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Natural obligations and the common law of unjust enrichment

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NATURAL OBLIGATIONS AND THE COMMON LAW OF UNJUST ENRICHMENT

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A Introduction

Two leading restitution scholars have recently argued that the notion of natural obligations is now an important defence in the law of unjust enrichment.[1] In particular, the late Professor Peter Birks asserts, in his last book, that 'the claimant cannot say that the money was not due if, behind the technicalities of the law, there was still a moral obligation to pay.'[2] This development is interesting because the concept of natural obligations is traditionally thought to be a civilian and not a common law concept. Birks' assertion represents an attempt to use the study of comparative law to interpret the common law and argue that certain civilian concepts are found in (or should be transplanted into) the common law.[3] This paper is an investigation into whether such an endeavour is necessary to develop the common law of unjust enrichment. On a jurisprudential level, this paper also serves as a contemporary case study on whether it is desirable to engage in an exercise of legal transplant of a civilian concept into the common law.

B Why is the Concept of Natural Obligations Potentially Significant in the Law of Unjust Enrichment?

In order to understand how natural obligations might potentially be relevant to the law of unjust enrichment, we would have to look closely at this concept. What then is a natural obligation? Unfortunately, Birks does not develop this idea further save for citing *Moses v MacFerlan*,[4] where Lord Mansfield said that restitution is barred:

* PhD, LLM (Cantab), LLB (NUS), Associate Professor, National University of Singapore. I am indebted to Graham Virgo, Andrew Burrows, Craig Rotherham and an anonymous referee for reading an earlier version of this paper and their many helpful and insightful comments. The usual caveats apply.

[1] P Birks, *Unjust Enrichment* (2nd edn OUP, Oxford 2005) 257–258; D Sheehan, 'Natural Obligations in English Law' [2004] LMCLQ 172. See also G Virgo, *The Principles of the Law of Restitution* (2nd edn OUP, Oxford 2006) 674, which seems to implicitly endorse the concept of a natural obligation as a defence.

[2] Birks (n 1) 258.

[3] See also D Sheehan, '*Negotiorum Gestio*: A Civilian Concept in the Common Law?' (2006) 55 ICLQ 253.

[4] (1760) 2 Burr 1005, 1012–1013; 97 ER 676, 680–681; Birks (n 1) 257.

> for money paid by the plaintiff, which is claimed of him [the claimant] as payable in point of honor and honesty, although it could not have been recovered from him by any course of law; as in payment of a debt barred by the Statute of Limitations, or contracted during his infancy, or to the extent of principal and legal interest upon an usurious contract, or, for money fairly lost at play: because in all these cases, the defendant may retain it with a safe conscience . . .

Thus, there are four categories in which a natural obligation is said to arise which preclude a restitutionary claim. These include payments made pursuant to the following transactions: (a) a time-barred debt; (b) a contract made during the age of minority; (c) a usurious contract; and (d) a gambling loss. In this paper, these categories where no restitutionary recovery is possible shall be termed Lord Mansfield's negative paradigm.

Why is there a renewed interest in Lord Mansfield's negative paradigm? The reason for this is because the case of *Kleinwort Benson v Lincoln City Council*[5] might have rendered these categories completely nugatory as a defence since the majority of the House of Lords in that case adopted a very wide view of mistake of law. Recall in that case the claimant paid out a sum of money pursuant to a swaps contract when it was not immediately apparent in light of the state of law at the time of payment that the making of the contract was *ultra vires vis-à-vis* the defendant. Subsequently, a definitive pronouncement from the courts established that the contract was indeed *ultra vires*. The majority of the House of Lords (Lords Goff, Hoffmann and Hope[6]) decided that the claimant was labouring under a mistake of law at the time of payment and was entitled to restitution. In light of the decision of *Kleinwort Benson*, a restitutionary claim could potentially be constructed based on the allegation of mistake of law in all categories of Lord Mansfield's negative paradigm. The payor in these cases could assert that: 'I paid money based on a mistake of law because I did not know that such payments were unenforceable.' Dannemann correctly observes: '[e]very item on Lord Mansfield's negative list can now be reshaped into a mistake of law'.[7] In order to salvage Lord Mansfield's negative paradigm an explanation must be found to justify why restitution is barred in these categories. Birks' strategy is to argue that in Lord Mansfield's negative paradigm, the existence of *a natural obligation* to pay on the part of the claimant prevents him from succeeding in a restitutionary action.[8]

The main structure of the inquiry conducted in this paper is three-fold. First, the author considers whether the defence of a natural obligation is still relevant in light of Birks' model of unjust enrichment based on an absence of basis. Second, Lord

[5] [1999] 2 AC 349 (HL). See also *Deutsche Morgan Grenfell v HM IRC* [2006] UKHL 49, [2006] 3 WLR 781.

[6] See S Hedley, 'Restitution—Mistake of law—Reform in Haste, Repent at Leisure' (1999) 58 CLJ 21, 22 for a different interpretation of Lord Hope's speech.

[7] G Dannemann, 'Unjust Enrichment by Transfer: Some Comparative Remarks' (2001) 79 Texas L Rev 1837, 1844–1845.

[8] Birks (n 1) 257–258. See also Sheehan (n 1) 172.

Mansfield's negative paradigm will be examined in detail to see whether it is still compatible with the modern developments of the law of unjust enrichment and in particular the concept of mistake of law. Each category of the negative paradigm will be investigated in detail in the sections below to see whether a bar to a restitutionary claim is justified in these cases. Finally, if Lord Mansfield's negative paradigm does survive *Kleinwort Benson*, Birks' argument that a wider principle, ie the concept of natural obligations, emerges from these categories will be evaluated. In particular, Sheehan's essay defending the notion of natural obligations in English law will be considered and assessed in this paper.[9] Other competing theories capable of explaining Lord Mansfield's negative paradigm will also be reviewed.

C Is the Concept of Natural Obligations Still Relevant in the New Birksian Scheme?

This part considers whether the concept of natural obligations is still relevant if Birks' new theory on the law of unjust enrichment represents the law.[10] Essentially, Birks abandoned the category based 'unjust factors' approach, involving the requirement that the claimant must be able to fit the facts into one of the established grounds of restitution before relief is allowed. Instead, he proposed a unitary ground of restitution—absence of basis.[11] Under this new approach, a claimant is allowed recovery as long as she can show that the transfer of the enrichment lacks a basis. *Prima facie*, if this new framework gains currency, it seems that the concept of mistake is irrelevant to an unjust enrichment claim, since there is no longer a need to look at the claimant's defective intent in the transfer of the enrichment. Instead, restitutionary liability would depend on the question of whether the enrichment lacks a basis. If this is an accurate representation of the law, is there then a need for the concept of a natural obligation as a defence to a restitutionary claim?

There are several responses to the argument that a defence asserting a natural obligation is irrelevant in light of Birks' new model of unjust enrichment. The first is that Birks himself explicitly incorporates natural obligations in his new theory.[12] Unfortunately, he did not seem to have had the opportunity to develop and explain this defence fully. Due to the seemingly open-ended nature of this defence, it is important to subject this concept to a thorough investigation.

It must be pointed out that Birks' new theory can be criticised as lacking in authority and being conceptually flawed. With regard to the former point, the framework of analysis for unjust enrichment, as accepted in a number of

[9] Sheehan (n 1) 172.

[10] See generally Birks (n 1).

[11] Cf. S Hedley, *A Critical Introduction to Restitution* (Butterworths, London 2001) 1–33 who proposes a similar approach i.e. a failure of *quid pro quo*.

