⁵⁷ The court also rejected the approach that had been taken by the trial judge, Warren C.J., where she had held that remedies in unjust enrichment should not be permitted to subvert the contractual bargain. In the Court of Appeal’s view, the remedy in unjust enrichment was only possible because of the “fiction of the contract’s having ceased to exist ab initio”¹⁵⁸; it therefore followed that, if there was a claim, it could not be limited by the contract price.

(ii) General Principle

3-51 As the brief survey of authorities above demonstrates, the cases show a variety of conflicting approaches to the issue. Since the point remains open in England,

¹⁵³ *Renard Constructions* (1992) 26 N.S.W.L.R. 234 at 277, per Meagher J.A.

¹⁵⁴ *Iezzi Constructions Pty Ltd v Watkins Pacific (Qld) Pty Ltd* [1995] 2 Qd R. 350.

¹⁵⁵ See particularly *Iezzi Constructions* [1995] 2 Qd R. 350 at 361, per McPherson J.A.

¹⁵⁶ *Sopov v Kane Constructions Pty Ltd (No.2)* [2009] VSCA 141; (2009) 257 A.L.R. 182.

¹⁵⁷ *Sopov* [2009] VSCA 141; (2009) 257 A.L.R. 182 at [12].

¹⁵⁸ *Sopov* [2009] VSCA 141; (2009) 257 A.L.R. 182 at [21].

an approach based on general principle would seem to be the most convincing solution. Three fundamental points must inform this solution. First, the law of unjust enrichment is independent of the law of contract, and is not, therefore, automatically constrained by contractual provisions.¹⁵⁹ Second, the claim in unjust enrichment following termination for breach of contract is brought on the ground of failure of basis. Unfortunately none of the recent Australian cases identified which unjust factor was involved, referring to the claim as being in quantum meruit. Third, it is recognised that the law of unjust enrichment should not undermine the parties’ allocations of risk.¹⁶⁰ This proposition does not reflect inappropriate deference to the law of contract; rather, it flows from the fact that the claim in unjust enrichment is grounded on failure of basis, and the (contractual) dealings between the parties indicate the basis on which the benefit was to be retained by the recipient.

Sometimes the point that the law of unjust enrichment should respect the parties’ allocation of risk is expressed in terms of the exclusion of remedies in unjust enrichment.¹⁶¹ Thus, if the parties have agreed that, should the contract fail, any claim in unjust enrichment should be limited to the contract price, the parties’ contractual agreement is respected.¹⁶² It may well be possible to go further, and, similarly to the approach in relation to part performance of entire contractual obligations,¹⁶³ to regard the contractual stipulation regarding price as implicitly excluding a different valuation from being put on the benefit conferred in a claim in unjust enrichment.¹⁶⁴

Alternatively, and more straightforwardly, the analysis can be undertaken by express reference to the general principle that the law of unjust enrichment should respect the contracting parties’ allocation of risk. As explained above, this is not indirectly to enforce the terms of a contract that has been terminated; rather, it is a reflection of the fact that the ground of recovery is failure of basis, and the parties have agreed what the basis of the transfer is to be. The contract price implicitly allocates certain risks to the supplier of the goods or services, such as the risk that the market value of the goods or services will increase before performance, and the risk that the goods or services prove to be more costly to supply than the supplier had anticipated. Allowing a supplier bringing an action in unjust enrichment to recover more than the contract price for any goods or services supplied under the contract would clearly reallocate those risks to the purchaser. In our view, this approach, which was essentially the approach adopted by Warren C.J. in *Sopov*, is the most convincing as a matter of principle.

¹⁵⁹ G. Palmer, “The Contract Price as a Limit on Restitution for Defendant’s Breach” (1959) 20 Ohio State L.J. 264, 274–275; K. Barker, “Unjust Enrichment: Containing the Beast” (1995) 15 O.J.L.S. 457, pp.460–462; P. Birks “Failure of Consideration” in F. Rose (ed.), *Consensus Ad Idem* (London: Sweet & Maxwell, 1996), 179, p.188, fn.29.

¹⁶⁰ See above, para.3–16.

¹⁶¹ See above, para.3–30.

¹⁶² Barker, “Unjust Enrichment: Containing the Beast”, 462. See also, in the context of the Law Reform (Frustrated Contracts) Act 1943 s.1(3), the example given in *BP Exploration Co (Libya) Ltd v Hunt (No.2)* [1979] 1 W.L.R. 783 at 806, of a poor householder agreeing with a builder for work to be done at a price below the market rate: Robert Goff J. held that liability would be limited to the contract price.

¹⁶³ See above, paras 3–29–3–30.

¹⁶⁴ Cf. *Iezzi Constructions* [1995] 2 Qd R. 350 at 361, per MacPherson J.A.

back” generates a personal claim for the surviving value of the proceeds of money paid after an act of bankruptcy has been committed. This case is notoriously difficult to interpret, and Lord Millett, who was a member of the court, later denied in extra-judicial writings that the case had anything to do with unjust enrichment.⁹⁵

4-39 Secondly, a line of Canadian cases concerned with cohabitational property disputes, starting with *Peter v Beblow*,⁹⁶ holds that claimants can be awarded an equitable share in property on the ground of unjust enrichment because this comprises the “surviving value” of their domestic labour. In *Kerr v Baranow*,⁹⁷ the Supreme Court of Canada also allowed a personal claim in unjust enrichment to recover the “surviving value” of the claimant’s contributions to the wealth accumulated by the parties during the course of their quasi-marital “joint family venture”. These authorities are unlikely to be followed by the English courts which have developed a different doctrinal vehicle through which to resolve familial property disputes, namely the common intention constructive trust.⁹⁸ Outside this context, and particularly in the context of commercial dealings, it is even less likely that the English courts will follow the Canadian cases, which take a notably loose approach to the identification of benefit, to the rule that the defendant’s enrichment must have been gained at the claimant’s expense, and to the question whether the claimant should be entitled to a personal or a proprietary remedy.⁹⁹

4-40 Thirdly, there is the Court of Appeal’s decision in *Cheese v Thomas*.¹⁰⁰ The claimant was unduly influenced by his great-nephew to buy a house with him that later declined in value. The claimant sought to recover the value of his contribution to the purchase price but the court held that the fall in value should be borne by both parties in proportion to their contributions, so that the claimant was effectively limited to recovery of the value surviving in the defendant’s hands. In our view this outcome can only have been correct if the defendant was entitled to argue that he had changed his position by retaining his share of the house although its value was depreciating,¹⁰¹ a debatable question because this defence may not be available in response to claims grounded on undue influence.¹⁰²

⁹⁵ P. Millett, “Proprietary Restitution” in S. Degeling and J. Edelman (eds), *Equity in Commercial Law* (Sydney: Lawbook Co, 2005), 309, p.323; P. Millett, “*Jones v Jones*: Property or Unjust Enrichment?” in A. Burrows and Lord Rodger (eds), *Mapping the Law* (Oxford: OUP, 2006), 265.

⁹⁶ *Peter v Beblow* [1993] 1 S.C.R. 980.

⁹⁷ *Kerr v Baranow* [2011] SCC 10; [2011] 1 S.C.R. 269.

⁹⁸ *Stack v Dowden* [2007] UKHL 17; [2007] 2 A.C. 432; *Abbott v Abbott* [2007] UKPC 53; [2008] 1 F.L.R. 1451.

⁹⁹ For critical comment, see J. Mee, *The Property Rights of Cohabitees* (Oxford: Hart, 1999), especially pp.219–222 and 224; M. McInnes, “Reflections on the Canadian Law of Unjust Enrichment: Lessons From Abroad” (1999) 78 Can. Bar Rev. 416; M. McInnes, “The Measure of Restitution” (2002) 52 University of Toronto L.J. 163; J. McCamus, “Restitution on Dissolution of Marital or Other Intimate Relationships: Constructive Trust or *Quantum Meruit*?” in Neyers et al. (eds), *Understanding Unjust Enrichment*, 359, especially pp.372–375. See too para.6–66.

¹⁰⁰ *Cheese v Thomas* [1994] 1 W.L.R. 129.

¹⁰¹ Cf. M. Chen-Wishart, “Loss Sharing, Undue Influence, and Manifest Disadvantage” (1994) 110 L.Q.R. 173, pp.177–178.

¹⁰² See paras 11–25 and 27–47.

Fourthly, there is Robert Goff J.’s decision in *BP Exploration Co (Libya) Ltd v Hunt (No.2)*,¹⁰³ which concerned services claims under the Law Reform (Frustrated Contracts) Act 1943 s.1(3). His Lordship held that the 1943 Act is underpinned by the principle against unjust enrichment,¹⁰⁴ but he clearly did not mean to lay down rules of general application since he also stressed the “considerable problems” created by the statutory wording.¹⁰⁵ Consistently with the general rule described above, he held in relation to money claims under s.1(2) that:

“the money may have been paid . . . many years before the date of frustration; but the cause of action accrues on that date and the sum recoverable under the Act as at that date can be no greater than the sum actually paid”.¹⁰⁶

However, he laid down a different rule for services claims under s.1(3), namely that the date for valuing the benefit received by the defendant is the date when the contract is frustrated. He thought this to follow from s.1(3)(b), which he took to mean that the court must have regard to the circumstances giving rise to the frustration of the contract when quantifying the defendant’s enrichment. He reasoned that “if the effect of the frustrating event upon the value of the benefit is to be measured, it must surely be measured upon the benefit as at the date of frustration”.¹⁰⁷ Consistency then required him to say that every non-money benefit should be valued at this date for the purposes of a s.1(3) claim, although this was inconsistent with his rule for money claims under s.1(2).

4-42 These problems could have been avoided if Robert Goff J. had construed s.1(3)(b) to be relevant not to the quantification of the defendant’s benefit, but to the calculation of a “just sum” payable by the defendant under s.1(3). On this reading, events such as the destruction of the fruits of the claimant’s work might entitle the defendant to raise a change of position defence, but would not affect the rule that his enrichment is valued at the date of receipt—a rule which Robert Goff J. himself would have preferred, since it would enable the courts to hold in appropriate cases that the benefit received by the defendant was the claimant’s services, rather than their end-product.¹⁰⁸

5. SIGNIFICANCE OF THE PARTIES’ DEALINGS BEFORE TRANSFER OF THE BENEFIT

4-43 If the parties to a claim in unjust enrichment have had dealings prior to the transfer which gives rise to the claim, then there are several ways in which these may affect the identification and valuation of the defendant’s enrichment.¹⁰⁹ There are three main possibilities. First, the parties may have entered a contract which still governs their relationship and the defendant’s liability to pay for the relevant benefit. Secondly, they may have entered a contract that has been

¹⁰³ *BP Exploration Co (Libya) Ltd v Hunt (No.2)* [1979] 1 W.L.R. 783.

