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An Introduction to the Law of Unjust Enrichment

Alvin W. L. SEE
Singapore Management University, alvinsee@smu.edu.sg

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AN INTRODUCTION TO THE LAW OF UNJUST ENRICHMENT

ALVIN W-L SEE[1]

INTRODUCTION

The principle that no one shall be unjustly enriched at the expense of another[2] has been invoked to rationalise the right to restitution in a number of cases which fall outside the provinces of contract and tort. This has eventually led to the recognition of an independent legal discipline known as the law of unjust enrichment. It is among the most debated private law subjects today despite its remarkably recent origin. In Malaysia, despite the increase in judicial reference to the language of unjust enrichment to justify an award of restitutionary relief, there is generally a lack of understanding about the subject and a failure to adopt a principled approach in its treatment. Therefore, it can hardly be said that Malaysia has a well-developed law of unjust enrichment, which is unfortunate given how frequently issues concerning unjust enrichment arise. This article seeks to address the problem by offering an introduction to the subject. The ensuing discussion proceeds in five parts. Part I (History) embarks on a journey through time, tracing the evolution of unjust enrichment from its beginning to its modern form. Part II (Taxonomy) examines the place of unjust enrichment within the general framework of private law and explains its differences with the more familiar disciplines such as contract and tort. Part III (Terminology), which flows from the discussions in Parts II and I, explains why it is

[1] BCL (Oxford); CLP; LLB (Leeds); Assistant Professor of Law, Singapore Management University. I The following abbreviations are used: JH Baker, 'The History of Quasi-Contract in English Law' in WR Cornish, Richard Nolan, J O'Sullivan and G Virgo (eds), *Restitution: Past, Present & Future* (Oxford: Hart Publishing, 1998) p 37 (Baker, 'History'); Peter Birks, *An Introduction to the Law of Restitution* (Oxford: OUP, 1985) (Birks, *Introduction*); Peter Birks, *The Foundations of Unjust Enrichment: Six Centennial Lectures* (Wellington: Victoria U Press, 2003) (Birks, *Foundations*); Peter Birks, *Unjust Enrichment*, 2nd edn (Oxford: OUP, 2005) (Birks, *Unjust Enrichment*); Andrew Burrows, *The Law of Restitution*, 3rd edn (Oxford: OUP, 2011) (Birks, *Unjust Enrichment*); Charles Mitchell, Paul Mitchell and Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment*, 8th edn, (London: Sweet & Maxwell, 2011) (*Goff & Jones: Unjust Enrichment*); DJ Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford: OUP, 1999) (Ibbetson, *Introduction*); RM Jackson, *The History of Quasi-Contract in English Law* (Cambridge: Cambridge U Press, 1936) (Jackson, *History*); Graham Virgo, *The Principles of the Law of Restitution*, 2nd edn (Oxford: OUP, 2006) (Virgo, *Restitution*); Percy H Winfield, *The Chief Sources of English Law* (Cambridge: Harvard U Press, 1925) (Winfield, *Sources*); Percy H Winfield, *The Province of the Law of Tort* (Cambridge: Cambridge U Press, 1931) (Winfield, *Province*).

[2] This principle made early appearances in Justinian's *Digest* (6th century AD) in two texts attributed to the Roman scholar Pomponius. See *Digest*, 12.6.14: '*Nam hoc natura aequum est neminem cum alterius detrimento fieri locupletiorem*' ('For this is by nature fair that nobody should be enriched by another's loss'); *Digest*, 50.17.206: '*Iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiorem*' ('It is fair according to the law of nature that nobody should be enriched by loss and injustice to another'). Translated: Birks, *Unjust Enrichment*, at p 268.

important to speak of unjust enrichment instead of restitution. Part IV (Lessons) explains why the discussions in Parts I to III matter today. Lastly, Part V (Future) sets out certain themes that should inform future works on this subject. The last two parts will focus on the Malaysian context.

PART I: HISTORY

Although restitutionary relief was available under medieval English law for a variety of situations, the medieval lawyers were generally unconcerned about whether these situations could be rationalised by some unifying principle and be coalesced into an independent legal discipline.[3] The neglect of principle was largely attributed to the contentment in finding an accepted legal formula within which the claims could fit. The practical lawyers had no need to turn their minds to the conceptual bases that underlie their claims. Procedure suppressed principle.

An attempt to fill this conceptual void was not made until the mid-eighteenth century. In the celebrated case of *Moses v Macferlan*,[4] Lord Mansfield spoke of an action to recover money which '*ex aequo et bono*'[5] (according to equity and good conscience) or 'by the ties of natural justice and equity' the defendant ought to refund.[6] The action was said to lie:

> … for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition, (express, or implied;) or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances.[7]

Lord Mansfield's judgment was afforded the first thorough treatment in Evans' extended essay on the action for money had and received published in 1802.[8] He

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[3] See Baker, 'History', at pp 37–56; Jackson, *History*, at pp 1–36; Ibbetson, *Introduction*, at pp 265–68; David Ibbetson, 'Unjust Enrichment in England before 1600' in Eltjo JH Schrage (ed), *Unjust Enrichment: The Comparative Legal History of the Law of Restitution* (Berlin: Duncker & Humblot, 1995) p 121.

[4] (1760) 2 Burr 1005 at p 1012.

[5] *Ibid*.

[6] *Ibid* at pp 1008, 1012. See also *Sadler v Evans* (1766) 4 Burr 1984 at p 1986; *Clarke v Shee and Johnson* (1774) 1 Cowp 197 at pp 199–200; *Towers v Barrett* (1786) 1 Term Rep 133 at p 134; *Jestons v Brooke* (1778) 2 Cowp 793 at p 795.

[7] (1760) 2 Burr 1005 at p 1012. See also *Isaak Mattos v Parker* (1756) LI Harrowby MS doc 17 at p 35: 'Wherever money paid by mistake, fraud, deceit or extortion without consideration, the law makes it money to the use of the payer'.

[8] William David Evans, 'An Essay on the Action for Money Had and Received' in William David Evans, *Essays on the Action for Money Had and Received, on the Law of Insurances, and on the Law of Bills of Exchange and Promissory Notes* (Liverpool: Merritt & Wright, 1802) p 1.

accepted Lord Mansfield's list of situations in which the action would lie, to which he added money paid under an illegal contract. The maxim '*Hoc naturâ aequum est, neminem cum alterius detrimento fieri locupletiorem*'[9] was invoked to justify the use of the action in these cases.[10]

Despite these attempts to explain the conceptual basis that underlie the right to restitution in these cases, no independent subject was born. Instead, most of these cases became subsumed within the province of the law of contract.[11] In order to understand this phenomenon, it is necessary go further back in time.

About two-thirds of the law of unjust enrichment was of common law origin and these fell under the rubric of quasi-contract.[12] The term 'quasi-contract' was derived from the phrase '*quasi ex contractu*' used in Roman law. The Romans initially (in the second century AD) classified civil obligations into those arising either *ex contractu* (from contract) or *ex delicto* (from wrong).[13] But it was realised that some obligations arose from neither (eg obligation to repay a mistaken payment),[14] thus resulting in the creation of a separate category of obligations arising *ex variis causarum figuris* (from various other causes).[15] Later, in the sixth century AD, this miscellaneous category was split into obligations arising *quasi ex contractu* (as though from contract) and *quasi ex delicto* (as though from wrong).[16] While obligations that arise from lawful or non-wrongful conducts were commonly contractual, it was recognised that the contractual sphere was not exhaustive of such obligations. The residue was thus slotted into the category of obligations arising *quasi ex contractu*,[17] which were sanctioned in much the same way as obligations arising *ex contractu*.[18] Importantly,

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[9] For translation, see n 2 above.
[10] William David Evans, 'An Essay on the Action for Money Had and Received' in William David Evans, *Essays on the Action for Money Had and Received, on the Law of Insurances, and on the Law of Bills of Exchange and Promissory Notes* (Liverpool: Merritt & Wright, 1802) p 1 at p 5. See also his other works: William David Evans, *A General View of the Decisions of Lord Mansfield in Civil Causes*, vol II (London: J Butterworth, 1803) at p 200; R Pothier, *A Treatise on the Law of Obligations or Contracts*, William David Evans (trans) (London: Joseph Butterworth, 1806), vol I, at pp 69–70; vol II, at pp 378–81.
[11] For some early examples, see Samuel Comyn, *A Treatise of the Law Relative to Contracts and Agreements Not Under Seal*, vol II (London: J Butterworth, 1807) at ch 1; Joseph Chitty, *A Practical Treatise on the Law of Contracts Not Under Seal* (London: S Sweet, 1826) at s V3; Stephen Martin Leake, *Elements of the Law of Contracts* (London: Stevens and Sons, 1867) at ch I s I §2.
[12] Birks, *Introduction*, at p 29. Although quasi-contractual obligations did not all arise from unjust enrichment, the bulk of them did. Most works on quasi-contract dealt only with the unjust enrichment aspect of it.
[13] Gaius, *Institutes*, 3.88.
[14] Gaius, *Institutes*, 3.91.
[15] *Digest*, 44.7.1 pr. (Gaius, 2 *Aurea*).
[16] *Digest*, 44.7.5 (Gaius, 3 *Aurea*); Justinian, *Institutes*, 3.13.2.
[17] Birks, *Introduction*, at pp 30–31.
[18] *Ibid*.

the Romans clearly did not regard such obligations as based on contract. As Birks explained, '[i]f Gaius himself did coin the phrase 'quasi ex contractu' it is as certain as anything could be that he meant to emphasise that there was no contract'.[19]

Roman law had some influence on the laws of ancient England.[20] This was apparent in the second systematic treatise on English law written by Henry of Bracton in the thirteenth century.[21] Of interest is Bracton's adoption of the fourfold classification of obligations by the Romans.[22] But this Roman influence was destined to be short-lived. The rise of the forms of action during the reigns of Henry III (1216–1272) and Edward I (1272–1307)[23] turned the attention away from the systematic exposition of the laws to a focus on procedures.[24] It is accurate to describe the laws and procedures of medieval England as being inseparably intertwined.[25] Baker explained:

> The learning about writs, forms of action and pleading was fundamental to the old common law … because the procedural institutions preceded the substantive law as it is now understood. The principles of the common law were never mapped out in the abstract, but grew around the forms by which justice was centralised and administered by the king's courts. There was a law of writs before there was a law of property, or of contract, or of tort.[26]

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[19] Birks, *Foundations*, at p 16.

[20] See generally Thomas Edward Scrutton, *The Influence of the Roman Law on the Law of England* (Cambridge: Cambridge U Press, 1883); Winfield, *Sources*, at ch IV; TFT Plucknett, 'The Relations Between Roman Law and English Common Law Down to the Sixteenth Century: A General Survey' (1939) 3 U Toronto LJ 24; Paul Vinogradoff, *Roman Law in Medieval Europe* (London and NY: Harper, 1909) at ch IV.

[21] Henrici de Bracton*, De Legibus et Confuetudinibus Angliæ* (*Of Laws and Customs of England*) (c. 1210 to 1268). Most of Bracton's Roman materials were derived indirectly from the *Corpus Juris* through the work of Azo of Bologna. On the extent to which Bracton's work was influenced by Roman law, see Thomas Edward Scrutton, *The Influence of the Roman Law on the Law of England* (Cambridge: Cambridge U Press, 1883) at ch III; Frederick William Maitland, *Selected Passages From the Works of Bracton and Azo* (London: B Quaritch, 1895); Frederick Pollock and Frederick William Maitland, *The History of English Law*, vol I (Cambridge: Cambridge U Press, 1895) at ch VI; George E Woodbine, 'The Roman Element in Bracton's De Adquirendo Rerum Dominio' (1922) 31 Yale LJ 827; WS Holdsworth, *A History of English Law*, 3rd edn (Rewritten), vol II (London: Methuen & Co, 1923) at pp 267–286; Paul Vinogradoff, 'The Roman Elements in Bracton's Treatise' (1923) 32 Yale LJ 751; SE Thorne, *Essays in English Legal History* (London: Hambledon Press, 1985) at ch 8.

[22] *De Legibus et Confuetudinibus Angliæ*, at ff 100–101.

[23] See generally AH Chaytor and WJ Whittaker (eds), FW Maitland, *Equity, also the Forms of Action at Common Law* (Cambridge: Cambridge U Press, 1910) at pp 314–346.

[24] However, it may be that some forms of action had Roman influence. See Birks, *Foundations*, at p 13.

[25] This was also an era of books about legal practice. As Winfield observed: '[N]early every effort at legal literature had been obscured by a dense cloud of procedure. Most of the books seem to answer the question, 'What must I do in Court?' rather than, 'What is the law?' They are like printed instructions hung up in the engine-room of a factory rather than manuals on the science of engineering' (Winfield, *Sources*, at p 311).

[26] JH Baker, *An Introduction to English Legal History*, 2nd edn (London: Butterworths, 1979) at p 49. See also Baker, 'History', at p 40 ('In such a legal world, practice was necessarily in advance of settled

Despite this, the Roman phrase '*ex quasi contractu*' still found its way in English law. To see how it did, it is necessary to study the forms of action, which until the mid-nineteenth century substantially influenced the development of the common law. These are best understood as legal formulas which the plaintiff's pleading must confirm to.

The sixteenth century saw the creation of a new form of action, the action of *assumpsit*, which became an attractive alternative to the older actions of debt and account.[27] The plaintiff who brings an action of *assumpsit* asserts that the defendant made a promise (*assumpsit*) to pay but broke it. It was in form an action for damages for breach of a promise.[28] In *Slade v Morley*, the plaintiff who sought to recover the price due under a sale was allowed to use *assumpsit* as an alternative to the action of debt, which was previously not allowed.[29] Where so used, it was known as *indebitatus assumpsit*. The *indebitatus assumpsit* rested on the assertion that the defendant, being indebted to the plaintiff for a certain sum (*indebitatus*), and in consideration thereof, promised to repay it (*assumpsit*) but failed to do so. Once the debt was proven, however, no separate proof of promise was required.[30] It was implied, and not traversable.[31] On actual facts, the defendant in *Slade v Morley* made no (subsequent) promise to repay. As Baker explained, 'the promise to pay was no doubt almost always fictitious, for it was generally accepted that this was essentially a claim of debt forced into the assumpsit formula by the addition of an imaginary promise'.[32] However, despite the fictional promise, there was no doubt that the plaintiff's claim was essentially contractual.

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law, and propositions of law took root in advance of speculative explanations'); Sir Henry Sumner Maine, *Dissertations on Early Law and Custom* (NY: Henry Holt & Co, 1886) at p 389 ('So great is the ascendency of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the envelope of its technical forms').

[27] In an action of debt, for example, the defendant was usually entitled to wage the law, ie to make an oath that he did not owe the plaintiff the amount, and if a number of persons (usually eleven or twelve) swore that they believed him, the plaintiff's claim will be defeated. See Ibbetson, *Introduction*, at p 32

[28] Baker, 'History', at p 39. See also JB Ames, 'The History of Assumpsit' (1888) 2 Harvard L Rev 2.

[29] (1602) 4 Co 92b at p 94a. See also JH Baker, 'New Light on Slade's Case' (1971) 29 Cambridge LJ 51 at p 213; David Ibbetson, 'Sixteenth Century Contract Law: *Slade's Case* in Context' (1984) 4 Oxford J Legal Studies 295.

[30] Birks, *Foundations*, at p 13.

[31] Jackson, *History*, at p 44.

[32] Baker, 'History', at p 42. See also JH Baker, *An Introduction to English Legal History*, 4th edn (London: Butterworths, 2002) at p 348: 'No one was in any doubt that the courts had allowed the forms of law to be twisted so that the transactions represented by the common counts could be enforced without resort to an action of debt. That had been the object of the majority in *Slade's Case*'.

The courts subsequently extended the use of *assumpsit* to cases involving non-contractual claims in the latter half of the seventeenth century.[33] The action for money had and received, a sub-form of *indebitatus assumpsit*, became the chief method by which unjust enrichment claims were brought. The action could be briefly pleaded as follows:

> Being indebted in such a sum as so much money had and received to the plaintiff's use, in consideration thereof the defendant afterwards promised to pay, yet he wickedly broke that promise.[34]

Here the cause of the defendant's indebtedness was pleaded as money had and received to the plaintiff's use, which means money received on the plaintiff's behalf.[35] The exact details of the claim (eg the plaintiff has paid the defendant by mistake) do not appear on the face of the action and would be dispensed with until trial.[36] At trial, the plaintiff would adduce certain facts to substantiate the allegation. As to what facts the court would accept as sufficient to show that the defendant received the money on the plaintiff's behalf, Lord Mansfield had provided the answer in *Moses v Macferlan*: payments made under mistake or duress, or for a consideration that has failed, etc.[37] On establishing any of these, the law would imply a promise.