[12] Birks (n 1) 257–258.

decisions,[13] is as follows: (1) Has the defendant been enriched? (2) Was the enrichment at the expense of the claimant? (3) Was the enrichment unjust? (4) Is there any specific defence available to the defendant? While Birks relies on some judicial decisions[14] to support his proposed framework, Stevens[15] has rightly criticised the absence of basis approach as not being consistent with the decision of the House of Lords in *Kleinwort Benson*. However, Stevens' argument from authority might be blunted by Lord Walker's recent statement in *Deutsche Morgan*[16] where he expressed a 'tentative inclination' to welcome any tendency to align English law of unjust enrichment more closely to Scottish and civilian law. However, Lord Walker did not feel that this was the right time to make a final decision on this point.[17] In the same case, Lord Hoffmann did not reject Birks' new model of unjust enrichment outright preferring to simply state that it was not necessary in that particular case to decide on this question.[18] Although no holding was made in this case on this point, these observations leave the development of the law of unjust enrichment in the manner suggested by Birks theoretically open.

Apart from the argument from authority, the present writer's criticism of Birks' theory is the way in which he arrived at the conclusion of the inevitability of the absence of basis approach. According to Birks, the unjust factors are a list which can be divided into roughly two groups. Under the first group, the list of unjust factors comprises 'all the situations in which the claimant's intent was sufficiently defective or qualified'.[19] The second list consists of all the situations where the policies behind the facts demand restitution. Consider this crucial passage:

> the list of unjust factors was already miscellaneous. In principle it could admit another reason for restitution . . . But absence of basis is not a deficiency of consent; nor is it a policy dictating that the enrichment should be reversed; it is also not a reason for restitution independent of the other members of the list. This means that it cannot join either of the two groups of unjust factors, and it cannot make a third group of its own. One could not smuggle 'vertebrates' into a list of mammals. In the same way absence of basis cuts across the list of unjust factors.[20]

From this passage, it is clear that Birks' new scheme was motivated by a desire to maintain conceptual tidiness in this area of the law. However, is such a desire sufficient to justify the adoption of an altogether new framework of analysis?

[13] *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 (HL) 227 (Lord Steyn); *Rowe v Vale of White Horse DC* [2003] EWHC 388 (Admin), [2003] 1 Lloyd's Rep 418, 421; *Cressman v Coys of Kensington (Sales) Ltd* [2004] EWCA Civ 47, [2004] 1 WLR 2775, 2785.

[14] *Westdeutsche Landesbank Girozentrale v Islington BC* [1994] 4 All ER 890 (QB); *Guinness Mahon v Kensington & Chelsea Royal London BC* [1999] QB 215 (CA); Birks (n 1) 110-112.

[15] R Stevens, 'Absence of Basis Accepted: Unjust Factors Rejected (chs 5–6)' in A Burrows and others, 'The New Birksian Approach to Unjust Enrichment' (2004) 12 RLR 260, 270.

[16] *Deutsche Morgan* (n 5) [158].

[17] *Deutsche Morgan* (n 5) [155].

[18] *Deutsche Morgan* (n 5) [22].

[19] Birks (n 1) 106.

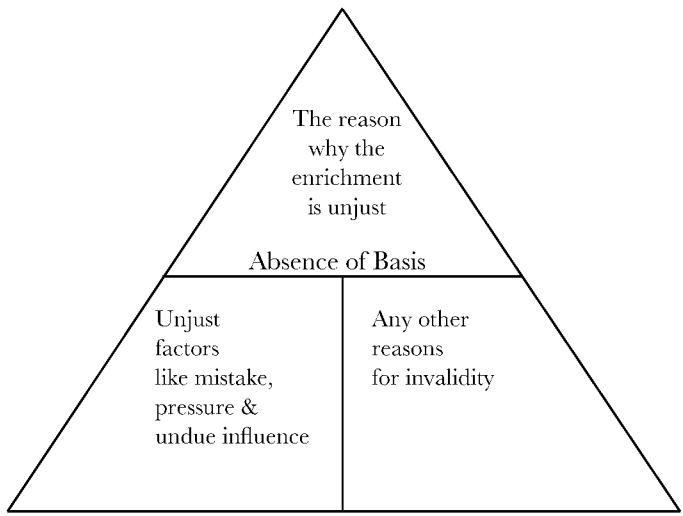
[20] Birks (n 1) 114.

Apropos, as Virgo puts it: 'the law of restitution is not a work of art; something to be looked at and admired. It is a body of law which must operate in the real world. Elegance and function do not always go together. Far better that the body of law works, even if it has some rough edges.'[21]

On a theoretical level, a major criticism of Birks' new theory is that it is conceptually flawed. Birks' project *does* in fact incorporate elements of unjust factors from the category-based approach in what he calls a 'limited reconciliation'.[22] He does not go so far as to say that the claimant's intent is entirely irrelevant. In his view, the relevance of the claimant's intent is 'submerged'.[23] Birks says:

> a pyramid can be constructed in which, at the base, the particular unjust factors such as mistake, pressure, and undue influence become reasons why, higher up, there is no basis for the defendant's acquisition, which is then the master reason why, higher up still, the enrichment is unjust and must be surrendered . . . The base of the pyramid thus consists of all the categories of deficient intent (no intent, impaired intent, and qualified intent) together with all other causes of invalidity. All these work through 'absence of basis'. A single proposition covers every case: an enrichment at the expense of another is unjust when it is received without explanatory basis.[24]

Birks' scheme can be represented diagrammatically as follows:



Model of Birks' New Theory

[21] Virgo (n 1) viii. See also E McKendrick, 'Taxonomy: Does it Matter?' in D Johnston and R Zimmerman (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (CUP, Cambridge 2002) 627, 649–651.

[22] Birks (n 1) 104, 116–117.

[23] Birks (n 1) 104.

[24] Birks (n 1) 116.

This analysis is in fact an unsatisfactory half-way house between a civilian model of unjustified enrichment and the unjust factors approach. Birks does not go as far as prescribing that we now analyse matters in terms of whether the enrichment was *unjustified* rather than *unjust*. Stevens quite rightly asks:

> it may be queried whether a three-stage pyramid is really necessary. If we are concerned with *unjustified* enrichments the intermediation of the super unjust factor "absence of legal ground" may be thought unnecessary. *Unjustified* enrichment could fulfil the normative job done by absence of basis.[25]

Even if these criticisms against Birks' new model are misplaced, the diagram above shows quite starkly that intent based unjust factors (for example mistake) are still important in Birks' hierarchy, as they explain in large part why the enrichment lacks a basis.[26] Although Birks says the relevance of intent is now 'submerged', the presence of an unjust factor is usually the primary reason why the enrichment *cannot* be rationalised as a transfer pursuant to a contract, gift or trust; the unjust factor negates the finding of a contract, gift or trust and demonstrates that such enrichment was made without a basis. In particular, mistake remains very pertinent to Birks' latest theory on two levels. For example, if the claimant was labouring under a mistake of law (in absence of a contract) when making the transfer, this will bring the transaction into the next level of Birks' pyramid, ie an enrichment made where there is an absence of basis. Therefore, restitution is justified. In cases where restitution is allowed, the mistake usually *illuminates* why there is an absence of basis for the transfer of the enrichment. Even in situations where there is no contract, gift or trust to speak of, the claimant's intent might still be relevant in Birks' scheme. For example, where the claimant can demonstrate that the enrichment was made due to a mistake in discharge of a non-existent obligation, it follows that there is also an absence of basis for the enrichment. Thus, even accepting Birks' new model at face value, the enquiries under consideration in this article are still relevant and can be easily accommodated within Birks' new framework.

D Payment of Time Barred Debt

The first category in Lord Mansfield's negative paradigm is a time barred debt. Does this restriction against recovery survive *Kleinwort Benson*? It is foreseeable that such a claimant would now argue: 'I was mistaken with regard to the Statute of Limitation. If I had known, I would never have paid the debt'. *Prima facie*, this assertion seems to satisfy the elements of an unjust enrichment claim which entitle a claimant to restitution.

