

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 9 - Restitution

Chapter 29 - Restitution ¹

Section 1. - Introduction

(a) - Nature of Restitution ²

The essence of restitution

29-001

⚠ The law of restitution is concerned with whether a claimant can claim a gain from the defendant, rather than whether a claimant can be compensated for loss suffered. Restitutionary remedies are therefore distinct from those which are traditionally available in contract or in tort, as was recognised by Lord Wright ³ ⚠:

“It is clear that any civilised 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 derived 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 recognised to fall within a third category of the common law which has been called quasi-contract or restitution.”

The House of Lords recognised on a number of occasions that restitutionary remedies are available where the defendant has been unjustly enriched at the expense of the claimant. ⁴ It appears, however, that unjust enrichment is not the only principle which will trigger restitutionary remedies, since such remedies may also be awarded where the defendant has obtained a benefit by the commission of a wrong ⁵ or where the claimant can bring a claim to recover property held by the defendant in which the claimant has a proprietary interest. ⁶

Common Law

29-002

⚠ The obligation to make restitution can arise in a wide variety of situations, but their common framework is that they involve a special relationship between two persons where the law imposes a duty on one person to pay a sum of money or, exceptionally, to deliver specific property to another or to hold property for another. This relationship is based either upon the involuntariness of an initial payment of money, transfer of property or the provision of a service, the qualified nature of the payment, transfer or provision, or the conduct of the transferee. A restitutionary claim resembles a contractual one in that liability is imposed upon one person to pay money or transfer property to another person, yet it differs radically in that restitutionary liability is imposed by the law irrespective of the agreement of the parties. Indeed, the law of restitution is subordinate to the law of contract in that, if a contractual relationship subsists between the parties, the contractual regime will prevail. ⁷ ⚠ Restitutionary liability, although like tortious liability in that it is imposed upon the defendant by

operation of law, differs from such liability in that it need not be founded on the commission of any wrongdoing, although, as will be seen, such remedies are sometimes available where the defendant has profited from the commission of a tort.⁸

Equity

29-003

The Common Law has not been alone in providing restitutionary remedies. Equity independently developed some principles which are aimed at the same result of giving up to the claimant benefits obtained. In Equity such restitutionary remedies may involve restoring value to the claimant or the return of property obtained or its traceable substitute. In Equity restitutionary principles have been influential in a number of ways. First in the constructive trust, whereby a defendant is deemed to be a trustee of property for the claimant by operation of law, so that the claimant as beneficiary is able to recover what is due to him.⁹ Secondly, the better developed rules of tracing in Equity enable the claimant to recover property or its substitute from the defendant, despite being mixed with other property.¹⁰ Thirdly, there is the equitable remedy of an account of profits which involves the return of value to the claimant when the defendant has profited from the commission of an equitable wrong.¹¹ Fourthly, the equitable doctrine of acquiescence has enabled relief to be given to a person who has expended money on the property of another.¹² Fifthly, the equitable concept of unconscionability has proved important in the development of certain grounds of unjust enrichment, especially those relating to the exploitation of the claimant by the defendant.¹³ In the United States these different principles of Common Law and Equity were amalgamated into a single topic in the law called "Restitution", as is evidenced by the volume published in 1937 entitled *The American Law Institute's Restatement of the Law of Restitution, Quasi-Contracts and Constructive Trusts*.¹⁴ English lawyers are now aware of the interrelation of Common Law and Equity in the law of restitution,¹⁵ and it has been said that, in the particular context of restitution for unjust enrichment, there is no need to treat the action for money had and received and an action for an equitable remedy "as any longer depending upon different concepts of justice".¹⁶ Accordingly, in this Chapter some indication will be given of the scope of equitable claims and remedies which have a restitutionary function.



Classification

29-004

❗ There is no generally accepted method of classifying the instances of restitution. Various methods of classification have been suggested in lieu of the old method of classifying by the form of action used, e.g. the action for money had and received, the action for money paid, quantum meruit (for the value of services provided) or quantum valebat (for the value of goods transferred). But these causes of action were abolished by the Common Procedure Act 1852 and, whilst they are useful to describe the nature of the benefit obtained by the defendant, they do not assist in the definition of the cause of


action.¹⁷ ❗ A pragmatic classification could be adopted instead with reference to the route by which a particular type of benefit was received,¹⁸ such as "restitution" where the defendant is obliged to restore or pay for a benefit received from the claimant, "reimbursement" where the defendant is obliged to repay the claimant in respect of money paid by the claimant to a third person, "liability to account to the claimant" for money received from a third party and "recompense", such as quantum meruit claims for services rendered. But, with the recognition of the unjust enrichment principle by the House of Lords, and, further, the apparent recognition that the law of restitution is founded on three distinct principles, this pragmatic classification will not be adopted here, especially because the nature of the claim is typically affected neither by the nature of the benefit nor the route by which it was received. Consequently, the classification adopted in this chapter will focus on the nature of the underlying claim, namely unjust enrichment, wrongdoing or property claims.

1. For a full treatment of the subject matter of this chapter, see: Burrows, *The Law of Restitution*, 3rd edn (2011); Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016); Virgo, *The*

- Principles of the Law of Restitution*, 3rd edn (2015). See also Beatson, *The Use and Abuse of Unjust Enrichment* (1991); Birks, *An Introduction to the Law of Restitution* (1985); Birks, *Unjust Enrichment*, 2nd edn (2005); Maddaugh and McCamus, *The Law of Restitution*, 2nd edn (2004); McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014); Mason, Carter and Tolhurst, *Restitution Law in Australia*, 2nd edn (2008); Palmer, *The Law of Restitution* (1978) (four Vols); The American Law Institute's Restatement of the Law Third, Restitution and Unjust Enrichment (2011).
2. Burrows at pp.1–13; Virgo at pp.1–18.
 3.  *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] A.C. 32, 61. See also Lord Wright, *Legal Essays and Addresses* (1939), p.6. In *Revenue and Customs Commissioners v Investment Trust Companies* [2017] UKSC 29, [2017] 2 W.L.R. 1200 at [59], Lord Reed recognised that the purpose of restitution is to reverse a defective transfer and not to compensate for loss suffered.
 4. *Lipkin Gorman (A Firm) Ltd v Karpnale* [1991] 2 A.C. 548; *Woolwich Equitable Building Society v IRC* [1993] A.C. 70; *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669; *Kleinwort Benson Ltd v Glasgow CC* [1999] 1 A.C. 153; *Banque Financière de la Cité v Parc Battersea Ltd* [1999] 1 A.C. 221; *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 A.C. 349; *Foskett v McKeown* [2001] 1 A.C. 102; *Deutsche Morgan Grenfell Group Plc v IRC* [2006] UKHL 49, [2007] 1 A.C. 558; *Sempra Metals Ltd v I.R.C.* [2007] UKHL 34, [2008] 1 A.C. 561; *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752.
 5. See below, paras 29-145 et seq.
 6. *Foskett v McKeown* [2001] 1 A.C. 102. See below, paras 29-177 et seq.
 7.  *Guinness Plc v Saunders* [1990] 2 A.C. 663, 697–698 (Lord Goff); *Taylor v Motability Finance Ltd* [2004] EWHC 2619 (Comm) at [23] (Cooke J.); *Mowlem Plc v Stena Line Ports Ltd* [2004] EWHC 2206; *S and W Process Engineering Ltd v Cauldron Foods Ltd* [2005] EWHC 153 (TCC); *Lumbers v W Cook Builders Pty Ltd* [2008] HCA 27, para.46 (Gleeson C.J.); *Costello v MacDonald* [2011] EWCA Civ 930, [2012] Q.B. 214. The contract itself may provide for a restitutionary remedy, but this is a contractual rather than a restitutionary remedy within the distinct law of restitution. In *Co-operative Bank Plc v Hayes Freehold Ltd* [2017] EWHC 1820 (Ch) at [149] Henry Carr J. recognised that the doctrine of unjust enrichment could not be used to relieve a party of the consequences of the bargain which he or she had made.
 8. See below, paras 29-147 et seq.
 9. See below, para.29-168.
 10. See below, para.29-172.
 11. See below, para.29-163.
 12. See below, para.29-169; *Ramsden v Dyson* (1866) L.R. 1 H.L. 83; *Plimmer v Wellington Corp* (1884) 9 App. Cas. 699, 710; *Blue Haven Enterprises Ltd v Tully* [2006] UKPC 17, see Watts (2006) 122 L.Q.R. 553.
 13. See below, paras 29-143 et seq.
 14. Seavey and Scott (1938) 54 L.Q.R. 29; Lord Wright, *Legal Essays and Addresses*, pp.34 et seq. For the history of the unjust enrichment principle in the United States see Kull [2005] O.J.L.S. 297. See now Restatement of the Law Third, Restitution and Unjust Enrichment (2011).
 15. Winfield (1948) 64 L.Q.R. 46. See also Lord Wright (1936) 6 C.L.J. 305 (reprinted in his *Legal Essays and Addresses*, p.1); Holdsworth (1939) 55 L.Q.R. 37; *Nelson v Larholt* [1948] 1 K.B.

339, 343 (see also Denning (1949) 65 L.Q.R. 37); *Lipkin Gorman v Karpnale Ltd* [1991] 2 A.C. 548, 581; *Westdeutsche Landesbank Girozentrale v Islington LBC* [1994] 4 All E.R. 890 QB and CA, [1996] A.C. 669; *Tribe v Tribe* [1996] Ch. 107; *Pitt v Holt* [2013] UKSC 26, [2013] 2 A.C. 108; Virgo (ed. Getzler), *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (2003), Ch.5; Mason [2007] R.L.R. 1.

16. *Westdeutsche Landesbank Girozentrale v Islington LBC* [1994] 4 All E.R. 890, 914 (Hobhouse J.); see also [1996] A.C. 669.

17.  Burrows at pp.9–13; Virgo at pp.58–61. In *Yeoman's Row Management Ltd v Cobbe* [2008] UKHL 55, [2008] 1 W.L.R. 1752 the House of Lords recognised a distinct restitutionary claim in quantum meruit but without explaining what needed to be proved to establish such a claim or how it differed from a claim in unjust enrichment, which it also recognised as well as a claim for a consideration which had wholly failed. The better view is that these all form the same cause of action which was properly characterised as one in unjust enrichment. See also *Handayo v Tjong Very Sumito* [2013] SGCA 44, at [125] and Havelock (2016) L.Q.R. 470

18. As adopted in some of the earlier editions of this work.

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Section 1. - Introduction

(b) - Historical Introduction ¹⁹

Writs of assumpsit, debt and account

29-005

The action of assumpsit had become the regular remedy for breaches of contract at the beginning of the seventeenth century, and so was considered as the main remedy to enforce consensual obligations. The action of debt was an alternative remedy to enforce such obligations, but it was also used to remedy some claims which were not based on consent, such as claims for a liquidated sum of money due as a penalty under a statute, as a forfeiture under a by-law, as a customary fine or levy, or as a judgment debt. Debt also lay to recover money which had been paid to the defendant for a specific purpose (e.g. to pay to a third person) which the defendant had failed to carry out. ²⁰ The old action of account also embraced some obligations which were not necessarily contractual: in general, it lay to enforce the duty of a guardian, bailiff or receiver to account to the plaintiff for moneys received on his behalf. ²¹ But, through the development of the notion of a "constructive" receiver, account came to be used to recover money paid under a mistake, or money paid for a consideration which had wholly failed. ²² Thus account as well as debt covered some instances of liability to pay money imposed by operation of the law, and not voluntarily assumed under an agreement.