To justify such an extension of *assumpsit*, Lord Mansfield said:

> If the defendant be under an obligation, from the ties of natural justice, to refund; the law implies a debt, and gives this action, founded in the equity of

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[33] On the use of *indebitatus assumpsit* for unjust enrichment claims, see JB Ames, 'The History of Assumpsit' (1888) 2 Harvard L Rev 53 at pp 63–69; Winfield, *Province*, at pp 123–28; Jackson, *History*, at pp 39–117; JH Baker, 'The Use of Assumpsit for Restitutionary Money Claims 1600–1800' in in Eltjo JH Schrage (ed), *Unjust Enrichment: The Comparative Legal History of the Law of Restitution* (Berlin: Duncker & Humblot, 1995) p 31; Ibbetson, *Introduction*, at pp 269–73; William Cornish *et al*, *The Oxford History of the Laws of England*, vol XII (Oxford: OUP, 2010) at ch VIII.

[34] Birks, *Foundations*, at p 14. See also Birks, *Unjust Enrichment*, at p 287; AH Chaytor and WJ Whittaker (eds), FW Maitland, *Equity, also the Forms of Action at Common Law* (Cambridge: Cambridge U Press, 1910) at p 385.

[35] Birks, *Foundations*, at p 14.

[36] *Moses v Macferlan* (1760) 2 Burr 1005 at p 1010: 'One great benefit, which arises to suitors from the nature of this action, is, that the plaintiff needs not state the special circumstances from which he concludes "that, ex æquo & bono, the money received by the defendant, ought to be deemed as belonging to him:" he may declare generally, "that the money was received to his use;" and make out his case, at the trial'. See also JH Baker, *An Introduction to English Legal History*, 4th edn (London: Butterworths, 2002) at p 373: 'This gave the plaintiff a considerable advantage when compared with special *assumpsit*, in which all material details had to be shown'.

[37] Judges normally decided the matter off the record. See Birks, *Foundations*, at p 49; Baker, 'History', at pp 40–42. See also *Isaak Mattos v Parker* (1756) LI Harrowby MS doc 17 at p 35.

> the plaintiff's case, as it were upon a contract ('quasi ex contractu,' as the Roman law expresses it).[38]

Birks described this as 'the brilliant and dangerous attempt to kill two birds with one alien stone, the appeal to the Roman phrase *quasi ex contractu* which seeks both to justify the action's form and to affirm its non-contractual nature'.[39] The reference to '*quasi ex contractu*' was only necessary to give the cases a contractual cloak to justify the use of *indebitatus assumpsit*.[40] There is clearly no contract, for a mistaken payment is recoverable by *indebitatus assumpsit* although the mistaken payee did not actually promise to repay it.[41] Everyone knew that the promise was a fiction.[42]

The action of money paid to the defendant's use was another sub-form of *indebitatus assumpsit*.[43] The alleged cause of the defendant's indebtedness was money paid, laid out and expended for the defendant at his special instance and request. The law will imply both the request and the promise to pay on the proof of certain facts, eg where the plaintiff paid money to a third party under compulsion or necessity from which the defendant derived a benefit.[44]

Two other sub-forms of *assumpsit* were *quantum meruit* (as much as he deserved) and *quamtum valebat* (as much as they were worth).[45] These were ordinary actions of *assumpsit* (not *indebitatus assumpsit*, since they do not allege a debt) alleging the breach of a promise to pay a reasonable sum for a service or goods requested by the defendant, respectively.[46] While *quantum meruit* and *quantum valebat* were used

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[38] *Moses v Macferlan* (1760) 2 Burr 1005 at p 1008.
[39] Birks, *Introduction*, at p 36.
[40] *Ibid* at p 63.
[41] One of the earliest cases in which *assumpsit* was used to recover a mistaken payment was *Lady Cavendish v Middleton* (1628) Cro Car 141.
[42] See *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at p 62: 'Lord Mansfield does not say that the law implies a promise. The law implies a debt or obligation which is a different thing. In fact, he denies that there is a contract; the obligation is as efficacious as if it were upon a contract' (*per* Lord Wright). The fiction was in fact recognised much earlier: R Pothier, *A Treatise on the Law of Obligations or Contracts*, William David Evans (trans), vol I (London: Joseph Butterworth, 1806) at Introduction p 85; Henry Maine, *Ancient Law* (London: John Murray, 1861) at pp 343–44; Stephen Martin Leake, *Elements of the Law of Contracts* (London: Stevens and Sons, 1867) at pp 39–40; Frederick Pollock, *Principles of Contract at Law and in Equity* (London: Stevens and Sons, 1876) at p 29; William R Anson, *Principles of the English Law of Contract* (Oxford: Clarendon Press, 1879) at pp 321, 324; AH Chaytor and WJ Whittaker (eds), FW Maitland, *Equity, also the Forms of Action at Common Law* (Cambridge: Cambridge U Press, 1910) at p 364.
[43] See generally Robert Goff and Gareth Jones, *The Law of Restitution* (London: Sweet & Maxwell, 1966) at pp 3–4, 29–31; Birks, *Unjust Enrichment*, at pp 287–88; Baker, 'History', at pp 44–46; Ibbetson, *Introduction*, at pp 269–272; William Cornish *et al*, *The Oxford History of the Laws of England*, vol XII (Oxford: OUP, 2010) at pp 598–600.
[44] See eg *Exall v Patridge* (1799) 8 Term Rep 308.
[45] See generally Baker, 'History', at pp 42–44, 46–48.
[46] See Birks, *Unjust Enrichment*, at p 287.

mostly in situations where the promise to pay could properly be inferred from an existing contract, they could also apply in non-contractual situations, eg where the plaintiff performed services or delivered goods pursuant to a contract which did not materialise or was void. Again, the promise to pay, and in some cases the request, was implied.

Unfortunately, the courts were already referring to quasi or implied contracts as early as the beginning of the eighteenth century.[47] Such terminologies are misleading. The term 'quasi-contract' suggests that the action is in substance contractual although its only similarity with contract was the form in which the claims could be brought. Birks complained:

> 'Quasi-contract' sounds like 'sort of contract'. However hard the impression is combated, the image is of matter barely tolerated on the fringe of contract … The Latin is a bit safer: *quasi ex contractu* means 'as though upon a contract', and fairly obviously implies that there is none. But the English noun cannot be turned away from its false overtone.[48]

The term 'implied contract' fared no better since what was implied was a promise, not a contract.[49] By the time *Moses v Macferlan* was decided, Blackstone, the first Vinerian Professor of English Law, was already lecturing on quasi-contracts at Oxford.[50] Due to his fondness for the social contract and the influence of civilian scholarship, he explained those cases identified by Lord Mansfield as based on implied contract.[51] This view was clearly set out in his *Commentaries* published shortly after, which contained the first academic citation of *Moses v Macferlan*.[52] Lord Mansfield's judgment in *Moses v Macferlan* was cited verbatim,[53] albeit in

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[47] See eg *Jacob v Allen* (1703) 1 Salk 27; *Cock v Vivian* (1734) W Kel 203.
[48] Birks, *Introduction*, at p 34. See also Henry Maine, *Ancient Law* (London: John Murray, 1861) at p 344: 'This word 'quasi,' prefixed to a term of Roman law, implies that the conception to which it serves as an index is connected to which it serves as an index is connected with the conception with which the comparison is instituted by a strong superficial analogy or resemblance. It does not denote that the two conceptions are the same or that they belong to the same genus'.
[49] Ibbetson, *Introduction*, at p 272: 'the courts had moved from the wholly accurate proposition that these actions were based on implied promise to the wholly inaccurate proposition that they were based on implied contracts'.
[50] *Ibid* at p 273.
[51] Peter Birks and Grant McLeod, 'The Implied Contract Theory of Quasi-Contract: Civilian Opinion Current in the Century Before Blackstone' (1986) 6 Oxford J Legal Studies 46.
[52] William Blackstone, *Commentaries on the Laws of England*, Book III (Oxford: Clarendon Press, 1768) at pp 161–65.
[53] *Ibid* at p 162.

support of a proposition that deviated from what Lord Mansfield originally intended.[54]

The forms of action were finally abolished in the mid-nineteenth century.[55] However, the fiction of implied contract grew rather than diminish in importance for some time thereafter. It seemed immortal.[56] In 1914, the House of Lords in *Sinclair v Brougham*[57] stubbornly maintained that the common law recognised only two classes of obligations: contractual and tortious.[58] It explained quasi-contractual claims as referring to claims which 'in theory is based on a contract which is imputed to the defendant by a fiction of law'.[59] More importantly, the court said that '[t]he fiction can only be set up with effect if such a contract would be valid if it really existed'.[60] The case involved depositors of an ultra vires banking business who sought to recover their money on the basis of money had and received. It was held that they could not because the contracts of deposit were void. Lord Sumner explained:

> To hold otherwise would be indirectly to sanction an ultra vires borrowing. All these causes of action are common species of the genus assumpsit. All now rest, and long have rested, upon a notional or imputed promise to repay. The law cannot de jure impute promises to repay, whether for money had and received or otherwise, which, if made de facto, it would inexorably avoid.[61]

The fictitious contract was treated as giving rise to matters of substance.[62] Ironically, the same argument would have been rejected if raised in a medieval court.[63]

It is not difficult to guess why the court in *Sinclair v Brougham* continued to resort to the implied contract theory. Judges of that time were reluctant to accept Lord

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[54] *Ibid* at p 161. The implied contract theory was also adopted by Blackstone's successors: Thomas M Curley (ed), Robert Chambers, *A Course of Lectures on English Law Delivered at the University of Oxford 1767–1773*, vol II (Oxford: OUP, 1986) at p 224; Richard Wooddeson, *A Systematic View of the Laws of England, as Treated in a Course of Vinerian Lectures*, vol II (London: T Payne, 1792–93) at p 158.
[55] Common Law Procedure Act 1852.
[56] AH Chaytor and WJ Whittaker (eds), FW Maitland, *Equity, also the Forms of Action at Common Law* (Cambridge: Cambridge U Press, 1910) at p 296: 'The forms of action we have buried, but they still rule us from their graves'.
[57] [1914] AC 398.
[58] *Ibid* at p 415 (*per* Viscount Haldane LC).
[59] *Ibid*.
[60] *Ibid*.
[61] *Ibid* at p 452. See also *Re Simms* [1934] Ch 1.
[62] See also WS Holdsworth, 'Unjustifiable Enrichment' (1939) 55 LQR 37 at pp 47–48: 'But some of these pleading fictions have made substantive law, and the changes made in the law of pleading have not got rid of the substantive law which they have made … I maintain that the fiction that the remedy for unjustifiable enrichment was based on a contract has given rise to the rule of substantive law'.
[63] See *Moses v Macferlan* (1760) 2 Burr 1005 at p 1008; *Arris v Stukely* (1677) 2 Mod 260 at p 262.

Mansfield's references to conscience, natural justice and equity as the bases for imposing a duty to make restitution. These notions were regarded as being too vague.[64] The alternative is to look for analogy with contract, an established concept. Some two decades before *Sinclair v Brougham*, Pollock explained:

> In many cases where duties resembling those created by contract are imposed by law (where in Roman terms there is obligation *quasi ex contact*), they are such as it is considered that a just man, on being fully informed of the facts, would in the circumstances willingly assume. The most familiar example in this kind is the duty of returning a payment made by mistake.[65]

From this it was inferred that some contractual rules should also apply to quasi-contracts. Holdsworth explained:

> Thus, although the contract implied is a fictitious contract because there is no consent, the liability is so analogous to a contract that some of the rules relating to a true contract must be applied to determine whether in the circumstances it is possible to impose it. In other words, the question whether the enrichment is unjustifiable depends partly upon whether it is fair and right that the defendant should repay, and partly upon whether the relations of the parties are such that it is legally possible to imply a contract. The analogy to a contract, which is indicated by the word 'quasi-contract', is thus logically made part of the test which determines in what circumstances it is possible to give a remedy for unjustifiable enrichment.[66]

However, once it is recognised that the supposed affinity between contract and quasi-contract was a historical accident, the logic of drawing an analogy between the two collapses. As Winfield expressed, '[i]t is not merely that in them the analogy is faint; there is no analogy at all'.[67] The conceptual difference between contract and unjust enrichment will be considered in more detail in Part III.

It shall be noticed that Lord Mansfield also made references to equity and relied on the notion of conscience in his treatment of the common law action for money had

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[64] See Part III below.
[65] Frederick Pollock, *A First Book of Jurisprudence* (London: Macmillan & Co, 1896) at p 89. He most probably had in mind Chapter V of the Indian Contract Act, 1872 (see Part IV below).
[66] WS Holdsworth, 'Unjustifiable Enrichment' (1939) 55 LQR 37 at p 42. See also HG Hanbury, 'The Recovery of Money' (1924) 40 LQR 31.
[67] Winfield, *Province*, at p 119. See also Jackson, *History*, at p 129 'The essence of contract has thus come to be agreement, whilst the essence of quasi-contract has remained a duty imposed by law irrespective of agreement … the present link is merely the dogmatic 'fictitious contract''.

and received.[68] It was thus posited that he borrowed from equity to advance the common law action.[69] The contrary view is that he was simply referring to '*aequitas*', a Latin term used in Roman law to signify equity in the non-technical sense of natural justice or fairness.[70] However, in either case, he was clearly dealing with a common law money count which only entitled the plaintiff to monetary restitution. In *Longchamp v Kenny*,[71] Lord Mansfield said: 'It is certain, that, where the demand is for a specific thing, an action cannot be maintained in this form'.[72]

However, Equity, too, has important contributions to the law of unjust enrichment. The Chancery granted restitutionary relief in cases involving mistake, fraud, innocent misrepresentation, undue influence, exploitation of weakness, failure of purpose, etc.[73] More importantly, it allowed a variety of restitutionary remedies: account, rescission, constructive or resulting trust, subrogation, equitable lien, etc.[74] Unfortunately, without a unifying label as its common law counterpart had, unjust enrichment in equity fell on the wayside.

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[68] Besides *Moses v Macferlan* (1760) 2 Burr 1005, see also his references to equity in *Saddler v Evans* (1766) 4 Burr 1984 at p 1986 ('It is a liberal action, founded upon large principles of equity, where the defendant can not conscientiously hold the money. The defence is any equity that will rebut the action'); *Clarke v Shee and Johnson* (1774) 1 Cowp 197 at p 199 ('This is a liberal action in the nature of a bill in equity'); *Jestons v Brooke* (1778) 2 Cowp 793 at p 795 ('This is an action for money had and received; and therefore it is analogous to a bill in equity').

[69] See Ben Kremer, 'The Action for Money Had and Received' (2001) 17 J Contract L 93. See also Warren Swain, '*Moses v Macferlan*' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Restitution* (Oxford and Portland, Oregon: Hart Publishing, 2006) p 19 at pp 27–28, 32; Keith Mason, 'What Has Equity to do with Restitution? Does it Matter?' [2007] Restitution L Rev 1. Some scholars speculated that Lord Kames' important treatise (Henry Homes, *Principles of Equity* (London and Edinburgh: A Millar and A Kincaid, 1760)), which relied heavily on the maxim *nemo debet locupletari aliena jactura* (no person ought to profit by another's loss) to justify restitutionary remedies, had an influence on Lord Mansfield. There was evidence of this from two letters (dated 27 February 1762 and 26 May 1766) in which Lord Mansfield responded to Lord Kames' ideas. However, whether Lord Mansfield had read Lord Kames' pre-publication manuscript before handing down the judgment in *Moses v Macferlan* is open to speculation: see Ian Simpson Ross, *Lord Kames and the Scotland of His Day* (Oxford: Clarendon Press, 1972); Hector L MacQueen and W David H Sellar, 'Unjust Enrichment in Scots Law' in Eltjo JH Schrage (ed), *Unjust Enrichment: The Comparative Legal History of the Law of Restitution* (Berlin: Duncker & Humblot, 1995) p 289 at pp 314–16; Ibbetson, *Introduction*, at p 272; Tariq A Baloch, *Unjust Enrichment and Contract* (Oxford and Portland, Oregon: Hart Publishing, 2009) at pp 35–37.