But is such a claim sustainable? To assess this argument, we first have to determine whether the claimant was mistaken. A mistake is a state of mind where

[25] Stevens (n 15) 272.
[26] A point made by Lord Walker in *Deutsche Morgan* (n 5) [158].

a person's belief is inconsistent with the facts.[27] A mistake is arguably distinguishable from a state of ignorance.[28] In most cases, the debtor pays the money because she overlooked or forgot about the time bar. So, can we say in such a situation that the debtor is more properly characterised as being ignorant of the time bar but not mistaken? On balance, this characterisation is not convincing. Although the debtor was ignorant of the time bar, it could be said that the debtor paid while labouring under a *tacit* mistake.[29] A state of ignorance is when the person's state of mind is a complete blank with regard to the relevant fact.[30] In this case, the debtor's state of mind was not a complete blank with regard to the enforceability of the obligation. Hence, it is more convincing to say that the debtor paid under the tacit mistaken belief that the underlying obligation was enforceable. *David Securities Pty v Commonwealth Bank of Australia*[31] provides some indirect support for this argument. In this case, a sum of money which was paid in ignorance of the existence of a statute that avoided a contractual term was successfully recovered by the payor. This case could be argued to stand for the proposition that a person is regarded as mistaken even though the mistake was a tacit mistake as to the enforceability of the contractual obligation.

Despite the fact that a debtor who pays out on a time-barred debt might *prima facie* be characterised as mistaken, there are several reasons why a court should be wary of allowing restitution. First, a restitution claim does not further the policies behind time bar statutes. It is possible to identify four reasons why claims are barred after a period of time, namely: (i) time bars protect persons who have paid their debts and destroyed proof of payment;[32] (ii) 'long dormant claims have often more of cruelty than of justice in them';[33] (iii) a statutory limitation scheme exists to discipline litigants for sleeping on their rights;[34] and (iv) it is against public interest to ask courts to determine disputes on unreliable evidence.[35] All these policy reasons

[27] See *Kelly v Solari* (1841) 9 M & W 54, 58, (1842) 152 ER 24, 26; *Roles v Pascall & Sons* [1911] 1 KB 982 (CA) 987; *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407, [2003] QB 679, 690. See also Restatement of the Law, Second, Contracts (St. Paul, Minn, American Law Institute Publishers 1981–1983) s 151 which asserts: 'A mistake is a belief that is not in accord with the facts'.

[28] See G Jones (ed), *Goff and Jones: The Law of Restitution* (7th rev edn Sweet and Maxwell, London 2007) 187–188; D Sheehan, 'What is a Mistake?' (2000) 20 LS 538, 539; S Hedley, 'Unjust Enrichment: A Middle Course' (2002) 2 OUCLJ 181, 189; HW Tang, 'Restitution for Mistaken Gifts' (2004) 20 JCL 1, 5–8. Cf A Burrows, *The Law of Restitution* (2nd edn Butterworths, London 2002) 144–145; T Krebs, *Restitution at Crossroads: A Comparative Study* (Cavendish, London 2001) 37; R Grantham and C Rickett, *Enrichment and Restitution in New Zealand* (Hart, Oxford 2000)119–120; *Deutsche Morgan* (n 5) [64].

[29] See Tang (n 28) 8–9.

[30] EA Farnsworth, *Alleviating Mistakes: Reversal and Forgiveness for Flawed Perceptions* (OUP, Oxford 2004) 31.

[31] (1992) 175 CLR 353 (High Court of Australia).

[32] *A'Court v Cross* (1825) 3 Bing 329, 130 ER 540.

[33] *A'Court* (n 32).

[34] *Board of Trade v Cayzer, Irvine and Company, Ltd.* [1927] AC 610 (HL) 628.

[35] *R B Policies at Lloyd's v Butler* [1950] 1 KB 76 (KB); *Edwards v Edwards* [1968] 1 WLR 149 (P, D & Admlty); *Biss v Lambeth, Southwark and Lewisham Health Authority* [1978] 1 WLR 382 (CA).

account for why a court will not *enforce* statutorily barred claims; but these reasons do not provide a justification for asking a court to *reverse* a payment by a debtor who overlooked a time bar defence. In the latter scenario, the creditor is not asking the court to enforce a claim. Rather, it is the debtor who is inviting the court to help assert a defence *ex post facto*. The primary objections to enforcing a time-barred claim no longer exist in these circumstances. This analysis has some support from the cases on acknowledgement and part payment of a debt.[36] The notion of acknowledgement started out as a judge-made rule to combat the perceived unfairness of limitation statutes. Initially, the rationale for this doctrine was that if the debtor acknowledged or made part payment on the debt, the debtor was regarded as making a fresh promise to pay the debt.[37] Hence, time began to run anew from the date of the promise. Obviously, premising a theory on an implied promise in this context would present some formidable problems. As Lord Sumner pointed out, the task of finding an implied promise was very difficult since 'the decisions on the exact meaning and effect of the precise words employed by generations of shifty debtors, are . . . irreconcilable.'[38] Nevertheless, the rule of part payment and acknowledgement has since been statutorily recognised, although the implied promise justification has since been abandoned. In its modern form, s 29(5) of the Limitation Act 1980 provides that time begins to run against the debtor afresh from the date that the debtor acknowledges or makes part payment on the debt. The argument that is made here is that a payment of a time-barred debt is similar to an acknowledgement and part payment of a debt in that these are instances of admission that the debt was due.[39] Hence, the courts should not order restitution on a payment made in ignorance of a time bar defence.

Second, the court's attitude towards time-bars has always been that it is an *affirmative* defence which must be specifically pleaded in the defendant's statement of case.[40] Lord Cairns LC stressed in *Dawkins v Penrhyn*[41] that:

> it cannot be predicated, that the defendant will appeal to the Statute of Limitations for his protection; many people, or some people at all events, do not do so; therefore you must wait to hear from the defendant whether he desires to avail himself of the defence of the Statute of Limitation or not.

If the limitation issue is not raised, the action is perfectly sound. Thus, the court might very well adopt a similar attitude in a case where a person pays a debt overlooking a statutory bar. The onus of raising the defence lies squarely on the debtor.

[36] See generally *Surrendra Overseas Ltd v Government of Sri Lanka* [1977] 1 WLR 565 (QB).

[37] See *Hyleing v Hastings* (1699) 1 Ld Raym 389.

[38] *Spencer v Hemmerde* [1922] 2 AC 507 (HL), 534.

[39] However, it is conceded that s 29(5) of the Limitation Act 1980 does not revive the cause of action where a debtor pays a time-barred debt. Section 29(7) expressly stipulates 'a right of action, once barred by this Act, shall not be revived by any subsequent acknowledgment or payment.'

[40] See *Ketteman v Hansel Properties* [1987] AC 189 (HL) 219.

[41] (1878) 4 App Cas 51 (HL) 59. See also *Dismore v Milton* [1938] 3 All ER 762 (CA) 763; *Walkley v Precision Forgings Ltd* [1979] 2 All ER 548 (HL) 558.

Finally, it is important to note that most time bars are prescriptive in effect. The statutes do not usually have the draconian effect of totally extinguishing the creditor's right; they bar only the remedy and not the right.[42] Most limitation provisions are merely procedural and do not affect the underlying substantive right. Although this distinction is slender, there are important implications that flow from it. The right continues to exist even though it cannot be enforced by court action. Even though a creditor cannot recover a time-barred debt by court process, the law allows the creditor to obtain payment in various other ways. A creditor might recover a statute-barred debt through appropriation,[43] account stated[44] or by exercising a creditor's lien.[45] In fact, the existence of the creditor's right of appropriation weakens the argument that restitution is available on the ground of mistake of law. Appropriation works like this: if the debtor makes a payment without specifying a particular debt, the creditor is entitled to appropriate it to a time-barred debt at any time before the commencement of proceedings. A right to restitution on a payment overlooking a time bar would obviously be inconsistent with the creditor's right of appropriation. If such a restitutionary right exists, the debtor could defeat the creditor's appropriation by asserting mistake of law and demand the sum of money to be returned to the debtor. It is highly unlikely that in abrogating the mistake of law bar to a restitutionary action, the House of Lords in *Kleinwort Benson* also intended to abolish the right of appropriation.