Development of indebitatus assumpsit

29-006

Following *Slade's Case*, ²³ indebitatus assumpsit became a complete alternative to the old writ of debt, and it inherited the wide scope of debt over not only consensual obligations but also some obligations classified in modern law as restitutionary. The rapid development of indebitatus assumpsit in the seventeenth century led to cases where the court permitted the newer and better remedy to replace debt and also account for non-contractual claims, e.g. to recover customary dues levied on foreign goods exposed for sale, ²⁴ and to recover a customary fine due to the plaintiff as lord of the manor. ²⁵ In some respects, indebitatus assumpsit extended the scope of restitutionary remedies: it was allowed upon a quantum meruit to claim a reasonable remuneration where the plaintiff had rendered services or supplied goods to the defendant at the latter's request, but the parties had not fixed the sum to be paid, although it was obvious in the circumstances that neither party intended the services to be gratuitous, or the goods to be a gift. ²⁶ Indebitatus assumpsit soon was employed to remedy many widely differing situations, often under the common formula that the sum of money claimed was "had and received to the use of the plaintiff". Thus it lay to recover money paid under a mistake, ²⁷ or extorted from the plaintiff by duress of his goods, ²⁸ or paid to the defendant on a consideration which totally failed, ²⁹ or to recover profits received by the defendant while wrongfully usurping an office belonging to the plaintiff, ³⁰ or as an alternative remedy to trover for the tort of conversion. ³¹

Implied promise

29-007

It was only by historical accident that all these causes of action were based on the common remedy of indebitatus assumpsit, and the courts treated the alleged promise to pay as purely fictitious. The “promise” or obligation to pay was imposed by the law, and any genuine promise was plainly contrary to the facts, especially when the defendant was actually a tortfeasor. Lord Atkin, referring to such a case, said: ³²

“... it was necessary to create a fictitious contract: for there was no action possible other than debt or assumpsit on the one side and action for damages for tort on the other ... The law, in order to do justice, imputed to the wrongdoer a promise which alone as forms of action then existed could give the injured person a reasonable remedy ... These fantastic resemblances of contracts invented in order to meet requirements of the law as to forms of action which have now disappeared should not in these days be allowed to affect actual rights.”

But, even though the allegation of a “promise” within the action of indebitatus assumpsit for money had and received to the use of the plaintiff was treated as fictitious by the courts, after the abolition of the forms of action by the Common Law Procedure Act 1852, some courts considered that the contractual framework of these actions was not merely a matter of procedure but was one of substantive law. The most important statement of this view was in *Sinclair v Brougham* ³³ where Lord Sumner said:

“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 pay.”

In *Sinclair v Brougham* a building society carried on an ultra vires banking business. On the winding up of the society, the House of Lords held that the depositors could not sue in a common law action for money had and received, since the law could not imply a promise to repay where an actual promise would have been ultra vires the society:

“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.” ³⁴

But it is clear that the “notional or imputed promise” mentioned by Lord Sumner was:

‘... a legal fiction, intrinsically bound up with the defunct action of assumpsit and expressly abolished by s.49 of the Common Law Procedure Act 1852.’ ³⁵

Lord Wright said that Lord Sumner’s observation “was not necessary for the decision of the case”. He did not understand why or how Lord Sumner’s statement “closed the door to any theory of unjust enrichment in English law”:

“It would indeed be a reductio ad absurdum of the doctrine of precedents. In fact, the common law still employs the action for money had and received as a practical and useful, if not complete or ideally perfect, instrument to prevent unjust enrichment, aided by the various methods of technical equity which are also available, as they were found to be in *Sinclair v Brougham*.” ³⁶

The fate of the implied contract theory

29-008

The “implied contract” theory found other judicial and academic support since *Sinclair v Brougham*,³⁷ but was severely criticised as artificial by many judges and writers.³⁸ The implied contract theory does not elucidate the vital question, which is: “In what circumstances will the law impose restitutionary liability”? Furthermore, not all cases in which an action for money had and received or a quantum meruit has succeeded are consistent with the theory.³⁹ It was “unequivocally and finally” rejected by the House of Lords in *Westdeutsche Landsbank Girozentrale v Islington LBC*.⁴⁰ The result in *Sinclair v Brougham* was finally rejected in *Haugesund Kommune v Depfa ACS Bank*⁴¹ where a lender recovered the value of money lent in circumstances where the borrower had lacked the capacity to enter into the loan contract, rendering the contract void.

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1. For a full treatment of the subject matter of this chapter, see: Burrows, *The Law of Restitution*, 3rd edn (2011); Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016); Virgo, *The Principles of the Law of Restitution*, 3rd edn (2015). See also Beatson, *The Use and Abuse of Unjust Enrichment* (1991); Birks, *An Introduction to the Law of Restitution* (1985); Birks, *Unjust Enrichment*, 2nd edn (2005); Maddaugh and McCamus, *The Law of Restitution*, 2nd edn (2004); McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014); Mason, Carter and Tolhurst, *Restitution Law in Australia*, 2nd edn (2008); Palmer, *The Law of Restitution* (1978) (four Vols); The American Law Institute’s Restatement of the Law Third, Restitution and Unjust Enrichment (2011).
 19. Jackson, *History of Quasi-Contract* (1936); Winfield, *Quasi-Contracts* (1952), pp.1–25; Holdsworth, *History of English Law*, Vol.VIII, pp.88–98; Simpson, *A History of the Common Law of Contract* (1975), pp.489 et seq.; Baker, *An Introduction to English Legal History*, 4th edn (2002), Ch.21; Baker and Milsom, *Sources of English Legal History* (1986), pp.463–481; Birks and McLeod (1986) 6 O.J.L.S. 46; Ibbetson, *A Historical Introduction to the Law of Obligations* (1999), Pt 4.
 20. Fifoot, *History and Sources of the Common Law: Tort and Contract* at pp.222–223; Baker, at p.362; Ibbetson at pp.132–133. In modern law the term used would be “paid on a consideration or basis which had wholly failed”.
 21. Fifoot at pp.268 et seq. See Stoljar (1964) 80 L.Q.R. 203.
 22. Fifoot at pp.272–273; Baker at pp.363–365.
 23. (1602) 4 Co. Rep. 91a, 92b. See Simpson (1958) 74 L.Q.R. 381; Fifoot at pp.281 et seq., 489 et seq.; Baker [1971] C.L.J. 51, 213; Ibbetson (1984) 4 O.J.L.S. 295.
 24. *City of London v Goree* (1677) 2 Levinz 174, 3 Keble 677. (The phrase “quasi ex contractu” was used in the judgment.)
 25. *Shuttleworth v Garnett* (1688) 3 Mod. 240, 3 Lev. 261. See also *City of York v Toun* (1700) 5 Mod. 444, 2 Ld. Raym. 502.
 26. Fifoot at pp.360–363. Quantum meruit was introduced especially to cover services rendered by innkeepers, common carriers, and others exercising a “common calling”. See *Warbrook v Griffin* (1609) 2 Brownlow 254; *Rogers v Head* (1610) Cro.Jac. 262.
 27. *Tomkyns v Barnet* (1693) Skin. 411.
 28. *Astley v Reynolds* (1731) 2 Strange 915.

- [29.](#) *Martin v Sitwell* (1690) 1 Show. 156.
- [30.](#) *Howard v Wood* (1680) 2 Levinz 245.
- [31.](#) *Lamine v Dorrell* (1705) 2 Ld. Raym. 1216.
- [32.](#) *United Australia Ltd v Barclays Bank Ltd* [1941] A.C. 1, 27–29.
- [33.](#) [1914] A.C. 398, 452.
- [34.](#) [1914] A.C. 398, 452 (see also at 415, 417). The House, however, was able to extend an equitable proprietary claim to the case, and to give “a sort of rough justice” by dividing the assets *pari passu* between the shareholders and the depositors in proportion to the sums which they had severally contributed. On this aspect of the case, see below, para.29-179, and see generally above, para.10-025.
- [35.](#) Munkman, *Quasi-Contracts*, p.8.
- [36.](#) *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] A.C. 32, 64.
- [37.](#) See, for example, *Morgan v Ashcroft* [1938] 1 K.B. 49, 62–63 (Lord Greene M.R., contra Scott L.J. at 75–77); *Transvaal and Delagoa Bay Investment Co Ltd v Atkinson* [1944] 1 All E.R. 579; *Re Diplock* [1947] 1 Ch. 716, 724 (Wynn-Parry J.); [1948] Ch. 465, 480–481 CA; *Bossevain v Weil* [1950] A.C. 327, 341 (Lord Radcliffe); *Reading v Att-Gen* [1951] A.C. 507, 513 (Lord Porter); *Ministry of Health v Simpson* [1951] A.C. 251, 275 (Lord Simonds); *Orakpo v Manson Investments Ltd* [1978] A.C. 95, 104 (Lord Diplock); *Stoke on Trent CC v Wass* [1988] 1 W.L.R. 1406; *Guinness Plc v Saunders* [1990] 2 A.C. 663, 689 (Lord Templeman); *Taylor v Bhail* [1996] C.L.C. 377.
- [38.](#) *Brooks Wharf and Bull Wharf Ltd v Goodman Bros* [1937] 1 K.B. 534, 545; *United Australia Ltd v Barclays Bank Ltd* [1941] A.C. 1, 27–29 (Lord Atkin); *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] A.C. 32, 61–64 (Lord Wright); *Nelson v Larholt* [1948] 1 K.B. 339, 343 (Denning J.); *Larner v LCC* [1949] 2 K.B. 683; *Kiriri Cotton Co Ltd v Dewani* [1960] A.C. 192, 204–205; Denning (1949) 65 L.Q.R. 37; *Hussey v Palmer* [1972] 1 W.L.R. 1286; *Att-Gen v Nissan* [1970] A.C. 179, 228 (Lord Pearce) (approving Winn L.J.’s dictum in [1968] 1 Q.B. 286, 352); *Lipkin Gorman v Karpnale Ltd* [1991] 2 A.C. 548, 559, 578 (Lord Goff); *Woolwich Equitable B.S. v IRC* [1993] A.C. 70, especially 196–197 (Lord Browne-Wilkinson); *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669, especially 710 (Lord Browne-Wilkinson) (see also at 688 (Lord Goff), 718 (Lord Slynn), 720 (Lord Woolf), 738 (Lord Lloyd)); *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 A.C. 349. See also Lord Wright (1938) 6 Camb. L.J. 305 (reprinted in his *Legal Essays and Addresses*, pp.1–33).
- [39.](#) *Craven Ellis v Cannons Ltd* [1936] 2 K.B. 403; *Brook’s Wharf and Bull Wharf Ltd v Goodman Bros* [1937] 1 K.B. 534. See also *Re Rhodes* (1890) 44 Ch. D. 94, 105. But cf. *Guinness Plc v Saunders* [1990] 2 A.C. 663, 689 (Lord Templeman) for apparent acceptance of implied contract as the basis of quantum meruit claims.
- [40.](#) [1996] A.C. 669, 710 (Lord Browne-Wilkinson). See also at 718 (Lord Slynn), 720 (Lord Woolf), 738 (Lord Lloyd).
- [41.](#) [2010] EWCA Civ 579, [2012] Q.B. 549. See also *Kleinwort Benson Ltd v Glasgow CC* [1999] 1 A.C. 153 and *Roxborough v Rothmans of Pall Mall Australia Ltd* (2002) 76 A.L.J.R. 203, *High Ct of Australia* at [20], per Gleeson C.J., Gaudron and Hayne JJ.; at [63], per Gummow J.; and at [156]–[164], per Kirby J.

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Section 1. - Introduction
(c) - The Theoretical Basis of the Law of Restitution

Introductory

29-009

For many years the theoretical basis of restitutionary liability has been controversial. Although a claimant must bring his claim under a recognised head of liability, the underlying theory needs to be examined carefully since it influences the development of the subject, especially when a court is asked to extend or restrict the scope of a specific rule in restitution. Thus, in one case, the fact that no general theory of restitution was accepted led the court to reject the relevance of arguments by analogy, ⁴² whereas in another the acceptance of an underlying principle led to the recognition of a new defence. ⁴³ The search is not to discover a precise rule on which liability in restitution can be tested, but to discover theoretical principles or common factors which underlie the categories of restitution which already exist.