[70] *Baylis v Bishop of London* [1913] 1 Ch 127 at p 137: 'It is further clear that the equity to which he was referring is not 'an equity' in the sense in which it was used in the Court of Chancery … Lord Mansfield was referring to the jus naturale of Roman law which … has had a considerable influence in moulding our common law' (*per* Farwell LJ). See also *Sinclair v Brougham* [1914] AC 398 at pp 454–56; Peter BH Birks, 'English and Roman Learning in *Moses v. Macferlan*' (1984) 37 CLP 1 at pp 20–22.

[71] (1778) 1 Doug 137.

[72] *Ibid*. See also *Nightingal v Devisme* (1770) 5 Burr 2589.

[73] Ibbetson, *Introduction*, at pp 273–75.

[74] See Ibbetson, *Introduction*, at pp 273–76; Birks, *Unjust Enrichment*, at pp 292–307.

Besides the jurisdictional divide, the rise of the implied contract theory also broke the link between quasi-contract and its equitable counterpart. By the mid-nineteenth century, judges began to steer away from references to conscience and equity, preferring fictions over vague notions. The common law and equitable aspects of unjust enrichment did not meet until much later.[75]

Across the Atlantic things were more encouraging—at least in the beginning. The blurry images of the modern law of unjust enrichment began to emerge from a series of *Harvard Law Review* articles in the late nineteenth century. Keener, in his 1887 article, explained a person's right to recover money paid away under mistake as based on the principle that '[o]ne shall not be allowed to unjustly enrich himself at the expense of another'.[76] Ames, in his 1888 article, wrote more generally that 'the great bulk of quasi-contracts' were based on the principle that 'one person shall not unjustly enrich himself at the expense of another'.[77] The principle of unjust enrichment also informed Keener's subsequent works, which include the subject's first casebook[78] and more importantly its first treatise in 1893 (*A Treatise on the Law of Quasi-Contracts*).[79] Ames was commonly credited for inspiring Keener in the production of these works.[80] Following closely were a number of casebooks by various authors[81] and the second treatise by Woodward in 1913.[82] While retaining the label of quasi-contract, these works made clear that the cause of action was not based on contract but on the principle of unjust enrichment. None of them, however, provided a full

[75] Despite the eventual administrative fusion of common law and equity, substantive fusion occurred at a much slower pace. On the challenges of integrating equity into the existing unjust enrichment framework, see J Beatson, *The Use and Abuse of Unjust Enrichment: Essays on the Law of Restitution* (Oxford: OUP, 1991) at ch 9; Peter Birks, 'Annual Miegunyah Lecture: Equity, Conscience, and Unjust Enrichment' (1999) Melbourne U L Rev 1 at pp 22–24; Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 U Western Australia L Rev 1 at pp 67–97.

[76] William A Keener, 'Recovery of Money Paid Under Mistake of Fact' (1887) 1 Harvard L Rev 211.

[77] JB Ames, 'The History of Assumpsit' (1888) 2 Harvard L Rev 53 at p 66.

[78] William A Keener, *A Selection of Cases on the Law of Quasi-Contracts*, vols I and II (NY: Baker, Voorhis & Co, 1888–89).

[79] William A Keener, *A Treatise on the Law of Quasi-Contracts* (NY: Baker, Voorhis & Co, 1893).

[80] Andrew Kull, 'James Barr Ames and the Early Modern History of Unjust Enrichment' (2005) 25 Oxford J Legal Studies 297 at pp 306–307.

[81] John Davidson Lawson, *Cases on Quasi-Contracts* (Columbia: Press of EW Stephens, 1904); James Brown Scott, *Cases on Quasi-Contracts* (NY: Baker, Voorhis & Co, 1905); Edwin H Woodruff, *Selected Cases on Quasi-Contracts* (Indianapolis: Bobbs-Merill, 1905); William S Pattee, *Cases on Quasi-Contracts* (Minneapolis: HW Wilson, 1911); Edward S Thurston, *Cases in Quasi-Contract: Selected From Decisions of English and American Courts* (St Paul: West Publishing Co, 1916).

[82] Frederic Campbell Woodward, *The Law of Quasi Contracts* (Boston: Little, Brown & Co, 1913). The concept of misreliance, which the book was based on, was derived from JH Wigmore, 'A Summary of Quasi-contracts' (1891) 25 American L Rev 695. The latter, interestingly, was written during the Professor Wigmore's stay in Tokyo, Japan.

account of the subject since they do not deal with equity's contributions to the subject.[83]

The real breakthrough came in 1937 when the American Law Institute (ALI) published its first *Restatement of the Law of Restitution* (hereinafter *Restatement*),[84] of which Seavey and Scott were the Reporters.[85] The subject matters of the *Restatement*, which came under the new label 'Restitution', were based on the principle that 'A person who has been unjustly enriched at the expense of another is required to make restitution to the other' (§1). Part I, titled 'Quasi Contracts and Kindred Equitable Relief', dealt mainly with the grounds for allowing restitution and the remedy of monetary restitution. Part II, titled 'Constructive Trusts and Analogous Equitable Remedies', dealt specifically with three equitable restitutionary remedies: constructive trust, equitable lien and subrogation. Both parts overlap and the principle of unjust enrichment cuts across the traditional divide between law and equity. The significance of receiving equity into the family was that proprietary relief became available.

However, despite the celebrated breakthrough and subsequent efforts to advance the subject,[86] the flame for some reason 'flickered and almost went out'.[87] As early as the 1960s restitution departed from most American law school curriculums to occupy only a part of more standard courses on contracts, property and remedies.[88] The exact

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[83] But see Walter Wheeler Cook, *Cases and other Authorities in Equity*, vol 3 (St Paul: West Publishing, 1924) at Preface ('The collection of cases in the present volume represents an attempt to combine material usually presented in advanced equity courses dealing with reformation, rescission, and restitution with that combined in the course commonly called quasi-contracts'. See also review by E Merrick Dodd Jr, 'Book Review' (1925) 11 Cornell LQ 132.

[84] American Law Institute, *Restatement of the Law of Restitution: Quasi Contracts and Constructive Trusts* (St Paul: ALI Publishers, 1937).

[85] The Reporters were aided by a committee of Advisers. Notable members include Edward Thurston and Samuel Williston.

[86] See eg John P Dawson, *Unjust Enrichment: A Comparative Analysis* (Boston: Little, Brown & Co, 1951); George E Palmer, *The Law of Restitution* (Boston: Little, Brown & Co, 1978); John W Wade, *Cases and Materials on Restitution* (Brooklyn: Foundation Press, 1958). For the then-existing literature, see John W Wade, 'The Literature of the Law of Restitution' (1968) 19 Hastings LJ 1087.

[87] Birks, *Unjust Enrichment*, at p 278.

[88] See 'Symposium: Restitution and Unjust Enrichment' (2001) Texas L Rev 1763; DF Partlett and RL Weaver, 'Restitution: Ancient Wisdom' (2003) 36 Loyola Los Angeles L Rev 975; Chaim Saiman, 'Restitution in America: Why the US Refuses to Join the Global Restitution Party' (2008) 28 Oxford J Legal Studies 99. See also Douglas Laycock, 'Restoring Restitution to the Canon' (2012) 110 Michigan L Rev 929 at p 930: 'The restitutionary causes of action dropped out of the curriculum of American law schools in the third quarter of the twentieth century, largely by accident. Innovative law teachers created the modern remedies course by combining separate courses in damages, equity, and restitution, and the idea spread rapidly after about 1960. This change led to a great improvement in the teaching of remedies, including restitutionary remedies. But combining three courses into one left many things on the cutting room floor, including the restitutionary causes of action. And no one picked them up'.

reason is difficult to pinpoint, but it was said that much was owed to 'the realists' scorn for legal doctrine'.[89]

Fortunately, the dimming torch was passed back to a now more receiving end of the Atlantic.[90] The decision of *Sinclair v Brougham* had sparked a renewed interest in the efforts to identify what truly underpins the subject. In the latter half of the 1930s, the satisfactoriness of the implied contract theory began to be widely questioned by both the courts[91] and scholars.[92] By the early 1940s the courts began to explicitly denounce the implied contract theory. In *United Australia Ltd v Barclays Bank Ltd*,[93] Lord Atkin said:

> These fantastic resemblances of contracts invented in order to meet requirements of the law as to the forms of action which have now disappeared should not in these days be allowed to affect actual rights. When the ghosts of the past stand in the path of justice clanking their medieval chains the proper course for the judge is to pass through them undeterred.[94]

Similarly, in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*, Lord Wright commented[95] '[Lord Mansfied] denies that there is a contract; the obligation is as efficious as if it were upon a contract. The obligation is a creation of the law, just as much as an obligation in tort'.[96]

The first English scholar of this period to embrace the principle of unjust enrichment was Winfield.[97] In *The Province of The Law of Tort* published in 1931, he devoted a

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[89] JH Langbein, 'The Later History of Restitution' in Cornish *et al*, *Restitution: Past, Present & Future*, p 57 at p 62.
[90] For an excellent account of how unjust enrichment developed on the English side, see Francis Rose, 'The Evolution of the Species' in Andrew Burrows and Lord Rodger of Earlsferry (eds), *Mapping the Law: Essays in Memory of Peter Birks* (Oxford: OUP, 2006) p 13.
[91] See *Craven-Ellis v Canons* [1936] 2 KB 403 at p 410; *Brook's Wharf and Bull Wharf Ltd v Goodman Brothers* [1937] 1 KB 534 at p 545; *Morgan v Ashcroft* [1938] 1 KB 49 at p 76.
[92] See PH Winfield (1937) 53 LQR 447 at p 449; W Friedmann (1937) 53 LQR 449 at p 451; Jackson, *History*, at p 123; HC Gutteridge and RJA David, 'The Doctrine of Unjustified Enrichment' (1933–35) 5 Cambridge LJ 204 at p 223; The Right Hon Lord Wright, '*Sinclair v Brougham*' (1938) 6 Cambridge LJ 305.
[93] [1941] AC 1.
[94] *Ibid* at p 29.
[95] [1943] AC 32.
[96] *Ibid* at p 62.
[97] See also W Friedmann, 'The Principle of Unjust Enrichment in English Law' (1938) 16 Can Bar Rev 243 (Part I); (1938) 16 Can Bar Rev 365 (Part II). The first English scholar to use the language of unjust enrichment was probably Holdsworth: WS Holdsworth, *A History of English Law*, vol VIII (London: Methuen & Co, 1925) at pp 88–97.

lengthy chapter exploring quasi-contracts.[98] Clearly influenced by American jurisprudence,[99] he wrote:

> There must always be circumstances which make one man civilly liable to another on grounds reducible neither to contract nor tort. The principle that 'one person shall not unjustly enrich [preferably 'benefit'] himself at the expense of another' must penetrate any system of law. That principle is at the root of all genuinely quasi-contractual relations.[100]

The 1938 issue of the *Law Quarterly Review* was also especially important. It contained a detailed explanation of the *Restatement* by Seavey and Scott[101] as well as a favourable review of the *Restatement* by Winfield.[102] These exposed the *Restatement* to a wider English and Commonwealth audience, paving the way for a more ready reception of the principle of unjust enrichment.

Lord Wright, in his review of the *Restatement*, regarded it as 'an admirable model' from which the English lawyers could produce a 'reasoned treatise on the subject'.[103] His Lordship also took advantage of his judicial capacity to promote the principle of unjust enrichment. Most noteworthy was his attempt to do so in the *Fibrosa* case in 1943:

> It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derive from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution.[104]

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[98] Winfield, *Province*, at ch VII.

[99] He cited James Barr Ames, *Lectures on Legal History and Miscellaneous Legal Essays* (Cambridge: Harvard U Press, 1913), which was a reprint of JB Ames, 'The History of Assumpsit' (1888) 2 Harvard L Rev 53.

[100] Winfield, *Province*, at p 122. See also his exchange with Landon: PA Landon, 'The Province of the Law of Tort' (1931) 8 Bell Yard 19 and PH Winfield, 'The Province of the Law of Tort: A Reply' (1932) 9 Bell Yard 32.

[101] WA Seavey and AW Scott, 'Restitution' (1938) 54 LQR 29 at p 32: 'A person has a right to have restored to him a benefit gained at his expense by another, if the retention of the benefit by the other would be unjust. The law protects this right by granting restitution of the benefit which otherwise would, in most cases, unjustly enrich the recipient'.

[102] PH Winfield, 'The American Restatement of the Law of Restitution' (1938) 54 LQR 529.

[103] Lord Wright, 'Book Review: *Restatement of the Law of Restitution*' (1937) 51 Harvard L Rev 369. A shorter review of the *Restatement* was given in The Right Hon Lord Wright, '*Sinclair v Brougham*' (1938) 6 Cambridge LJ 305 at pp 322–26.

[104] *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at p 61.

Unfortunately, the Second World War interrupted legal progress. Post-war, two little books on quasi-contract were published.[105] But it was not until some two decades later that Lord Wright's call was answered. In 1966, Goff (later Lord Goff) and Jones (later Professor Jones) published their pioneer work, *The Law of Restitution*.[106] As what would later become known simply as *Goff & Jones*, the book gathered together all the cases that triggered restitutionary responses and showed that they were founded on the principle of unjust enrichment.[107] Determined to abandon the traditional constraints, the authors made clear in the book's preface:

> [T]he law of Restitution is the law relating to all claims, quasi-contractual or otherwise, which are founded on the principle of unjust enrichment … We have cast our net very wide. Our account cuts across the boundaries which traditionally separate law from equity. We have included topics from such diverse fields as, for example, trusts, admiralty, and many branches of commercial law; and we have considered proprietary as well as personal claims. Indeed, it is our belief that only through the study of Restitution in its widest form can the principle underlying the subject be fully understood.[108]

They explicitly rejected the implied contract theory, describing it as 'a meaningless, irrelevant and misleading anachronism'.[109]

Then, in 1985, Birks published his modestly titled but unquestionably seminal book, *An Introduction to the Law of Restitution*. Although preceded by two editions of *Goff and Jones*, it offered, among other things, a fuller and more detailed discussion of the elements of unjust enrichment and, importantly, its relations with the other branches of the private law. As Birks himself said, it was not a textbook, but rather one that was 'pre-occupied with the task of finding the simplest structure on which the material in *Goff and Jones* can hang'.[110] It provided the much needed conceptual

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[105] JH Munkman, *The Law of Quasi-Contracts* (London: Pitman, 1950); PH Winfield, *The Law of Quasi-Contracts* (London: Sweet & Maxwell, 1952).

[106] Robert Goff and Gareth Jones, *The Law of Restitution* (London: Sweet & Maxwell, 1966). See comment by JW Wade, 'Book Review' (1966) 19 Vanderbilt L Rev 1430: 'Aside from the *Restatement*, this is the first comprehensive treatise in the field of Restitution. It is a fine product and an excellent culmination of the books which have preceded it'. See also their earlier works: Robert Goff, 'Reform of the Law of Restitution' (1961) 24 Modern L Rev 85; Gareth Jones, 'Change of Circumstances in Quasi-Contract' (1957) 73 LQR 48.

[107] Peter BH Birks, 'A Letter to America: The New Restatement of Restitution' (2003) 3(2) Global Jurist Frontiers, article 2, at p 4: 'It emulated for English law what Scott and Seavey had done for American law'.

[108] Robert Goff and Gareth Jones, *The Law of Restitution* (London: Sweet & Maxwell, 1966) at p v.

[109] *Ibid* at p 10. For a case in this period which rejected the implied contract theory, see *Kiriri Cotton Co v Dewani* [1960] AC 192.

[110] Birks, *Introduction*, at p 3. This effort was recognised in the third edition of *Goff & Jones* published a year later: Lord Goff of Chieveley and Gareth Jones, *The Law of Restitution*, 3rd edn (London: Sweet

framework and structural coherence for the subject upon which many subsequent works were based. His works marked the beginning of the modern era of the law of unjust enrichment and a modern trend of private law scholarship.[111]

In sharp contrast to its earlier neglect, unjust enrichment has become the most debated private law subject.[112] The last two and a half decades witnessed the most remarkable scholarly achievements in the area of private law. There are now a number of leading textbooks[113] and even a *Restitution Law Review* (*RLR*) dedicated to its exploration. It has finally, albeit belatedly, come of age. On the American side, the flame is starting to reignite following the ALI's recent publication of the *Restatement (Third) of Restitution and Unjust Enrichment*.[114]

While the development of the subject was initially driven by academic discourse (it still largely is today), it was the positive receipt by the judiciary that turned theory into reality. If there were still doubts about whether English law recognised an independent law of unjust enrichment (and indeed there were),[115] the matter was finally put beyond question in 1991 when the House of Lords in *Lipkin Gorman v Karpnale Ltd*[116] gave its judicial blessing by recognising a claim for restitution based on unjust enrichment. Some of the other Commonwealth jurisdictions were in fact ahead on this measure.[117] Later, in *Westdeutsche Landesbank Girozentrale v Islington*

& Maxwell, 1986) at Preface: 'A notable recent publication is Professor Peter Birks' *Introduction to the Law of Restitution* (1985). Readers of this edition will quickly become aware of our indebtedness to his scholarly text'.