¹⁰⁴ *BP v Hunt* [1979] 1 W.L.R. 783 at 799.

¹⁰⁵ *BP v Hunt* [1979] 1 W.L.R. 783 at 801.

¹⁰⁶ *BP v Hunt* [1979] 1 W.L.R. 783 at 800.

¹⁰⁷ *BP v Hunt* [1979] 1 W.L.R. 783 at 803.

¹⁰⁸ *BP v Hunt* [1979] 1 W.L.R. 783 at 803.

¹⁰⁹ For additional discussion of this topic, see paras 3–40–3–57.

an additional definable payment burden, and otherwise the police were providing facilities and officers who could have been deployed elsewhere)."

6-33 This might be explained in causal terms. If C contracts with X, an employee, to provide certain services, then C has "bought" X's time and labour. If X's time and labour is thereafter used, within the scope of the employment relation, to benefit a third party, then there is no artificiality in saying that this is at C's expense: X's time and labour is a valuable resource, which C has bought, and which is at C's disposal as X's employer. It is not necessary, to reach this conclusion, to assume that the services which X renders to D, as C's employee, are individually accounted for between X and C. It is sufficient that the services fall within the scope of services for which C has some general obligation to remunerate X—say, by way of general salary.

6-34 The difficult question raised by these cases is whether the employee, agent, or other intermediary who actually performs the services might also bring a claim in unjust enrichment against the third party. The courts are, at least, very reluctant to allow this sort of claim—a reluctance manifested in the routine denial of claims in unjust enrichment to unpaid subcontractors against an employer.⁵⁸ There is little to be gained from explaining these cases on the basis that there is no "transfer of value" between the subcontractor and the employer, so that the third party's enrichment is not at the subcontractor's expense. It is more consistent with the reasoning in the authorities, and more rational, to say that there is a qualifying transfer of value, but that even so there are other reasons why his claim must fail, for example because recovery would be inconsistent with the contracts between the parties.

(iv) Sequential Transfers

6-35 The third category of multiple-party case involves a sequential transfer of value between C and X, and X and D. The simplest form is where C confers a benefit on X, and this causes X to confer a benefit on D; but it is also possible for the transactions to take place in reverse chronological order, so that X confers a benefit on D, and this causes C to confer a benefit on X. In some cases of this kind, C has been permitted to bring a claim in unjust enrichment against D, although he is only a remote recipient from C. For the sake of exposition, we divide these cases according to whether C's gain and D's loss are connected by (1) the payment or receipt of money by an agent, (2) transactional links that satisfy the law's rules on following and tracing, and (3) the happening of other causally connected events. Some other writers would distinguish between these categories of case, and would say that a sufficient connection is established in the

⁵⁸ The leading English case of this sort is *Costello* [2011] EWCA Civ 930; discussed at paras 3–58 and following. See too e.g. *Turf Masters Landscaping Ltd v T.A.G. Developments Ltd* (1995) 143 N.S.R. (2d) 275; *Pacific National Exhibition v Alpine Stone Ltd* [2003] BCSC 852; *Port Coquitlam Building Supplies Ltd v Borysiak* [2003] BCSC 1471; *Concord Carriers Ltd v Alnet Holdings Ltd* (2005) 46 C.L.R. (3d) 311; *Greatworth* [2006] HKCA 460; *Yew Sang Hong* [2008] HKCA 109; *Lumbers v W. Cook Builders Pty Ltd (In Liquidation)* [2008] HCA 27; (2008) 232 C.L.R. 635; *Wah Fai Plumbing & Heating Inc v Ma* [2011] BCCA 26; (2011) 13 B.C.L.R. (5th) 231.

first and second, but that it is not established in the third. We consider that all three categories can be understood as cases in which a sufficient connection is established by the application of a "but for" causal test.

Payment or receipt of money by an agent The cases support the view that if X, acting as an agent for a principal, C, makes a payment to D, then C and X can each establish that D is enriched at his expense.⁵⁹ The cases also support the view that if C makes a payment to X, who receives as agent for a principal, D, then C can establish that D has been enriched at his expense. Depending on the ambit of any defence of "ministerial receipt",⁶⁰ C can also establish that X, who received as agent for D, is enriched at his expense.⁶¹ In both types of case, the result is that C, who is the remoter source of D's gain, may bring a claim against him in unjust enrichment.

In the literature, these agency cases are widely regarded as involving an "exception" to a "direct transfer" rule, or as consistent with the rule on the basis that receipt from or by an agent is deemed to count as a "direct receipt" from or by his principal.⁶² Neither approach is particularly satisfying and other approaches are possible. In some cases, a proprietary analysis may explain the outcome: as where X pays D using C's money,⁶³ or where C pays money to X in circumstances that give D title to the money in X's hands.⁶⁴ In many of the agency cases, however, no proprietary link can be shown, and a better explanation of all the cases lies in a "but for" causal inquiry.⁶⁵ Whether X receives money from C as D's agent, or X pays D as C's agent, the legal incidents of the internal relationship between agent and principal allow a "but for" causal link to be readily established between the loss to C and the gain to D. Thus, where D's agent, X, receives money from C, X will owe a duty to account to his principal, D, for what he receives on D's behalf, and this liability to account enables X's receipt to be treated as D's receipt. This can be explained in causal terms: but for X's receipt from C, he would not incur a corresponding liability to D. Conversely, where C's agent, X, pays money to D, C will owe a duty to reimburse his agent, X, for his expenditure, and this reimbursement liability enables X's payment to be treated as C's payment. This can also be explained in causal terms: but for X's payment to D, he would not acquire a corresponding right against C.

⁵⁹ e.g. *Stevenson v Mortimer* (1778) 2 Cowp. 805 at 806; 98 E.R. 1372 at 1373 per Lord Mansfield; *Holt v Ely* (1853) 1 El. & Bl. 795; 118 E.R. 634; *Niru Battery Manufacturing Co v Milestone Trading Ltd (No.1)* [2002] EWHC 1425 (Comm); [2002] 2 All E.R. (Comm) 705 at [145].

⁶⁰ See Ch.28.

⁶¹ e.g. *Jones v Churcher* [2009] EWHC 722 (QB); [2009] 2 Lloyd's Rep. 94 (bank and its customer liable for funds mistakenly transferred to the customer's account).

⁶² e.g. Burrows, *The Law of Restitution*, pp.77–78, who states without further explanation, that the "relationship between [agent] and [principal] means that the two cannot be treated as if separate".

⁶³ e.g. a shop employee who hands over cash from the shop's till to a customer; or perfectly routine cases where an employee initiates a funds transfer from an employer's bank account.

⁶⁴ e.g. a shop employee who receives cash from a customer.

⁶⁵ Cf. *Shanghai Tongji Science & Technology Industrial Co Ltd v Casil Cleaning Ltd* [2004] HKCFA 21 at [69]–[73] (manifesting a robust causal analysis which disregards intermediate parties functioning as a conduit to effect payment).

same result should follow where the defendant is enriched by receiving some other, non-money asset of which the claimant is legal owner.⁹

(ii) *Unauthorised Use of C's Asset*

8-08 Where D temporarily deprives C of possession of an asset to which C has legal title, without C's consent, then C may have a personal claim in unjust enrichment against D for the use value of the asset. In many cases, a claim may lie to recover restitutionary damages for a wrong committed by D, for example, D's trespass to C's land, or D's trespass to or conversion of C's goods. However, a personal claim in unjust enrichment might in principle lie in the same circumstances, based on D's unauthorised use of C's asset, without it being necessary to prove a wrong committed by D.

8-09 Some support for this proposition can be found in a classic dictum of Lord Mansfield in *Hambly v Trott*.¹⁰ In the course of discussing actions that survive the death of a tortfeasor, Lord Mansfield expressed the view that an action in tort would be extinguished by the *actio personalis* rule, but that another action could still be brought¹¹:

"[I]f a man take a horse from another, and bring him back again; an action for trespass will not lie against his executor, though it would against him; but an action for the use and hire of the horse will lie against the executor."

More recent recognition of the same sort of claim can be found in the Australian case of *Torpey Vander Have Pty Ltd v Mass Constructions Pty Ltd*,¹² where a purchaser of land from a company in liquidation developed land in accordance with plans which architects had previously prepared for the company. A majority of the court held that the purchaser had a licence to use the architects' plans in this way, but on the assumption that this was not the case, all of the court considered that the purchasers would be liable to the architects, on the basis that they would then have been unjustly enriched at the architects' expense.

(iii) *Unauthorised Substitution of C's Asset*

8-10 Where D receives an asset to which C retains legal title, and D subsequently transfers the asset to a third party without C's consent, C may have a personal claim in unjust enrichment against D for the value of the unauthorised substitute which D receives from the third party in exchange.¹³ This is supported by an old

⁹ Cf. *Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyd's Rep. 620, where the defendant had possession of the claimant's wheat, although title did not pass, and Mance J. suggested at 634 that if the defendant did not return the wheat then the claimant might have a "restitutionary right or a right in damages".

¹⁰ *Hambly v Trott* (1776) 1 Cowp. 371 at 375; 98 E.R. 1136 at 1138. See too, by analogy, the case of *Foster v Stewart* (1814) 3 M. & S. 191; 105 E.R. 582, where Lord Mansfield's words were relied on to support the conclusion that a claim might be brought for the value of the services of the claimant's apprentice, whom the defendant had enticed to work for him. See further para.8-49.

¹¹ *Hambly* (1776) 1 Cowp. 371 at 375; 98 E.R. 1136 at 1138.

¹² *Torpey Vander Have Pty Ltd v Mass Constructions Pty Ltd* [2002] NSWCA 263; see Edelman and Bant, *Unjust Enrichment in Australia*, p.274.