Although there are convincing policy reasons for not allowing a restitution claim where a debtor pays a time-barred debt, there is still the problem of explaining in doctrinal terms why this is so. *Prima facie*, the action satisfies all the usual elements of a restitutionary action for a mistaken payment. There is a causative (albeit tacit) mistake of law which induced the payment. It is suggested that the courts should lay down a rule precluding recovery in this situation on policy grounds.[46] This rule can be justified on the following grounds: (i) restitution would not further the general policy of the statute of limitation; (ii) the act of payment on a statute-barred debt might be characterised as an admission that the sum was due; and (iii) that time bar is an affirmative defence which must be specifically asserted by the debtor.

[42] See *Phillips v Eyre* (1870) LR 6 QB 1 (Ex Ch) 29; *Black Clawson v Papierwerke* [1975] AC 591 (HL) 630. The exceptions to the general rule are sections 3(2), 17 and 25(3) of the Limitation Act 1980, which could be interpreted as extinguishing the claimant's right. Section 25(3) thereof, however, was repealed by the Patronage (Benefices) Measure 1986, s 4(3).

[43] See *Mills v Fowkes* (1839) 5 Bing N C 455; *Nash v Hodgson* (1855) 6 De G M & G 474; *Friend v Young* [1897] 2 Ch 421.

[44] *Nash v Hodgson* (n 43).

[45] See, *Spears v Hartly* (1799,1801,1819) 3 Esp 81, 170 ER 545; *Higgins v Scott* (1831) 2 B & Ad 413; *Curwin v Milburn* (1889) 42 Ch D 424 (CA); *Re Brockman* [1909] 2 Ch 170 (CA).

[46] Such a rule would be similar to the rule barring restitutionary recovery once the recipient has threatened to take legal proceedings. See *Moore v Vestry of Fulham* (1895) 1 QB 399 (CA); *William Whiteley Ltd v R* (1909) 101 LT 741 (KB); *Woolwich Equitable Building Society v IRC* [1993] AC 70 (HL) 165.

E Money Paid Pursuant to Contracts Made During Infancy

The next limb of Lord Mansfield's negative paradigm to be examined is benefits paid pursuant to contracts made during infancy. Is restitution possible post *Kleinwort Benson*? Can a person who paid money in reliance on such a contract succeed in an unjust enrichment claim premised on the assertion of mistake of law? In order to answer these questions, we must look at the statutory and common law developments since Lord Mansfield's time. A minor is statutorily defined as a person who has not yet reached the age of 18.[47] Essentially the modern position is this: contracts with minors fall into one of three heads:[48] first, contracts for necessaries and beneficial contracts of service are valid; second, contracts where the minor acquires an interest of a permanent or continuous nature, for example, acquisition of shares or land, are voidable. These contracts are binding on the minor unless she repudiates the contract while still a minor or within a reasonable time after reaching the age of majority. Finally, all other contracts that are not continuous in nature are unenforceable against the minor unless the minor ratifies the contract on reaching the age of majority.

Lord Mansfield's restriction against restitutionary recovery is true with regard to contracts for necessaries and beneficial contracts of services.[49] Since the minor is bound by such contracts, it is inappropriate to order restitution. What is uncertain is whether restitution is similarly unavailable where the minor is entitled to avoid the contract. Can the minor or adult ask for restitution of benefits transferred pursuant to the contract? The older cases suggest that a minor is only allowed restitution for benefits transferred pursuant to a void contract, if the minor can establish a *total* failure of consideration.[50] Further, what amounts to a total failure is construed strictly. As seen in *Steinberg*,[51] the mere fact that the minor was allotted shares was considered as a form of consideration. Similarly, in *Valentini*,[52] the use of the premises for a few months was considered to be sufficient consideration. And in *Pearce*,[53] the use of the car for four days was enough to negative a finding of a total failure of consideration.

Goff and Jones argue against the insistence on a total failure of consideration before allowing restitution by saying that:

> . . . the question should be whether the minor has made *restitution in integrum* . . .[54] A minor who cannot restore the *status quo* should be unable to avoid the contract; if he has restored

[47] Family Law Reform Act 1969 s 12.
[48] G Treitel, *The Law of Contract* (Sweet & Maxwell, London 2003) 539–57.
[49] *Ryder v Wombwell* (1868) LR 4 Exch 32, 38; *Zouch v Parsons* (1763) 3 Burr 1794, 97 ER 1103.
[50] See *Corpe v Overton* (1833) 10 Bing 252, 131 ER 901; *Valentini v Canali* (1889) 24 QBD 166 (QB); *Steinberg v Scala (Leeds) Ltd* [1923] 2 Ch 452 (CA); *Pearce v Brain* [1929] 2 KB 310 (KB)..
[51] *Steinberg* (n 50).
[52] *Valentini* (n 50). See also *Holmes v Blogg* (1818) 8 Taunt 508, 129 ER 481.
[53] *Pearce* (n 50).
[54] Goff and Jones (n 28) 640.

the *status quo*, he should be able to avoid the contract and recover benefits conferred thereunder.[55]

This analysis is eminently sensible. The requirement of total failure of consideration was probably developed so that adults who provided minors with some benefits that were consumed by the minor would not be on the losing end. However, a strict insistence on a total failure of consideration before a minor is entitled to restitution does not further the policy of protecting the minor from being taken advantage of by unscrupulous adults and saving the minor from her own imprudence. The insistence on a total failure of consideration makes the law lean too heavily in favour of the adult's interest. Further, the requirement of a total failure of consideration is too blunt a tool to balance the tension between protecting both the interests of the minor and the adult.[56] The current position has the following unfortunate effect: if the minor paid the money up-front and received some form of consideration, however insignificant, that money is irrecoverable. This result would therefore depend on a question of fortuitous timing of when the payment was due under the contract. As a matter of policy, a rigid adherence to total failure of consideration would do injustice in most cases.

It is now possible to recast the ground of restitution in this area as either based on the incapacity of the minor or as a mistake of law.[57] The latter point requires some explanation. The mistake of law is with regard to the minor's ability to make a valid contract. Once the claim is re-formulated in this way, then the restitution claim is freed from the requirement that the failure of consideration must be total. Any benefit provided by the adult to the minor would be analysed under the defence of change of position instead. However, that is not the end of the story. Just because the contract has been avoided due to incapacity does not mean that the policies shaping the law in this area are irrelevant in the restitution analysis. It is wrong to assume that a minor's right to restitution is simply a matter of applying the following formula:

Minor's right to restitution = (Benefits transferred by the minor to the adult) – (Benefits transferred by the adult to the minor).

In deciding whether to order the minor to provide counter-restitution, there are two main considerations that must be kept in mind. First, the adult must establish that she dealt in good faith with the minor and the contract was fair and reasonable. Second (and this is where the policies on minor's contracts might affect the restitution inquiry), the court must be careful in not indirectly enforcing the contract that has been avoided by ordering the minor to make counter-restitution to the adult. Therefore, the adult's right to counter-restitution ought to be limited

[55] Ibid. A Burrows (n 28) 414, 415.

[56] S Meier, 'Restitution after Executed Void Contracts' in P Birks and F Rose (eds), *Lessons of the Swaps Litigation* (LLP/Mansfield Press, London 2000), 187–93.

[57] *Kleinwort Benson* (n 5).

to a reasonable sum and not necessarily the contract price. In some cases, where the court may feel that it is imperative to uphold the policy of protecting the minor from her own imprudence, the court could deny counter-restitution altogether. The following example illustrates this point. Suppose a minor leased a very luxurious flat in Knightsbridge which she could ill-afford. The minor paid a huge deposit to the defendant and stayed in the premises for a few months before avoiding the contract. In such a situation, the court would have to balance the need to protect the minor from her own foolishness with the adult's right to counter-restitution. If the court gives primacy to the former, then the adult may not obtain full counter-restitution of the value of the rent in the open market. The appropriate counter-restitution in this case would simply be the value of accommodation which the minor would require for the relevant period of time bearing in mind her station in life.