[111] See Part II below.

[112] Winfield once described the subject as 'no man's land, not in the sense that there are constant battles for it, but that nobody wants it': Winfield, *Province*, at p 118.

[113] See eg *Goff & Jones: Unjust Enrichment*; Burrows, *Restitution*; Virgo, *Restitution*; Keith Mason, JW Carter and GJ Tolhurst, *Mason and Carter's Restitution Law in Australia*, 2nd edn (Sydney: LexisNexis, 2008); James Edelman and Elise Bant, *Unjust Enrichment in Australia* (Melbourne: OUP, 2006). For more concise works, see Charles Mitchell, 'Unjust Enrichment' in Andrew Burrows (ed), *English Private Law*, 2nd edn (Oxford: OUP, 2007) at ch 18; Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford: OUP, 2012).

[114] American Law Institute, *Restatement (Third) of Restitution and Unjust Enrichment* (St Paul: ALI Publishers, 2011) (curiously, there was no *Restatement (Second)* of the subject). The Reporter was Andrew Kull, who was assisted by a committee of Advisers. Professor Jones of *Goff & Jones* was among them. On discussion of the new *Restatement*, see, among other works, the collections of essays in the 2012 volume of the Boston University Law Review and in Charles Mitchell and William Swadling (eds), *The Restatement Third, Restitution and Unjust Enrichment: Critical and Comparative Analyses* (Oxford and Portland, Oregon: Hart Publishing, 2013).

[115] See eg Steve Hedley, 'Unjust Enrichment as the Basis of Restitution – An Overworked Concept' (1985) 5 Legal Studies 56, *cf* Peter Birks, 'Unjust Enrichment – A Reply to Mr Hedley' (1985) 5 Legal Studies 67. See also Steve Hedley, *Restitution: Its Division and Ordering* (London: Sweet & Maxwell, 2001); Joachim Dietrich, *Restitution: A New Perspective* (Sydney: Federation Press, 1998); Peter Jaffey, *The Nature and Scope of Restitution* (Oxford: Hart Publishing, 2000).

[116] [1991] 2 AC 548.

[117] See *Deglman v Guaranty Trust* (1954) 3 DLR 785 (Canada); *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 (Australia).

LBC,[118] the House of Lords explicitly rejected the implied contract theory adopted in *Sinclair v Brougham*.[119] Since then, the number of case law dealing with unjust enrichment and referring to its proper name proliferated.

A number of lessons could be derived from this historical introduction.[120] First, we must stop using the language of the forms of actions. They hinder rather than aid understanding. Second, the older authorities must be read in their historical contexts. The references to (quasi) contract were a product of judicial innovation to extend the reach of certain forms of action. It is now accepted that the implied contract theory is flawed and that the principle of unjust enrichment underlies much of the cases previously falling under quasi-contract. Provided that we keep a keen eye, the older authorities remain useful for they continue to supply the materials for the study of the subject.

PART II: TAXONOMY

In 1925, Winfield wrote: 'One of the vices of the Common Law, or, for that matter, the whole of English Law, is its appalling bulk'.[121] That was only six decades since the beginning of official law reporting. As the amount of legal materials that we deal with today is far greater, the classification of law, also known as legal taxonomy, assumes greater importance. It is necessary to organise the body of law in a manner that facilitates accessibility and understanding.[122]

The earlier attempts at arranging the law are unsatisfactory by today's standard. Take for example Charles Viner's *Abridgment* published in the mid-eighteenth century.[123] In twenty-two volumes, he arranged numerous legal titles in alphabetical order, beginning with 'Abetment' and ending with 'Year, Day and Waste'. Other amusing

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[118] [1996] AC 669.
[119] *Ibid* at p 710.
[120] See further in Part IV.
[121] Winfield, *Sources*, at p 200.
[122] Unlike scientific taxonomy, legal taxonomy focuses on purpose rather than truth. See generally Geoffrey Samuel, 'Can Gaius Really Be Compared to Darwin?' (2000) 49 International & Comparative LQ 297; Emily Sherwin, 'Legal Taxonomy' (2009) 15 Legal Theory 25; Kelvin FK Low, 'The Use and Abuse of Taxonomy' (2009) 29 Legal Studies 355.
[123] Charles Viner, *A General Abridgment of Law and Equity*, vols I–XXII (Aldershot: 1741–1756). Viner's *Abridgment* was based largely on Henry Rolle, *Un Abridgment Des Plusieurs Cases Et Resolutions Del Common Ley: Alphabeticalment digest desouth severall Titles* (London: 1668) and Knightley D'Anvers, *A Genaral Abridgment of the Common Law*, vols. I and II (London: 1705–1713). For more advanced and developed abridgments, see Sir John Comyns, *A Digest of the Laws of England*, vols. I–VI (London: 1762–1767); Matthew Bacon, *A New Abridgment of the Law*, vols. I–V (London: 1736–1766). On legal abridgments generally, see WS Holdsworth, 'Charles Viner and the Abridgements of English Law' (1923) 39 LQR 17; Winfield, *Sources*, at ch VIII; WS Holdsworth, *Sources and Literature of English Law* (Oxford: Clarendon Press, 1925) at ch III.

titles include ‘Blood Corrupted’, ‘Deaf, Dumb and Blind’, ‘Deer-Stealing’, ‘Funeral Charges’ and ‘Negative Pregnant’. This seems like a massive collection of arbitrarily chosen titles. There is no connection between one title and its preceding or subsequent titles. If one wishes to know all that the law has to say about contract, it would be necessary to scan through all twenty-two volumes to pick up the relevant bits. Winfield thus rightly suggested:

> [T]he abridgment might take the form of connected exposition by various experts who would include enough of the history of the topics with which they were concerned to make them intelligible from a modern point of view; and that the whole might be indexed on the alphabetical principle. Lawyers would still be able to find their law, and to find it with some appreciation of its unity and without being jerked by a philological accident from the first volume to the twentieth. [124]

He probably had in mind Lord Halsbury’s *The Laws of England* published between 1907 and 1917. The titles contained in volume I of the first edition are as follows: action; admiralty; agency; agriculture; aliens; allotments; animals; arbitration; auction and auctioneers; bailment; bankers and banking.[125]

The more popular approach today is to arrange the law into even broader topics such as contract, tort, land, trusts, family, company, etc. This approach is best reflected in how textbooks are written and also in the law school curriculums. Essentially, each topic consists of what the law has to say about a particular area of human activity. Company law and family law draw together all the law relevant to families and companies, much as contract law draws together the law about contracts.[126] This method of arranging the law is known as contextual classification.[127]

Contextual classification, while practical and useful, has been thought to be inadequate in facilitating clear legal thought. At the conceptual level, the classification often conceals overlaps between the topics and the absence of unity of concept within the topics themselves. For example, the vitiating factors that are studied under contract law (eg mistake, misrepresentation, duress and undue influence) are not strictly speaking contractual concepts.[128] They are included in the

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[124] Winfield, *Sources*, at p 251.
[125] Earl of Halsbury, *The Laws of England: A Complete Statement of the Whole Law of England*, vol I (London: Butterworths, 1907).
[126] Peter BH Birks, ‘Restitution and the Freedom of Contract’ (1983) 36 141 at p 146.
[127] Birks, *Introduction*, 73–74.
[128] Stephen A Smith, *Contract Theory* (Oxford: OUP, 2004) at p 315: ‘insofar as they cannot be reduced to the rules of offer and acceptance or to the rules regarding implied terms, they are not based

study of contract because they impact on the validity of a contract. The same vitiating factors also impact on the validity of trusts and other voluntary dispositions, and therefore belong also to those subjects. Lawyers who focus rigidly on contextual classification are bound to overlook the fact that these vitiating factors, which share a conceptual basis, could form a topic of their own. These are the main unjust factors in the law of unjust enrichment. While contextual categorisation will remain useful in practice, conceptual categorisation must permeate legal thought.

At a practical level, the overreliance on contextual classification gives rise to what Birks called the 'stovepipe mentality'.[129] He gave the analogy of lawyers who know the law 'only in the way that many people know London, as pools of unconnected light into which to emerge from a limited number of friendly tube stations'.[130] These stovepipe lawyers see the law simply as 'a list of topics, heaped up in any order' or 'a list of courses taken at law school'.[131] They cannot see the connection between one topic and another. This is unfortunate, for as human activities become more complex, the same facts often give rise to overlapping issues from the different branches of the law.

The solution is to redraw the boundaries. The topics must be rearranged according to concepts, not contexts. Such conceptual classification would invariably cut across the traditional contextual categories of the law. According to Birks, the private law is best structured in terms of events and responses.[132] Borrowing from and varying the Roman approach, he introduced what is later known as the 'Birksian grid'.[133] It is an event-based classification which focuses on legally significant events to which the law responds.

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on contract law principles. This means that (true) excuse rules are not concerned with determining either the existence or the content of a contract. Excuse rules impose external limits on validity created contractual rights. Their origins are therefore found outside the law of contract as strictly defined'.

[129] Peter Birks (ed), *English Private Law* (Oxford: OUP, 2000) at pp xxxv–xxxvi.

[130] *Ibid*.

[131] Peter Birks, 'Definition and Division: A Meditation on *Institutes* 3.13' in Peter Birks (ed), *The Classification of Obligations* (Oxford: Clarendon Press, 1997) p 2 at p 2.

[132] The titles of the two books published in his memory reflect his contribution to legal taxonomy: Andrew Burrows and Lord Rodger of Earlsferry (eds), *Mapping the Law: Essays in Memory of Peter Birks* (Oxford: OUP, 2006); Charles Rickett and Ross Grantham, *Structure and Justification in Private Law: Essays for Peter Birks* (Oxford and Portland, Oregon: Hart Publishing, 2008).

[133] Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 U Western Australia L Rev 1 at pp 15–16: 'It is a modified version of the scheme descended from Gaius and Justinian'.

Event (across) Response (down)	Manifestation of Consent	Wrongs	Unjust Enrichment	Other Events
Restitution	1	6	11	16
Compensation	2	7	12	17
Punishment	3	8	13	18
Perfection	4	9	14	19
Other goals	5	10	15	20

The Birksian grid has not been judicially endorsed and is not free from criticisms.[134] For one thing, it does not present a complete picture of the law. 'Other events', for example, is not one but numerous categories of events. Obvious examples include events that trigger the law's imposition of tortious duties such as duty of care, duty not to trespass, duty not to defame, etc.[135] Also, the concept of property and the primary-secondary obligations dichotomy do not feature in the grid.[136] Nonetheless, the classification is at least useful for demonstrating the independence of unjust enrichment. This is achieved by explaining the differences between the contents of boxes 1, 6 and 11 of the grid.

The most familiar manifestation of consent is a contract. If I lent you $50 on the condition that you repay it on the following Monday, my right to the repayment arose from our mutual consents which underpinned the contract of loan. Unlike the Roman classification, however, consent here is pitched at a higher level of generality than contract. It includes also other manifestations of consent such as a gift and a declaration of trust.[137] For example, if I hand you a book and tell you to hold it on trust for me, my right to demand for the book arises from my declaration of trust and your acceptance of the trusteeship.

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[134] See Kelvin FK Low, 'The Use and Abuse of Taxonomy' (2009) 29 Legal Studies 355; Hanoch Dagan 'Legal Realism and the taxonomy of private law' in Charles Rickett and Ross Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Oxford and Portland, Oregon: Hart Publishing, 2008) p 103; Geoffrey Samuel, 'Can Gaius Really Be Compared to Darwin?' (2000) 49 International & Comparative LQ 297; Geoffrey Samuel, 'English Private Law: Old and New Thinking in the Taxonomy Debate' (2004) 24 Oxford J Legal Studies 335; Steve Hedley 'The Taxonomic Approach to Restitution' in Alastair Hudson (ed), *New Perspectives on Property Law, Obligations and Restitution* (London: Cavendish, 2004) p 151.

[135] Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 U Western Australia L Rev 1 at p 40.

[136] Though Birks sought to explain them elsewhere. Property: Birks, *Unjust Enrichment*, at pp 28–38. Primary and secondary rights: Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 U Western Australia L Rev 1 at pp 10–12; Peter Birks, 'The Concept of Civil Wrong' in David G Owen (ed), *Philosophical Foundations of Tort Law* (Clarendon Press, Oxford 2001) p 29 at p 46.

[137] Peter Birks, 'Misnomer' in Cornish *et al*, *Restitution: Past, Present & Future*, p 1 at p 8.

A wrong is simply a breach of duty or obligation.[138] It is pitched at a higher level of generality than tort, allowing the inclusion of other conceptually identical events such as equitable wrongs (eg breach of trust, breach of fiduciary duty and breach of confidence)[139] and breach of contract.[140] This event is best explained using the primary-secondary dichotomy of duties or obligations. In *Photo Production Ltd v Securicor Transport Ltd*,[141] Lord Diplock explained the nature of the obligation to pay damages for breach of contract:

> Every failure to perform a primary obligation is a breach of contract. The secondary obligation on the part of the contract breaker to which it gives rise by implication of the common law is to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach …[142]

The 'primary obligation' was in reference to what the contract breaker undertook to perform under the contract, which arose from the event of consent. The breach of such primary obligations amounts to a wrong and this triggers a secondary obligation, usually to make monetary compensation.

Unjust enrichment, in contrast, is neither consent-based nor wrong-based. The general principle of unjust enrichment is converted into applicable rules and principles mainly by reference to a four-stage inquiry:[143] (a) Is the defendant enriched? (b) Is it at the plaintiff's expense? (c) Is it unjust? and (d) Is the claim barred or limited by some defence or policy consideration? If (a) to (c) are answered in the affirmative, the plaintiff will have a prima facie right to restitution. The burden then shifts to the defendant to raise a defence. If the defendant fails to do so, the prima facie right to restitution crystalises into an absolute one.

It is only necessary here to focus on question (c). Despite the resonance of wrongfulness in the word 'unjust', it does not refer to any breach of duty or fault.

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[138] Birks, *Introduction*, at p 39; Peter Birks 'The Concept of a Civil Wrong' in David G Owen (ed) *Philosophical Foundations of Tort Law* (Clarendon press, Oxford 1997) p 29 at p 31; James Edelman, *Gain-based Damages* (Hart, Oxford and Portland, Oregon 2002) at pp 25, 33. Fault or blameworthiness is usually present but is not a necessary characteristic of a wrong. See eg strict liability torts and breach of contract.

[139] The separate treatment of common law torts and equitable wrongs is mainly a result of historical accident, specifically the jurisdictional divide between common law and equity.

[140] There is no unity of concept in contract law. As mentioned earlier, the vitiating factors belong in the category of unjust enrichment. The consequences of breach of contract, on the other hand, belong mainly in the category of wrongs.

[141] [1980] AC 827.

[142] *Ibid* at p 849.

[143] *Banque Financi`ere de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221; *Rowe v Vale of White Horse DC* [2003] EWHC 388 (Admin); [2003] 1 Lloyd's Rep 418; *McDonald v Coys of Kensington* [2004] EWCA Civ 47; [2004] 1 WLR 2775.

Neither is the right to restitution determined by a discretionary subjective evaluation of what amounts to unjust enrichment. In *Lipkin Gorman v Karpnale Ltd*,[144] Lord Goff said: 'The recovery of money in restitution is not, as a general rule, a matter of discretion for the court. A claim to recover money at common law is made as a matter of right'.[145] Under the prevailing common law approach, the 'unjust' inquiry is determined by reference to an established list of factors that the law recognises as calling for restitution.[146] These 'unjust factors' may be divided into two large categories: intent-based and policy-based.[147] The former category, which focuses on the absence of or defects in the plaintiff's subjective intention to benefit the defendant, includes lack of consent, mistake, duress, undue influence and failure of consideration. It is in this category that some unity of concept could be found, providing a justification for why unjust enrichment should be treated as an independent subject. The latter category, however, lacks such unity.[148] It consists a disparate list of situations in which certain policy considerations demand restitution, such as in the cases of necessity, compulsory discharge of another's debt, ultra vires receipts and payments by public bodies, etc. The list of unjust factors is not exhaustive and is capable of incremental expansion.[149] This unjust factors approach steers us away from approaching the unjust inquiry by reference to arbitrary and open-ended notions such as equity, conscience, fairness and natural justice, which do not provide sufficiently certain criteria for application.[150]

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[144] [1991] 2 AC 548.