¹³ This remedial option will be appealing if the value of the unauthorised substitute exceeds the value of the asset first received by the defendant. See paras 8-17 and following and 8-83 and following on the nature and basis of the proprietary rights which the law affords in cases of unauthorised substitutions.

line of cases in which D was held liable for the amount of the money proceeds of the disposal of C's asset in an action for money had and received.¹⁴ An example is *Oughton v Seppings*,¹⁵ where a sheriff's officer mistakenly seized and sold Oughton's pony under a writ of execution for another party's debts, and was held liable to Oughton for the proceeds in an action for money had and received. Many of these cases, historically said to involve "waiver of the tort" committed by D, might now be explained as cases awarding a gain-based money award for a wrong—usually the tort of conversion, committed when D disposes of C's goods without C's consent.¹⁶ But the cases may also be explained on the basis that where D disposes of C's asset to a third party without C's authority, and receives a substitute asset in exchange, D is unjustly enriched at C's expense by the value of the unauthorised substitute which he receives from the third party.¹⁷

An unjust enrichment explanation of these cases presents several difficulties. However, all of these reflect concerns about whether it might be said that D has been enriched by the value of the substitute at C's expense, and none cast doubt on the viability of C's lack of consent as the restitution-justifying ground.

First, it might be thought that holding D liable for the value of the asset which he receives from X, in exchange for C's asset, is inconsistent with the basic proposition that for a personal claim in unjust enrichment, D's enrichment is measured at the time of its receipt—which suggests that D's liability should be for the original asset's value at the time of his original receipt.¹⁸ However, the answer may be that C's claim is a new cause of action, based upon D's subsequent unjust enrichment at C's expense, which occurs when D uses C's asset without his consent to acquire a new asset. Consistently with basic principle, the prima facie measure of C's personal claim would be the value of the unauthorised substitute at the time of its receipt by D.

Secondly, it might be thought that D is enriched at X's expense, and not C's expense, given that the substitute asset came from X and not from C.¹⁹ However, this objection rests on a narrow view of the "at the expense of" requirement, which we do not think is correct.²⁰ In these cases, C can show that D was enriched at his expense by showing that the new asset which D received was acquired in exchange for C's original asset, whether or not C retains title to the original asset in the third party's hands.²¹

¹⁴ e.g. *Lamine v Dorrell* (1701) 2 Ld. Raym. 1216; 92 E.R. 303; *Oughton v Seppings* (1830) 1 B. & Ad. 241; 109 E.R. 776; *King v Leith* (1787) 2 T.R. 141; 100 E.R. 77; *Parker v Norton* (1796) 6 T.R. 695; 101 E.R. 777. And see *United Australia Ltd v Barclays Bank Ltd* [1941] A.C. 1.

¹⁵ *Oughton v Seppings* (1830) 1 B. & Ad. 241; 109 E.R. 776.

¹⁶ See for examination of gain-based damages awards of this type, J. Edelman, *Gain-Based Damages* (Oxford: Hart, 2002), Ch.4.

¹⁷ This analysis is consistent with our preferred explanation for the proprietary rights that the law affords claimants to the unauthorised substitutes for their assets, at least where the substitution is carried out by someone other than a trustee or fiduciary: see paras 8-83 and following, and 8-17 and following.

¹⁸ See paras 4-34—4-42.

¹⁹ Cf. L.D. Smith, "Unjust Enrichment, Property and the Structure of Trusts" (2000) 116 L.Q.R. 412, pp.424-425; L.D. Smith, "Restitution: The Heart of Corrective Justice" (2001) 79 *Texas Law Review* 2115, pp.2157-2159.

²⁰ See para.6-12 and following.

²¹ This follows from the wider causal analysis explained in Ch.6.

even if the benefit is *immediately* conferred via an automated process, it may not have been conferred but for some act or omission of the claimant or his agent, which is affected by some relevant mistake. This mistake may mean that the automated process is set in motion, when it would not otherwise have been; and/or not halted, when it would otherwise have been. For example, a clerk in a company's finance department may by mistake enter a new part-time employee into the company's computer system as a full-time employee, with the consequence that, until this error is noticed and rectified, the employee receives a full-time monthly salary via the company's automated payment system. Here, the company might seek restitution based on the clerk's initial mistake of fact, which is responsible for setting the automated payment system in motion. Alternatively, it might seek restitution based upon its continuing ignorance of the initial error, which results in an ongoing failure to stop the over-payment(s) from being made.¹¹⁶ Viewing the facts in this way, a person who uses an automated process is similarly placed to a person who uses a human agent. A principal who gives instructions to a human agent to confer a benefit on another, under a "mistake", might recover on this basis.¹¹⁷ So too, a principal who, under a "mistake", omits to revoke or modify earlier instructions.¹¹⁸

9-46 These cases may seem uncontroversial, to the extent that the over-payments could be attributed to a mistaken act or omission on the part of the claimant or some human agent, which had the result that an automated payment process was initiated (when it would not otherwise have been) or not halted (when it might otherwise have been).¹¹⁹ However, it is not clear that all cases can—without artificiality—be dealt with in this way. For example, if a computer spontaneously malfunctions without warning, and this results in an over-payment, there is no difficulty saying that this payment was not intended, but there is more difficulty saying that the payment was invariably *caused* by a mistaken act or omission of the claimant. So too, if a fraudster procures an automated bank payment, via misuse of a customer's on-line banking security details.

9-47 These cases will always present difficulty within an unjust factors model of the law of unjust enrichment. One answer, which will sometimes do, is to accept that a state of causative ignorance can qualify as a restitution-grounding mistake. That is, it is enough that the payment would not have been made but for the ignorance of the claimant, or some person acting for him, of some material fact—for example, that the rent payable under a lease had reverted to some earlier, lower rate.¹²⁰

¹¹⁶ For illustrations, see *Avon CC v Howlett* [1983] 1 W.L.R. 605 (CA) at 619–620 per Slade L.J. (overpaid sick pay: as a result of a mistake, a pay clerk fails to give instruction to reduce sick pay); and *Nurdin & Peacock Plc v D.B. Ramsden & Co Ltd* [1999] 1 W.L.R. 1249 (overpaid rent: as a result of a mistake as to the fact that a lease provided for rent to revert to an earlier, lower rate from year six in the absence of a rent review, no instructions were given by the tenant company's secretary to its accounts department to reduce the amount paid).

¹¹⁷ e.g. where a customer, acting under a causative mistake, instructs his bank to make a payment (*Customs & Excise Commissioners v National Westminster Bank Plc* [2002] EWHC 2204 (Ch); [2003] 1 All E.R. (Comm.) 327).

¹¹⁸ e.g. where a customer, acting under a causative mistake, fails to revoke a standing order given to his bank.

¹¹⁹ See the analysis in *Goff and Jones: The Law of Restitution*, para.4.001.

¹²⁰ As in *Nurdin & Peacock* [1999] 1 W.L.R. 1249.

A second answer may be more simply found in the separate ground for restitution, explained in Ch.8, which is described there as the claimant's "lack of consent": the defendant received a benefit, wholly without the claimant's consent, and which was therefore not intended for him.¹²¹ This ground is sufficient to explain what Robert Goff J. regarded as a clear case for relief in *Barclays Bank v Simms*¹²²: "[a] substantial charity uses a computer for the purpose of distributing small benefactions. The computer runs mad, and pays one beneficiary the same gift one hundred times over". Robert Goff J. apparently considered that this payment could be recoverable as a payment made under a mistake. However, this analysis presents the obvious difficulty, that the agent of the payment is a computer and, on the facts given, it is not easy to attribute the payment to any causative mistake of the claimant, or of any human agent. It is, quite simply, an unintended payment. In light of this, it seems impossible to say in all cases of this type that the claimant can recover on the basis of a causative mistake, unless the courts are prepared to say that a *computer* has an "intention" for this purpose, which is vitiated,¹²³ and that this "intention" can be attributed to the claimant, in the same way as the intention of a human agent of a principal may be. The simplest answer is that this is unnecessary, because the ground of "lack of consent" can do the work; it is not invariably necessary to hunt for a mistake.¹²⁴

3. CAUSATION

There must be a causal relationship between the claimant's mistake and his act (or omission), which results in the conferral of a benefit on the defendant. This requires the claimant's mistaken belief or assumption to influence the claimant's decision to act (or not act) in this way. In what sense must this be so? In other words, what is the law's approach to decision-causation?¹²⁵ In principle, there are several different approaches that could be adopted to this question. The courts

¹²¹ Cf. earlier editions of this work, which did not recognise such a separate ground and sought to bring these cases within an expansive concept of "mistake": *Goff and Jones: The Law of Restitution*, para.4.001.

¹²² *Barclays Bank v Simms* [1980] Q.B. 677 at 697.

¹²³ Cf. the historic assumption within the criminal law, that a person who obtains a benefit, by some dishonest practice on a machine, without the intervention of a human mind, cannot be guilty of a deception offence: "[t]o deceive is . . . to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false": *Re London & Globe Finance Co Ltd* [1903] 1 Ch. 728 at 732. See e.g. D. Ormerod and D.H. Williams, *Smith's Law of Theft*, 9th edn (Oxford: OUP, 2007), paras 3.64 and following; *Re Holmes* [2004] EWHC 2020 Admin; [2005] 1 W.L.R. 1857 (DC). Cf. now the Fraud Act 2006 s.2(5).

¹²⁴ See too Birks, *An Introduction to the Law of Restitution*, p.142, recognising that the pressure to expand the concept of "mistake" is reduced once it is recognised that other grounds of restitution can do the required work in these cases; Birks relied on the ground of "ignorance", which we prefer to cast in wider terms, as either "lack of consent" or "want of authority": see Ch.8.

¹²⁵ For analysis, see especially Birks, *An Introduction to the Law of Restitution*, pp.156–158; Wu, "Restitution for Mistaken Gifts"; Farnsworth, *Alleviating Mistakes*, pp.93–101; G. Virgo, "Causation and Remoteness in the Law of Unjust Enrichment" in J. Edelman and S. Degeling, *Unjust Enrichment in Commercial Law* (Sydney: Lawbook Co, 2008), 147; E. Bant, "Causation and Scope of Liability in Unjust Enrichment" [2009] R.L.R. 60; Burrows, *The Law of Restitution*, pp.91–95, and p.209.

to prevail over reliance damages. There, in a cause of action which is aimed at enforcing the contract, two possible measures of damages are in conflict; not inappropriately, the courts refuse to make an award that puts the innocent party in a better position than if the contract had been performed. The award in unjust enrichment, by contrast, relates to a distinct cause of action, which is aimed at reversing a transfer of benefit. Undoubtedly the practical result of the option to pursue a claim in unjust enrichment is that the innocent party escapes the consequences of a bad bargain; but whether this is regarded as objectionable or not depends on whether it is thought that the law of unjust enrichment should be systematically subordinated to the law of contract; it has nothing to do with whether there has been a total or only a partial failure of basis.⁶¹

(iv) *Symmetry*

- 12-23 A further argument against the requirement of total failure of basis in relation to money payments is that no similar requirement is imposed in respect of claims where non-monetary benefits have been given on a basis that has subsequently failed. For instance, in *Lusty v Finsbury Securities Ltd*⁶² an architect claimed in unjust enrichment for the value of work done at the request of the defendants for a project which the defendants ultimately decided not to pursue. The defendants had already paid the architect an interim fee of £10,000, but the fact that the architect had received part payment was no bar to his claim—he was simply required to give credit for the part payment.⁶³ One explanation for this more flexible approach when work has been done and only part-payment for it received may be based on the ease of counter-restitution. Unlike services, money is readily restored, and it may be that in cases like *Lusty* the courts are operating on the basis that counter-restitution could easily take place, but that it is unnecessarily cumbersome and literal-minded to require it to be done. If this explanation is correct, then the difference in treatment between cases where money is paid first and cases where work is done first comes back to the difficulty of valuing the work done. As argued above,⁶⁴ the difficulty in valuing performance should not be exaggerated, and is certainly not sufficient to justify denying a claim altogether. A further argument from symmetry is that, where a claim for unjust enrichment is based on a different unjust factor, such as mistake, there is no requirement that the claimant must have received nothing in return for the benefit he has transferred.