Two main theories


29-010

⚠ Although, as has been seen, the implied contract theory was once influential as providing a theoretical foundation for the subject, it is now discredited as based on a fiction and misleading, and has been rejected by the courts. ⁴⁴ More recently the controversy about the proper theoretical basis for the law of restitution has focused on two alternative theories. The first is unjust enrichment, whereby the law of restitution is equated with the law of unjust enrichment, so that restitutionary remedies are only available where the defendant has been unjustly enriched at the expense of the claimant. ⁴⁵ The second is a composite theory whereby restitutionary remedies are available either where the defendant has been unjustly enriched, or where the defendant has profited from the commission of a relevant wrong or where the defendant has interfered with the claimant's proprietary rights. Although recent authority is consistent with the second theory, ⁴⁶ ⚠ the first theory still has strong proponents. ⁴⁷ There are also other theories relating to the subject, including those who argue that the true basis of a number of situations in which restitution is granted is a principle by which the claimant's reasonable reliance on a defendant's words or conduct is protected. ⁴⁸ In *Lowick Rose LLP v Swynson Ltd* ⁴⁹ ⚠ Lord Sumption recognised that there was no universal theory in English law to explain all the cases where restitution is available.

The principle of unjust enrichment

29-011

⚠ The American Law Institute's Restatement of the Law Third, Restitution and Unjust Enrichment

states that “a person who is unjustly enriched at the expense of another is subject to liability in restitution.”⁵⁰ The House of Lords in *Lipkin Gorman v Karpnale Ltd* held that the concept of unjust enrichment lies at the heart of, and is the principle underlying, the individual instances in which the law gives a right of recovery in restitution.⁵¹  However, despite the strong support of several judges including Lords Wright,⁵² Atkin,⁵³ Denning,⁵⁴ Pearce⁵⁵ and Goff⁵⁶ and numerous academic writers, the precise shape of English law has until recently been formed against a background of scepticism.⁵⁷

The action for money had and received

29-012

In 1760 Lord Mansfield sought to rationalise the action for money had and received to the use of the claimant in the following well-known passage⁵⁸:




“This kind of equitable action to recover back money which ought not in justice to be kept is very beneficial, and therefore much encouraged. It lies for money which, ex aequo et bono, the defendant ought to refund; it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honour 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 minority, or to the extent of principal and legal interest upon a usurious contract, or for money fairly lost at play: because in all these cases the defendant may retain it with a safe conscience, though by positive law he was debarred from recovering ... [T]he gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.”

The equity (aequum et bonum) to which Lord Mansfield referred was not the technical system of Equity of the Court of Chancery, but the jus naturale of the Roman law.⁵⁹ It was merely a synonym for “natural justice” and has for this reason often been criticised as vague and uncertain:

“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.’”⁶⁰

Judicial recognition

29-013

 The criticism that the principle of unjust enrichment is too vague to be of any practical use⁶¹  overlooks the fact that there is a considerable body of case law dealing with the grounds of restitution, so that judges are not called upon to use their own sense of justice in order to apply or develop the law. The judges will follow the existing precedents, which cover most of the likely problems of restitution, and, if an extension of the law is sought, the meaning to be attached to “unjust enrichment” will be gleaned from those precedents.⁶²  Lord Mansfield’s view of the restitutionary obligation was accepted by many in the nineteenth century,⁶³ though it was attacked in the first half of the twentieth century by judicial⁶⁴ and academic⁶⁵ adherents of the “implied contract” theory. In recent years Lord Mansfield’s approach has been strongly supported⁶⁶ and was relied on in the decisions of the House of Lords developing the law by recognising the defence of change of position, the liability to make restitution of ultra vires receipts of tax, and of money paid in pursuance of an ineffective contract.⁶⁷

Statutory recognition

29-014

The unjust enrichment principle has also been recognised by statute. The Torts (Interference with Goods) Act 1977 s.7(4) imposes a liability to reimburse upon a person who, as a result of enforcement of a double liability in proceedings for wrongful interference with goods, is “unjustly enriched to any extent”. Furthermore, the separation in the Insolvency Act 1986 s.382(4), of liabilities arising out of contract, tort, trust and bailment from those “arising out of an obligation to make restitution” may provide implicit support for the principle of unjust enrichment, and the statutory power to refund overpayments of rates has been said to create “a statutory remedy of restitution ... to prevent the unjust enrichment of the rating authority at the expense of the ratepayer”.⁶⁸ It has been recognised that the rationale of the Civil Liability (Contribution) Act 1978 is to ensure that a defendant is not unjustly enriched where the defendant’s liability to a third party has been discharged by the claimant who is also liable to the third party.⁶⁹ Finally, certain statutory rights to recover overpaid tax are subject to the *defence* that repayment would unjustly enrich the claimant.⁷⁰

The state of the unjust enrichment principle

29-015

❗ In conclusion, it does not follow from the absence of a general cause of action in English law for unjust enrichment that the specific remedies provided are not justifiable by reference to the principle of unjust enrichment, even if they were originally framed without primary reference to it,⁷¹ and the modern cases show an increasing tendency to cut through technicality to perceive and define the underlying principle.⁷² English law has joined US jurisdictions,⁷³ Australian law,⁷⁴ Canadian law,⁷⁵

Scots law,⁷⁶ French law,⁷⁷ Roman-Dutch law,⁷⁸ and Singapore law,⁷⁹ ❗ in accepting the principle of unjust enrichment. In *Uren v First National Home Finance Ltd*⁸⁰ it was held that English law does not yet recognise a free-standing claim of unjust enrichment such that the claimant can simply plead an enrichment which is unjust. Rather, the claimant needs to establish either that the claim falls within one of the recognised grounds of restitution or within a new ground which is a justifiable extension from the established grounds. In *F J Chalke Ltd v Commissioners for Her Majesty’s Revenue and Customs*⁸¹ Henderson J. recognised that a number of different causes of action exist within the unjust enrichment principle, each with their own requirements, such as the cause of action for tax unlawfully demanded,⁸² and that for the recovery of money paid under a mistake of law.⁸³ In *Revenue and*




*Customs Commissioners v Investment Trust Companies*⁸⁴ ❗ Lord Reed recognised that law of unjust enrichment is founded on the principle of corrective justice and that its purpose is to “correct normatively defective transfers of value” typically by restoring the parties to their pre-transfer positions; with “normative” referring to a defect recognised by the law of unjust enrichment.

Different claims within the law of restitution



29-016


❗ An alternative theory of restitution assumes that the award of restitutionary remedies is not confined to situations where the defendant has been unjustly enriched. Rather, restitutionary remedies are available by reference to three distinct principles. The first of these is the unjust enrichment principle itself. Secondly, such remedies may also be awarded where the defendant has benefited from the commission of some form of wrongdoing, such as certain torts,⁸⁵ equitable wrongs⁸⁶ and, exceptionally, for breach of contract.⁸⁷ In such cases the cause of action is founded on the wrong rather than unjust enrichment. Thirdly, restitution may also be awarded where the defendant has interfered with property in which the claimant has a legal or equitable proprietary interest. In such claims the underlying cause of action is the vindication of the claimant’s property rights rather than unjust enrichment.⁸⁸ ❗ This latter principle remains controversial, with a number of jurists preferring to explain restitutionary claims to substitute property as founded on unjust enrichment.⁸⁹ How the

claim is characterised matters as regards what needs to be proved to establish the claim and the application of defences.

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1. For a full treatment of the subject matter of this chapter, see: Burrows, *The Law of Restitution*, 3rd edn (2011); Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016); Virgo, *The Principles of the Law of Restitution*, 3rd edn (2015). See also Beatson, *The Use and Abuse of Unjust Enrichment* (1991); Birks, *An Introduction to the Law of Restitution* (1985); Birks, *Unjust Enrichment*, 2nd edn (2005); Maddaugh and McCamus, *The Law of Restitution*, 2nd edn (2004); McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014); Mason, Carter and Tolhurst, *Restitution Law in Australia*, 2nd edn (2008); Palmer, *The Law of Restitution* (1978) (four Vols); The American Law Institute's Restatement of the Law Third, Restitution and Unjust Enrichment (2011).
 42. *Orakpo v Manson Investments Ltd* [1978] A.C. 95. See below, paras 29-085, 29-180. For criticism of this see Davies (1978) 41 M.L.R. 330, 334. cf. *Spottiswoode's case* (1855) 6 De G.M. & G. 345, 371–372, below, para.29-128; *Pavey and Matthews Pty Ltd v Paul* (1986–1987) 162 C.L.R. 221, 256–257 (Deane J.).
 43. *Lipkin Gorman v Karpnale Ltd* [1991] 2 A.C. 548. See below, para.29-186.
 44. See above, para.29-008.
 45. This is the approach adopted by the American Law Institute in its Restatement of the Law Third, Restitution and Unjust Enrichment (2011).
 46.  See especially *Foskett v McKeown* [2001] A.C. 102 and *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), [2013] Ch. 156. See also *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66, [2016] A.C. 176 at [37] (Lord Clarke); [98] (Lord Neuberger); [108] (Lord Carnwath). See further below, para.29-016.
 47. See Burrows, Ch.8; Goff and Jones.
 48. Fuller & Purdue (1936) 46 Yale L.J. 52; Atiyah, *The Rise and Fall of Freedom of Contract* (1979), pp.764 et seq.; Beatson, *The Use and Abuse of Restitution* (1991), Ch.2; Stoljar, *The Law of Quasi-Contract*, 2nd edn, pp.9–10.
 49.  [2017] UKSC 32, [2017] 2 W.L.R. 1161 at [22].
 50. (2011) art.1. See Mitchell and Swadling, *The Restatement Third: Restitution and Unjust Enrichment: Critical and Comparative Essays* (2013).
 51.  [1991] 2 A.C. 548, 559, 578. See also *Woolwich Equitable B.S. v IRC* [1993] A.C. 70, especially 196–197 (Lord Browne-Wilkinson); *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669, especially 710 (Lord Browne-Wilkinson) (see also at 688 (Lord Goff), 718 (Lord Browne-Wilkinson), 720 (Lord Woolf), 738 (Lord Lloyd)); *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 A.C. 349; *Deutsche Morgan Grenfell Group Plc v IRC* [2006] UKHL 49, [2007] 1 A.C. 558; *Sempra Metals Ltd v I.R.C.* [2007] UKHL 34, [2008] 1 A.C. 561; *Yeoman's Row Management Ltd v Cobbe* [2008] UKHL 55, [2008] 1 W.L.R. 1752; *Test Claimants in the Group Litigation v HMRC* [2012] UKSC 19, [2012] 2 A.C. 337; *Pitt v Holt* [2013] UKSC 26, [2013] 2 A.C. 108; *Benedetti v Sawiris* [2013] UKSC 50, [2014] A.C. 938. *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66, [2016] A.C. 176; *Patel v Mirza* [2016] UKSC 42, [2017] A.C. 467. These built on *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour* [1943] A.C. 32, especially Lord Wright at 61 (quoted at para.29-001, above).
 52. *Brook's Wharf and Bull Wharf Ltd v Goodman Bros* [1937] 1 K.B. 534, 545; *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] A.C. 32, 61–64; Lord Wright (1938) 6

Camb. L.J. 305 (reprinted in his Legal Essays and Addresses, pp.1–33).