[145] *Ibid* at p 578. Cited with approval in *Fernrite Sdn Bhd v Perbadanan Nasional Bhd* [2011] 6 CLJ 1 at pp 12–13. See also *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at p 256; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at p 379; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at p 185.

[146] *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at p 379; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at p 185.

[147] See Birks, *Introduction*, at ch IV; Birks, *Unjust Enrichment*, at p 106; James Edelman and Elise Bant, *Unjust Enrichment in Australia* (Melbourne: OUP, 2006) at pp 10–13.

[148] See Simone Degeling, 'Understanding Policy-motivated Unjust Factors' in Charles Rickett and Ross Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Oxford and Portland, Oregon: Hart Publishing, 2008) p 267.

[149] *CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714 at p 720: 'the categories of unjust enrichment are not closed' (*per* Sir Donald Nicholls VC).

[150] See Peter Birks, 'Annual Miegunyah Lecture: Equity, Conscience, and Unjust Enrichment' (1999) 23 Melbourne U L Rev 1; Graham Virgo, 'Restitution Through the Looking Glass: Restitution Within Equity and Equity Within Restitution' in Joshua Getzler (ed), *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (London: LexisNexis, 2003) p 82. A few Australian cases, however, have shown antipathy towards the principle of unjust enrichment, preferring an equitable approach based on the concept of unconscionability: see eg *Roxborough v Rothmans of Pall Mall Australia* (2002) 76 ALJR 203. *Cf* J Beatson and GJ Virgo, 'Contract, Unjust Enrichment and Unconscionability' (2002) 118 LQR 352 at p 354: 'Overall it is more difficult to identify when a defendant has acted unconscionably than it is to determine whether a defendant has been unjustly enriched. This is because the use of the word 'unjust' is not a cipher for a general investigation into injustice. It is a concept which can be defined with some degree of precision, and by reference to cases,

In *Kelly v Solari*,[151] an insurance company mistakenly paid out to a widow on a lapsed policy. The court held that, unless at retrial the jury was to find that the company was not actually mistaken or was indifferent as to whether the money was correctly paid out, the widow must repay the money. The causative event is not consent. The widow did not agree to repay the money, hence the dispute. To regard her as having agreed, when in fact she did not, will be to subscribe to the fiction of implied contract or promise, which we have strongly warned against. Neither did she commit a wrong by accepting the mistaken payment. The law does not (although it could) impose a primary duty not to receive mistaken payment or to retain it. If such a duty is to be imposed at all, then logically some fault element must be required on her part. She must, for example, have known that the company was mistaken at the time of receipt. But the widow's duty to repay the money was not premised on her knowledge (if any) of the company's mistake.[152] It did not matter what she did or what she knew. The duty arose immediately upon her receipt of the money. Although the court made no reference to unjust enrichment, the company's right to recover the mistaken payment is most readily explicable by the law's intervention to reverse unjust enrichment. The widow was enriched through the receipt of the money. The enrichment was at the expense of the company, which paid her the money. The enrichment was unjust because the company's decision to benefit the widow was vitiated by mistake. This prima facie right to restitution crystalised into an absolute one since the widow did not plead any defence.

Let us now turn to causative responses, briefly defined as rights that arise from the happening of certain legally significant events. Whether a particular response is available in any given case depends on the causative event one is concerned with. One response that we are all familiar with is the granting of a right to compensation for loss. When we speak of damages, we usually mean compensatory damages. It is a loss-based response. Restitution, in contrast, operates to reverse or undo the defendant's enrichment. It is a gain-based response, and includes both 'giving back' and 'giving up'.[153]

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albeit with the assistance of academic commentary'.

[151] (1841) 9 M & W 54.

[152] Birks, *Unjust Enrichment*, at p 5: 'there is nothing resembling a requirement of fault on the part of the defendant. Mrs Solari was indeed a total honest and innocent claimant, but it made no difference'. The existence of fault, however, would affect the availability of certain defences, eg bona fide change of position and bona fide purchase for value.

[153] Birks, *Unjust Enrichment*, at pp 281–82; Peter BH Birks, 'A Letter to America: The New Restatement of Restitution' (2003) 3(2) Global Jurist Frontiers, article 2, at pp 5–10.

Unjust enrichment entitles the plaintiff to restitution.[154] Importantly, restitution is the only response to unjust enrichment. As Birks explained, 'the measure of the plaintiff's recovery is dictated by the causative event itself'.[155] Therefore, where an action is based on unjust enrichment, any claim for compensation must be readily dismissed.

Restitution, however, does not respond solely to unjust enrichment. Although the standard response to a wrong is compensation,[156] it has been recognised that for certain wrongs, gain-based responses are available.[157] The case of *Attorney-General v Blake*[158] is a good example. The defendant, in breach of his employment contract with the state, wrote a memoir based on confidential information acquired in the course of the performance of his duties as a secret intelligence officer. The memoir was published and he received royalties from the publisher. The state suffered no quantifiable loss to be compensated. But the House of Lords held that it was entitled to damages assessed on the basis of the profits made by the defendant. Such gain-based damages required the defendant to make restitution in the 'giving up' sense, since the profits were derived not from the state but from the publisher.[159] Other wrongs which may trigger restitution include property torts (eg trespass and conversion)[160] and breach of fiduciary duty.[161] The multi-causality of restitution means that it is wider than unjust enrichment as a subject of study (see Part III below).

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[154] As the duty to make restitution of unjust enrichment does not arise from a prior breach of duty but from unjust enrichment, it is by definition a primary duty. However, it is generally accepted that the breach of this primary duty does not trigger a secondary duty to make compensation. This is not because the breach does not amount to a wrong, but rather because the duty to make restitution is closer to secondary duties than conventional primary duties due to its remedial character. See Stephen A Smith, 'Unjust Enrichment: Nearer to Tort than Contract' in Robert Chambers, Charles Mitchell and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford: OUP, 2009) p 181 at pp 187–89.

[155] Peter Birks, 'The Concept of Civil Wrong' in David G Owen (ed), *Philosophical Foundations of Tort Law* (Clarendon Press, Oxford 2001) p 29 at p 47. *Cf* Samuel Stoljar, 'Unjust Enrichment and Unjust Sacrifice' (1987) 50 Modern L Rev 603; G Muir, 'Unjust Sacrifice and the Officious Intervener' in PD Finn (ed), *Essays on Restitution* (New South Wales: Law Book Co, 1990) p 297. The concept of unjust sacrifice, however, failed to gain acceptance.

[156] Peter Birks, 'The Law of Restitution at the End of an Epoch' (1999) 28 U Western Aus L Rev 13 at p 40: 'The response to breaches of duty is a matter of choice, not logic. The victim might be given the right to beat the defendant or to cut off his ears. For good and sufficient reasons we have chosen to make damages the primary response'.

[157] See James Edelman, *Gain-based Damages* (Oxford and Portland, Oregon: Hart Publishing, 2002).

[158] [2001] 1 AC 268.

[159] Contrast this with a case of mistaken payment, where the mistaken payee's enrichment is derived from the mistaken payer. Here, restitution is used in the 'giving back' sense.

[160] See eg *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25; *Strand Electric v Brisford Entertainment* [1952] 2 QB 246; *Penarth Dock Engineering Co v Pounds* [1963] 1 Lloyd's Rep 359.

[161] See eg *Reading v Attorney-General* [1951] AC 507; *Boardman v Phipps* [1967] 2 AC 46; *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324.

There are several ways to effect restitution.[162] It is only necessary here to explain briefly the distinction between personal and proprietary restitution. Where the plaintiff claims personal restitution, he is seeking to recover from the defendant the monetary value of the enrichment, which is assessed at the time of the defendant's receipt of the enrichment. As this is not a claim for the thing that forms the enrichment, whether the thing is still with the defendant is irrelevant. On the other hand, where a plaintiff claims proprietary restitution, he is seeking to recover the thing itself or its traceable proceeds (ownership claim), or to enforce an equitable lien over the thing or its traceable substitute to secure a claim for personal restitution (security claim). The claim is not against a fixed person but rather against any person in whose hands the thing or its traceable substitute now lies. A proprietary claim is advantageous in the event of the defendant's insolvency and where the value of the thing or its traceable substitute is higher than what the plaintiff is entitled to under personal restitution.

While it is clear that unjust enrichment triggers personal restitution, the availability of proprietary restitution has been a matter of dispute. Most scholars accept that some cases of unjust enrichment trigger proprietary restitution.[163] Virgo, however, sees proprietary restitution as exclusively a matter of property law.[164] In his view, a plaintiff who claims proprietary restitution is seeking to vindicate his property right. This has nothing to do with unjust enrichment since the plaintiff is asserting 'That is mine!' as opposed to 'You are enriched at my expense!' This view has some judicial support.[165] To properly assess this view, it is necessary to examine the concept of property and how it relates to the causative events.

The word 'property' can be used as both an adjective and a noun. As an adjective, it describes a certain type of rights which relates to specific assets and is exigible against the world.[166] Such rights are commonly referred to as property rights. These are to be contrasted with personal rights (eg contractual rights), which are exigible only against specific persons (eg the parties to the contract). The most important of

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[162] See *Goff & Jones: Unjust Enrichment*, at chs 36–40. See also *Air Express International (M) Sdn Bhd v MISC Agencies Sdn Bhd* [2012] 4 MLJ 59 at p 70: 'Restitution means to cause the restoration of a thing, the enrichment or benefit or its money's worth …'

[163] See eg *Goff & Jones: Unjust Enrichment*, at chs 37–40; Burrows, *Restitution*, at ch 8; Birks, Unjust Enrichment, at ch 8; James Edelman and Elise Bant, *Unjust Enrichment in Australia* (Melbourne: OUP, 2006) at ch 3.

[164] Virgo, *Restitution*, at ch 20.

[165] See *Foskett v McKeown* [2011] AC 102; *Trustee of the Property of FC Jones & Sons (A Firm) v Jones* [1997] Ch 159; *Armstrong DLW GmbH v Winnington Networks Ltd* [2013] Ch 156.

[166] See generally William Swadling, 'Property: General Principles' in Andrew Burrows (ed), *English Private Law*, 2nd edn (Oxford: OUP, 2007) at ch 4; Ben MacFarlane, *The Structure of Property Law* (Oxford and Portland, Oregon: Hart Publishing, 2008) at ch D1.

property rights is legal ownership, which is the right to exclusive control of an asset. It imposes on the rest of the world a corresponding duty not to interfere with an owner's control of his asset. An interesting issue is the extent to which a beneficiary's interest in a trust asset approximates legal ownership. Unlike legal ownership, the beneficiary's interest does not always relate to a physical thing. The trust asset could be a personal right, eg money in a bank account, which is essentially a contractual right to demand payment (only) from the bank. Therefore, the beneficiary's interest is best seen as relating to whatever right, whether property or personal, the trustee is holding for him. Like legal ownership, the beneficiary's right to demand for the trust asset is exigible against the world. If a trust asset has fallen into the hands of a third party, the beneficiary is prima facie entitled to demand for its return. Also, the beneficiary's interest is not affected by the insolvency of the person holding the trust asset.[167] For these reasons, a beneficiary's right to the trust asset is generally accepted as part of the property law system.[168] We shall refer to it as equitable ownership and treat it as a form of property right.

As a noun, 'property' refers to the asset to which property rights could attach. We have already noted the difference between legal and equitable ownership in this respect. The traditional view is that, with a few exceptions, legal ownership only attaches to physical things.[169] But this has not gone unchallenged. In *OBG Ltd v Allan*,[170] for example, Baroness Hale (minority) gave a broad definition of property: 'The essential feature of property is that it has an existence independent of a particular person: it can be bought and sold, given and received, bequeathed and inherited, pledged or seized to secure debts, acquired (in the olden days) by a husband on marrying its owner'.[171] If this view is accepted, then, in principle, property rights could attach to intangible assets, which mostly consists of personal rights (eg choses in action). We shall return to see why this is important.

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[167] Bankruptcy Act 1967, section 48(1)(a)(i).

[168] See Ben MacFarlane, *The Structure of Property Law* (Oxford and Portland, Oregon: Hart Publishing, 2008) at ch C1.

[169] See eg James Penner, *The Idea of Property in Law* (Oxford: OUP, 2000); Ben MacFarlane, *The Structure of Property Law* (Oxford and Portland, Oregon: Hart Publishing, 2008) at chs B and D1; Arianna Pretto-Sakman, *Boundaries of Personal Property Law: Shares and Sub-Shares* (Oxford and Portland, Oregon: Hart Publishing 2005) at chs 4 and 5; Simon Douglas, *Liability for Wrongful Interferences with Chattels* (Oxford and Portland, Oregon: Hart Publishing, 2011) at ch 2.

[170] [2008] 1 AC 1.

[171] *Ibid* at p 88. See also Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 Yale LJ 710 at pp 733–32; James Harris, 'Property – Rights *in Rem* or Wealth?' in Peter Birks and Arianna Pretto (eds), *Themes in Comparative Law* (Oxford: OUP, 2002) p 51; Sarah Green and John Randall, *The Tort of Conversion* (Oxford and Portland, Oregon: Hart Publishing 2009) at pp 130–31; Pey-Woan Lee, 'Inducing Breach of Contract, Conversion and Contract as Property' (2009) 29 Oxford J Legal Studies 511 at pp 513–19.

For now, let us focus on property in the first sense. Birks was correct to point out that we are dealing with rights, which belong in the response plane.[172] It is a categorical error to present property and unjust enrichment as mutually exclusive categories since they belong in different planes. Property rights could be acquired through a number of events.[173] Suppose that I purchased a book from a bookstore and gave it to you as a birthday present. You then declared a trust of the book for your friend. The legal ownership in the book was created when the book was manufactured, which falls within the category of 'other events'.[174] I then acquired it through a contract of sale entered into with the bookstore. You subsequently acquired the same by me making a gift to you. Lastly, when you declared a trust of the book, your friend acquired a new equitable ownership in the book. The last three instances belong within the category of 'consent'.

The commission of a wrong may also create new property rights. In *Attorney-General for Hong Kong v Reid*,[175] the fiduciary accepted bribes and used them to purchase a number of real properties. The Privy Council held that the fiduciary held the properties on a constructive trust for the principal. The principal's equitable ownership in the properties arose for the first time when the constructive trust was imposed, which was in response to the defendant's breach of a fiduciary duty. Even Virgo concedes that in this case there is an overlap between property law and the law of wrongs, and it is preferable to treat the claim as founded on a wrong 'since it is the wrong which triggers the recognition of the claimant's proprietary right'.[176]

If property rights could arise from consent, wrong and other events, there is no logical reason to deny the same from arising from unjust enrichment. In *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd*,[177] the court held that the mistaken payee was to hold the money on a trust for the mistaken payor. Since mistake does not prevent legal ownership in the money from passing, the mistaken payor's claim cannot be based on any pre-existing legal ownership in the money.[178] Instead, a new equitable ownership in the money was created in response to unjust enrichment.

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[172] Birks, *Unjust Enrichment*, at pp 32–38; Peter BH Birks, 'Restitution and the Freedom of Contract' (1983) 36 Current Legal Problems 141.
[173] See generally William Swadling, 'Property: General Principles' in Andrew Burrows (ed), *English Private Law*, 2nd edn (Oxford: OUP, 2007) at paras 4.398–4.437; Ben MacFarlane, *The Structure of Property Law* (Oxford and Portland, Oregon: Hart Publishing, 2008) at pp 154–79; FH Lawson and Bernard Rudden, *The Law of Property*, 3rd edn (Oxford: OUP, 2002) at ch 3.
[174] See *Re Peachdart* [1984] Ch 131; *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch 25.
[175] [1994] 1 AC 324. See also *Keech v Sandford* (1726) Sel Cas Temp King 61.
[176] Virgo, *Restitution*, at p 575.
[177] [1981] Ch 105.
[178] See William Swadling, 'Unjust Delivery' in Andrew Burrows and Lord Rodger of Earlsferry (eds), *Mapping the Law: Essays in Memory of Peter Birks* (Oxford: OUP, 2006) p 277.