(c) *Application of the Total Failure Requirement*

- 12-24 Taken literally, the requirement of *total* failure of basis would suggest that wherever a claimant has received anything at all in return for the payment, no claim in unjust enrichment can lie. However, the courts have not adopted a literal

⁶¹ See further para.3-40 and following.

⁶² *Lusty* (1991) 58 B.L.R. 66.

⁶³ See also *Whittle Movers Ltd v Hollywood Express Ltd* [2009] EWCA Civ 1189; [2009] 2 C.L.C. 771, where the Court of Appeal assumed that a similar exercise would be permissible in an inquiry to ascertain the extent of any unjust enrichment. On this case see further P.S. Davies, "Contract and Unjust Enrichment: A Blurry Divide" (2010) 126 L.Q.R. 175, pp.178-179.

⁶⁴ See paras 12-17-12-18.

approach. Three qualifications have emerged. First, although the claimant might have received some benefit, if that benefit does not form part of what was understood to be given for the payment, the claim for total failure of basis remains intact.⁶⁵ The principles that the courts have used in identifying the bases of payments are examined in detail in the next chapter. Secondly, the courts disregard benefits potentially forming part of the basis for payment where the claimant has exercised his or her legal rights so as to reject those benefits. Thirdly, it may be possible to sever the payment, and allocate parts of it to distinct elements of the benefit in return for which the payment was made; if only part of that expected benefit has been conferred, it is said that there has been a total failure of basis in relation to the severable part of performance which has not been achieved. These last two qualifications will now be analysed in detail.

(i) *Exercise of a Legal Right to Reject any Benefit Conferred*

Where a claimant has exercised a legal right to reject a benefit conferred by the defendant, the receipt of that benefit is disregarded for the purposes of assessing whether the basis of payment has totally failed. The most common instance is where a buyer exercises the right to reject goods that are defective or unfit for their purpose.⁶⁶ For instance, in *Baldry v Marshall*⁶⁷ the purchaser of a Bugatti car, who had stipulated that it must be "comfortable and suitable for the ordinary purposes of a touring car" rejected the car delivered once it transpired that it was neither comfortable nor suitable for touring. His claim for the price succeeded. Whilst it may sometimes be immediately obvious whether goods comply with the seller's obligations (and, therefore, little benefit can be gained by a buyer who promptly exercises the right to reject), the nature of the obligations imposed on a seller may mean that considerable use has been made of the goods before they are validly rejected. For instance, one aspect of the implied condition of satisfactory quality is "durability"⁶⁸; if the goods are of a kind where the buyer is entitled to expect significant longevity, the buyer may legitimately take considerable benefit from the goods before rejecting them once the lack of durability becomes apparent. For example, in *Rogers v Parish (Scarborough) Ltd*⁶⁹ a Range Rover was driven for 5,500 miles over a few months, then validly rejected.⁷⁰ As these examples make clear, significant benefits are disregarded when no account is taken of the position prior to the exercise of a right to reject.

12-25

(ii) *Severability*

The practical significance of the requirement of total failure of basis is reduced by the doctrine of severability. The doctrine of severability allows courts to split up the total payment made and allocate it to particular parts of the benefit

12-26

⁶⁵ *Comptoir d'Achat et de Vente du Boerenbond Belge S/A v Luis de Ridder Limitada (The Julia)* [1949] A.C. 293, discussed at para.13-05.

⁶⁶ The buyer's rights to reject are set out in Sale of Goods Act 1979 s.35.

⁶⁷ *Baldry v Marshall* [1925] 1 K.B. 260.

⁶⁸ Sale of Goods Act 1979 s.14.

⁶⁹ *Rogers v Parish (Scarborough) Ltd* [1987] Q.B. 933.

⁷⁰ Cf. *Bernstein v Pamson Motors (Golders Green) Ltd* [1987] 2 All E.R. 220 (car accepted by use for three weeks).

5. FAILURE OF BASIS AS FAILURE TO DISCHARGE THE TRANSFEROR FROM LEGAL LIABILITY

(a) *General Principle*

13-33 Failure of basis as a failure to achieve a particular legal result can also arise where both parties understand the basis of the transfer to be the performance of a legal obligation. For instance, both parties might understand that a payment is due in respect of tax, or pursuant to a valid contractual obligation. If the tax is not due, or the contractual obligation is a penalty (and, therefore, void), there is also a failure of basis, but, unlike in the examples relating to ultra vires contracts and sellers of goods given above, the failure of basis consists in the failure of the transfer to discharge the claimant from certain legal obligations. The same broad principle of failure of basis can be used to justify recovery in this type of situation as in the situation where there is a failure to confer expected legal rights. The key question is to distinguish between legal results that are the basis of the transfer, and legal results that are merely ancillary to the basis of the transaction. As highlighted in the previous chapter, however, although situations in which a party believes that he is discharging a legal obligation can be analysed in terms of failure of basis (and are so analysed in the cases), failure of basis is not really the best way to deal with situations where the transfer is made under compulsion.¹¹¹

(b) *Instances of Failure of Basis as Failure to Discharge Legal Liability*(i) *Payment of Tax and Similar Charges*

13-34 The basis of a transfer fails where both parties understand that the transfer is made in order to discharge a tax (or similar) liability, but no such liability in fact exists.¹¹² For instance, where a plantation owner in Grenada paid duty on sugar exports which had been demanded by the authorities pursuant to an ineffective royal proclamation, he was entitled to reclaim the money on the ground that the basis of his payment had failed.¹¹³ Similarly, in *Steele v Williams*¹¹⁴ a parish clerk insisted on receiving a payment for searches of the parish registers in excess of the amount prescribed by statute. Martin B. regarded the case as being “like the case of money paid without consideration”.¹¹⁵ This was a convincing analysis, since the agreed basis on which the payment was made was that it was required by statute; that turned out not to be correct. In *Woolwich Equitable Building Society v IRC*¹¹⁶ the House of Lords recognised a new principle of unjust enrichment, under which money paid by a citizen to a public authority in the form of taxes or other levies, which is paid pursuant to an ultra vires demand by

¹¹¹ See paras 12-07—12-09.

¹¹² *Westdeutsche* [1994] 4 All E.R. 890 at 959-960.

¹¹³ *Campbell v Hall* (1774) 1 Cowp. 204, 98 E.R. 1045. See also Lord Browne-Wilkinson’s speech in *Woolwich* [1993] A.C. 70 at 197.

¹¹⁴ *Steele v Williams* (1853) 8 Exch. 625; 155 E.R. 1502.

¹¹⁵ *Steele v Williams* 8 Exch. at 632; 155 E.R. at 1506.

¹¹⁶ *Woolwich Equitable Building Society v IRC* [1993] A.C. 70.

the authority, is prima facie recoverable.¹¹⁷ Most cases of money paid on the understanding that it is made to discharge a tax, or similar, liability, will now fall under this new principle.¹¹⁸

(ii) *Payment of Contractual Penalty*

Where a transfer is made as required by the terms of a contract, the agreed basis of the transfer will generally be that it is to discharge a legal liability. If the contractual provisions requiring the transfer are void, so that no legal liability to make the transfer exists, the basis for the payment has failed. Thus, in *Commissioner of Public Works v Hills*¹¹⁹ a railway company contracted with the South African government to construct a railway line, and paid £50,000, as stipulated in the contract, as security for performance. The contract also provided for the government to retain sums it owed to the company from the earlier construction of two other lines as part of a “guarantee fund” for the third line. The line was not completed on time, and the government claimed to forfeit both the £50,000 and the guarantee fund. The Privy Council held that the total paid by the company was not a genuine pre-estimate of loss likely to be suffered on breach, and, therefore, that the contractual terms requiring it to be paid were void under the rule against penalties. The payments were ordered to be returned to the company. Although no analysis of the legal basis for returning the payments was made, one explanation for the result is that the basis for making those payments had failed (another explanation could be mistake). In *Union Eagle Ltd v Golden Achievement Ltd*¹²⁰ the Privy Council described the remedy available to a person who had made payments which fell foul of the rule against penalties as “a restitutionary form of relief against forfeiture, which gives the court a discretion to order repayment of all or part of the retained money”.¹²¹ This statement was not necessary for the decision in the case, and it is respectfully submitted that it was not accurate to describe the remedy as turning on “a discretion”: the claimant has a claim for unjust enrichment under such circumstances as of right.

(iii) *Payments Made to Close a Transaction*

Where a payment is made voluntarily in order to close a transaction, the payment will not be recoverable despite it not having been required by law. In such circumstances the basis of the payment is the satisfaction of the payor’s liabilities, whatever those might be. Thus, in *Brisbane v Dacres*¹²² the captain of a naval vessel made a substantial payment to the admiral to whom he reported, believing that there was a binding naval custom that he must do so. The payment was held to be irrecoverable, having been made voluntarily to close the transaction.¹²³ By contrast, if the payment has been coerced, it may be recovered on the

¹¹⁷ *Woolwich* [1993] A.C. 70 at 177.

¹¹⁸ See further, Ch.23.

¹¹⁹ *Commissioner of Public Works v Hill* [1906] A.C. 368.

¹²⁰ *Union Eagle Ltd v Golden Achievement Ltd* [1997] A.C. 514.

¹²¹ *Union Eagle Ltd* [1997] A.C. 514 at 520.