53. *United Australia Ltd v Barclays Bank Ltd* [1941] A.C. 1, 27–29.
54. *Nelson v Larholt* [1948] 1 K.B. 339, 343; *Larner v LCC* [1949] 2 K.B. 683; *Kiriri Cotton Co Ltd v Dewani* [1960] A.C. 192, 204–205; (1949) 65 L.Q.R. 37; *Hussey v Palmer* [1972] 1 W.L.R. 1286.
55. *Att-Gen v Nissan* [1970] A.C. 179, 228 (approving Winn L.J.’s dicta in [1968] 1 Q.B. 286, 352).
56. As well as *Lipkin Gorman v Karpnale Ltd* [1991] 2 A.C. 548 and *Woolwich Equitable B.S. v IRC* [1993] A.C. 70, see *B.P. (Exploration) Co (Libya) Ltd v Hunt (No.2)* [1979] 1 W.L.R. 788, 799 (Robert Goff J.); affirmed [1981] 1 W.L.R. 232 CA; [1983] 2 A.C. 352 HL; *British Steel Corp v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All E.R. 504, 511 (Robert Goff J.); *Whittaker v Campbell* [1984] Q.B. 318, 327 (Robert Goff L.J.); *R. v Tower Hamlets LBC Ex p. Chetnik Developments Ltd* [1988] A.C. 858, 882 (Lord Goff).
57. *Orakpo v Manson Investments Ltd* [1978] A.C. 95, 104 (Lord Diplock). See also *Bossevain v Weil* [1950] A.C. 327, 341 (Lord Radcliffe); *Reading v Att-Gen* [1951] A.C. 507, 513 (Lord Porter); *Ministry of Health v Simpson* [1951] A.C. 251, 275 (Lord Simonds); *Morris v Tarrant* [1971] 2 Q.B. 143, 160–162 (Lane J.); *Stoke on Trent CC v Wass* [1988] 1 W.L.R. 1406; *Guinness Plc v Saunders* [1990] 2 A.C. 663, 689 (Lord Templeman); *Holdsworth* (1939) 55 L.Q.R. 37 (cf. Winfield at p.161); *Landon* (1937) 53 L.Q.R. 302; *Gutteridge* (1934) 5 Camb. L.J. 204, 223–229; *Radcliffe* (1938) 54 L.Q.R. 24.
58. *Moses v Macferlan* (1760) 2 Burr. 1005, 1012. The actual decision in the case, which set aside the judgment of a competent court otherwise than by appeal, was not followed later: *Marriott v Hampton* (1797) 7 T.R. 269. See Winfield (1944) 60 L.Q.R. 341, 342–343. See also Lord Mansfield in *Towers v Barrett* (1786) 1 T.R. 133, 134; *Weston v Downes* (1778) 1 Dougl. (KB) 23, 24.
59. *Baylis v Bishop of London* [1913] 1 Ch. 127, 137; *Sinclair v Brougham* [1914] A.C. 398, 417, 454–456 (Lord Sumner).
60. *Baylis v Bishop of London* [1913] 1 Ch. 127, 140, per Hamilton L.J. See also *Holt v Markham* [1923] 1 K.B. 504, 513 (Scrutton L.J.).
61.  But the similar principles of the reasonable man and of public policy, which are frequently employed in the law of torts and contract (and are accepted by the legislature, e.g. s.2(2) of the Occupiers’ Liability Act 1957), are not considered too vague. See Winfield (1928) 42 Harv. L.R. 97. See also the fundamental principle of proportionality within the law relating to human rights. In *Revenue and Customs Commissioners v Investment Trust Companies* [2017] UKSC 29, [2017] 2 W.L.R. 1200 at [39] Lord Reed recognised that a claim based on unjust enrichment does not create judicial licence to reach a fair result on a case-by-case basis. Rather, legal rights which arise from unjust enrichment should be determined by rules of law which are ascertainable and consistent. See also *Lowick Rose LLP v Swynson Ltd* [2017] UKSC 32, [2017] 2 W.L.R. 1161 at [22] (Lord Sumption).
62.  See *Revenue and Customs Commissioners v Investment Trust Companies* [2017] UKSC 29, [2017] 2 W.L.R. 1200 at [40] (Lord Reed): “the wisdom of our predecessors is a valuable resource”.
63. e.g. *Kelly v Solari* (1841) 9 M. & W. 54; *Edwards v Bates* (1844) 7 Man. & G. 590; *Freeman v Jeffries* (1869) L.R. 4 Ex. 189, 199. See also Bullen & Leake, *Precedents of Pleadings*, 3rd edn (1868), p.44.
64. e.g. Lord Sumner in *Sinclair v Brougham* [1914] A.C. 398, 452–456; Greene M.R. in *Morgan v Ashcroft* [1938] 1 K.B. 49, 62–63 (contra Scott L.J. at 75–77); *Re Diplock* [1947] 1 Ch. 716, 724 (Wynn-Parry J.); [1948] Ch. 465, 480–481 CA.

- [65.](#) Such as *Winfield, Province of the Law of Tort* (1931), pp.119–141 and *Friedmann* (1937) 53 L.Q.R. 449.
- [66.](#) Above, para.29-011.
- [67.](#) *Lipkin Gorman v Karpnale Ltd* [1991] 2 A.C. 548; *Woolwich Equitable B.S. v IRC* [1993] A.C. 70 and *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669 respectively.
- [68.](#) *R. v Tower Hamlets LBC Ex p. Chetnik Developments Ltd* [1988] A.C. 858, 882 (Lord Goff). cf. *BP Exploration Co (Libya) Ltd v Hunt (No.2)* [1981] 1 W.L.R. 232, 243 (CA got “no help from the use of words which are not in the statute”—re the Law Reform (Frustrated Contracts) Act 1943 s.1(3)).
- [69.](#) *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 A.C. 366 at [76] (Lord Hobhouse).
- [70.](#) Value Added Tax Act 1994 s.80(3) as amended. See also below, para.29-093.
- [71.](#) Dawson, *Unjust Enrichment* (1951), pp.116–117.
- [72.](#) *Woolwich Equitable B.S. v IRC* [1993] A.C. 70, 166 (Lord Goff).
- [73.](#) e.g. Restatement of the Law Third, Restitution and Unjust Enrichment art.1 and comment (b); Dawson, *Unjust Enrichment* (1951); Palmer, *The Law of Restitution* (1978) (four volumes).
- [74.](#) *Pavey and Matthews Pty Ltd v Paul* (1987) 69 A.L.R. 57. For a significant attack on the validity of the principle in Australia, see Gummow J. in *Roxborough v Rothmans of Pall Mall Australia Ltd* (2002) 76 A.L.J.R. 203 *High Ct of Australia*, but cf. *Beatson and Virgo* (2002) 118 L.Q.R. 352. See also *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 2; *Matthew Lumbers v W. Cook Builders Pty Ltd* [2008] HCA 27; *Bofinger v Kingsway Group Ltd* [2009] HCA 44 at [86] In *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* [2014] HCA 14, [78] the plurality recognised that “the concept of unjust enrichment is not the basis of restitutionary relief in Australian law”. Rather, the “enquiry is conducted by reference to equitable principles”, namely whether the retention of monies paid to the defendant can be considered to be unconscionable. The difficulty with this approach relates to the identification of when the defendant’s retention can be considered to be unconscionable. The plurality recognised that ‘conscience’ does not involve the judge’s subjective evaluation of the justice of the case, and purported to identify equitable principles to assess what conscience demands. But the only indication as to what these principles are involved reference to “a construct of standards and values” or, as Chief Justice French recognised, at [16], a legal standard “informing guiding criteria for particular classes of case”. But there was no attempt to identify what these standards, values or criteria might be.
- [75.](#) *Deglman v Guaranty Trust Co of Canada* [1954] S.C.R. 725; *Pettkuss v Becker* [1980] 2 S.C.R. 834; *Rawluk v Rawluk* [1990] 1 S.C.R. 70; *Garland v Consumer’s Gas Distributors Inc* [2004] 1 S.C.R. 629; *Pacific National Investments Ltd v Corp of the City of Victoria* (2004) S.C.C. 75.
- [76.](#) *Morgan Guaranty Trust Co of N.Y. v Lothian R.C.* (1995) S.C. 151, 229; *Shilliday v Smith* (1998) S.L.T. 976, 978.
- [77.](#) *Gutteridge and David* (1934) 5 Camb. L.J. 204.
- [78.](#) e.g. *Hussenabai Hassanally v Mohamed Muheeth Mohamed Cassim* [1960] A.C. 592; *Willis Faber Enthoven Ltd v Receiver of Revenue* (1992) (4) S.A. 202.
- [79.](#)  *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* [2013] SGCA 36. Also in Malaysia: *Dream Property v Atlas Housing* [2015] 2 M.L.J. 441.
- [80.](#) [2005] EWHC 2529 (Ch).
- [81.](#) [2009] EWHC 952 (Ch), [2009] S.T.C. 2027 at [127]; *Claimants in the FII Group Litigation v*

Commissioners for HM Revenue and Customs (No.2) [2014] EWHC 4302 (Ch), [2015] S.T.I 49, at [248] (Henderson J.). See also *Deutsche Morgan Grenfell Group Plc v IRC* [2006] UKHL 49, [2007] 1 A.C. 558, at [17] (Lord Hoffmann); *Littlewoods Ltd v Commissioners for HM Revenue and Customs* [2015] EWCA Civ 515, [8] (Arden L.J.).

[82.](#) See below, para.29-090.


[83.](#) See below, para.29-047.

[84.](#)  [2017] UKSC 29, [2017] 2 W.L.R. 1200 at [42]–[43].

[85.](#) See below, para.29-147.

[86.](#) See below, para.29-163.

[87.](#) See below, para.29-158.

[88.](#)  *Foskett v McKeown* [2001] 1 A.C. 102, 109 (Lord Browne-Wilkinson). See also 115 (Lord Hoffmann), 118 (Lord Hope) and 129 (Lord Millett); *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), [2013] Ch. 156. However, in *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66, [2016] A.C. 176 a majority of the Supreme Court recognised that the proprietary remedy of subrogation could be awarded to reverse the defendant's unjust enrichment. See Watterson [2016] C.L.J. 209. See generally Salmons (2017) 76 C.L.J. 399. See below, para.29-166.

[89.](#) See especially Birks [2001] C.L.P. 231; Burrows (2001) 117 L.Q.R. 412; Goff and Jones; cf. Lord Millett in Burrows and Rodgers (eds), *Mapping the Law: Essays in Honour of Peter Birks* (2006) p.265. See also *Handayo v Tjong Very Sumito* [2013] SGCA 44, where the Singapore Court of Appeal considered that such claims might be founded on unjust enrichment, but, having rejected want of authority as a ground of restitution, failed to identify an alternative ground of restitution.

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Volume I - General Principles
Part 9 - Restitution
Chapter 29 - Restitution ¹
Section 2. - Unjust Enrichment
(a) - The Content of the Unjust Enrichment Principle

The elements of unjust enrichment

29-017

⚠ A claim in unjust enrichment is a claim in debt and not for damages ⁹⁰ ⚠ and is a claim which is not founded on the commission of a wrong. ⁹¹ The principle of unjust enrichment requires: first, that the defendant has been enriched by the receipt of a benefit; secondly, that this enrichment is at the expense of the claimant; thirdly that the retention of the enrichment be unjust and finally that there is no defence or bar to the claim. ⁹² ⚠ The development of the law of restitution in England has meant that the principle of unjust enrichment has not manifested itself in a general action for the recovery of money paid and other benefits conferred on the ground that they were not due, ⁹³ ⚠ but instead as a number of specific substantive grounds upon which restitution may be ordered. In *Moses v Macferlan* Lord Mansfield stated that the action for money had and received:



“... lies 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 an undue advantage taken of the claimant’s situation, contrary to the laws made for the protection of persons under those circumstances.” ⁹⁴

Where a sum has been paid which is not due but the payer cannot establish a ground for recovery, it is not recoverable. ⁹⁵ The non-recognition of the principle of unjust enrichment in the past has meant that the concepts of “benefit”, “at the expense of the claimant” and “unjustness” of retention tended to develop in a fragmented way within the substantive categories in which relief had been given ⁹⁶ and sometimes, as in the former rules that only mistakes as to liability gave rise to restitution ⁹⁷ and that in general a payment under a mistake of law was not recoverable, ⁹⁸ in an unsatisfactory way.