Having gone through the law in some detail, we are now in the position to assess the validity of the second limb of Lord Mansfield's negative paradigm against restitutionary recovery. On balance, it is suggested that Lord Mansfield's restriction against restitutionary recovery is only *partially* true with regard to money paid pursuant to a contract made by a minor. A minor is not entitled to restitution for benefits transferred with regard to a contract for necessaries or beneficial contracts of services because such contracts are binding on the minor. However, recent developments and very influential academic commentators suggest that a blanket rule precluding minors or adults from asking for restitution in contracts that are avoided will not survive for much longer. The preferable position is that the minor may obtain restitution for benefits transferred subject to making *reasonable* counter-restitution of benefits received. Likewise, the adult ought to obtain *reasonable* restitution of benefits conferred on the minor subject to the adult making counter-restitution to the minor. What amounts to 'reasonable' would depend on the policy of the law in this area, ie to protect the minor from her own foolishness and to prevent the minor from being taken advantage by unscrupulous adults.

F Principal and Interest Paid on an Usurious Contract

For the purposes of our enquiry, it is sufficient to note that Lord Mansfield's third example of usurious contracts has been superseded by developments in the law.[58] There is now no general rule against payment of interests in contracts. As regards consumer credit, the matter is now governed largely by the Consumer Credit Act 1974. Sections 137 to 140 of this Act empower the court to reopen a credit bargain regarded as extortionate. This power extends even to completed trans-

[58] See R Goode, 'Usury in English Law, a Comparative Outlook: Moneylending and its Regulation' (1982) 1 Ariz J Int'l & Comp L 38, for a historical overview of the law of usury.

actions.[59] Section 139(2) provides that the court in opening the transaction may order *inter alia* an account to be taken and the creditor to repay the whole or part of any sum paid under the credit bargain or any related agreement to the debtor. Therefore, it is safe to say that Lord Mansfield's third limb of the negative paradigm against restitutionary recovery is now irrelevant.

G Money Fairly Lost at Play

Statutory developments have also affected the final limb of Lord Mansfield's negative paradigm. Section 18 of the Gaming Act 1845 declares all gaming or wagering contracts as null and void and that no suit shall be brought in court to recover money allegedly won upon any wager. What is interesting is that the statute does not deal directly with the issue of whether restitutionary recovery is possible for bets which have been paid.

After *Kleinwort Benson*, could a gambler who paid on a wager maintain a restitutionary action on the grounds that she made a mistake of law with respect to the effect of the gambling arrangement? Although such a plea is technically possible, it is unlikely to succeed. A gambling and wagering arrangement is fundamentally different from an *ultra vires* swap transaction undertaken by a city council. In the latter, there are strong policy reasons why a city council should not enter into such arrangements. It is therefore unsurprising that the courts will undo the effects of executed *ultra vires* swaps. However, with regard to gambling, the policy of the law is not as severe. Although gaming and wagering contracts are null and void, the law does *not* prevent parties from making bets. In fact, there is a thriving legalised betting industry in most common law countries.[60] A restitutionary right of recovery, if it exists, could be potentially disastrous to this industry. The policy behind the Gaming Act 1845 is probably based on the philosophy that the courts have more important things to do than to adjudicate on gaming and wagering arrangements.[61] Such matters are therefore treated as social and family affairs to be settled outside the courts of law. This reason would therefore be consistent with a no-restitution rule for money paid on a bet. Just as a court will not enforce a winning bet, a court will not order restitution in favour of a wager paid by a losing party.

[59] See *Lyle (BS) Ltd v Pearson* [1941] 2 KB 391 (CA), a decision under the Moneylenders Act 1900. See R Goode, *Consumer Credit Law* (Butterworths, London 1989) 47.21–47.83.

[60] See Gambling Act 2005, which contains regulations of all forms of gambling in the United Kingdom. For an overview of the Gambling Act 2005: C Rohsler and K Conlon, 'An Analysis of the Chief Features of the Gambling Act 2005' (2005) 16 Ent L R 226; D Miers, *Regulating Commercial Gambling: Past, Present and Future* (OUP, Oxford 2004) 329–519.

[61] S Smith, *Atiyah's Introduction to the Law of Contract* (Clarendon Press, Oxford 2005) 213–14. See also Miers (n 60) 59–60.

There are therefore three ways to explain why a restitutionary claim ought to be denied for money lost on a wager even if the gambler can technically establish a mistake of law. First, there are strong social policy reasons against the court undoing such a transaction. Second, wagers once paid are treated at law as valid gifts. '[A] gaming loss, whenever paid is a completed voluntary gift from the loser to the winner'[62] and hence irrecoverable. Third, the Gaming Act 1845 is an affirmative statute which should be raised by the gambler. Otherwise, once the bet has been paid, the court will treat the payor as waiving a benefit which the statute has given her.[63] The upshot of this section is that Lord Mansfield's final category against recovery is still probably valid.

H The Search for a General Principle in Lord Mansfield's Negative Paradigm

1 Natural Obligation as a General Defence: A Case for a Legal Transplant?

Although Birks asserts that a surviving natural obligation is a defence to an unjust enrichment claim,[64] he does not go on to develop what he means by this concept. This is unfortunate because he is aware that the introduction of such a concept can 'become an unruly horse'.[65] There are two possibilities as to what Birks means by a natural obligation. The first is to equate a natural obligation with a moral obligation. In articulating the defence, Birks uses the word 'moral' twice. However, this interpretation of Birks' work is unlikely to be correct because Birks is well known for his disapproval of the use of the notion of morality in the law of unjust enrichment.[66] Therefore, it is more likely that Birks had in mind the second possible meaning—the technical civilian concept of natural obligations.
Sheehan explains the scope of the defence as follows:

> The defence should arise where the claimant has undertaken to do an act, but the contract, under which he undertook the duty, is void. Nonetheless, we see the undertaking of the duty as worthy of some recognition. However, the reason why the contract, or agreement, is void ought not indicate a disapproval of the act itself, or a need to protect the claimant. We see later that this closely parallels those cases in which a moral obligation will support a contract as consideration, albeit that moral consideration is presently substantially more anaemic than the instance of the defence.[67]

[62] *Lipkin Gorman v Karpnale* [1991] 2 AC 548 (HL) 562 (Lord Templeman).
[63] *Bridger v Savage* (1884) 15 QBD 363 (CA) 367.
[64] Birks (n 1) 257–58.
[65] Birks (n 1) 258.
[66] Eg P Birks 'Annual Miegunyah Lecture: Equity, Conscience and Unjust Enrichment' (1999) 23 MULR 1, 20–23.
[67] Sheehan (n 1) 185.

Sheehan argues that in order to discover what is a natural obligation we must 'go behind the mere fact of the nullity of the contract and ask why it is void.'[68] His essay relies heavily on meticulously researched historical and comparative material; Sheehan points out that the concept of natural obligation is found in *inter alia* Roman, Roman-Dutch, Louisiana and Scots law.[69] In particular, Sheehan argues that the fact that 'the presence of a natural obligation bars relief for mistake in Scots law is a powerful indication that it should similarly do so in English law.'[70] In essence, Sheehan is advocating a legal transplant of a civilian concept into the common law.