¹²² *Brisbane v Dacres* (1813) 5 Taunt. 143; 128 E.R. 641.

¹²³ *Brisbane* 5 Taunt. at 152; 128 E.R. at 646 per Gibbs J.

the possible award under s.1(3), expenses exceeding the contractual remuneration will be irrecoverable.

15-46 Effect of the frustrating event The second matter to which s.1(3) directs a court to have regard is the effect of the frustrating event on the benefit. This might be an increase in value (for instance, if the frustrating event causes the market price to go up) or a decrease (for instance, if the frustrating event damages or destroys work done under the contract).¹¹⁶ As explained above, in *BP v Hunt* Robert Goff J. regarded this part of subsection (3) as particularly significant, since it demonstrated the intention to regard the “benefit” conferred as the end product of services.¹¹⁷ The judge also took the view that the value of the benefit was to be assessed after the frustrating event had taken place.¹¹⁸ This effectively made the importance of the effect of the frustrating event a mandatory rather than discretionary factor. In our view Robert Goff J.’s interpretation limited the court’s discretion to a greater extent than was required by the statutory language. The effect of the frustrating event should be a matter for the judge’s discretion not a mandatory rule for assessing the value of the benefit conferred.

15-47 Prior breaches Despite the reference in s.1(3) to “all the circumstances”, breaches of contract committed prior to the frustrating event have been held to be irrelevant to the assessment of the just sum. As Robert Goff J. put it in *BP v Hunt*¹¹⁹:

“[T]he basis of such an award is that the defendant has been unjustly enriched at the plaintiff’s expense, and the mere fact that the plaintiff has committed a prior breach of contract does not affect the question whether the defendant has been unjustly enriched, which depends upon the quite separate question whether he has received a benefit in respect of which he ought, in justice, to make restitution.”

As can be seen from this analysis, Robert Goff J. reached his conclusion by relying on the assumption that s.1(3) was designed to reverse unjust enrichment. There is no support for this assumption either in the wording of the Act, or in the genesis of the subsection, and this has prompted commentators to question whether Robert Goff J.’s conclusion was correct.¹²⁰ However, although we share the doubts that the Act was designed to reverse unjust enrichment, Robert Goff J.’s decision to exclude prior breaches from the assessment of the just sum under s.1(3) can be supported on the ground that consistency with s.1(2) requires it. As shown above,¹²¹ the wording of s.1(2) excludes consideration of prior breaches (or, indeed, any other factor) where a payment has been made and no expenses have been incurred by the other party. Under such circumstances the sum received must simply be repaid. Where the party receiving the payment has incurred expenses, the court’s discretion comes into play, but there is no good

¹¹⁶ Williams, *The Law Reform (Frustrated Contracts) Act 1943*, pp.54–55.

¹¹⁷ See para.15–31.

¹¹⁸ See para.15–36.

¹¹⁹ *BP v Hunt* [1979] 1 W.L.R. 783 at 808.

¹²⁰ Haycroft and Waksman, “Frustration and Restitution”, p.222.

¹²¹ See para.15–25.

reason why prior breaches should suddenly become relevant at that point. If prior breaches were to be made relevant under s.1(3) there would, therefore, be an unfortunate asymmetry in the treatment of money and non-money benefits.

Relationship between s.1(2) and (3) Section 1(3)(a) expressly contemplates that claims under s.1(2) and under s.1(3) will arise on the same facts. Where claims are brought under both subsections, s.1(3)(a) indicates that, in assessing the just sum under s.1(3), the court should take account of payments made by the recipient of the benefit and retained (or recoverable) under s.1(2). In other words, a party should not be permitted to recover for both expenses incurred (under s.1(2)) and for the benefit that his expenditure has conferred on the other party (under s.1(3)).

The provisions of s.1(2) and (3) have the potential to present parties with a choice about how to formulate their claims to their best advantage. Thus, where a party has received a prepayment under a contract that is subsequently frustrated, if that party has incurred expenses in doing work under the contract, he could either seek to have his expenses taken account of in reducing the payer’s claim under s.1(2); or, if the work undertaken has conferred a benefit on the payer, the payee could claim under s.1(3).¹²² The Act imposes no restriction on the payee’s choice, so the decision is likely to turn on whether the benefit to the payer has exceeded the cost of providing it.

Insurance Section 1(5) of the 1943 Act directs the court not to take into account any sums which have “become payable” to either contracting party, as a result of the frustrating circumstances, under contracts of insurance. However, the subsection makes an exception where there is either an “express term” of the frustrated contract that imposes an obligation to insure or an obligation to insure imposed by statute. The general exclusion of insurance payments can be explained on the basis that such payments are *res inter alios acta*, and that any other rule would interfere with the insurer’s right of subrogation.¹²³ The exceptions are readily comprehensible, as relating to situations where the obligation to insure indicates that the risk of the frustrating event was to be borne by the party bearing that obligation. Indeed, it may be that, where one of the parties was under an obligation to insure, it would not even be necessary for a court to examine whether insurance had actually been obtained, and whether any sums had “become payable” under it. In such circumstances, it may well be that the existence of the obligation to insure would be, in itself, sufficient to justify awards under s.1(2) and (3) that placed the risk of the frustrating event on the party subject to the insurance obligation.

(e) *Limitations on the Application of the Act*

Section 2 of the Act sets out certain limits on its operation. The following three subsections call for substantive comment. Section 2(3) disapplies the Act where

¹²² Cf. Stewart and Carter, “Frustrated Contracts and Statutory Adjustment: The Case for a Reappraisal”, p.80, where the authors state that “It seems implicit . . . that where the expenses result in a benefit to the other party the claim in respect of those expenses must be brought under section 1(3).”

¹²³ Williams, *The Law Reform (Frustrated Contracts) Act 1943*, p.56. For general discussion of insurers’ subrogation rights, see Ch.21.

incurred under an indemnity clause in a towage contract may be held to be a general average loss.¹⁴⁵ An accident subsequent to the general average act, such as the breaking of a towline and the subsequent liability to tugowners under the indemnity clause, does not break the chain of causation if at the time of the general average act that accident was foreseeable.¹⁴⁶ Hence those losses, damages or expenses which should reasonably have been foreseen as flowing from the general average act constitute “a general average loss . . . caused by and directly consequential on a general average act.”¹⁴⁷

- 18-46 General average expenditure is normally incurred in the first instance by the ship. In the past, important examples have been the cost of salvage operations and port of refuge expenses, but under the York-Antwerp Rules 2004, salvage has been excluded from general average (except where one party to the salvage has paid all or any of the proportion of salvage due from another party),¹⁴⁸ and crew wages and maintenance at a port of refuge are no longer allowed.¹⁴⁹

(e) *Benefit to Defendant*

- 18-47 The law of unjust enrichment holds that a defendant's benefit must be valued at the time of receipt.¹⁵⁰ Yet the law of general average, and the York-Antwerp Rules 2004, Rules XVI and XVII, hold that the value of the property sacrificed and of the interests benefited must be assessed at the port of adjustment, which is normally at the end of the voyage.¹⁵¹ Consequently the effect of events occurring between the general average act and the termination of the adventure must be taken into account. For example, in *Chellew v Royal Commission on the Sugar Supply*,¹⁵² a ship sustained damage to her hull and engines, and so the master put into a port of refuge where he incurred expenses. After the ship left the port of refuge, a fire then broke out and the ship and cargo were lost. The shipowners claimed a general average contribution from the cargo owners for the port of refuge expenses but their claim failed. In our view the best explanation for this result is that the cargo owners were enriched when the expenses were

¹⁴⁵ But see *Sea-Land Services Inc v Aetna Insurance Co (The Beauregard)* [1977] 2 Lloyd's Rep. 84 (US CCA, 2nd Circuit).

¹⁴⁶ *Australian Coastal Shipping Commission v Green* [1971] 1 Q.B. 356.

¹⁴⁷ Within the Marine Insurance Act 1906 s.66(1): *Green* [1971] 1 Q.B. 456 at 481. See also *Federal Commerce & Navigation Co Ltd v Eisenerz GmbH (The Oak Hill)* [1970] 2 Lloyd's Rep. 332; [1975] 1 Lloyd's Rep. 105.

¹⁴⁸ York-Antwerp Rules 2004, Rule VI(a). Compare York-Antwerp Rules 1994, Rule VI. Prima facie, expenditure on salvage operations does not give rise to a right of general average contribution in any case, because each interest benefited is only severally liable for its own proportion of such expenditure. But where salvage expenditure is incurred under a salvage agreement, the ship may be liable for the full amount of the expenditure under the agreement.

¹⁴⁹ York-Antwerp Rules 2004, Rules X and XI. Compare York-Antwerp Rules 1994, Rules X and XI.

¹⁵⁰ See paras 4-34-4-42.

¹⁵¹ *Simonds v White* (1824) 2 B. & C. 805; 107 E.R. 582; *Wavertree Sailing Ship Co Ltd v Love* [1897] A.C. 373.

¹⁵² *Chellew v Royal Commission on the Sugar Supply* [1921] 2 K.B. 627; affirmed [1922] 1 K.B. 12. See too *Tate & Lyle Ltd v Hain Steamship Co* (1934) 151 L.T. 249 at 256; *Green Star Shipping Co Ltd v London Assurance (The Andree)* [1933] 1 K.B. 378 at 390; *The Cheldale* [1947] A.C. 265 at 283, 285 and 312.

incurred, but were entitled to a change of position defence following the loss of their property.¹⁵³

(f) *Remedies*

According to Lord Watson in *Strang, Steel & Co v A. Scott & Co*¹⁵⁴:

18-48

“Each owner of jettisoned goods becomes a creditor of ship and cargo saved, and has a direct claim against each of the owners of ship and cargo, for a *pro rata* contribution towards his indemnity, which he can enforce by a direct action.”

Shipowners also have a personal claim to recover the value of sacrifices and expenditure from cargo owners, and the common law also gives them a possessory lien over the cargo to support this claim. As noted by Clarke L.J. in *Mora Shipping Inc v Axa Corporate Solutions Assurance SA*¹⁵⁵:

“Cargo owners have no such lien because they do not have possession of cargo which is laden on board the vessel but owned by others. However, it is the duty of the shipowner to exercise a lien on the cargo, not only for his own contribution but also for that of cargo owners who may be entitled to contribution. Failure to do so exposes the shipowner to liability and damages.”