Defences and denials

29-018


⚠ The claimant bears the burden of proving the elements of the unjust enrichment claim, namely that the defendant has been enriched at the claimant’s expense and that one of the recognised grounds of restitution apply. ⁹⁹ Once this has been established, the burden shifts to the defendant, either to deny that an element of the cause of action has been established or to identify a reason why the defendant should not be liable or why the liability should be reduced by pleading a defence. So, for example, if the defendant argues that there was a legal basis for the receipt of an enrichment, such as a valid gift, this is properly characterised as a denial of the claim, because the claimant bears the burden of proving that there was no legal basis for the enrichment. ¹⁰⁰ This will also be established where the

benefit was conferred pursuant to a valid Common Law, equitable or statutory obligation owed by the claimant to the defendant,¹⁰¹  or was conferred by the claimant while performing an obligation owed to a third party.¹⁰² This proved significant in *MacDonald Dickens and Macklin v Costello*¹⁰³  where the claimant had provided a service to a company and was held to be unable to sue the defendants in unjust enrichment for the value of the service, even though the defendants were the sole directors and shareholders of the company. This was because the award of a restitutionary remedy would undermine the contractual arrangement between the claimant and the company, even though there was no such contract between the claimant and the defendants. The claim will also be denied where the benefit was transferred by the defendant in submission to an honest claim, under process of law or a compromise of a disputed claim.¹⁰⁴ The claim will also be denied where the claimant is considered to have acted “voluntarily” or “officially”.¹⁰⁵ If, however, the defendant argues that his position has changed after the enrichment has been received, this is a defence, which the defendant bears the burden of proving, because the change of position is only considered to be relevant after the cause of action has been established.¹⁰⁶ Other defences include where the claimant is estopped from establishing the claim,¹⁰⁷ or where public policy precludes restitution.¹⁰⁸




1. For a full treatment of the subject matter of this chapter, see: Burrows, *The Law of Restitution*, 3rd edn (2011); Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016); Virgo, *The Principles of the Law of Restitution*, 3rd edn (2015). See also Beatson, *The Use and Abuse of Unjust Enrichment* (1991); Birks, *An Introduction to the Law of Restitution* (1985); Birks, *Unjust Enrichment*, 2nd edn (2005); Maddaugh and McCamus, *The Law of Restitution*, 2nd edn (2004); McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014); Mason, Carter and Tolhurst, *Restitution Law in Australia*, 2nd edn (2008); Palmer, *The Law of Restitution* (1978) (four Vols); The American Law Institute's Restatement of the Law Third, Restitution and Unjust Enrichment (2011).

90.  *Boake Allen Ltd v HMRC* [2006] EWCA Civ 25, [2006] S.T.C. 606, [175] (Mummery L.J.). Despite this, sometimes the remedy has been described inappropriately as “compensation” (*MacDonald Dickens and Macklin v Costello* [2011] EWCA Civ 930, [2012] Q.B. 244 at [31] (Etherton L.J.)) or “damages” (*Harrison v Madejski and Coys of Kensington* [2014] EWCA Civ 361, [52] (Etherton C.)). See also *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66, [2016] A.C. 176 at [80] where Lord Neuberger described the remedy as “financial compensation”. To the extent that this suggests a focus on the loss suffered by the claimant rather than gain made by the defendant, such language should be avoided. In *Revenue and Customs Commissioners v Investment Trust Companies* [2017] UKSC 29, [2017] 2 W.L.R. 1200 at [45], Lord Reed recognised that the loss suffered by the claimant to establish a claim in unjust enrichment need not be a loss in the same sense as in the law of damages and he emphasised that a restitutionary remedy is not compensatory. The relevant loss could, for example, be established if the claimant had provided a service without payment, since the claimant would have given up something of economic value.

91. *Haugesund Kommune v Depfa ACS Bank* [2011] EWCA Civ 33, [2012] Q.B. 549, at [69] (Rix L.J.).

92.  See *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 A.C. 221, 234, per Lord Hoffmann, who added that a further question was whether there were any reasons of policy for denying a remedy. See also *Portman B.S. v Hamlyn Taylor Neck* [1998] 4 All E.R. 202, 206 (Millett L.J.); *Lloyds Bank Plc v Independent Insurance Co* [2000] Q.B. 110, 123 (Waller L.J.); *Rowe v Vale of White Horse D.C.* [2003] EWHC 388 (Admin), [2003] 1 Lloyd's Rep. 418; *McDonald v Coys of Kensington* [2004] EWCA Civ 47, [2004] 1 W.L.R. 2775; *Benedetti v Sawiris* [2013] UKSC 50, [2014] A.C. 938 at [10] (Lord Clarke). In *Investment Trust Companies v Commissioners for Her Majesty's Revenue and Customs* [2012] EWHC 458 (Ch), [2012] S.T.C. 1150 Henderson J., at [39], emphasised that these four questions are simply “broad headings for ease of exposition” and they should not be treated as if they had statutory force. This was confirmed by Lord Clarke in *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66, [2016] A.C. 176 at [19]. But failing to consider the distinct elements of the unjust enrichment

claim will result in a loss of rigour in the analysis and application of the law. This was recognised by Lord Reed in *Revenue and Customs Commissioners v Investment Trust Companies* [2017] UKSC 29, [2017] 2 W.L.R. 1200 at [41], although he emphasised that the elements do not involve legal tests the meaning of which can be discerned as if by statutory interpretation; rather, they are signposts towards areas of inquiry which involve distinct legal requirements. See also *Lowick Rose LLP v Swynson Ltd* [2017] UKSC 32, [2017] 2 W.L.R. 1161 at [112] (Lord Neuberger). See also *Gibb v Maidstone and Tunbridge Wells NHS Trust* [2010] EWCA Civ 678 at [24] (Laws L.J.).

93.  See para.29-032, below. See also *Patel v Mirza* [2016] UKSC 42, [2017] A.C. 467 at [246] (Lord Sumption).
94. (1760) 2 Burr 1005, 1007.
95. *Woolwich Equitable B.S. v IRC* [1993] A.C. 70, 165, 172 (Lord Goff); *Uren v First National Home Finance Ltd* [2005] EWHC 2529 (Ch) at [16], per Mann J; *Test Claimants in the FII Group Litigation v HMRC* [2012] UKSC 19, [2012] 2 A.C. 337, at [162] (Lord Sumption) See below, para.29-032.
96. For detailed discussion see the appropriate sections of this chapter, below.
97. See below, para.29-035.
98. See below, para.29-044.
99. *Banque Financière de la Cité v Parc (Battersea) Ltd* [1991] 1 A.C. 221, 227 (Lord Steyn). See Goudkamp and Mitchell, *The Restatement Third: Restitution and Unjust Enrichment: Critical and Comparative Essays* (2013), Ch.6.
100. *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349, 408 (Lord Hope). See also *Fairfield Sentry Ltd v Migani* [2014] UKPC 9, [18] (Lord Sumption).
101.  *Brittain v Rossiter* (1879) 11 Q.B.D. 123, 127; *Gilbert & Partners v Knight* [1968] 2 All E.R. 248, 250 (Harman L.J.); *Pan Ocean Shipping Ltd v Creditcorp Ltd* [1994] 1 W.L.R. 161, 164, 165 (Lord Goff); *Portman B.S. v Hayman Taylor Neck* [1998] 4 All E.R. 202; Burrows [1994] Rest. L. Rev. 52; *Berezovsky v Edmiston* [2010] EWHC 1883 (Comm) at [70] (Field J.) (where payment for services is provided for under a contract, the claimant is precluded from claiming a quantum meruit for the reasonable value of the services). Where a claim in unjust enrichment has already crystallised, the parties may enter into a contract to provide for restitution which will then prevail over the unjust enrichment claim. That contract may itself be terminated, in which case the original unjust enrichment claim will continue to operate, save if the contract is interpreted as extinguishing the unjust enrichment claim: *Newland Shipping and Forwarding Ltd v Toba Trading FZC* [2014] EWHC 661 (Comm), at [92] (Leggatt L.J.). In *Universal Advance Technology Ltd v Lloyds Bank Plc* [2016] EWCA Civ 933 a claim in debt in respect of goods supplied failed because the goods had not been supplied and, consequently, if the claim had succeeded the claimant would have become unjustly enriched at the expense of the defendant. See also *Lowick Rose LLP v Swynson Ltd* [2017] UKSC 32, [2017] 2 W.L.R. 1161 at [119] (Lord Neuberger).
102. *Brown & Davies Ltd v Galbraith* [1972] 1 W.L.R. 997; *Pan Ocean Shipping Ltd v Creditcorp Ltd* [1994] 1 W.L.R. 161, 166, 170–171; *Eso Petroleum v Hall Russell & Co* [1989] A.C. 643; *Matthew Lumbers v W. Cook Builders Pty Ltd* [2008] HCA 27. See Getzler [2009] L.Q.R. 196; Goymour [2008] C.L.J. 469.
103.  [2011] EWCA Civ 930, [2012] Q.B. 244; see Davies (2012) C.L.J. 37. See also *McGill v Sports and Entertainment Media Group* [2014] EWHC 3000 (QB) at [156] (Judge Waksman Q.C.); *Erith Holdings Ltd v Murphy* [2017] EWHC 1364 (TCC), [102] (O'Farrell J.).
104. See below, paras 29-042, 29-197.

- [105.](#) See *Falke v Scottish Imperial Insurance Co* (1886) 34 Ch. D. 234, 248 (Bowen L.J.); *Ruabon S.S. Co v The London Assurance* [1990] A.C. 6, 10; *Walsh v Singh* [2009] EWHC 3219 (Ch), [2010] 1 F.L.R. 1658 at [65] (Judge Purle Q.C.) (quantum meruit not available where provision of services made voluntarily and not in the expectation of reward but in the expectation of a long-term relationship); *MacDonald Dickens and Mackin v Costello* [2011] EWCA Civ 930, [2012] QB 244 at [21] (Etherton L.J.). See also *Owen v Tate* [1976] Q.B. 402; below, paras 29-115—29-118; Hope (1929) Cornell L.Q. 25; Wade (1966) Vanderbilt L.R. 1183; Evans, [1998] R.L.R. 1, 8.c.f. *G.N. Ry v Swaffield* (1874) L.R. 9 Ex. 132; *Matheson v Smiley* [1932] 2 D.L.R. 787; *Yeoman's Row Management Ltd v Cobbe* [2008] UKHL 55, [2008] 1 W.L.R. 1752; *Wilmot-Smith* [2011] 127 L.Q.R. 610.
- [106.](#) See below, para.29-186.
- [107.](#) See below, para.29-183.
- [108.](#) See below, paras 29-042, 29-080, 29-202. See also *R. Leslie Ltd v Sheill* [1914] 3 K.B. 607; *Boissevain v Weil* [1950] A.C. 327; *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579, [2012] Q.B. 549.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 9 - Restitution

Chapter 29 - Restitution ¹

Section 2. - Unjust Enrichment

(b) - Enrichment

The nature of the enrichment ¹⁰⁹

29-019

⚠ Enrichment may take the form of a positive addition to the recipient's wealth, such as by the receipt of money, ¹¹⁰ or a negative one, for instance where an inevitable expense has been saved. The most common example of the second type of benefit is the discharge of an obligation owed by the defendant, whether by the claimant paying his creditor ¹¹¹ ⚠ or abating a nuisance ¹¹² or the claimant performing some other service ¹¹³ for which the defendant is primarily responsible. An enrichment has also been held to include where the claimant has forgone a valid claim against the defendant, such as a claim for compensation for unfair dismissal. ¹¹⁴ In *Bank of Cyprus UK Ltd v Menelaou* ¹¹⁵ ⚠ the Supreme Court recognised that the transfer of freehold property without a charge, when the property should have been subject to a valid charge, constituted an enrichment to the extent of the amount with which the property should have been charged. In *Lowick Rose LLP v Swynson Ltd* ¹¹⁶ ⚠ Lord Mance recognised that an enrichment included the reduction of a loss which would otherwise have been recoverable by a claim for damages for breach of contract or breach of a duty. In assessing whether the defendant has been enriched by the receipt of money it is also necessary to have regard to any consequent liabilities which might negate the enrichment. So, for example, in *Jeremy D Stone Consultants Ltd v National Westminster Bank Plc* ¹¹⁷ it was recognised that a bank was not enriched by a payment to it for the account of a customer, even though the bank became beneficially entitled to the money, because the increase in the bank's assets was matched by an immediate balancing liability in the form of the debt which it owed to its customer. In such circumstances the claimant should sue the customer rather than the bank. Where there have been payments between the claimant and the defendant, the net amount will constitute the relevant enrichment. ¹¹⁸ ⚠