While one may argue about whether unjust enrichment should generate property rights, any conclusion must be a matter of choice, not logic.[179] If it is accepted that unjust enrichment does generate property rights, the question of when they should arise must equally be a matter of choice informed by relevant principles and policies.

Once property rights are created, how they are protected is a different matter.[180] Consider a simple case where I dropped my watch and you happened to pick it up. Although I retain legal ownership in the watch,[181] I am, traditionally, not entitled to claim the return of the watch by virtue of my legal ownership. The law does not recognise a claim that corresponds to the assertion 'That watch is mine!' Instead, my legal ownership in the watch is protected indirectly through other branches of the law. If you refuse to return my watch, you would have committed the torts of conversion and detinue.[182] Although the court has the power to order the return of my watch,[183] the standard remedy is compensation.[184] Conversion and detinue, however, do not lie for the interference of intangible assets.[185] The best example is money in a bank

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[179] Birks, *Unjust Enrichment*, at pp 32–33. *Cf* Virgo, *Restitution*, at p 573: '… regardless of the reason for the existence of the right, all these rights are proprietary and may trigger restitutionary remedies. Whether or not the claimant has a proprietary right is a matter for the law of property and it is only once such rights have been recognized that the question of restitutionary relief becomes relevant'.

[180] See generally Peter Birks, 'Personal Property: Proprietary Rights and Remedies' (2000) 11 Kings College LJ 1.

[181] Ownership only passes if I intend it to pass. See *R v Middleton* (1873) LR 2 CCR 38 at p 43: 'At common law the property in personal goods passes by a bargain and sale for consideration, or a gift of them accompanied by delivery; and it is clear, from the very nature of the thing, that an intention to pass the property is essential both to a sale and to a gift'.

[182] See generally Sarah Green and John Randall, *The Tort of Conversion* (Oxford and Portland, Oregon: Hart Publishing 2009); Simon Douglas, *Liability for Wrongful Interferences with Chattels* (Oxford and Portland, Oregon: Hart Publishing, 2011). Whether a claim in unjust enrichment would also lie is a matter of dispute. It has been argued that the defendant is not enriched if he has not acquired ownership in the thing: William Swadling, 'Ignorance and Unjust Enrichment: The Problem of Title' (2008) 28 Oxford J Legal Studies 627. The opposing views focus on the defendant's factual enrichment, acquisition of possessory ownership, the plaintiff's renunciation of his ownership, etc. See Burrows, *Restitution*, at pp 194–98, 407–408; James Edelman and Elise Bant, *Unjust Enrichment in Australia* (Melbourne: OUP, 2006) at pp 102–103; Birks, *Unjust Enrichment*, at pp 66–67. That unjust enrichment could lie finds support in *Air Express International (M) Sdn Bhd v MISC Agencies Sdn Bhd* [2012] 4 MLJ 59 (although the court did not consider this debate).

[183] However, although Malaysia has not adopted the Torts (Interference with Goods) Act 1977 (under which the courts have the power to make an order for delivery of the goods), the court may, if appropriate, order you to return the watch to me. See eg *EG Tan & Co (Pte) v Lim & Tan (Pte)* [1987] 2 MLJ 149 (the court ordered the asset to be returned); *Perbadanan Kemajuan Negeri Selangor v Teo Kai Huat Building Contractor* [1982] 2 MLJ 165 (the court awarded damages in lieu of an order to return the damaged assets).

[184] If the defendant has made a gain, the plaintiff may choose to sue for restitution.

[185] In *OBG Ltd v Allan* [2008] 1 AC 1, the House of Lords by a majority of 3-2 held that conversion does not lie for intangible assets (Lord Nicholls and Baroness Hale dissenting). The exception is documentary intangibles such as negotiable instruments, shares, insurance policies, etc. *Cf Electro Cad Australia Pty Ltd v Mejati RCS Sdn Bhd* [1998] 3 MLJ 422 where the High Court held that conversion could lie in respect of information. *Cf* Sarah Green and John Randall, *The Tort of Conversion* (Oxford and Portland, Oregon: Hart Publishing 2009) at ch 5, who argue that the scope of conversion should be

account, which is, in essence, a contractual debt owed by the bank to the account holder. For such cases, unjust enrichment plugs the gap.[186] If you somehow managed to withdraw money from my bank account, the transfer of value represents your enrichment at my expense. The unjust factor is lack of consent.[187] Both examples show that the protection of legal ownership is not exclusively a matter of property law. Legal ownership is protected indirectly through the other branches of the law.

However, there is nothing to prevent a legal system from enforcing property rights directly. The law may respond by saying 'That watch is yours!' This is best reflected by how equitable ownership is protected. Where a trust asset is disposed of without authority, the beneficiary could do more than to sue the trustee for breach of trust. He has a direct claim for the return of the trust asset against anyone (except an 'Equity's darling')[188] in whose hands the trust asset now lies.[189] There are indications that the common law is slowly moving in this direction, at least in the protection of intangible assets.[190] This, of course, must be premised on the law's recognition that property rights could attach to such assets in the first place, lending support to the wider conception of property as a noun.[191] As noted earlier, Virgo sees such claims as a matter of property law. The plaintiff is asserting his ownership rather than claiming unjust enrichment. This is convincing. The curious question that remains is what event do such claims respond to? Virgo, having admitted that the principle of vindication of property right is not an event, went on to say: 'the event could be that the defendant has interfered with the claimant's property rights in some way'.[192] It is interesting to note that the same event also gives rise to actions in conversion and detinue, which belong in the event of wrongs. However, as the plaintiff who seeks to vindicate his property right need not specifically plead a breach of duty, it is best not to regard the causative event as a wrong. If we insist on identifying an event within the Birksian grid on which the plaintiff's claim is based, it is the event through which

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determined by the concept of possession rather than the illogical distinction between tangible and intangible assets.

[186] See David Fox, *Property Rights in Money* (Oxford: OUP, 2008) at pp 309, 311–16.

[187] See *Goff & Jones: Unjust Enrichment*, at ch 8; Burrows, *Restitution*, at ch 16. Note, however, that the courts have not formally recognised lack of consent as an unjust factor.

[188] An 'Equity's darling', ie a person who purchases the trust asset for value and in good faith, will take the asset free of the beneficiary's interest.

[189] *Foskett v McKeown* [2011] AC 102; *Macmillan Inc v Bishopgate Investment Trust plc* (No 3) [1996] 1 WLR 387.

[190] *Trustee of the Property of FC Jones & Sons (A Firm) v Jones* [1997] Ch 159; *Armstrong DLW GmbH v Winnington Networks Ltd* [2013] Ch 156.

[191] In *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at p 574, Lord Goff said in relation to bank money: 'Such a debt constitutes a chose in action, which is a species of property'.

[192] Virgo, *Restitution*, at p 572.

he has acquired his property right. He is seeking the direct enforcement of this primary right.

Although Birks appeared to accept that a claim based on pre-existing ownership is a matter of property law, he continued to dispute the role of property law where the plaintiff is seeking to recover a new asset as substitute for the original. In *Foskett v McKeown*,[193] the beneficiaries succeeded in tracing trust money into a substitute asset and claiming a proportionate share in it. The majority of the judges held that the claim was based on vindication of property right.[194] Birks disagreed on the basis that it is a misconception to regard the plaintiff's equitable ownership in the original asset as capable of latching on to the substitute asset.[195] The ownership of an asset cannot be detached from it. Instead, the equitable ownership in the substitute asset is newly created in response to unjust enrichment. This objection could be rebutted. As Low explains, 'the nature and extent of property rights is determined by the particular legal system and it is not illogical for the common law to decide that property rights are to be protected to the extent that an original owner will be able to reach through the original thing to its substitutes'.[196] Property law may decide to enforce the plaintiff's ownership by allowing him to claim a substitute asset as his.[197] It is not necessary to resort to unjust enrichment.

The causative events may also determine the available defences. For example, in *Lipkin Gorman v Karpnale Ltd*,[198] where the House of Lords recognised that an unjust enrichment claim could be met by a change of position defence,[199] Lord Goff said: 'the defence should not be open to a wrongdoer'.[200] This has been interpreted to

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[193] See *Foskett v McKeown* [2001] 1 AC 102 (noted Tang Hang Wu, 'Foskett v McKeown: Hard-Nosed Property Rights or Unjust Enrichment?' (2001) 25 Melbourne U L Rev 295).
[194] *Ibid* at pp 110 (Lord Browne-Wilkinson), 115 (Lord Hoffmann), 127, 129, 132 (Lord Millett).
[195] Birks, *Unjust Enrichment*, at pp 34–37. See also Andrew Burrows, 'Proprietary Restitution: Unmasking Unjust Enrichment' (2001) 117 LQR 412 at p 418: 'Ownership of a pig can explain ownership of the piglets but does not explain why P can be said to own the horse that D has obtained in substitution for the pig stolen from P'.
[196] Kelvin FK Low, 'The Use and Abuse of Taxonomy' (2009) 29 Legal Studies 355 at p 364.
[197] For an alternative view relating to the basis of a claim for a substitute for a trust asset, see David Hayton, Paul Matthews and Charles Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees*, 18th edn (London: LexisNexis, 2010) at pp 1304–05: 'In a case where a trustee uses trust property to acquire new property, and this new property remains in the trustee's hands, the source of the beneficiaries' proprietary right to the new property is the trustee's promise on taking office that he will hold both the original trust property and the traceable proceeds thereof on trust for the beneficiaries'.
[198] [1991] 2 AC 548.
[199] But the defence is not available in all unjust enrichment cases. The defendant may be disqualified from relying on the defence due to his bad faith or fault, or due to some policy considerations. See *Bumiputra-Commerce Bank Bhd v Siti Fatimah Mohd Zain* [2011] 2 CLJ 545.
[200] [1991] 2 AC 548 at p 580.

exclude the defence in cases of restitution for wrongs.[201] Although this view has its supporters,[202] it has also been argued that the defence should apply to strict liability wrongs where the defendant has not acted in bad faith, and so long as allowing the defence does not undermine the policy behind the law's prohibition of such wrongs.[203] This requires the policy behind the wrong in question to be independently considered.

Finally, it is useful to note that a same set of facts could give rise to concurrent causes of action. A simple example would suffice.[204] Where a defendant breached a contract by his failure to render any performance, the plaintiff may either (a) base his claim in contract and claim for compensatory damages, or (b) base his claim on unjust enrichment, specifically on the ground of (total) failure of consideration, and claim for restitution.[205] Between the two concurrent alternative causes of action the plaintiff must choose one, but not both. The effects of the available responses on the plaintiff's position will play a major role in his selection. Compensatory damages would place the plaintiff, as far as money can do, in the position as if the contract has been performed.[206] This is beneficial if the plaintiff would have earned a profit from the performance of the contract. He would be compensated for his loss of profit. In contrast, restitution would place the plaintiff, as far as money can do, back in his original position prior to the contract. This would require the defendant to refund any benefit received from the plaintiff, eg a part payment. This is beneficial where the

[201] In *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2008] EWHC 2893 at para 320, Henderson J explained that the bar applies only 'where the cause of action relied upon by the claimant was itself founded upon wrongdoing by the defendant'. See also Birks, *Unjust Enrichment*, at p 213; Burrows, *Restitution*, at p 698.

[202] See Peter Birks, 'Overview: Tracing, Claiming and Defences' in PBH Birks (ed), *Laundering and Tracing* (Oxford: Clarendon Press, 1995) p 289 at pp 325–26; Burrows, *Restitution*, at pp 699–700. Both argued that change of position could not outweigh policies justifying restitution for a wrong. See also James Edelman, 'Change of Position: A Defence of Unjust Disenrichment' (2012) 92 Boston U L Rev 1009 at pp 1031–32, who argued that the defence only applies where the defendant's enrichment was a result of the plaintiff's impaired intention. Since liability for a wrong is based solely on the defendant's breach of duty, the defence does not apply.

[203] See Elise Bant, *The Change of Position Defence*, Hart Publishing (Oxford and Portland, Oregon: Hart Publishing, 2009) at pp 166–72, 209–10, approved in *Cavenagh Investment Pte Ltd v Kaushik Rajiv* [2013] SGHC 45. See also Richard Nolan, 'Change of Position' in in PBH Birks (ed), *Laundering and Tracing* (Oxford: Clarendon Press, 1995) p 135 at p 154; Graham Virgo, *The Principles of the Law of Restitution*, 2nd edn (Oxford: OUP, 2006) at p 708.

[204] Other examples of overlap include mistake (unjust enrichment) and misrepresentation (tort of deceit), duress (unjust enrichment) and intimidation (tort), etc. See Peter BH Birks, 'Restitution and Wrongs' (1982) 35 Current Legal Problems 53.

[205] If the plaintiff wishes to base his claim on unjust enrichment, he must first terminate the contract. This is to prevent unjust enrichment from encroaching into the territories of contract. See *Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 2 QB 459; *Re Richmond Gate Property Ltd* [1965] 1 WLR 335. See also Gerard McMeel, 'Unjust Enrichment and Contract' in Andrew Burrows and Lord Rodger of Earlsferry (eds), *Mapping the Law: Essays in Memory of Peter Birks* (Oxford: OUP, 2006) p 221.

[206] *Robinson v Harman* (1848) 1 Ex Rep 850.

plaintiff has made a bad bargain and has nothing to gain from the performance of the contract.[207] Besides the measure of recovery, other factors that may influence a plaintiff's choice when faced with concurrent alternative causes of action include the availability of evidence, limitation period, defences and choice of law issues.

PART III: TERMINOLOGY

Only a handful of books published after the *Restatement* were written under the title of 'quasi-contract'. [208] *Goff and Jones* affirmed the *Restatement*'s choice of 'restitution' as the preferred title. An observant reader, however, would wonder why the choice was not 'unjust enrichment'. It is, after all, the event that triggers restitution. It is strange to speak of the law of restitution for the same reason why we do not usually speak of the law of compensation.[209] Even Seavey, one of the Reporters for the *Restatement*, admitted almost two decades later that '[p]erhaps unjust enrichment would be a better term'.[210]

The main reason why unjust enrichment lost the titular honour was due to fear of uncertainty.[211] In a letter dated 14 November 1770, a mysterious writer who used the pseudonym Junius complained to Lord Mansfield:

> Instead of those certain, positive rules, by which the judgment of a court of law should invariably be determined, you have fondly introduced your own unfettered notions of equity and substantial justice … In the mean time the practice gains ground; the court of King's Bench becomes a court of equity, and the judge, instead of consulting strictly the law of the land, refers only to the wisdom of the court, and to the purity of his own conscience.[212]

Another scholar commented even more bluntly: '*Aequum et bonum*! At the mention of this term, a shudder will pass through the frames of esteemed and learned friends'.[213] The courts, too, became wary of abstract conceptions of justice and

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[207] See Burrows, *Restitution*, at pp 344–46.
[208] Robert H Kersley, *Quasi-Contract* (London: Law Notes, 1932); JH Munkman, *The Law of Quasi-Contracts* (London: Pitman, 1950); PH Winfield, *The Law of Quasi-Contracts* (London: Sweet & Maxwell, 1952). The last was SJ Stoljar, *The Law of Quasi Contract*, 2nd edn (Sydney: Law Book Co, 1989).
[209] Of course, the worthiness of a response-based study must not be doubted. See eg Harvey McGregor, *McGregor on Damages*, 18th edn (London: Sweet & Maxwell, 2012); *Andrew Burrows, Remedies for Torts and Breach of Contract* (Oxford: OUP, 2004).
[210] WA Seavey, 'Problems in Restitution' (1954) 7 Oklahoma L Rev 257.
[211] Birks, *Introduction*, at pp 18–20.
[212] *The Genuine Letters of Junius* (London: 1771) at p 245.
[213] CK Allen, 'Fraud, Quasi-contract and False Pretences' (1938) 54 LQR 201 at p 202.

fairness. The history of quasi-contract, which was filled with Lord Mansfield's reference to '*aequo et bono*' as justifying the right to restitution, was described as a 'history of well-meaning sloppiness of thought'.[214] Similarly, in *Baylis v Bishop of London*,[215] Hamilton LJ said:

> To ask what course would be *ex aequo et bono* to both sides never was a very precise guide … Whatever may have been the case 146 years ago, we are not now free in the twentieth century to administer that vague jurisprudence which is sometimes attractively styled 'justice as between man and man.'[216]

'Unjust enrichment', if left undefined, is no less vague. When the final draft of the *Restatement* was approved in May 1936, the title remained *Restatement of Restitution and Unjust Enrichment*.[217] 'Unjust Enrichment' was finally dropped from the title most likely because the ALI was concerned that it might be seen as 'endorsing an open-ended charter of liability, to be invoked in any case where "enrichment" and "injustice" might be thought to coincide'.[218]

Birks complained that neither the *Restatement* nor *Goff and Jones* did much to cure the worry: 'They leave 'unjust' up in the sky, where it cannot do this necessary work'.[219] When Birks published his book, however, the role and meaning of 'unjust' was already afforded careful treatment.[220] He explained:

> 'Unjust' … does not look up to an abstract notion of justice but down to the cases and statutes. It is merely a general word expressing the common quality of those factors which, when present in conjunction with enrichment, have been held to call for restitution. So there has to be a list of such factors and, if possible, the list should have some order to it. It should not be compiled at random.[221]

Moreover, he was clearly aware that it was unjust enrichment, not restitution, which falls on the plane of causative events.[222] Therefore, one would have expected him to

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[214] *Holt v Markham* [1923] 1 KB 504 at p 513 (*per* Scrutton LJ).
[215] [1913] 1 Ch 127.
[216] *Ibid* at p 140.
[217] EW Patterson, 'The Scope of Restitution and Unjust Enrichment' (1936) 1 Missouri L Rev 223.
[218] Andrew Kull, 'James Barr Ames and the Early Modern History of Unjust Enrichment' (2005) 25 Oxford J Legal Studies 297 at p 318. See also EW Patterson (1938) 47 Yale LJ 1420 at p 1421.
[219] Birks, *Introduction*, at p 20. See also Peter Birks, 'Definition and Division' in Peter Birks (ed), *The Classification of Obligations* (Oxford: Clarendon Press, 1997) p 1 at p 20.
[220] Birks, *Introduction*, at chs IV to IX.
[221] *Ibid* at p 99. See also Part II above.
[222] *Ibid* at p 26: 'The word 'restitution' belongs in the same series as 'compensation' and 'punishment'. The phrase 'unjust enrichment', an abbreviation, aligns with 'contract' and with 'tort' in the list of causative events'. See also RM Jackson, 'Book Review: The Restatement of Restitution' (1938) 10

name his book *An Introduction to the Law of Unjust Enrichment*. The reason for not doing so was this. At that time, he was of the view that '[r]estitution and unjust enrichment and restitution quadrate, naming the same area of law from different sides of the square'.[223] In other words, '[w]hen there is unjust enrichment then there is restitution, and *vice versa*'.[224] Since unjust enrichment and restitution both refer to the same area of the law, the more familiar term was adopted.