The shipowner's lien is normally released in exchange for the defendant's giving an average bond¹⁵⁶ and security in the form of a cash deposit¹⁵⁷ or (more usually) a guarantee from his insurer. An average adjuster will then be appointed to assess the rights and liabilities of all the parties and at the conclusion of this (often lengthy) process, the defendant's insurer will generally pay the contribution that is found to be due.¹⁵⁸ If a shipowner refuses to deliver cargo to a consignee who has offered to pay a reasonable sum by way of deposit or to put up a reasonable security, he may be liable in conversion.¹⁵⁹

18-49

¹⁵³ As argued in Rose, “General Average as Restitution”, p.572. For the view that reliance on receipt of the enrichment is not a prerequisite for the change of position defence, see para.27-28. An alternative explanation suggested in Rose, *General Average*, p.50 is that the cargo owners' restitutionary liability crystallised at the time of the general average act, but that the valuation of this liability was postponed to the end of the voyage, by which time the value of the cargo had decreased to zero. However, this is inconsistent with the general rule governing the timing of benefits, and also seems wrongly to assume that the benefit received by the cargo owners was the value of the cargo rather than the value of their saved expense at the time when the expenditure was incurred. On this view, the value of the defendant ship and cargo owners' respective interests at the end of the voyage is only relevant because this information is needed in order to apportion responsibility for paying the claimant.

¹⁵⁴ *Strang, Steel & Co v A. Scott & Co* (1889) 14 App. Cas. 601 at 606.

¹⁵⁵ *Mora Shipping Inc v Axa Corporate Solutions Assurance SA* [2005] EWCA Civ 1069; [2005] 2 Lloyd's Rep. 769 at [25]. See too *Strang* (1889) 14 App. Cas. 601 at 606.

¹⁵⁶ With the result that a new contractual relationship is created between the parties that supersedes their previous rights and obligations: *The Potoi Chau* [1984] A.C. 226 at 239-241.

¹⁵⁷ On which, see the York-Antwerp Rules 2004, Rule XXII.

¹⁵⁸ Though N.B. the adjustment is not generally binding on the parties: *Wavertree Steamship Co Ltd v Love* [1897] A.C. 373; *Attaleia Marine Co Ltd v Bimeh Iran (The Zeus)* [1993] 2 Lloyd's Rep. 497; *Sameon Co SA v NV Petrofina (The World Hitachi Zosen)* Unreported CA, April 30, 1997.

¹⁵⁹ *Anderson Tritton & Co v Ocean Steamship Co* (1884) 10 App. Cas. 107 at 115.

20-13 This is unsatisfactory. When a single incident gives rise to several sets of proceedings in which the courts make inconsistent findings of fact, the parties may rightly feel that justice has not been done.³⁶ Note, in particular, that a claimant who is found liable to a third party in one set of proceedings remains liable even if a different court holds otherwise in a later set of proceedings. This follows from the principle that a competent court has jurisdiction to decide wrongly as well as rightly³⁷: if it makes a mistake, then the mistake will be conclusive between the parties unless and until it is corrected by an appellate court.³⁸ Sixty years ago, these considerations led Glanville Williams to argue that the English rules of civil procedure should be altered to oblige claimants to use the machinery of third-party proceedings to recover contribution and to prevent them from issuing separate sets of proceedings with this end in mind.³⁹ However this excellent suggestion has never been implemented.⁴⁰

(iii) Settlements

20-14 If a claimant settles a third party's claim, and then sues a defendant, the defendant may wish to argue that the settlement figure was too high or that the claimant should not have settled at all. Such arguments are open to defendants in some situations.

20-15 For example, where several sureties have guaranteed a debt, and the debt falls due, one can give notice to the others that they should take steps to defend the creditor's claim, make terms, or pay their due shares of the debt, and if they do nothing after receiving this notice, they cannot complain if he settles with the creditor on their behalf. If he fails to give notice, however, then they can object that the creditor's claim was unfounded or that the settlement could have been made on better terms.⁴¹

³⁶ See Lord Neuberger M.R.'s comments in *Wright (A Child) v Cambridge Medical Group* [2011] EWCA Civ 669 at [86]–[87]. And cf. *Johnson v Cartledge and Matthews* [1939] 3 All E.R. 654, where the incident with which the case was concerned gave rise to five separate sets of proceedings in which the courts had reached inconsistent findings on the question of liability.

³⁷ *Phillips v Bury* (1694) Skin. 447 at 485; 90 E.R. 198 at 216.

³⁸ *Meyers v Casey* (1913) 17 C.L.R. 90 at 115.

³⁹ G. Williams, *Joint Torts and Contributory Negligence* (London: Stevens, 1951), pp.185–186, allowing for exceptions where third-party proceedings are impossible.

⁴⁰ Though note CMR art.39. For discussion by law reform bodies of the question whether claimants should be compelled to seek contribution by third party proceedings, see University of Alberta, Institute of Law Research and Reform, *Contributory Negligence and Concurrent Wrongoers* (Report No.31, 1979) p.74; Ontario Law Reform Commission, *Report on Contribution Among Wrongoers and Contributory Negligence* (1988) pp.215–216; Scottish Law Commission, *Report on Civil Liability: Contribution* (Scot Law Com. No.115, 1988) paras 3.78–3.79; New Zealand Law Commission, *Apportionment of Civil Liability* (NZLC PP 19, 1992) para.256; New South Wales Law Reform Commission, *Contribution Between Persons Liable for the Same Damage* (Discussion Paper No.38, 1997) paras 7.3–7.11.

⁴¹ *Duffield v Scott* (1789) 3 T.R. 374; 100 E.R. 628; *Smith v Compton* (1832) 3 B. & Ad. 407; 110 E.R. 146 (doubted for other reasons in *Great Western Railway v Fisher* [1905] 1 Ch. 316 at 324); *Jones v Williams* (1841) 7 M. & W. 493 at 501; 151 E.R. 860 at 864; *Pettmann v Keble* (1850) 9 C.B. 701; 137 E.R. 1067; *Stewart v Braun* [1925] 2 D.L.R. 423 (Manitoba KB); *B.S.E. Trading Ltd v Hands* (1998) 75 P. & C.R. 138.

Under the Civil Liability (Contribution) Act 1978 s.1(4), a claimant “who has made or agreed to make any payment in bona fide settlement or compromise”⁴² of a third party's claim⁴³:

“shall be entitled to recover contribution in accordance with this section without regard to whether or not he himself is or ever was liable in respect of the damage, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established.”

This subsection was enacted to overcome the problems created by *Stott v West Yorkshire Road Car Co Ltd*,⁴⁴ where it was held that a claimant who settled a third party's claim could not recover contribution from a defendant unless he could prove that he would have been held liable if the third party had sued him to judgment. The Law Commission thought that a claimant who settled a third party's claim might find this hard to prove, particularly where he had denied liability in order to negotiate a more favourable settlement,⁴⁵ suggesting that the *Stott* rule discouraged the settlement of claims.⁴⁶ Hence, s.1(4) was enacted to relieve a settling claimant of the need to show that the third party would have been able to prove the factual basis of his claim.

However, the claimant still has to show that he would have been liable in law⁴⁷ if the alleged facts were made out, and so a claimant who settles with a creditor although his liability is legally doubtful may still be unable to recover a contribution. This was tested in *B.R.B. (Residuary) Ltd v Connex South Eastern Ltd*.⁴⁸ The parties both inherited rights and liabilities from the British Railways Board. The claimant settled an action by the widow of one of the Board's former employees in the mistaken belief that it had inherited the Board's liability towards her when in fact this liability had been inherited by the defendant. Judgment was entered against the claimant by consent and it sought reimbursement under the 1978 Act. The defendant denied liability on the basis that the claimant had never been legally liable to the widow, but Cranston J. found for the claimant for two reasons: first, because the entry of judgment had itself conclusively rendered the claimant liable to the widow, regardless of the underlying legal merits of her claim, and, secondly, because the question whether the claimant would have escaped liability on the legal merits had to be tested against

⁴² The word “payment” includes “payment in kind”, and so the subsection applies where a claimant does work to repair damage to property: *Baker & Davies Plc v Leslie Wilks Associates (A Firm)* [2005] EWHC 1179 (TCC); [2005] 3 All E.R. 603.

⁴³ See too the Defamation Act 1996 s.3(8)(a): where a claimant offers to make amends for defaming a third party by paying him compensation, and the offer is accepted, “the amount of compensation paid under the offer shall be treated as paid in bona fide settlement or compromise of the claim” for the purposes of the 1978 Act.

⁴⁴ *Stott v West Yorkshire Road Car Co Ltd* [1971] 2 Q.B. 651, especially at 657 (CA). See too *James P. Corry & Co Ltd v Clarke* [1967] N.I. 62 at 71. And cf. *Baylis v Waugh* [1962] N.Z.L.R. 44 at 49 (NZ High Ct).

⁴⁵ As was subsequently the case in e.g. *Thomas Saunders Partnership v Harvey* (1989) 30 Con. L.R. 103 at 120–121.

⁴⁶ Law Commission, *Report on Contribution* (1977) Law Com. No.79, paras 44–57.

⁴⁷ Whether English or foreign law. Propositions of foreign law do not comprise part of the “factual basis” of the third party's claim for the purposes of s.1(4): *Arab Monetary Fund v Hashim (No.8)*, *The Times*, June 17, 1993 (Chadwick J.).

⁴⁸ *B.R.B. (Residuary) Ltd v Connex South Eastern Ltd* [2008] EWHC 1172 (QB); [2008] 1 W.L.R. 2867.

tenant's covenant to repair, to exempt him from liability to repair fire damage. A similar conclusion may also be drawn, in the absence of an express covenant to insure, where the tenant must pay an amount which is stated to correspond to the cost of premiums¹⁶⁷; and even the absence of a term requiring the tenant to pay for the premiums may not be fatal if the other terms are present and the landlord in fact pays for the premiums out of rental income.¹⁶⁸

21-81 On the other hand, a covenant to insure by the landlord, without more, will not found an inference that the landlord has agreed not to sue the tenant,¹⁶⁹ and where the lease does not require the landlord to insure, this is likely to prove fatal to the tenant's defence.¹⁷⁰

21-82 Note that the tenant is not precluded from relying on his agreement with the landlord by the fact that he has no insurable interest in the property. This point was made in the Ontario Court of Appeal, in *Amexon Realty Inc v Comcheq Services Ltd*,¹⁷¹ where Goudge J.A. stressed that it is the agreement between the landlord and the tenant that disables the insurer from recovering via a subrogated action, and it makes no difference whether the tenant himself would have been able to claim under the policy.