Non-monetary benefits


29-020

⚠ Establishing a restitutionary claim in respect of nonmoney benefits is more difficult than claims relating to money in part, due to the fact that:

“... by their very nature services cannot be restored: nor in many cases can goods be restored, for example where they have been consumed or transferred to another.” ¹¹⁹

Furthermore, even where the benefit takes the form of an increase in the value of the defendant's property, the increase can only be realised by forcing a sale. ¹²⁰ In the case of the rendering of

services as opposed to the payment of money, “the identity and value of the resulting benefit to the recipient may be debatable”. ¹²¹ Many, but not all, cases involving the rendering of services are anyway capable of analysis as a genuine implied contract, ¹²² thus not engaging the law of restitution. Where a genuine contract cannot be implied a claim in unjust enrichment may lie. Services may take many forms and while some result in an accretion to the defendant’s wealth, for instance by improving his property, other “pure” services do not. An unjust enrichment claim might still be available even as regards “pure” services if they can be regarded as beneficial, which will typically be established if the

defendant had requested them or, knowing that they were to be paid for, had freely accepted ¹²³  or acquiesced in them. ¹²⁴ The unjust enrichment cases involving free acceptance or acquiescence do not depend upon the service adding to the defendant’s wealth; the service per se is treated as a benefit. ¹²⁵ Thus, restitution has been awarded in respect of plans prepared in anticipation of the conclusion of a contract by a developer but rendered useless when the landowner decided not to proceed, ¹²⁶ and in respect of work done by a person on his own property at the request of prospective tenants when negotiations for a lease broke down. ¹²⁷ Restitution will not be awarded if the dealing between the parties shows that the risk is to be borne by the party rendering the services. ¹²⁸

Service resulting in incontrovertible benefit

29-021

There is also authority that treats a service as beneficial where it results in an “incontrovertible benefit” to the defendant, ¹²⁹ namely a benefit which cannot be devalued by the defendant. With the possible exception of necessitous intervention to preserve life or health, ¹³⁰ only services that result in an accretion to the defendant’s wealth can constitute an incontrovertible benefit. ¹³¹ In *Benedetti v Sawiris* ¹³² Arden L.J. recognised that a defendant could not be considered to have been incontrovertibly benefited by the receipt of services if the defendant never expected to pay for the service. This confuses, however, the distinct questions of whether a defendant has been enriched and whether that enrichment is unjust. If the defendant did not expect to pay for a service, this would not prevent the service from being incontrovertibly beneficial, but it would mean that there was no failure of basis ¹³³ in respect of the service being received, since the basis for the performance of the service would be that it was to be paid for by somebody else and not by the defendant.


Receipt of goods

29-022

The receipt of goods may also constitute a benefit and, although where title has not passed to the recipient the proper claim will be in tort for wrongful interference to goods, ¹³⁴ where title has passed it would seem that the principles governing services will apply by analogy and in an appropriate case result in the court awarding a quantum valebat.

Use value of money

29-023

 In *Sempra Metals (formerly Metallgesellschaft Ltd) Ltd v IRC* ¹³⁵ the House of Lords held that a taxpayer which had paid tax too early in breach of EC law could establish that the Revenue had been unjustly enriched, with the enrichment consisting of the Revenue’s use of the money until the tax was properly due. This enrichment was valued with reference to compound interest which the defendant would have had to pay to borrow an equivalent amount of money to that which had been received from the taxpayer and which, for the Revenue, was a rate which was lower than the commercial rate. This claim for the use value of money will be available for all unjust enrichment claims where money has been paid which was not due to the defendant. So, for example, any claimant who pays money by mistake has two restitutionary claims, one for the amount paid and one for the defendant’s use value of that money. Whilst not formally overruling *Westdeutsche Landesbank Girozentrale v Islington*

LBC,¹³⁶ which had held that compound interest could only be awarded in respect of equitable claims, the House of Lords in *Sempra Metals* held, in obiter dicta, that compound interest should be generally available as of right for unjust enrichment claims at Common Law. In *Ipswich Town Football Club Co*

*Ltd v Chief Constable of Suffolk*¹³⁷ ! it was recognised that, where there was no evidence that the defendant had benefited from the receipt and possession of the payment, and also that the claimant had suffered no loss from being deprived of the time value of the money, only simple and not compound interest would be awarded. This is consistent with the subsequent decision of the

Supreme Court in *Revenue and Customs Commissioners v Investment Trust Companies*¹³⁸ ! that the defendant's enrichment must be directly obtained at the expense of the claimant, who must have incurred a loss as a result of providing the benefit. Whilst the Supreme Court did not consider the impact of this principle on the decision in *Sempra Metals*, it is certainly the case that the use of compound interest as the measure of the defendant's use value of the money received could only be justified if the claimant had suffered a loss as a result of paying the money.

Valuing enrichment


29-024





! In *Benedetti v Sawiris*¹³⁹ the Supreme Court clarified the law on valuing an enrichment, whether it be goods, services or the use value of money. Value is to be ascertained at the time when the enrichment was received. The starting point for the valuation exercise is to identify the objective market value of the benefit. A significant distinction is to be drawn between the "ordinary market value" and the "objective value of the benefit". The former is the price which would have been agreed in the market in the absence of some unusual characteristic of the purchaser, whereas the latter is the value of the benefit to the reasonable person in the position of the defendant. Usually both values will be the same, and will simply involve an assessment of what it would have cost a reasonable person to acquire the goods or services elsewhere in the market. The objective value of the benefit may be higher or lower than the ordinary market value by virtue of the defendant's position, where the defendant's position would have been taken into account by the market. This includes, for example, the defendant's buying power which enables him to negotiate a low price, his credit rating and the defendant's age, gender, occupation and state of health. This objective value may be reduced but not increased by reference to the defendant's own personal preferences and idiosyncratic views as to the value of the enrichment. It follows that subjective devaluation is recognised and subjective over-valuation is not recognised, although Lord Clarke, with whom Lords Kerr and Wilson agreed, did reserve the possibility of recognising subjective over-valuation in exceptional circumstances; he did not indicate what those circumstances might be. The defendant bears the burden of proving subjective devaluation. This analysis of objective valuation was applied by the Court of Appeal in

*Littlewoods Retail Ltd v Commissioners for HM Revenue and Customs*¹⁴⁰ ! to value the Revenue's use of tax paid prematurely.


29-025

! The application of the subjective devaluation principle has proved to be difficult. For example, in *Harrison v Madejski and Coys of Kensington*¹⁴¹ Harrison, through his son, bid at auction for a Jaguar car, which belonged to Madejski and who had requested the auctioneer not to sell the right to a personal registration number (known as a Mark) as well. Despite this, the Mark was included in the sale and Harrison registered it in his own name. Madejski sued Harrison for the value of the right to the Mark. One of the key issues concerned the identification and valuation of the enrichment. The Mark was valued objectively at £50,000. Harrison had told his son that the maximum bid for the car should be £100,000 if the Mark was not included and £130,000 if it was included. Believing the Mark was included in the sale, the son bid £130,000. Consequently, Harrison argued that he could subjectively devalue the mark to £30,000. This was rejected by the Court of Appeal on the ground that there were no personal circumstances of Harrison which indicated that the Mark was worth less to the defendant than its objective value. This confuses the analysis adopted by the Supreme Court in *Benedetti*. The defendant's personal circumstances are relevant to the objective valuation of the enrichment if they would have been taken into account by the market. It should still have been open to Harrison to establish that the value of the enrichment should be reduced to £30,000, since that was

what he was willing to pay for the Mark. As the Court of Appeal recognised in *Littlewoods Retail Ltd v Commissioners for HM Revenue and Customs*,¹⁴² a “defendant-focused” valuation enables the claimant to establish that he received no benefit or less than the market value. In *Bank of Cyprus UK Ltd v Menelaou*¹⁴³  Lord Neuberger suggested that if the valuation of the enrichment resulted in a sum which was “unfair or oppressive” it was open to the court to adjust it, although he identified no basis for the court to make such an adjustment.

1. For a full treatment of the subject matter of this chapter, see: Burrows, *The Law of Restitution*, 3rd edn (2011); Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016); Virgo, *The Principles of the Law of Restitution*, 3rd edn (2015). See also Beatson, *The Use and Abuse of Unjust Enrichment* (1991); Birks, *An Introduction to the Law of Restitution* (1985); Birks, *Unjust Enrichment*, 2nd edn (2005); Maddaugh and McCamus, *The Law of Restitution*, 2nd edn (2004); McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014); Mason, Carter and Tolhurst, *Restitution Law in Australia*, 2nd edn (2008); Palmer, *The Law of Restitution* (1978) (four Vols); The American Law Institute's Restatement of the Law Third, Restitution and Unjust Enrichment (2011).
109. Burrows, Ch.3; Goff and Jones, Pt 3; Virgo, Ch.4; Stevens in Burrows and Rogers, *Mapping the Law* (2006), p.65; Edelman in Chambers, Mitchell and Mitchell, *Philosophical Foundations of the Law of Unjust Enrichment* (2008), p.211; Lodder, *Enrichment in the Law of Unjust Enrichment and Restitution* (2012).
110. *Kelly v Solari* (1841) 9 M. & W. 54 (below, para.29-035); *Brook's Wharf and Bull Wharf Ltd v Goodman Bros* [1937] 1 K.B. 534 (below, para.29-108). Note also the benefit arising from the use of money, see para.29-023, below.
111.  *Exall v Partridge* (1799) 8 T.R. 208 (below, para.29-109). See also *National Bank of Egypt International Ltd v Oman Housing Bank SAOC* [2002] EWHC 1760 (Comm), [2003] 1 All E.R. (Comm) 246. See also *Richards v Worcestershire County Council* [2016] EWHC 1954 (Ch) (discharge of defendant's statutory liabilities).
112. *Gebhardt v Saunders* [1892] 2 Q.B. 452 (below, para.29-113).
113. Below, para.29-113.
114. *Gibb v Maidstone and Tunbridge Wells NHS Trust* [2010] EWCA Civ 678 at [30] (Laws L.J.).
115.  [2015] UKSC 66, [2016] A.C. 176.
116.  [2017] UKSC 32, [2017] 2 W.L.R. 1161 at [57]. See also Lord Neuberger at [113].
117. [2013] EWHC 208 (Ch).
118.  In *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2011] SGCA 22, [2011] 3 S.L.R. 540. this was called “the running account method” of valuing an enrichment. See also *Revenue and Customs Commissioners v Investment Trust Companies* [2017] UKSC 29, [2017] 2 W.L.R. 1200 at [30] (Lord Reed).
119. *B.P. Exploration Co (Libya) Ltd v Hunt (No.2)* [1979] 1 W.L.R. 783, 799, affirmed by the House of Lords [1983] 2 A.C. 352.
120. In *Greenwood v Bennett* [1973] 1 Q.B. 195 (below, para.29-055) a sale had, in fact, taken place.
121. *B.P. Exploration Co (Libya) Ltd v Hunt (No.2)* [1979] 1 W.L.R. 783, 799 (Robert Goff J.);

affirmed by the Court of Appeal [1981] 1 W.L.R. 232 and by the House of Lords [1983] 2 A.C. 352. See also Burrows at pp.46–61; Virgo at pp.75–77; Jones (1977) 93 L.Q.R. 273; Barker (2001) 54 C.L.P. 255.