While Sheehan's historical and comparative work is interesting and valuable, his methodology and conclusion is disputable. Just because a particular concept or doctrine is recognised or has a long pedigree in civilian jurisdictions does not make for a 'powerful indication' that English law should go down a similar road. It is important to understand why legal transplants of Roman law concepts have happened in many countries in Continental Europe. Professor Watson who has written extensively on legal transplants explains why legal borrowings have been the 'most fertile' source of development in the Western world. He identifies two reasons:

> Law is treated [by lawyers] as existing in its own right; it is being in conformity with lawness that makes law law. Hence, first, the means of creating law, the sources of law, come to be regarded as a given, almost as something sacrosanct . . . Secondly, law has to be justified in its own terms; hence authority has to be sought and found. That authority (in some form, which may be perverted) must already exist; hence law is typically backward-looking. These two features make law inherently conservative.[71]

If Watson is right that legal transplants of civilian concepts in European jurisdictions are due largely to the fact that lawyers are generally 'creatures of habit' and 'in altering the law they seek . . . either to play down the extent of the change, or to borrow a rule from some foreign legal system with great prestige and authority',[72] then the case for a legal transplant in English law becomes less compelling. Watson's transplant thesis may explain, on a *descriptive* level, why legal transplants have been so successful in the past in European legal systems. But the reasons for legal transplants are certainly not edifying. The transplant thesis does not provide a *normative* basis on why we should adopt such a technique in interpreting the common law. An argument premised solely on the historical pedigree of Roman law and the conservativeness of lawyers does not provide a convincing justification as

[68] Sheehan (n 1) 186.
[69] Sheehan (n 1) 186.
[70] Sheehan (n 1) 186.
[71] A Watson, *The Evolution of Law* (Blackwells, Oxford 1985) 119. Watson's transplant thesis is lucidly summarised in W Ewald, 'Comparative Jurisprudence II: The Logic of Legal Transplants' (1995) 43 Am J Comp L 489.
[72] Ewald (n 73) 489, 499.

to why we should adopt the civilian concept of natural obligations.[73] It is hard to disagree with Professor Markesinis, another distinguished comparative lawyer, who observed that the clinging to Roman texts and legal history 'only help distance their authors and their ideas slowly but steadily from the real world of practice which, in the common law world, is the bloodline of survival and regeneration.'[74]

A further reason against the recognition of natural obligations in English law is that the concept could have potential ripple effects which might distort the law of contract. Although Sheehan's thesis is that natural obligations are not enforceable,[75] this is not how it is understood in some civilian jurisdictions. Many European jurisdictions enforce promises to perform a natural obligation. In contrast, in English law, it is axiomatic to state that promises are only enforceable where there is valid consideration. The best illustration of how the adoption of a natural obligation concept might affect contract law is provided by the Trento project on *The Enforceability of Promises in European Contract Law*.[76] In this project, hypothetical factual scenarios are discussed by leading commentators from various European countries to map out the laws of European contract law. If we accept the concept of natural obligations, then it means that the following promises are enforceable:

(i) 'Kurt promised a large sum of money to Tony who had suffered a permanent back injury saving (a) Kurt or (b) Kurt's adult child from drowning after a boating accident';[77] and

(ii) 'Ian, now solvent and an adult, had once owed money to Anna that she could not claim legally because (a) Ian's debt has been discharged in bankruptcy, (b) the debt was barred by the passage of time (by prescription or by a statute of limitations) . . . Ian now promises to pay the debt.'[78]

But this result would be at variance with orthodox English contract law. Of course, a response to this criticism is that we should only adopt the concept of natural obligations with regard to unjust enrichment and not contract law. But is a *partial* legal transplant a valid strategy? Is it possible to cherry-pick and choose the different aspects of a foreign doctrine to transplant? It is this writer's view that it is not. The concept of a natural obligation is simply incompatible with the English notion of consideration in contract law. This will be shown later in this section.

[73] See also B Markesinis, *Comparative Law in the Courtroom and the Classroom* (Hart, Oxford 2003) 8–14, who argues that lengthy references to Roman law often add little to the understanding of the common law. In another context, he says colourfully that modern conditions makes 'the linking with the Roman past as meaningful as referring a modern nuclear scientist to Democritus as the father of the atom theory.'

[74] Markesinis (n 75) 10.

[75] Sheehan (n 1) 172, 173.

[76] J Gordley, *The Enforceability of Promises in European Contract Law* (CUP, Cambridge 2001).

[77] Gordley (n 78) 67, 86. The French, Belgian and Austrian reporters believe that their courts would enforce the promise to perform a natural obligation.

[78] Gordley (n 78) 88.

The weakness of using natural obligation as a concept is further exposed by Sheehan's analysis of *Tootal Clothing v Guinea Properties*.[79] The landlord, G agreed to allow T, the tenant, to occupy the premises rent-free for three months on the understanding that work was carried out by T on the premises. G also agreed to pay T £30,000 upon satisfactory completion of the work. The first agreement signed by the parties did not mention that G would contribute to the work; it also stated that 'this agreement sets out the entire agreement of the parties.' However, a second agreement expressed as a supplemental agreement was entered into the same day which provided that G would contribute to the cost of the work. Upon completion, T asked G for £30,000. G refused to pay T and relied on s 2 of the Law of Property (Miscellaneous Provisions) Act 1989 which provided *inter alia* that a disposition of land must be in writing and incorporate all the express terms agreed in one document. T's claim was successful because Scott LJ said that s 2 did not apply to *executed* contracts. Sheehan says this case can be explained on the following ground:

> There was a natural obligation to carry out the agreement. There is simply no reason to go back on the agreement other than that it turned out to be a bad bargain. We recognise that there is nothing wrong with a contract for the sale of land, and that the defendant was not handicapped in a way that requires us to relieve him.[80]

This analysis is unconvincing. Sheehan does not tell us *why* there was a natural obligation on G's part to pay T. It cannot be the case that *every* unenforceable obligation would give rise to a natural obligation; Sheehan fails to identify the crucial elements which raise a natural obligation. Also, this example vividly illustrates the criticism made above, ie that the concept of natural obligation has the potential to distort the law of contract. *Tootal Clothing* is nothing more than a case dealing with formalities where the court was essentially struggling with the age-old dilemma of balancing the need for certainty in the law with regard to formalities and the quest to do justice in the individual case. The Court of Appeal in this case decided to go with the latter.[81] This case has nothing to do with natural obligations. In fact, even if the second contract was avoided by the statute, liability could be imposed on the landlord to make reasonable restitution to the tenant.[82] To say that G had a natural obligation to pay T does not tell us how we should resolve the tension posed by the two distinct policy considerations which underlie the case. Also, the concept of a natural obligation could potentially resurrect the doctrine of part performance, albeit in a modified form. This is because Sheehan seems to be arguing for a position similar to German law that performance of a contract, which has not complied with statutory formalities, will 'heal' the contract. However, this position is untenable, as the doctrine of part performance has been statutorily abolished in this area.

[79] (1992) 64 P & CR 452 (CA). See Sheehan (n 1) 189.
[80] Sheehan (n 1) 189.
[81] See also *Grossman v Hooper* [2001] EWCA Civ 615.
[82] See *Pavey & Matthews Pty Ltd v Paul* (1986) 162 CLR 221 (High Court of Australia).