21-83 **Construction contracts** Just as the terms of leases vary from one case to another, so too do the terms of the different JCT agreements which it has fallen to the courts to consider. Hence much turns on the precise wording of the relevant clauses and any overview of the subject must be read with this in mind. However, some general comments will be offered here in relation to a paradigm case: a subrogated action brought by an employer's insurer against a negligent contractor.

21-84 Typically in a case of this sort, the court must decide how two clauses of the construction contract were intended by the parties to interact, one stipulating that the contractor should be liable to the employer for loss caused by the contractor's negligence, the other requiring the employer to insure against the risk of damage to the works. The court must first decide whether it was the parties' intention to arrange matters so that they should both have to bear (and thus be obliged to insure against) the same risk, i.e. that the works would be damaged by the contractor's negligence. Generally speaking, the courts have tended to hold that the parties did not intend to put themselves in this position. This seems realistic, given the commercial context of the parties' dealings.

¹⁶⁷ *Tsolon Investments Pty Ltd v Waffle Pod Footing Systems NSW Pty Ltd* [2002] NSWCA 302.

¹⁶⁸ *Agnew-Surpass Shoe Stores Ltd v Cummer-Yonge Investments Ltd* (1973) 55 DLR (3d) 676; *Ross Southward Tire Ltd v Pyrotech Products Ltd* (1975) 57 DLR (3d) 248; *T. Eaton Co v Smith* [1978] 2 S.C.R. 749 especially at 754-755; *Marlborough Properties Ltd v Marlborough Fibreglass Ltd* [1981] 1 N.Z.L.R. 464; *North Newton Warehouses Ltd v Alliance Woodcraft Manufacturing Inc* [2005] BCCA 309; (2005) 44 B.C.L.R. (4th) 227.

¹⁶⁹ *Marlborough Properties* [1981] 1 N.Z.L.R. 464; *Leisure Centre Ltd v Babylon* [1984] 1 N.Z.L.R. 318; *Lambert v Keymoor Ltd* [1997] 2 E.G.L.R. 70 (where the tenant's actions were in any case reckless rather than merely negligent). Cf. *Wisma Development Pte Ltd v Sing-The Disc Shop Pte Ltd* [1994] 3 S.L.R. 295 (where a covenant to insure by a tenant without more constituted insufficient evidence from which the court could infer an agreement that the tenant would not sue the negligent landlord).

¹⁷⁰ *Matthews v Andrew* (1986) 25 D.L.R. (4th) 452; *Yale Properties Ltd v Pianta* (1987) 13 B.C.L.R. (2d) 242; *Lee-Mar Developments Ltd v Monto Industries Ltd* (2000) 18 C.C.L.I. (3d) 224 (Ontario Sup Ct); affirmed (2001) 146 O.A.C. 360; *Sooter Studios Ltd v 74963 Manitoba Ltd* [2006] MBCA 12; (2006) 34 C.C.L.I. (4th) 1.

¹⁷¹ *Amexon Realty Inc v Comcheq Services Ltd* (1998) 37 O.R. (3d) 573 at 576.

The courts must next decide whether the parties intended the employer or the contractor to bear the relevant risk. Two approaches to this question emerge from the cases. The first, which puts the risk of damage caused by the contractor's negligence onto the contractor, is to construe the clause obliging the employer to insure as placing him under an obligation to insure only in respect of damage caused by a reason other than the contractor's negligence.¹⁷² The second, which puts the risk onto the employer, is to hold that the clause obliging the employer to insure obliges him to insure against damage caused by the contractor's negligence, and hence that the employer intended to exempt the contractor from liability for causing such damage.¹⁷³

In *Scottish & Newcastle Plc v G.D. Construction (St Albans) Ltd*,¹⁷⁴ the Court of Appeal held that the latter construction of the parties' agreement produces the result that the insured is debarred from suing the defendant whether or not he actually obtains the benefit of coverage for the defendant. Note, though, that the insured must have assumed a contractual obligation to do this, and that "a mere intention to do so in the future is insufficient", as Colman J. observed in *BP Exploration Operating Co Ltd v Kvaerner Oilfield Products Ltd*.¹⁷⁵

(ii) Inconsistent Policy Terms

Insurers sometimes insert an express term into their policies, stipulating that the policy coverage is not intended to enure to the benefit of third parties.¹⁷⁶ The question arises whether such a term is effective to prevent a defendant from relying on a benefit of insurance clause in his contract with the insured? When answering this, the court should bear in mind that the key question is what the insured and the defendant intended and not what the insurer intended. However, where the insured and the defendant are both aware that the insurer has expressly prohibited the insured from extending the benefit of coverage to third parties, this may suggest that they did not intend the defendant to be protected.

This is the best explanation of *Court Line Ltd v Canadian Transport Co Ltd*,¹⁷⁷ which concerned a charterparty which provided that the owner should give the

¹⁷² As in e.g. *Barking and Dagenham LBC v Stamford Asphalt Co Ltd* (1997) 54 Con. L.R. 1 (CA). See too *National Trust v Haden Young Ltd* (1994) 72 B.L.R. 1; affirming (1993) 66 B.L.R. 88; *European and International Investments Inc v McLaren Building Services Ltd* [2001] Scot CS 67; *Casson v Ostely P.J. Ltd* [2001] EWCA Civ 1013; (2001) 85 Con. L.R. 18; *Tyco Fire & Integrated Solutions (U.K.) Ltd v Rolls-Royce Motor Cars Ltd* [2008] EWCA Civ 286; [2008] 2 All E.R. (Comm.) 584.

¹⁷³ As in e.g. *James Archdale & Co Ltd v Comservices Ltd* [1954] 1 W.L.R. 459 (CA); *Coleman Street Properties Ltd v Denco Miller Ltd* (1982) 31 B.L.R. 32; *Scottish Special Housing Association v Wimpey Construction (UK) Ltd* [1986] 1 W.L.R. 995 (HL). Similar cases on subcontractors are: *Norwich CC v Harvey* [1989] 1 W.L.R. 828; *British Telecommunications Plc v James Thomson & Sons (Engineers) Ltd* (1996) 82 B.L.R. 1; *John F. Hunt Demolition Ltd v A.S.M.E. Engineering Ltd* [2007] EWHC 1507 (TCC); [2008] Bus. L.R. 558. And cf. *Madison Developments Ltd v Plan Electric Co* (1997) 152 D.L.R. (4th) 653 (Ontario CA).

¹⁷⁴ *Scottish & Newcastle Plc v G.D. Construction (St Albans) Ltd* [2003] EWCA Civ 16; (2003) 86 Con. L.R. 1 at [11], also noting that in these circumstances the insured's failure to obtain coverage for the defendant might constitute a breach of contract for which damages are recoverable.

¹⁷⁵ *BP Exploration Operating Co Ltd v Kvaerner Oilfield Products Ltd* [2004] EWHC 999 (Comm); [2005] 1 Lloyd's Rep. 307 at [99].

¹⁷⁶ e.g. Institute Cargo Clauses (1/1/82) cl.15; Institute Container Clauses, Time (1/1/87) cl.17; International Hull Clauses (1/11/03) cl.36.

¹⁷⁷ *Court Line Ltd v Canadian Transport Co Ltd* [1940] A.C. 934 at 938-941. See too *Canadian National Railway* [1941] S.C.R. 591.

that the firm was two-thirds at fault, for the defendant's payment to the clerk, and so his liability was reduced by two-thirds of this amount. Again, in *National Bank of New Zealand*,¹¹¹ the claimant negligently ignored the defendant's warnings that it had paid the defendant money by mistake, and the defendant negligently took insufficient security when it deposited the money with a finance house which became insolvent. The court declined to allow the defence in full, but reduced the defendant's liability by 90 per cent.

- 27-37 These cases were reviewed in *Dextra Bank*,¹¹² where the Privy Council declined to introduce the concept of "relative fault" into the common law version of the defence. They gave two reasons for this. One was that the process of comparing the degrees of fault displayed by the parties was too uncertain. The other was that a claimant's carelessness does not prevent him from establishing a cause of action, and that it would therefore be "very strange" if "the defendant should find his conduct examined to ascertain whether he had been negligent". The first of these reasons is more persuasive than the second. The claimant's fault is irrelevant when asking whether he has a claim, because this enquiry assumes that the benefit still exists and asks which of the parties has the better right to it. At the later stage when the defence of change of position is considered, this assumption no longer holds good. Ex hypothesi, the benefit has been lost and a different question must be addressed, namely which of the parties should bear the loss. Hence there would be no inconsistency if the court ignored the claimant's fault at the first stage, but took it into account at the second stage.¹¹³

(iii) *Attributed Fault*

- 27-38 In *Credit Suisse*,¹¹⁴ money was paid into a joint bank account held by two defendants, who were husband and wife. Gross J. held that the wife was debarred from relying on the defence because her husband had acted in bad faith, reasoning that in the case of joint accounts, bad faith by one account-holder should be attributed to the other. He would have done better to treat the defendants separately when considering their states of mind, given that their liabilities were joint and several.¹¹⁵ This was done in a similar case, *Euroactividade AG v Moeller*,¹¹⁶ where Simon Brown L.J. found the argument "not unappealing" that Mrs Moeller's position had been changed for her by her husband's withdrawals from their joint account, but did not believe that she had actually acted in good faith, the only evidence offered on this point having been the "totally and absolutely worthless" assertions of her husband that she had known nothing of his fraudulent activities.

(b) *Wrongdoing*

- 27-39 Lord Goff did not say in *Lipkin Gorman* whether a defendant should be characterised as a "wrongdoer" because he has committed a criminal offence, and/or

¹¹¹ *National Bank of New Zealand* [1999] 2 N.Z.L.R. 211.

¹¹² *Dextra Bank* [2002] 1 All E.R. (Comm.) 193 at [45].

¹¹³ J. McCamus, "Wrongful Conduct and Change of Position" in S. Degeling and J. Edelman (eds), *Unjust Enrichment in Commercial Law* (Sydney: Lawbook Co, 2008), 385; Bant, *The Change of Position Defence*, p.179.

¹¹⁴ *Credit Suisse* [2004] EWHC 374 (Comm) at [98].

¹¹⁵ See para.4-54.

¹¹⁶ *Euroactividade AG v Moeller* Unreported CA, February 1, 1995.

because he has committed a civil wrong, and/or because he has behaved in a morally shabby way.