122. *RTS Flexible Systems Ltd v Molkerei Alios Müller GmbH* [2010] UKSC 14, [2010] 1 W.L.R. 753. Below, para.29-071.
123.  See Burrows at pp.56–59; Goff and Jones at paras 4-43–4-50; Virgo at pp.85–90. In *Rowe v Vale of White Horse D.C.* [2003] EWHC 388 (Admin), [2003] 1 Lloyd's Rep. 418, 421 (Lightman J.) free acceptance was recognised, obiter, as relevant to establish both an enrichment and a ground of restitution where home-owners had received sewerage services without charge. Free acceptance was not established on the facts because there had been no acquiescence by the defendant in the supply of services for a consideration. See also *McDonald v Coys of Kensington* [2004] EWCA Civ 47, [2004] 1 W.L.R. 2775 (free acceptance could be established on the facts) at [32] (Mance L.J.); *Chief Constable of the Greater Manchester Police v Wigan Athletic AFC Ltd* [2008] EWCA Civ 1449, [2009] 1 W.L.R. 1580 (policing of football matches at a higher level than requested, no free acceptance because the club was unable to reject these additional services alone). In *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* [2013] SGCA 36 the Singapore Court of Appeal, at [108], noted the controversy about recognising free acceptance as a ground of restitution, because unjust enrichment is claimant-focused and does not focus on the fault of the defendant.
124. *Ellis v Hamlen* (1810) 3 Taunt 52, 53; *Nemes v Ata Chaglayan*, Unreported, October 11, 1982 CA; *Marston Construction Co Ltd v Kigass Ltd* [1989] 46 B.L.R. 109. cf. *Bookmakers Afternoon Greyhound Services Ltd v Wilfred Gilbert Staffordshire Ltd* [1994] F.S.R. 723, 742–744.
125. *William Lacey (Hounslow) Ltd v Davis* [1957] 1 W.L.R. 932; *Brewer Street Investments Ltd v Barclay Woollen Co* [1954] 1 Q.B. 428, 433–434 (Somervell L.J.), 438 (Denning L.J.); *British Steel Corp v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All E.R. 504. cf. *Sumpter v Hedges* [1898] 1 Q.B. 673; *Wiluszynski v Tower Hamlets LBC* [1989] I.C.R. 493. See also *Independent Grocers Co-operative Ltd v Noble Lowndes Superannuation Consultants Ltd* [1993] 60 S.A.S.R. 525. Below, paras 29-071 et seq.
126. *William Lacey (Hounslow) Ltd v Davis* [1957] 1 W.L.R. 932; *Sabemo v N. Sydney M.C.* [1977] 2 N.S.W.L.R. 880; *Marston Construction Co Ltd v Kigass Ltd* [1989] 46 B.L.R. 109; *Countrywide Communications Ltd v ICL Pathway Ltd* [2000] C.L.C. 324; *Bridgewater v Griffiths* [2000] 1 W.L.R. 524; *Yeoman's Row Management Ltd v Cobbe* [2008] UKHL 55, [2008] 1 W.L.R. 1752 (services in obtaining grant of planning permission).
127. *Brewer St Investments Ltd v Barclays Woollen Co Ltd* [1954] 1 Q.B. 428.
128. *Regalian Properties Plc v London Dockland Development Corp* [1995] 1 W.L.R. 212. See also *Bookmakers Afternoon Greyhound Services Ltd v Wilfred Gilbert Staffordshire Ltd* [1994] F.S.R. 723; *Matthew Lumbers v W. Cook Builders Pty Ltd* [2008] HCA 27; *MacDonald Dickens and Macklin v Costello* [2011] EWCA Civ 930, [2012] Q.B. 244.
129. *Craven-Ellis v Canons Ltd* [1936] 2 K.B. 403 (below, para.29-082); *Greenwood v Bennett* [1973] 1 Q.B. 195, 202 (Lord Denning), below, para.29-055; *Procter & Gamble Corp v Peter Cremer GmbH & Co* [1988] 3 All E.R. 843, 855–856 (Hirst J.); *Re Berkeley Applegate Ltd* [1989] Ch. 32, 50–51; *Rowe v Vale of White Horse DC* [2003] EWHC 388 (Admin), [2003] 1 Lloyd's Rep. 418, 421 (Lightman J.); *McDonald v Coys of Kensington* [2004] EWCA Civ 47, [2004] 1 W.L.R. 2775.
130. *Matheson v Smiley* [1932] 2 D.L.R. 787; *G.N. Ry v Swaffield* (1874) L.R. 9 Ex. 132; below, paras 29-137 et seq.
131. See Burrows at pp.47–51 and Virgo at pp.78–85. *McDonald v Coys of Kensington* [2004] EWCA Civ 47, [2004] 1 W.L.R. 2775 (incontrovertible benefit where the benefit is readily returnable): at [37] (Mance L.J.); *Harrison v Madejski and Coys of Kensington* [2014] EWCA Civ 361. See also *J S Bloor Ltd v Pavillion Developments Ltd* [2008] EWHC 724 (TCC) (building of a road was not incontrovertibly beneficial because, despite benefiting the defendant, the

defendant also suffered detriment, such as not having designed the road to its own specification and it had not negotiated the cost).


[132.](#) [2010] EWCA Civ 1427 at [120].


[133.](#) See further para.29-057, below.

[134.](#) Torts (Interference with Goods) Act 1977. But see below, paras 29-147 et seq. (waiver of tort). See also proprietary restitutionary claims, below, paras 29-166 et seq.


[135.](#) [2007] UKHL 34, [2008] 1 A.C. 561. See *Kowalishin v Roberts* [2015] EWHC 1333 (Ch); *Littlewoods Retail Ltd v HM Revenue and Customs Commissioners* [2015] EWCA Civ 515.

[136.](#) [1996] A.C. 669.

[137.](#)  [2017] EWHC 375 (QB).


[138.](#)  [2017] UKSC 29, [2017] 2 W.L.R. 1200. See below, paras 29-028 and 29-029.

[139.](#) [2013] UKSC 50, [2014] A.C. 938.

[140.](#)  [2015] EWCA Civ 515. See also *MacInnes v Gross* [2017] EWHC 46 (QB) at [162]–[166] (Coulson J.).

[141.](#) [2014] EWCA Civ 361.

[142.](#) [2015] EWCA Civ 515, [164].

[143.](#)  [2015] UKSC 66, [2016] A.C. 176 at [81].

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 9 - Restitution

Chapter 29 - Restitution ¹

Section 2. - Unjust Enrichment

(c) - At the Expense of the Claimant

Enrichment at the claimant's expense ¹⁴⁴

29-026

❗ In many cases the increase in the defendant's wealth is the direct result of, and is matched by, a corresponding diminution in the claimant's wealth. ¹⁴⁵ ❗ Sometimes this direct correspondence does not exist but restitution is still awarded. This will usually be by virtue of a principle other than unjust enrichment, such as the commission of a wrong where the defendant has profited from a third party in breach of a duty owed to the claimant, or where the defendant has indirectly obtained property in which the claimant has a proprietary interest. But sometimes the absence of correspondence between gain and loss will not defeat the claim in unjust enrichment. So, for example, in *Littlewoods Retail Ltd v Commissioners for Her Majesty's Revenue and Customs* ¹⁴⁶ Vos J. recognised that, since unjust enrichment is concerned with the defendant's gain rather than the claimant's loss, then, if the defendant has benefited from the use of money and the benefit is greater than what the claimant lost from not having the use of the money, the claimant can still recover the value of the defendant's benefit.

The suggested need for "privity" between the parties

29-027

One consequence of the implied contract theory was the view that the money sought to be recovered by an action for money had and received should have been received by the defendant under such circumstances as to create a privity between him and the claimant. It is difficult to say what this "privity" meant. It appears that an analogy was sought from the ordinary rules of contract. But the "implied contract" theory is based upon historical fictions which are no longer relevant, and has been rejected. Accordingly, this notion of "privity" is unnecessary in restitution. As Lord Wright said in one case: ¹⁴⁷

"The obligation [to repay] is imposed by the court simply under the circumstances of the case and on what the court decides is just and reasonable having regard to the relationship of the parties. It is a debt or obligation constituted by the act of the law, apart from any consent or intention of the parties or privity of contract."

Winfield concluded ¹⁴⁸ that most of the cases cited in support of the privity concept turn upon agency. They in fact lay down the rule of the law of agency that where the principal entrusts his agent with money to be paid to a third party, the latter cannot recover the money from the agent unless, on the facts, the agent has become also the agent of the third party. ¹⁴⁹ Thus any mention of the absence of "privity" was unnecessary in these cases, most of which date from a period before the modern

development of the law of restitution. ¹⁵⁰ The reference to “privity” may mean that a benefit received by the defendant indirectly is, as a general rule, not regarded as “at the claimant’s expense” where conferred by a third party, ¹⁵¹ but restitution might be available by reference to the vindication of property rights instead. ¹⁵²

Direct and indirect enrichment

29-028

⚠ In establishing whether the enrichment was obtained at the claimant’s expense, the question whether the enrichment must have been received directly by the claimant from the defendant or whether indirect enrichment, via a third party, suffices, has proved controversial. In *Investment Trust Companies v Revenue and Customs Commissioners* ¹⁵³ ⚠ the Court of Appeal had affirmed the analysis of Henderson J. ¹⁵⁴ ⚠ that, although there is no rule excluding unjust enrichment claims against indirect recipients, there is a general requirement of direct enrichment to which there are limited exceptions, including where the defendant’s enrichment can be considered to have been obtained at the expense of the claimant with reference to the economic realities of the case to determine where the economic burden has fallen. This approach was reversed in the Supreme Court

on the ground that it was too vague. ¹⁵⁵ ⚠ Likewise, in *Bank of Cyprus UK Ltd v Menelaou* ¹⁵⁶ ⚠ Lord Clarke had held that establishing that the defendant had been enriched at the claimant’s expense required consideration of whether there was a sufficient causal connection between the claimant’s loss and the defendant’s benefit. This was criticised by the Supreme Court in the *ITC* case

on the ground that it left unanswered what degree of connection was sufficient. ¹⁵⁷ ⚠ In the *ITC* case the suppliers of investment management services to customers were thought to be liable to pay VAT to the Commissioners. The customers bore a contractual liability to pay the full amount of VAT to the suppliers. Once it was discovered that the VAT was not lawfully due, because the services were exempt, and the suppliers were unable to recover all that had been paid, the customers sought restitution of the remaining amount from the Commissioners. This claim failed because the Commissioners had not been directly enriched at the expense of the customers, since no payment was made by the customers to the Commissioners; in other words, there was no direct dealing between the parties. The key test is whether the defendant had received a benefit from the claimant and the claimant had incurred a loss through the provision of that benefit. Whilst Lord Reed, with whom the other Justices agreed, recognised a number of scenarios which the law treated as equivalent to a direct transfer of value, none of these applied on the facts of the case. These scenarios are: (i) where an agent is interposed between the claimant and the defendant; (ii) where the right to restitution is assigned, so that the claimant stands in the shoes of the assignor; (iii) where an intervening transaction is a sham which is created to conceal the connection between the claimant and defendant; (iv) where a set of co-ordinated transactions is treated as forming a single scheme or transaction; (v) where the claimant can trace into property received by the defendant from a third party; (vi) where the claimant discharges a debt owed by the defendant to a third party whereby the defendant is directly enriched by the discharge of the debt rather than by the receipt of the money. ¹⁵⁸

⚠ Lord Reed acknowledged that this list was not necessarily complete. One further scenario should have been recognised, namely where the defendant has intercepted an enrichment which would otherwise have been transferred to the claimant by a third party: this will be treated as an enrichment at the expense of the claimant. ¹⁵⁹ ⚠

29-028A

⚠ Lord Reed considered that his decision explained a number of earlier decisions. So, for example, in *MacDonald Dickens and Macklin v Costello* ¹⁶⁰ ⚠ Etherton L.J. had recognised that the defendants who were directors and shareholders of a company could not be considered to have been enriched at the claimant’s expense where the claimant had provided a service to the company, because the enrichment to the defendant would only have been provided indirectly by the claimant. In *Relfo Ltd v Varsani* ¹⁶¹ ⚠ it was possible to look behind the various accounts via which money had been

transferred and conclude that the true nature of the transaction involved a direct payment from the claimant to the defendant. This was because a director of the claimant company had intended from the start that money would be transferred from the claimant to the defendant via various intermediaries, which was characterised by Floyd L.J. as an “elaborate façade” since it was designed to conceal the true nature of the transaction. Treating co-ordinated transactions as a single transaction involving the direct transfer of an enrichment from the claimant to the defendant was also considered to explain the unjust enrichment claim in *Banque Financière de la Cité SA v Parc*

(Battersea) Ltd,¹⁶² ⚠ and *Bank of Cyprus UK Ltd v Menelaou*¹⁶³ ⚠ On the facts of the latter case there was a direct transfer of value from the respondent bank to the appellant, since the bank had agreed to release £785,000 of the sum which it was owed on one property to enable another property to be purchased, but subject to a charge in favour of the bank on that property. In the end that property was received by the appellant without a valid charge, and she was consequently enriched to the extent that the property had not been charged. Lords Clarke and Neuberger¹⁶⁴ ⚠ considered this to involve one single scheme which directly benefited the appellant.