Ultimately the concept of natural obligation is too vague to be used as a general defence. Although Sheehan valiantly tries to overcome the vagueness objection by confining the defence of natural obligations to void contractual obligations which have been performed, this restriction is still too wide to be a workable doctrine. Contractual obligations can be void for myriad reasons such as *ultra vires*, lack of formalities etc. It is not very helpful to group all these disparate categories together and say that the courts will not reverse the performance pursuant to these obligations if these obligations are 'worthy of some recognition',[83] without telling us specifically what kinds of obligations are deserving of protection. It seems, in Sheehan's view, *all* promissory obligations should *prima facie* be worthy of recognition. Sheehan says:

> the reason why we deny recovery in the void cases is . . . we cannot destroy bargains. Fried, for instance, argues that there is a moral obligation behind every promise, and contracts are binding because of the moral obligation lying behind the promise and counter-promise. If we accept this, it follows that a unilateral promise once acted upon will not bar recovery of the transferred property if the transfer was made under a mistake.[84]

The argument that all promissory obligations are *prima facie* deserving of protection is too wide a starting point. With respect, Sheehan's analysis has concentrated on the wrong issue. We should inquire *not* whether the underlying obligation that has been performed is worthy of protection, but whether the policies behind the doctrine or law which avoided the obligation will be furthered by allowing or denying restitution. The difference between Sheehan's model and this suggested analysis is that in the former, the courts are faced with the unenviable task of making a judgment on the kind of obligations that are worth protecting despite their invalidity, whereas, in the latter, the court will focus on the law which invalidated the obligation, eg gambling, *ultra vires*, formalities and investigate whether reversing the claimant's performance will subvert or further the policies of the law which rendered the obligation void. Take the gambling example which has already been discussed above. The policy behind the Gaming Act 1845 which avoids gambling contracts is that the courts have more important things to do than to decide on such arrangements. Since allowing a restitution claim would not further the policy behind the voidness of gambling obligations, restitution ought to be denied in cases where a gambler pays out on a wager. To be fair to Sheehan, he does raise the policies behind the Gaming Act 1845. But his approach of inquiring whether the underlying obligation is worthy of protection forces him to make the following counter-intuitive assertion that: 'the law expects that you will pay your gambling debts'.[85]

[83] Sheehan (n 1) 185.
[84] Sheehan (n 1) 185.
[85] Sheehan (n 1) 190.

A person sympathetic to Sheehan's project of constructing a defence of natural obligation might argue that *in substance* the proposed analysis of looking at the reason behind the invalidity of the obligation is very similar to Sheehan's thesis. But there is a subtle and important distinction between both analyses. In Sheehan's model, the performance of a void obligation is *prima facie* irreversible because Sheehan makes the assumption that *all* promissory obligations are worthy of protection. However, the analysis suggested by this writer is that restitution will only be ordered where a claimant performed a void obligation if it *furthers* the policy of the law which invalidated the obligation in the first place. In some instances like the gambling situation, both analyses might yield the same result. But in others it might not. The facts of *Kleinwort Benson* provide an interesting illustration of how both analyses might diverge. Recall that this was a case where a city council entered into a swaps agreement with Kleinwort Benson (KB) which was *ultra vires* the city council. The swaps agreement was duly performed and the city council emerged as the 'winner' of the swaps arrangement. When the issue of *ultra vires* came to light, KB instituted a restitution claim premised on mistake of law. Under Sheehan's analysis, the city council could potentially avail itself of the defence of natural obligation. Since the underlying obligation was a promissory obligation, it was an obligation worthy of protection by the courts. Restitution should be denied since the swaps agreement had been performed. But if we look at the underlying basis of why the transaction was void, i.e. *ultra vires*, a strong argument could be made justifying a result mandating restitution because this would further the policies of *ultra vires* doctrine. Otherwise a no-restitution rule would unfairly favour those whose breach of the *ultra vires* rule was more flagrant.

Sheehan's analysis is also weakened by the House of Lords' rejection of the 'spent mistake' defence in *Kleinwort Benson*. This defence originated from a footnote in one of Professor Birks' essays.[86] Birks argued that in an executed contract, a restitution claim should be denied because the mistake had been spent. It could be argued that this defence is quite close to Sheehan's analysis that a restitution claim ought to be denied because it has been performed and the underlying obligation is worthy of recognition. Lord Goff rejected Birks' analysis by holding that this reasoning was:

> incompatible with the ultra vires rule that an ultra vires transaction should become binding on a local authority simply on the ground that it has been completed . . . the ultra vires rule is not optional; it applies whether the transaction in question proves to be profitable or unprofitable.[87]

2 No Unconscientious Retention

Another way of rationalising why the claimant is barred from a restitutionary claim when the facts fall within Lord Mansfield's negative paradigm is to say the

[86] P Birks, 'No Consideration: Restitution After Void Contracts' (1993) 23 UWA L Rev 195, 230.
[87] *Kleinwort Benson* (n 5). See also the speech of Lord Hope, 416.

defendant's retention of the enrichment is not unconscientious.[88] This analysis is consistent with Gummow J's judgment in *Roxborough v Rothmans of Pall Mall Australia Ltd*[89] where the learned judge proposed a test of liability which hinges on the conscientiousness of the defendant's retention of the money paid. However, there are difficulties with this rationalisation as well. The main problem with this approach is that a model of liability based on the equitable notion of unconscientious retention is unlikely to be adopted in favour of an unjust enrichment model in England.[90]

Yet another serious objection with this explanation is the difficulty in pinning down the precise ambit of unconscientiousness used in this context. Kremer, who is one of the leading proponents of this approach, attempts to do so by arguing:

> The notion of 'conscience' let in claims that were simply moral; rights that were not strictly legal but were only claims in honour or morality, by, for example, being unenforceable, still sufficed. Thus, if on the facts pleaded by both parties the defendant could point to nothing that would, in point of honour or conscience raise any semblance of an entitlement to retain the money, M[oney] H[ad] and R[eceived] would lie.[91]

Therefore, according to Kremer, a defendant is entitled to retain the enrichment if the defendant 'could point to [that] which showed some valid legal, equitable or moral claim to be entitled to the money'.[92] He asserts that the notion of conscience entitles a defendant to a defence if she can demonstrate that the payment was pursuant to rights that 'were not strictly legal but were only claims in honour or morality'.[93]

With respect, Kremer's analysis, which depends heavily on notions of honour or morality, will simply not work. Putting aside the longstanding jurisprudential debate as to whether it is possible to reconcile law with morality, it is contended that Kremer's rationalisation of the law is flawed because he fails to articulate any guiding principle which will help us answer this question: what exactly are claims which are payable in honour or morality?[94] He stresses repeatedly that the concept of conscience is not at large but falls to be determined according to the facts of the case; he concedes '[a]lthough relatively few principles have so far emerged

[88] *Bize v Dickason* (1786) 1 Term Rep 285, 99 ER 1097. See also G Palmer, *The Law of Restitution* (Little Brown & Co, Boston 1978) vol III, 357–61.

[89] (2002) 185 ALR 335 (High Court of Australia), 356–64.

[90] See eg *Banque Financière* (n 13); *Rowe* (n 13); *Cressman* (n 13). See also J Beatson and G Virgo, 'Contract, Unjust Enrichment and Unconscionability' (2002) 118 LQR 352; P Birks, 'Failure of Consideration and its Place on the Map' (2002) 2 OUCLJ 1.

[91] B Kremer, 'The Action for Money Had and Received' (2001) 17 JCL 93, 109–10.

[92] ibid 109.

[93] ibid 110.

[94] Cf. M Bryan, 'Unjust Enrichment and Unconscionability in Australia: A False Dichotomy?' in J Neyers, M McInnes and S Pitel (eds), *Understanding Unjust Enrichment* (Hart, Oxford Portland 2004) 47 for a careful analysis of the doctrine of unconscionability in Australian law. However, Professor Bryan's essay deals primarily with unconscionability *vis-à-vis* dealings with persons under a special disability or disadvantage and undue influence.

from the cases, there are already some rough parameters to be used in determining when there is some just claim to retain'.[95] Bearing in mind that there is a paucity of principles, one wonders why Kremer advocates this theory. In his essay, Kremer suggests that the presence of an unenforceable obligation is an example where the retention is not unconscientious. But this does not clarify matters at all. An obligation may be unenforceable due to a variety of reasons. Kremer's analysis does not tell us *what kinds* of unenforceable obligations would bar a restitutionary action save for the invocation of the term unconscientiousness. This is troubling because unconscientiousness can be an elastic concept. Take a hypothetical scenario loosely based on the facts of *Kelly*.[96] Suppose an insured who had been paying his premiums on a life insurance policy for years failed to do so due to a clerical oversight. As a result the policy lapsed. Let us also suppose that the insured had a huge portfolio of other non-life insurance policies with the same insurance company and was always diligent and prompt in maintaining his premiums. Subsequently, the insured died and the insurer paid the money to his widow without realising the policy had lapsed. In such a scenario, is the widow's retention of the money unconscientious? The fact that the beneficiary was a widow, that the mistake was inadvertent and that the insured was a loyal customer of the insurer for many years would lead many people to conclude that although the policy had lapsed, the insurance company had a moral duty to make the payment. But are these factors really relevant?