Many of the cases that have considered whether a defendant's "wrongdoing" should debar him from raising the defence have been concerned with illegality. In *Equiticorp Industries Group Ltd v R. (No.47)*,¹¹⁷ Smellie J. held that the New Zealand government could not raise the defence in respect of payments which had been made pursuant to a share purchase and buy-back scheme that infringed the New Zealand Companies Act 1955 s.62, which prohibits the purchase by a company of its own shares. In *Garland v Consumers' Gas Co Ltd*,¹¹⁸ the Supreme Court of Canada held that a regulated gas utility could not raise the defence against a claim to recover money which it had collected from customers as "late payment penalties", contrary to s.347 of the Canadian Criminal Code, which prohibits receiving interest at a criminal rate.¹¹⁹ In *Barros Mattos Junior v General Securities & Finance Ltd*,¹²⁰ Laddie J. held that the defendants could not raise the defence because they had converted US dollars which had been stolen from the claimant into Nigerian naira before paying the money away to third parties, contrary to the Nigerian Foreign Exchange (Monitoring and Miscellaneous Provisions) Decree 1995: this requires forex dealings in Nigeria to be conducted through authorised intermediaries.

The offences committed by each of these defendants were notably different, as were the circumstances of each case. In *Garland*, the defendant's enrichment at the expense of its customers was itself the illegal act which forestalled the change of position defence; in *Equiticorp*, both the government's receipt of benefits and its subsequent disposal of these benefits were illegal because they formed part of a larger scheme, the whole of which fell foul of the companies legislation; in *Barros*, the illegality in issue was not the defendants' receipt of money, nor their actions in paying it on to third parties, but their actions in converting the US dollars into Nigerian naira through an unauthorised intermediary. In *Equiticorp*, officers of the New Zealand government discovered late in the day that the share purchase scheme which they had devised was illegal, but decided to press ahead regardless¹²¹; in *Garland*, the gas utility implemented the late payment penalty with the approval and authority of its regulator, the Ontario Energy Board, and some 20 years elapsed before the legality of this penalty was challenged in the courts¹²²; in *Barros*, the defendants were presumably aware of the Nigerian forex regulations, but regarded them as a dead letter in light of the fact that the Nigerian authorities never enforce them in practice.¹²³

¹¹⁷ *Equiticorp Industries Group Ltd v R. (No.47)* [1998] 2 N.Z.L.R. 481 at 654 and 730 (NZ High Ct).

¹¹⁸ *Garland v Consumers' Gas Co Ltd* [2004] SCC 25; [2004] 1 S.C.R. 629 at [63]-[66]; followed in *Kilroy v A OK Payday Loans Inc* (2006) 273 D.L.R. (4th) 255 (British Columbia Sup Ct).

¹¹⁹ The Supreme Court had previously held that the defendant's actions in charging late payment penalties amounted to charging a criminal rate of interest under s.347, in *Garland* [1998] 3 S.C.R. 112.

¹²⁰ *Barros Mattos Junior v General Securities & Finance Ltd* [2004] EWHC 1188 (Ch); [2004] 2 Lloyd's Rep. 475.

¹²¹ *Equiticorp* [1998] 2 N.Z.L.R. 481 at 553-620.

¹²² *Garland* [2004] 1 S.C.R. 629 at [5]-[6].

¹²³ Or so the defendants alleged: no evidence seems to have been led on the point, and Laddie J. held that even if it were true that the "Nigerian authorities have . . . 'under-prioritised' the pursuit of breaches of the Decree, that does not alter the fact that it is existing criminal legislation in that country": *Barros* [2004] 2 Lloyd's Rep. 475 at [36].

subject matter of an interest that was discharged with property that was previously owned by the claimant.¹¹ This has been described as a rule that the claimant must establish a “proprietary base” to his claim.¹² Many scholars consider that in principle this rule is a sound starting point for identifying the circumstances in which proprietary remedies should be awarded, although there is a consensus that additional restrictions are also needed.¹³

37-11 To establish a “proprietary base”, a claimant must have resort to the rules of following and tracing. These rules are discussed in Ch.7. They are often expressed in the metaphorical language of “proprietary links”, and as Craig Rotherham has observed,¹⁴ this makes it tempting to think that the rules themselves can provide a normative justification for the award or refusal of proprietary remedies. But as he also observes, this would be an error. Some recent cases make it very clear that these rules are merely rules of evidence,¹⁵ and it follows that justifications for the “proprietary base” requirement must be sought elsewhere.

37-12 A strain of thought identifiable in some of the cases and literature is the vague idea that there should not be “too much” proprietary restitution, and that the “proprietary base” rule is a good way of reducing the general availability of proprietary remedies because it has the merit of certainty and predictability (to the extent that the rules of following and tracing are certain and predictable). This will not do as a justification for the rule since it begs the question of how much proprietary restitution there ought to be. Moreover this line of thinking creates the danger that the “proprietary base” rule will be used in an essentially arbitrary

¹¹ *Re Goldcorp Exchange Ltd* [1995] 1 A.C. 74 at 107–110 per Lord Mustill; *Bishopsgate Investment Management Ltd v Homan* [1995] Ch. 211 at 217–220 per Dillon L.J., and at 221 per Leggatt L.J.; *Boscawen v Bajwa* [1996] 1 W.L.R. 328 at 334 per Millett L.J.; *Lexi Holdings* [2008] EWCA Crim 1443; [2009] Q.B. 376 at [49]–[50] per Keene L.J., discussed at paras 7.37–7.39. Cf. L. Smith, “Tracing” in A. Burrows and Lord Rodger (eds), *Mapping the Law* (Oxford: OUP 2006), 119, pp.135–137, noting that rejection of the “swollen assets” theory reflects the “particular” conception of wealth on which the courts’ approach to the award of proprietary remedies is premised, while its acceptance would require them to abandon this for an “abstract conception”, i.e. it would require them to accept that an idea of wealth as abstract value, which underpins their approach to personal restitution, should also underpin their approach to proprietary restitution, in contradistinction to an idea of wealth as proprietary rights in particular subject matter. The difference between these two conceptions is also discussed in B. Rudden, “Things as Things and Things as Wealth” in Harris, *Property Problems*, 146.

¹² This term was coined by Peter Birks: P. Birks, *An Introduction to the Law of Restitution*, revised edn (Oxford: Clarendon Press, 1989), pp.375–385; P. Birks, “Establishing a Proprietary Base” [1995] R.L.R. 83. The terminology has made its way into judicial discourse: e.g. *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669 at 714 per Lord Browne-Wilkinson; *Foskett* [2001] 1 A.C. 102 at 117 per Lord Hope; *Daraydan Holdings Ltd v Solland International Ltd* [2004] EWHC 622 (Ch); [2005] Ch. 119 at [78] per Lawrence Collins J.; *O.J.S.C. Oil Co Yugraneft v Abramovich* [2008] EWHC 2613 (Comm) at [349] and [372] per Christopher Clarke J.

¹³ e.g. P. Birks, *Unjust Enrichment*, 2nd edn (Oxford: OUP, 2005), p.185; M. Bryan, “The Criteria for the Award of Proprietary Remedies: Rethinking the Proprietary Base” in M. Bryan (ed.), *Private Law in Theory and Practice* (London: Routledge-Cavendish, 2007) 271, p.274; Burrows, *The Law of Restitution*, p.174.

¹⁴ C. Rotherham, “The Metaphysics of Tracing: Substituted Title and Property Rhetoric” [1996] Osgoode Hall L.J. 321.

¹⁵ *Foskett* [2001] 1 A.C. 102 at 127–128 per Lord Millett; *Glencore International AG v Metro Trading International Ltd* [2001] 1 Lloyd’s Rep. 284 at [180] per Moore-Bick J.

way. Unless the policy calculations that underlie the adoption of control devices within private law are made explicit, their application always leads to confusion, inconsistency, and unfairness.

37-13 A more substantial argument, made by Andrew Burrows and others, is that wherever a defendant’s unjust enrichment exists in a surviving asset, “proprietary restitution should be the norm . . . [because it] more perfectly achieves restitution than does personal restitution”.¹⁶ On this view, the point of allowing proprietary restitution where a proprietary base can be established, but not otherwise, is that this is the only situation where it can be said that proprietary restitution more exactly effects the return of what the defendant received than a personal award, i.e. a property right, rather than the value of a property right.

37-14 One might demur over the details of this: an equitable proprietary interest under a trust is not exactly the same property right as a legal interest received by a defendant, and an equitable lien over the whole of a defendant’s assets is arguably “nearer” to the legal interest received by a defendant than an order directing the defendant to pay a money sum. However, it does seem plausible that, as between the claimant and the defendant, a proprietary right in a surviving asset is something to which the claimant should be entitled, since the benefits attached to ownership of this asset, including capital increases and income, are things to which the defendant ex hypothesi was not previously entitled. Yet the question still remains why the claimant should be entitled to “perfect restitution” when this will effectively advance his claim ahead of many other claims against the defendant in the event of the defendant’s insolvency.

37-15 So far as the relative status of claims in a defendant’s insolvency are concerned, some writers have argued that these should be ignored by the courts when deciding whether or not a claimant should be entitled to a proprietary remedy, because the ranking of claims in insolvency is a matter for Parliament, and the courts should therefore make their decision on other grounds in the expectation that Parliament will correct any injustice that results.¹⁷ We accept that civil litigation does not provide the best forum for resolving the difficult questions of distributive justice that are created by a defendant’s insolvency—in Peter Birks’ phrase, “the rationality of ‘women and children first’ may require re-examination, but shipwreck is not the time to attempt a reassessment.”¹⁸ Nevertheless we believe that it would be unprincipled and misguided for the courts to ignore one of the central reasons why it matters whether claimants are entitled to proprietary restitution when deciding whether or not such relief should be available. We agree with those writers who believe that it is both appropriate and necessary for

¹⁶ Burrows, *The Law of Restitution*, p.174. See too S. Smith, “The Structure of Unjust Enrichment Law: Is Restitution a Right or a Remedy?” (2003) 36 *Loyola of Los Angeles L.R.* 1037, p.1057; L. Smith, “Philosophical Foundations of Proprietary Remedies” in R. Chambers et al. (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford: OUP, 2009), 281, p.294. A similar idea also runs through R. Chambers, “Two Types of Enrichment” in Chambers et al., above, 242.

¹⁷ e.g. W. Swadling, “Policy Arguments for Proprietary Restitution” in S. Degeling and J. Edelman (eds.), *Unjust Enrichment in Commercial Law* (Sydney: Lawbook Co, 2008), 359, pp.372–375.

¹⁸ Birks, *Unjust Enrichment*, p.181.