The quadration, however, was achieved by forcing restitution for wrongs into the event of unjust enrichment using the label 'unjust enrichment by wrongdoing'.[225] This added to the existing category of 'unjust enrichment by subtraction',[226] which is essentially what we are concerned about in this article. This is represented by the diagram below.

	Unjust Enrichment	
Restitution	By subtraction	By a wrong

What this does was to conceal the fact that two categories of 'unjust enrichment' are analytically different. For example, in deciding whether restitutionary damages is available for breach of contract, the essential questions are (a) whether there is a breach of contract, and (b) whether there is any reason or legitimate interest justifying an award other than on the basis of compensation.[227] In contrast, a prima facie claim for restitution of unjust enrichment is made out upon answering the following questions in the affirmative: (a) was the defendant enriched? (b) was it at the

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Mississippi LJ 95 at p 96: 'On this scheme, contract and tort are marked off by the source of the obligation, whilst the third group is distinguished by the remedy that is available: the trichotomy is not contract, tort and unjust benefit, but contract, tort and restitution. It is theoretically as unsound as a classification of birds and mammals by their structure and fishes as things that swim in water, although the student of Blackstone who knows that whales are "royal fish" might perhaps find that this new science confirms the wisdom of the common law'.

[223] Birks, *Introduction*, at p 26. See also WA Seavey and AW Scott, 'Restitution' (1938) 54 LQR 29 at p 30; Robert Goff and Gareth Jones, *The Law of Restitution* (London: Sweet & Maxwell, 1966) at p 5: 'The law of restitution is the law relating to all claims … which are founded upon [the principle of unjust enrichment]'.

[223] Birks, *Introduction*, at p 26.

[224] *Ibid* at p 40.

[225] *Ibid* at pp 39–44.

[226] Also referred to as 'unjust enrichment at the plaintiff's expense' or 'autonomous unjust enrichment'.

[227] *Attorney-General v Blake* [2001] 1 AC 268. See also James Edelman, *Gain-based Damages* (Oxford and Portland, Oregon: Hart Publishing, 2002) at ch 5.

plaintiff's expense? and (c) was it unjust? It is obvious that the two courses of inquires do not correspond. Since unjust enrichment by wrongdoing is predicated upon a breach of duty, it is really a wrong-based event and should therefore be placed within the event of wrongs and not unjust enrichment. The quadrationist view was therefore incorrect.

Birks subsequently had a change of heart. As he confessed, '[t]he truth is that the quadration of unjust enrichment and restitution is not naturally perfect'.[228] He said:

> To say that every obligation arise from contract, wrong, restitution, or some other event is much like saying that animals are mammals, reptiles, birds, yellow, or of some other kind. The classification is bent. At yellow it turns a corner. It does not matter how often we tell ourselves that by 'restitution' in this context we actually mean 'autonomous unjust enrichment'. Sooner or later people will be misled and will turn the unintended corner.[229]

Modern textbooks now recognise the multi-causality of restitution. Some are dedicated to exploring restitution of unjust enrichment alone. Birks' last book was entitled *Unjust Enrichment*. The latest (eighth) edition of *Goff and Jones* has been renamed *The Law of Unjust Enrichment*. The new authors explained:

> … we have decided to excise all discussion of restitution for wrongdoing, and to focus our attention exclusively on the subject with which this work has always been centrally concerned, namely the law of unjust enrichment and the remedies that it generates.[230]

Other books held on to 'restitution' but made it clear that restitution is multi-causal.[231] They deal with both restitution of unjust enrichment and restitution for wrongs. The

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[228] Peter Birks, 'Definition and Division' in Peter Birks (ed), *The Classification of Obligations* (Clarendon Press, Oxford 1997) p 1 at pp 20–21; Peter Birks, 'Property and Unjust Enrichment: Categorical Truths' [1997] New Zealand L Rev 623 at p 626; Peter Birks, 'Misnomer' in Cornish *et al*, *Restitution: Past, Present & Future*, p 1 at p 7; Peter Birks, 'The Law of Unjust Enrichment: A Millennial Resolution' [1999] Singapore J Legal Studies 318; Peter Birks, 'The Law of Restitution at the End of an Epoch' (1999) 28 U Western Australia L Rev 13; Peter Birks, 'Unjust Enrichment and Wrongful Enrichment' (2001) 79 Texas L Rev 1768; Birks, *Foundations*, at p 20.

[229] Peter Birks, 'Definition and Division' in Peter Birks (ed), *The Classification of Obligations* (Oxford: Clarendon Press, 1997) p 1 at p 21. Another description of the traditional division was this: 'On the same level would be a division of animals between carnivores, herbivores and amphibians. The third term tells you the habitat, the first two the eating habit. It follows that the terms must cut across each other. Alligators are carnivorous and amphibious. In the same way restitution cuts across contracts and torts' (Peter BH Birks, 'A Letter to America: The New Restatement of Restitution' (2003) 3(2) Global Jurist Frontiers, article 2 at p 13).

[230] *Goff & Jones: Unjust Enrichment*, at p 5.

[231] See, notably, American Law Institute, *Restatement (Third) of Restitution and Unjust Enrichment* (St Paul: ALI Publishers, 2011).

latter usually occupy a few chapters at the end. It is ultimately a matter of preference whether one deals with the wider law of restitution, which is multi-causal, or only with restitution of unjust enrichment. The advantages of taking the wider approach is nicely summarised by Virgo:

> There are a number of common principles and questions of policy which underlie all restitutionary claims regardless of the cause of action. So, for example, there are important questions of relevance to all restitutionary claims concerning how restitutionary remedies should be assessed. Similarly, there are defences and bars which are generally applicable to all restitutionary claims regardless of the principle on which that claim is founded. Also, as a mechanism for analysis of the law, the law of restitution remains a useful hook on which to hang disparate areas of law. It forces us to make connections which might otherwise be ignored and so the subject remains of great use for the purposes of exposition.[232]

PART IV: LESSONS

In Malaysia, a number of important unjust enrichment claims are set out in Part VI (sections 69–73) of the Contracts Act 1950 under the title 'Of Certain Relations Resembling Those Created By Contract'. The forms of action received no mention since the Contracts Act 1950 postdated their abolishment. Although this provided the opportunity for a fresh start in approaching the subject, the courts have generally failed to capitalise on this opportunity. Legal progress is to some extent impeded by confusions arising from the failure to have regard to the historical backgrounds against which the statutory provisions in Part VI were enacted. Two examples will suffice. Both concern section 73 of the Contracts Act 1950, which states: 'A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it'.

In *AmBank (M) Bhd v KB Leisure (M) Sdn Bhd*,[233] a case about mistaken payments, the High Court held that section 73 of the Contracts Act 1950 only applies where there is a pre-existing contractual relation between the mistaken payer and payee.[234] The court allegedly found support from the two statutory illustrations to the section,

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[232] Virgo, *Restitution*, at p 18. See also Burrows, *Restitution*, at p 11.
[233] [2012] 7 MLJ 364.
[234] [2012] 7 MLJ 364 at pp 375–76.

of which we shall only refer to the one concerning mistake.[235] Illustration (a) states: 'A and B jointly owe RM100 to C. A alone pays the amount to C, and B, not knowing this fact, pays RM100 over again to C. C is bound to repay the amount to B'. It is possible that the illustration was drafted to reflect a liability mistake, ie the plaintiff was under an erroneous belief that he was liable to pay the defendant.[236] But even the requirement of a liability mistake, which has since been abandoned in most modern jurisdictions, is not confined to a mistake as to contractual liability.[237] The plaintiff could, for example, be mistaken about his liability to pay tax or a judgment debt. The court's insistence on a contractual link must have stemmed from the misconception that section 73 is governed by contract principles. It is, after all, found in a contract statute. History, however, has informed us that any affinity between contract and unjust enrichment was purely a result of historical accidents. More importantly, contract and unjust enrichment are conceptually distinct. A mistaken payee does not contract to repay the mistaken payer. To regard him as having done so, when in fact he did not, is to subscribe to the fictitious implied contract theory, which has since been rejected by the Court of Appeal in *Koh Siak Poo v Sayang Plantation Bhd*.[238] For these reasons, this aspect of the court's decision in *AmBank* must be regarded as incorrect.

The other example is the continued references to the obsolete forms of action without understanding what they really mean. In the context of mistaken payments, the courts almost never fail to speak of the action for money had and received. It was often regarded as a wider claim based on the principle of unjust enrichment, separate from the statutory claim encapsulated in section 73, although the elements of an unjust enrichment claim have also been applied to section 73.[239] As we have examined in Part I, the action for money had and received was only a procedural means by which the plaintiff enforces his claim. It was not a cause of action. The causative event that triggers the right to restitution is the plaintiff's mistake in making the payment, which rendered the defendant's enrichment unjust. This is now encapsulated in section 73 of

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[235] The obligation to consider the illustrations is emphasised in *Mohamed Syedol Ariffin v Yeoh Ooi Gark* [1916] 2 AC 575 at p 581.

[236] See *Aiken v Short* (1856) 1 H & N 210 at p 215; *Sri Sri Shiba Prasad Singh v Maharaja Srish Chandra Nandi* AIR 1949 PC 297 at p 302.

[237] For abandonment of the requirement of liability mistake, see *Barclays Bank Ltd v WJ Simms, Son and Cooke (Southern) Ltd* [1980] QB 677 at pp 689–94; *Kleinwort, Sons & Co v Dunlop Rubber Co* (1907) 97 LT 263; *Kerrison v Glyn, Mills, Currie & Co* (1911) 81 LJKB 465; *RE Jones Ltd v Waring and Gillow Ltd* [1926] AC 671; *The Colonial Bank v The Exchange Bank of Yarmouth, Nova Scotia* (1885) 11 App Cas 84.

[238] [2002] 1 MLJ 65 at p 70. See also *Badr-un-nisa v Muhammad Jan* (1880) ILR 2 All 671 at p 674.

[239] See *AmBank (M) Bhd v KB Leisure (M) Sdn Bhd* [2012] 7 MLJ 364; *Bank Bumiputra (M) Bhd v Hashbudin bin Hashim* [1998] 3 MLJ 262; *Green Continental Furniture (M) Sdn Bhd lwn Tenaga Nasional Bhd* [2011] 8 MLJ 394; *Affin Bank Bhd v MMJ Exchange Sdn Bhd* [2011] 9 MLJ 787.

the Contracts Act 1950.[240] In overlooking these connections, the courts often end up explaining the claim for money had and received separately by resorting to broad and open-ended notions such as equity, conscience and natural justice. For example, in *Bank Bumiputra (M) Bhd v Hashbudin bin Hashim*, the court so explained the basis of the duty to repay a mistaken payment: '[I]t is not right for the [defendant] to keep the money. He is bound by the ties of natural justice and equity to refund the money to the [plaintiff] … He would be unjustly enriched at the [plaintiff's] expense if the [plaintiff] could not recover from him'.[241] The court in *Affin Bank Bhd v MMJ Exchange Sdn Bhd*[242] was closer to the mark when it observed that 'if money was paid under a mistake, it would be against good conscience to retain that money'.[243] Unfortunately, the court went on to consider money had and received as a separate cause of action and made no reference to unjust enrichment.[244] As to be expected, however, the courts always arrive at the same conclusion for these claims. While this means that no direct harm is caused, the incorrect distinction is clearly unnecessary and is liable to confuse. There is only one case, *Bumiputra-Commerce Bank Bhd v Siti Fatimah Mohd Zain*, where the court rightly recognised the connections between section 73, money had and received, and unjust enrichment.[245] To avoid confusion, we must discard the language of the old forms of action, which hinder rather than aid understanding. The emphasis should be on the precise identification of the grounds for restitution.

There are also lessons to be learnt from Parts II and III. In many instances the courts invoked the phrase 'unjust enrichment' to explain responses that are best understood as triggered by other events. Such indiscriminate use of the term deprives the law of unjust enrichment of its established terminology and is likely to cause confusion.

In *Hsu Seng v Chai Soi Fua*,[246] the plaintiff was the assignee of an agreement to purchase a property made between a purchaser, who was the assignor, and the defendant vendor. The purchaser paid the vendor $72,000 as part payment of the purchase price of $120,000. The contract stated that if the vendor fails to obtain the property's document of title by a specified date, he shall be allowed a further period of six months to do so, during which he shall pay the purchaser $1,000 per month as liquidated damages. It also stipulated that if the vendor fails to obtain the said

[240] See *Mahabir Kishore and ors v State of Madhya Pradesh* AIR 1990 SC 313; *Renusagar Power Co Ltd v General Electric Co* 1994 AIR SC 860.
[241] [1998] 3 MLJ 262 at p 272.
[242] [2011] 9 MLJ 787.
[243] *Ibid* at p 806.
[244] *Ibid* at p 812.
[245] [2011] 2 CLJ 545.
[246] [1990] 1 MLJ 300.

document after the time extension, he shall pay $72,000 to the purchaser as liquidated damages. The defendant failed to perform his obligations within the specified deadlines and the plaintiff claimed for liquidated damages amounting to $78,000. The court found in the plaintiff's favour and explained the right to recover the part payment as based on the vendor's unjust enrichment at the plaintiff's expense. This is incorrect. In the English case of *The Trident Beauty*,[247] the charterer of a vessel, upon the termination of the charterparty for the ship-owner's breach of contract, sought to recover an overpayment of hire from the assignee of the ship-owner's right to receivables. As the charterparty contained a clause which required any overpaid hire to be returned, the charterer's claim for restitution based on the ground of total failure of consideration was rejected. As Lord Goff explained, 'the existence of the agreed regime renders the imposition by the law of a remedy in restitution both unnecessary and inappropriate'.[248] Likewise, in the present case, the agreed liquidated damages clauses ousted any unjust enrichment claim. The right to recover the part payment and damages for the delay were derived from the contractual terms. The causative event is the parties' consent and not unjust enrichment.