The final criticism of Kremer's unconscientious retention approach is that it does not have the explanatory force to justify why a claim made on a time-barred debt is irrecoverable. While it is true that Lord Mansfield thought that statute-barred claims are debts which are morally payable,[97] recent case law has suggested otherwise. In *Reeves v Butcher*,[98] Fry LJ said with regard to a limitation defence: '[w]e have not to determine whether the defence here set up is handsome or conscientious but whether it is good at law . . .' Rather more emphatically, Sheen J in *The Gaz Fountain*[99] accepted counsel's suggestion that the defence of limitation was available to a litigant as a matter of absolute right and that there was nothing unfair or reprehensible in raising this defence.

3 Implied Contracts

Professor Hedley has argued that many instances where courts have ordered restitution are not really cases of unjust enrichment.[100] Instead, he rationalises many

[95] Kremer (n 94) 117.
[96] *Kelly* (n 27).
[97] See also *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp (a firm)* [1979] Ch 384 (Ch D) 394 where Oliver J said a plea of limitation was 'an unattractive plea at the best of times.'
[98] [1891] 2 QB 509 (CA) 511.
[99] [1987] 2 Lloyd's Rep 151 (QB).
[100] S Hedley, 'Implied Contract and Restitution' (2004) 63 CLJ 435.

of the categories as examples which are 'very like a contract . . . [and can be characterised either as] a quasi-contract, a virtual contract, or an almost-contract.'[101] These categories are extremely similar to a contract save that there is some right to avoid the contractual obligation, for example, failure of contractual capacity, failure to follow the requisite formalities and failure of legality. Hedley argues forcefully for the adoption of the following four-stage analysis to deal with situations like this:

(i) an arrangement between two or more parties which would be a contract except for the application of one specific rule of law ('x'), and
(ii) the arrangement has been at least partly acted on, and
(iii) one party now seeks a remedy which would have arisen if the arrangement were contractual, then that remedy will be granted so long as
(iv) it can be granted without subverting the specific rule of law ('x').[102]

If Professor Hedley is right, is it possible to rationalise Lord Mansfield's negative paradigm against recovery on a similar analysis? In the spirit of friendly amendment, we can modify Hedley's analysis as follows: we substitute stages (iii) and (iv) with the following: '(iii) the party who performed pursuant to the arrangement now seeks restitution for the performance; (iv) restitution should be denied so long as it does not further the specific rule of law ('x')'.

On reflection, it is not possible to apply a modified version of Hedley's analysis to explain Lord Mansfield's negative paradigm. The notion of implied contract is normatively too weak as a justification for the categories listed in Lord Mansfield's examples. The difficult unanswered question is this: why do we treat certain arrangements as implied contracts once money has been paid? Hedley's response to this criticism would be to say that we must look carefully at the facts and the policy concerns surrounding the case. But it is difficult to see how the notion of implied contract contributes to our understanding of the policy underlying these cases. Also, is it really illuminating to group together varied categories such as contractual incapacity with instances of lack of compliance with formalities under the rubric of implied contracts? This writer is of the view that it is not. The policy concerns of minority contracts have little to do with contracts that are in breach of formality requirements. Therefore, the conclusion that is reached is that as a normative principle, the idea of an implied contract is too weak to be an adequate explanation of Lord Mansfield's negative paradigm against restitutionary recovery.

4 A Pragmatic Analysis—Looking at the Reasons behind the Invalidity

While this paper has rejected Sheehan's and Hedley's abstraction of a general principle to explain Lord Mansfield's negative paradigm, their work is extremely

[101] Hedley (n 103) 440.
[102] Hedley (n 103) 441.

valuable because they rightly point out that the key to explaining the cases must lie behind the reason why the obligation was rendered invalid. Instead of embarking on an ambitious project of trying to find an overarching principle in this area, a pragmatic approach is adopted in this paper. With regard to void obligations already performed, a court should investigate the policy reasons behind the invalidity and consider whether allowing a restitution claim would further or subvert the policies of the law in question. If a restitution claim does not further these policies, then a restitution claim should be denied. On the other hand, if a no-restitution result would subvert the rule which rendered the obligation invalid, then such a claim ought to be allowed.

At the moment there are two defences against restitutionary recovery when a mistake of law is asserted as a ground of recovery emerging from Lord Mansfield's negative paradigm. These defences sit alongside the rule that, once litigation is threatened, a payor cannot succeed in a restitutionary claim.[103] The first defence is that a claimant cannot get her money back on a payment made pursuant to a debt which is time-barred even if she can prove a mistake of law. Stated briefly, the reasons why restitution ought to be denied in this context are because: (i) time bar statutes are an affirmative defence which must be raised by the debtor. Otherwise, for all intents and purposes, the claim is valid; and (ii) most statutes of limitations do not extinguish the underlying action. In fact, the law provides the creditor with other means to satisfy her claim such as appropriation. A right to restitution is inconsistent with the creditor's right to appropriate.

With regard to the second defence, the rule is that payment on a gambling loss cannot be recovered as part of money paid under a mistake of law. There are two possible explanations for this. First, a gaming loss is treated in law as an irrevocable voluntary gift to the payee.[104] Alternatively, a gambler is taken as having waived the benefit of the statute which avoids executory gambling contracts when she pays out pursuant to a lost wager.[105] The Gaming Act 1845 is similar to the Statute of Limitation in the respect that both are affirmative defences where the onus of raising it lies with the payor. This position is justified because gambling contracts are not *per se* illegal; the law only avoids *executory* gambling contracts. Also, this defence is borne out of necessity bearing in mind that there is a thriving legalised betting industry in most countries. This business of betting may theoretically collapse if a gambler is allowed restitution for money paid out on a gambling loss on the ground of a mistake of law.

Modern developments in the law have superseded the other two categories in Lord Mansfield's negative list—money paid out pursuant to a contract made while still a minor and payment on usurious contracts. With regard to the former, there are strong reasons to believe that the courts will no longer adhere to a dogmatic

[103] *Moore* (n 46); *William Whiteley* (n 46); *Woolwich* (n 46).
[104] *Lipkin* (n 63) 562.
[105] *Bridger* (n 64) 367.

insistence on the requirement of a total failure of consideration before a minor is allowed restitution. Restitution ought to be ordered so long as the minor is able to make reasonable counter-restitution to the other party and such counter-restitution does not have the effect of acting as an indirect means of enforcing the contract. Developments in the law have also replaced the common law concerning usurious contracts. With regard to consumer contracts, under s 139(2) of the Consumers Credit Act 1974, the courts are empowered to re-open completed transactions.

I Conclusion

This paper has investigated whether the concept of natural obligations ought to be imported into the common law of unjust enrichment. The basic thesis of this paper is that such a legal transplant is unnecessary. The better view is that the law of unjust enrichment ought to be balanced with the recognition of two defences against restitutionary recovery—money paid pursuant to a time-barred debt and money paid in relation to a gambling loss may not be recovered simply by proving a mistake of law. These two defences are policy-based defences and they sit alongside the defence that money paid pursuant to a threat to sue is irrecoverable. The other important theme which has been explored in this paper is whether any underlying principle may be discerned within Lord Mansfield's negative paradigm. Several approaches were considered—the Birks/Sheehan civilian-influenced natural obligation rule, Kremer's equitable unconscientious receipt explanation and Professor Hedley's implied contract model. Ultimately, it is suggested that none of these abstractions provide a helpful basis to explain Lord Mansfield's negative paradigm