In *Koh Siew Keng (P) v Koh Heng Jin*,[249] a father opened a bank account to be held jointly by him and his two sons. He deposited money into the account, intending it to be shared equally between them. The father and one of the sons died shortly after, and the surviving son withdrew the money for himself. His mother, who was the residuary legatee under the father's will, claimed that the surviving son held one third of the money on trust for her. The Court of Appeal rejected the argument that there was a trust (and hence no breach of trust) but held that the mother was entitled to recover the money based on unjust enrichment. It is submitted that the decision is better justified on other grounds. The money in the bank account was in the form of a chose in action, specifically a debt owed by the bank to the account holders. As there cannot be a tenancy in common of a chose in action at law, the agreement to share the money equally could only be given effect to in equity.[250] The account holders must be taken to have agreed to hold the money on trust for each other, each entitled to one-third

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[247] *Pan Ocean Shipping Co Ltd v Creditcorp Ltd* [1994] 1 WLR 161.
[248] *Ibid* at p 164. See also Jack Beatson, 'Restitution and Contract: Non-Camul?' (2000) 1 Theoretical Inquiries in Law (2000) 83 at p 100.
[249] [2008] 3 MLJ 822.
[250] *Re McKerrell* [1912] 2 Ch 648 at p 653: 'it is clear that there could not have been a tenancy in common of a legal chose in action' (*per* Joyce J). See also Ben MacFarlane, *The Structure of Property Law* (Oxford and Portland, Oregon: Hart Publishing, 2008) at pp 532–33; EP Ellinger, Eva Lomnicka and CVM Hare, *Elinger's Modern Banking Law*, 5th edn (Oxford: OUP, 2011) at p 324; David Fox, *Property Rights in Money* (Oxford: OUP, 2008) at pp 253–54; Roger J Smith, *Plural Ownership* (Oxford: OUP, 2005) at pp 209–10.

share.[251] When two of them died, the surviving son became the sole trustee and continued to hold the money on trust, now for the estates of the deceased. When he withdrew the money for himself, the mother could bring a number of claims.[252] First, if the money is still with the son, she may trace her equitable ownership in one-third share of the debt into the money and assert her equitable ownership over it.[253] Her claim is to vindicate her equitable ownership, which was created by the trust and passed on to her under her husband's will. Second, if the money was no longer with the son, she may bring a substitutive performance claim, requiring him to restore the trust fund with his own money as a substitute for the original trust asset.[254] This is not a wrong-based claim but rather one to enforce the performance of the trustee's duties to hold and deliver trust property on demand, which arose from the trust.[255] Alternatively, she may bring a reparation claim for the compensation of any loss suffered by the trust fund as a result of the son's breach of trust. This is a wrong-based claim.[256] None of these are unjust enrichment claims.[257]

There were also instances where the courts explained the remedy of account of profits for breach of fiduciary duty as based on the prevention of unjust enrichment.[258]

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[251] The certainty of subject matter is not an issue. See *Hunter v Moss* [1994] 1 WLR 452.

[252] See John McGhee (ed), *Snell's Equity*, 32nd edn (London: Sweet & Maxwell, 2010) at ch 30; David Hayton, Paul Matthews and Charles Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees*, 18th edn (London: LexisNexis, 2010) at chs 21 and 23.

[253] *Foskett v McKeown* [2011] AC 102.

[254] See David Hayton, Paul Matthews and Charles Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees*, 18th edn (London: LexisNexis, 2010) at pp 1118–26; Charles Mitchell and Stephen Watterson, 'Remedies for Knowing Receipt' in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Oxford and Portland, Oregon: 2010, Hart Publishing) p 115 at pp 115–26; Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 U Western Australia L Rev 1 at pp 42–48; Steven B Elliott and Charles Mitchell, 'Remedies for Dishonest Assistance' (2004) 67 Modern L Rev 16 at pp 23–28.

[255] *Low v Bouverie* [1891] 3 Ch 82 at p 99: 'The duty of a trustee is properly to preserve the trust fund, to pay the income and the corpus to those who are entitled to them respectively, and to give all his cestuis que trust on demand information with respect to the mode in which the trust fund has been dealt with, and where it is' (*per* Lindley LJ).

[256] In a simple misappropriation case such as the present, there is no practical difference between a substitutive performance claim and a reparation claim. However, it would make a difference if causation of loss were an issue. While a reparation claim requires the proof of causation between the trustee's breach of duty and the loss to the trust fund, there is no such requirement for a substitutive performance claim. See *Target Holdings Ltd v Redferns* [1996] AC 421, as clarified in *Youyang Pty Ltd v Minster Ellison Morris Fletcher* (2003) 196 ALR 482. See also David Hayton, Paul Matthews and Charles Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees*, 18th edn (London: LexisNexis, 2010) at pp 1124–26; PJ Millett, 'Equity's Place in the Law of Commerce' (1998) 114 LQR 214 at pp 223–27; Steven Elliott and James Edelman, 'Target Holdings Considered in Australia' (2003) 119 LQR 545.

[257] For a similar error, see *Oriental Bank Bhd v Nordin Hamid* [2011] 5 CLJ 237.

[258] *Tengku Abdullah ibni Sultan Abu Bakar v Mohd Latiff bin Shah Mohd* [1996] 2 MLJ 265; *The Board of Trustees of the Sabah Foundation & Ors v Datuk Syed Kechik bin Syed Mohamed & Anor* [2008] 5 MLJ 469; *Pharmmalaysia Bhd v Dinesh Kumar Jashbhai Nagjibha Patel* [2004] 7 CLJ 465.

Although the remedy of account of profits is restitutionary (in the 'giving up' sense), it is in response to a wrong, specifically the breach of the (primary) fiduciary duty.

In another case, the court sought to characterise liability for knowing receipt as based on unjust enrichment.[259] An action for knowing receipt is based on the allegation that the defendant had received an asset traceable to a prior breach of fiduciary duty in such situation where it was unconscionable for him to retain the benefit of the receipt.[260] The element of unconscionability is largely determined by reference to the plaintiff's knowledge regarding the breach of fiduciary duty. Since the liability for knowing receipt depends on fault, it is inconsistent with liability for unjust enrichment, which is strict.[261] Although the cases have not explicitly said so, liability for knowing receipt is better regarded as wrong-based.[262] Whether a concurrent claim in unjust enrichment exists is a separate question.[263]

PART V: FUTURE

A comprehensive account of the law of unjust enrichment would require an entire book. The purpose of this article is more modest. It is intended to serve as a foundation upon which further works could be built. While these must be undertaken elsewhere, a few things could be said about the themes that should underlie them. Clearly, the emphasis should be on developing the substantive content of the subject.

A particularly interesting project is to examine how we could use the common law by analogy to develop the contents of the provisions in Part VI of the Contracts Act 1950. As Burrows opined, 'using the common law to interpret a statute should be positively encouraged not merely because this enhances consistency between common law and statute but also because the common law has been carefully crafted

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[259] *Pharmmalaysia Bhd v Dinesh Kumar Jashbhai Nagjibha Patel* [2004] 7 CLJ 465 at pp 556–58.

[260] See *El Ajou v Dollar Land Holdings Plc* [1994] 2 All ER 685; *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437; *Charter Plc v City Index Ltd* [2008] Ch 313; *George Raymond Zage III v Ho Chi Kwong* [2010] 2 SLR 589; *Thanakharn Kasikorn Thai Chamkat (Mahachon) v Akai Holdings Ltd (No 2)* (2010) 13 HKCFAR 479.

[261] See *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437 at pp 455–56; *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* [2013] SCCA 36 at paras 108–10, 138–46. See also Kelvin FK Low, 'The Use and Abuse of Taxonomy' (2009) 29 Legal Studies 355 at pp 366–68; Kelvin FK Low, 'Recipient Liability in Equity: Resisting the Siren's Lure' [2008] Restitution L Rev 96.

[262] See Peter Birks, 'Receipt' in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (Oxford and Portland, Oregon: Hart Publishing, 2002) p 213 at p 224.

[263] *Ibid*. See also Lord Nicholls, 'Knowing Receipt: The Need for a New Landmark' in WR Cornish, Richard Nolan, J O'Sullivan and G Virgo (eds), *Restitution: Past, Present & Future* (Oxford: Hart Publishing, 1998) p 231.

and is likely to be both principled and practically workable'.[264] In most other Commonwealth countries, the law of unjust enrichment exists mainly in the common law. Even in Malaysia, the courts were willing to venture beyond Part VI of the Contracts Act 1950. This is best evidenced by the recognition of total failure of consideration as a ground for restitution.[265] Also, in a recent case,[266] the court implicitly accepted the *Woolwich* principle, which allowed restitution in the case of ultra vires levy of tax by a public body.[267] These common law developments supply a wealth of materials from which guidance could be drawn in interpreting the provisions in Part VI of the Contracts Act 1950. The aim is to promote a principled approach in the application of the statutory provisions and to ensure consistency and coherence in the general law of unjust enrichment.

The Malaysian courts are generally receptive to this suggestion, as evidenced by their treatment of sections 70, 71 and 73 of the Contracts Act 1950.[268] They have purportedly applied the standard common law inquiry by asking: (a) is the defendant enriched? (b) is it at the plaintiff's expense? and (c) is it unjust? Unfortunately, however, the courts have sometimes approached this course of inquiry in a broad-brush manner. This is most apparent from the courts' treatment of the 'unjust' inquiry, as seen in Part IV. Ingredients (a) and (b) of the claim were also sometimes misunderstood, overlooked or left unaddressed. A couple of examples would suffice. In relation to ingredient (a), there is a tendency to speak of the defendant's retention of the enrichment.[269] However, when considering whether the plaintiff has a prima

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[264] Andrew Burrows, "The Relationship Between Common Law and Statute in the Law of Obligations" (2012) 128 LQR 232 at p 243.

[265] See eg *Wong Lee Sing v Mansor* [1972] 2 MLJ 154; *Berjaya Times Square Sdn Bhd v M Concept Sdn Bhd* [2011] 1 MLJ 597; *LSSC Development Sdn Bhd v Thomas Iruthayam & Anor* [2007] 2 CLJ 441. This topic has been plagued with difficulties due in part to the uncertainties pertaining to section 66 of the Contract Acts 1950.

[266] *Pelangi Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2012] 1 MLJ 825.

[267] *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70. See also *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2007] 1 AC 558; *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2012] 2 WLR 1149.

[268] On sections 70 and 71, see *New Kok Ann Realty Sdn Bhd v Development & Commercial Bank Ltd New Hebrides (In Liquidation)* [1987] 2 MLJ 57; *Koh Siak Poo v Sayang Plantation Bhd* [2002] 1 MLJ 65; *Sediperak Sdn Bhd v Baboo Chowdhury* [1999] 5 MLJ 229; *Multi-Purpose Credit Sdn Bhd v Tan Sri Dato' Paduka (Dr) Ting Pek Khing* [2006] 5 MLJ 589; *Perak Motor Sdn Bhd v Estate Pekebun Kecil Sdn Bhd* [2006] 4 CLJ 603; *Multi-Purpose Credit Sdn Bhd v Tan Sri Dato' Paduka (Dr) Ting Pek Khing* [2006] 6 CLJ 205; *Kumpulan Teknik Sdn Bhd v Murad Hashim Communication Sdn Bhd & Anor* [2012] 8 MLJ 573. On section 73, see *AmBank (M) Bhd v KB Leisure (M) Sdn Bhd* [2012] 7 MLJ 364; *Affin Bank Bhd v MMJ Exchange Sdn Bhd* [2011] 9 MLJ 787; *Bumiputra-Commerce Bank Bhd v Siti Fatimah Mohd Zain* [2011] 2 CLJ 545; *Kum Wah Sdn Bhd v RHB Bank Bhd* [2009] 9 MLJ 490; *Bank Bumiputra (M) Bhd v Hashbudin bin Hashim* [1998] 3 MLJ 262. See also Cheong May Fong, *Civil Remedies in Malaysia* (Petaling Jaya: Sweet & Maxwell Asia, 2007) at ch 7; David Fung, "Restitution and Section 71 of the Contracts Act 1950" [1994] 2 MLJ lxxix.

[269] In *AmBank (M) Bhd v KB Leisure (M) Sdn Bhd* [2012] 7 MLJ 364, the court held that the defendant was not enriched because it did not retain the benefit.

facie entitlement to restitution, the true focus is on the defendant's receipt of the enrichment, not its retention.[270] Section 73 of the Contracts Act 1950, for example, requires only that the defendant be a person 'to whom money has been paid'. In relation to ingredient (b), there is generally a failure to appreciate the complexities that may arise from cases involving multiple parties. For example, if A enters into a contract with B under which A is required to confer a benefit on C, which A did, can we say that C is enriched at A's expense?[271] The question of whether A could leapfrog B to recover from C becomes important where B is no longer to be found, is not worth suing, or is protected by a defence. While the wording of section 73 does not reveal any hostility against leapfrogging, the common law holds a firm view against leapfrogging in such a situation. Although it was A who conferred the benefit on C, A was merely fulfilling a contractual obligation owed to B. As it was B, not A, who bought the benefit for C, C is enriched at B's expense and not at A's.[272]

To be commended, however, is the willingness of the Malaysian courts to import common law defences to exclude or limit a claim for restitution based on a provision in Part VI of the Contracts Act 1950 (specifically section 73) even though these were not expressly provided for in the statute.[273] This will enable a more generous approach to be taken towards the ingredients of the claim (ie elements (a) to (c)) since the defences would serve as counterbalances.[274] However, it is important to be

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[270] See *Benedetti v Sawiris* [2013] 3 WLR 351 at p 360 ('[I]t is clear that the enrichment is to be valued at the time when it was received'); *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at p 386 ('It is well established that the cause of action for the recovery of money paid under a mistake of fact accrues at the time of payment'); *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at p 385 ('From the point of view of the person making the payment, what happens after he or she has mistakenly paid over the money is irrelevant, for it is at that moment that the defendant is unjustly enriched').

[271] This issue arose in *AmBank (M) Bhd v KB Leisure (M) Sdn Bhd* [2012] 7 MLJ 364 but was overlooked by the court.

[272] See eg Birks, *Unjust Enrichment*, at p 86: ''At the expense of the claimant' means, in the first instance, 'immediately at the expense of the claimant'. The alternative argument for forbidding A's claim against C is that to allow so would undermine the contractual arrangement between the parties. See *MacDonald, Dickens & Macklin v Costello* [2011] 3 WLR 1341 (noted Man Yip, 'Suing the Third Party for Improvements to Land: *Costello v Macdonald* [2011] EWCA Civ 930, [2011] 3 WLR 1341' (2011) 11 Oxford U Commonwealth LJ 217; Alvin W-L See, 'Contract, Unjust Enrichment and Leapfrogging' [2012] Restitution L Rev 125); *Lumbers v W Cook Builders Pty Ltd* (2008) 232 CLR 635 (noted James Edelman, 'Unjust Enrichment and Contract' [2008] Lloyd's Maritime & Commercial LQ 444).

[273] See *AmBank (M) Bhd v KB Leisure (M) Sdn Bhd* [2012] 7 MLJ 364; *Affin Bank Bhd v MMJ Exchange Sdn Bhd* [2011] 9 MLJ 787; *Bumiputra-Commerce Bank Bhd v Siti Fatimah Mohd Zain* [2011] 2 CLJ 545; *Kum Wah Sdn Bhd v RHB Bank Bhd* [2009] 9 MLJ 490; *Bank Bumiputra (M) Bhd v Hashbudin bin Hashim* [1998] 3 MLJ 262.

[274] *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 581: 'It will enable a more generous approach to be taken to the recognition of the right to restitution, in the knowledge that the defence is, in appropriate cases, available' (*per* Lord Goff). See also Birks, *Unjust Enrichment*, at p 207 ('Blunt restrictions placed on the cause of action did rough justice. That crude strategy has been given up. Instead the right to restitution is now selectively weakened. This fine-tuning is chiefly the

reminded that the defences are not discretionary but are instead governed by principles. As Lord Goff emphasised in *Lipkin Gorman v Karpnale Ltd*,[275] 'where recovery is denied, it is denied on the basis of legal principle'.[276] Having recognised the availability of restitutionary defences, the focus should shift to working out their detailed rules and principles to ensure that competing interests are properly balanced.

It is only through a committed effort to address all these could we truly claim to have a well-developed law of unjust enrichment. The courts must translate their enthusiasm for the subject into approaching it in a principled manner, which will enable them to identify clearly the problems and then address them with coherent solutions.

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responsibility of the defences'); Burrows, *Restitution*, at p 524 ('Rather than the courts placing arbitrary restrictions on liability, the scope of restitution is now more satisfactorily and openly controlled by the defences, especially the change of position defence').

[275] [1991] 2 AC 548.

[276] *Ibid* at p 578.