Incidental benefits

29-029

⚠ In *TFL Management Ltd v Lloyds Bank Plc*¹⁶⁵ ⚠ the Court of Appeal recognised that the defendant will be considered to be enriched at the claimant’s expense even if the claimant was acting primarily out of self-interest to benefit himself but, in doing so, the defendant was incidentally benefited. This was, however, rejected by the Supreme Court in *Revenue and Customs*

*Commissioners v Investment Trust*¹⁶⁶ ⚠ because in most cases where the benefit was an incidental or collateral result of the claimant’s expenditure it will not be possible to establish that the claimant had incurred a loss through the provision of the benefit, either because the claimant will have received the consideration for which he had bargained or because any loss suffered by the claimant would not have arisen through the provision of something for the benefit of the defendant. It appears, therefore, that the defendant can only be considered to have been enriched at the expense of the claimant where the claimant intended to benefit the defendant in some way. It follows that *TFL*

*Management Ltd v Lloyds Bank Plc*¹⁶⁷ ⚠ would now be determined differently. In that case a company had paid legal fees in a claim to recover a debt. This claim was unsuccessful, but the court held that the debt was actually owed to the defendant. Subsequently the defendant entered into a settlement with the debtor, relying on this judgment. The company’s rights having been assigned to the claimant, it sued the defendant in unjust enrichment on the ground that the company had incurred legal costs which conferred a valuable benefit on the defendant as a result of the company’s mistaken belief that the money was owed to it rather than the defendant. Even though this was an incidental benefit, because the company had acted in its own interest rather than to benefit the defendant, the Court of Appeal had held this did not necessarily negate the claim. Further, in the *ITC* case, Lord

Reed¹⁶⁸ ⚠ considered that any benefit obtained by the defendant had not been obtained directly from the company.

29-029A

⚠ Barring restitution where the enrichment was incidental will cause difficulties in other areas. For example, where the claimant discharges a debt which was primarily owed by the defendant this could be characterised as an incidental benefit, but it has long been recognised that the claimant can obtain

restitution in such a case,¹⁶⁹ ⚠ and this was expressly acknowledged by Lord Reed in *ITC*,¹⁷⁰ ⚠ although without any appreciation that the claim would be caught by the incidental benefit bar. The better view would be to reject the incidental benefit bar in the expectation that in most cases of an incidental benefit it will not be possible to establish an unjust enrichment because it will not be possible to identify a ground of restitution or a transfer of value between the claimant and the defendant or because the claimant can be considered to have been a risk-taker.¹⁷¹ ⚠


Rejection of “passing on” defence

29-030

In some cases the claimant is able to obtain restitution even though he has been able to pass on the loss, in the form of increased charges, to his customers.¹⁷² In such cases a defence of “passing on” is not recognised, because the law is concerned with the enrichment of the defendant at the expense of the claimant and not with what happened to the claimant following the defendant’s enrichment.¹⁷³ However, in *Marks and Spencer Plc v Commissioners of Customs and Excise*¹⁷⁴ Lord Walker of Westingthorpe recognised that passing on is recognised as a possible defence to any restitutionary claim. His Lordship cited *Roxborough v Rothmans of Pall Mall Australia Ltd*¹⁷⁵ in support of this conclusion, but that decision expressly rejected the passing on defence in Australia.

1. For a full treatment of the subject matter of this chapter, see: Burrows, *The Law of Restitution*, 3rd edn (2011); Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016); Virgo, *The Principles of the Law of Restitution*, 3rd edn (2015). See also Beatson, *The Use and Abuse of Unjust Enrichment* (1991); Birks, *An Introduction to the Law of Restitution* (1985); Birks, *Unjust Enrichment*, 2nd edn (2005); Maddaugh and McCamus, *The Law of Restitution*, 2nd edn (2004); McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014); Mason, Carter and Tolhurst, *Restitution Law in Australia*, 2nd edn (2008); Palmer, *The Law of Restitution* (1978) (four Vols); The American Law Institute’s Restatement of the Law Third, Restitution and Unjust Enrichment (2011).

144. *Halifax B.S. v Thomas* [1996] Ch. 217, 227 (Peter Gibson L.J.); Burrows at Ch.41; Goff and Jones, Pt 4; Virgo at Ch.5.

145.  This is so in all cases of money paid; e.g. *Kelly v Solari* (1841) 9 M. & W. 54 (below, para.29-035); *Brook’s Wharf and Bull Wharf Ltd v Goodman Bros* [1937] 1 K.B. 534 (below, para.29-108); *Uren v First National Home Finance Ltd* [2005] EWHC 2529 (Ch) at [22] (Mann J.). In *Haugesund Kommune v Depfa ACS Bank* [2011] EWCA Civ 33, [2012] Q.B. 549 Rix L.J. recognised (at [70]) that loss for the purposes of a claim in unjust enrichment does not necessarily equate with loss for the purposes of a claim for breach of contract or in tort. In *Revenue and Customs Commissioners v Investment Trust Companies* [2017] UKSC 29, [2017] 2 W.L.R. 1200 at [43], Lord Reed recognised that the reversal of unjust enrichment is premised on the defendant having received a benefit from the claimant such that the claimant has incurred a loss as a result of the provision of the benefit.

146. [2010] EWHC 1071 (Ch), [2010] S.T.C. 2072 at [145]–[147].

147. *Brook’s Wharf and Bull Wharf Ltd v Goodman Bros* [1937] 1 K.B. 534, 545.

148. Quasi-Contracts (1952), pp.14–17 (also his Province of the Law of Tort (1931), pp.134–138). See also Jackson, *History of Quasi-Contract* (1936) passim, especially pp.121–122.

149. e.g. *Stephens v Badcock* (1832) 3 B. & Ad. 354; *Howell v Batt* (1833) 2 Nev. & M. (K.B.) 381; *Cobb v Beake* (1845) 6 Q.B. 930 (see also the other cases cited by Winfield, Quasi-Contracts, p.15).

150. e.g. *Jones v Carter* (1845) 8 Q.B. 134 (a decision before the Gaming Act 1845 in which a stakeholder was held not liable to return a stake).

151. *Kleinwort Benson Ltd v Birmingham City Council* [1997] Q.B. 380; *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), [2013] Ch. 156 at [97] (Stephen Morris Q.C.). See now *Investment Trust Companies v Commissioners for Her Majesty’s Revenue and Customs* [2015] EWCA Civ 82, [2015] S.T.C. 1280. See below, para.19-028.

- [152.](#) See below, paras 29-164 et seq.
- [153.](#)  [2015] EWCA Civ 82, [2015] S.T.C. 1280.
- [154.](#)  [2012] EWHC 458 (Ch), [2012] S.T.C. 1150 at [67]. See also *Uren v First National Home Finance Ltd* [2005] EWHC 2529 (Ch) at [23] (Mann J.).
- [155.](#)  [2017] UKSC 29, [2017] 2 W.L.R. 1200.
- [156.](#)  [2015] UKSC 66, [2016] A.C. 176 at [27].
- [157.](#)  [2017] UKSC 29, [2017] 2 W.L.R. 1200 at [37] (Lord Reed).
- [158.](#)  See below, para.29-105.
- [159.](#)  See *Official Custodian for Charities v Mackey (No.2)* [1985] 1 W.L.R. 1308. See *Virgo* at pp.111–114. cf. *Burrows* at pp.79–85; *Smith* (1991) O.J.L.S. 481.
- [160.](#)  [2011] EWCA Civ 930, [2012] Q.B. 244 at [20].
- [161.](#)  [2014] EWCA Civ 360, [2015] 1 B.C.L.C. 14.
- [162.](#)  [1999] 1 A.C. 221; see below para.29-180.
- [163.](#)  [2015] UKSC 66, [2016] A.C. 176. See *Leung and Wong* [2016] L.M.C.L.Q. 337 and see generally *Winterton* [2016] R.L.R. 164.
- [164.](#)  [2015] UKSC 66 at [25] and [73].
- [165.](#)  [2013] EWCA Civ 1415, [2014] 1 W.L.R. 2006.
- [166.](#)  [2017] UKSC 29, [2017] 2 W.L.R. 1200. This is consistent with the decision of the House of Lords in *Ruabon SS Co v London Assurance* [1990] A.C. 6. See also *Edinburgh and District Tramways Co Ltd v Courtenay* 1909 S.C. 99.
- [167.](#)  [2013] EWCA Civ 1415, [2014] 1 W.L.R. 2006.
- [168.](#)  [2017] UKSC 29, [2017] 2 W.L.R. 1200 at [57].
- [169.](#)  See below para.29-105.
- [170.](#)  [2017] UKSC 9, [2017] 2 W.L.R. 1200 at [49].
- [171.](#)  See *Trotter* (2017) 76 C.L.J. 68.
- [172.](#) *Kleinwort Benson v Birmingham CC* [1997] Q.B. 380. See *Burrows* at pp.614–618; *Virgo* at Ch.25. See also *Mason v New South Wales* (1959) 102 C.L.R. 108, 146; *Roxborough v Rothmans of Pall Mall Australia Ltd* (2002) 76 A.L.J.R. 203 High Ct of Australia; *Kingstreet Investments Ltd v New Brunswick (Finance)* [2007] 1 S.C.R. 3 Supreme Ct of Canada; *McInnes* (2007) 123 L.Q.R. 365; *Williams* [2007] R.L.R. 130. See also *Rush, The Defence of Passing On*

(2006).

[173.](#) cf. the defence of change of position which is concerned with changes in the defendant's position following receipt of the enrichment. See below, para.29-186.

[174.](#) [2005] UKHL 53, [2005] C.M.L.R. 3 at [25].

[175.](#) (2002) 76 A.L.J.R. 203.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 9 - Restitution

Chapter 29 - Restitution ¹

Section 2. - Unjust Enrichment

(d) - The Grounds of Restitution ¹⁷⁶

The rationales of the grounds of restitution

29-031

There are a number of different grounds of restitution which operate to determine whether the defendant's receipt of an enrichment can be considered to be unjust. These grounds of restitution have a number of different rationales. Some operate on the basis that the claimant's intention to benefit the defendant can be treated as absent, vitiated or qualified in some way. Others operate by virtue of the defendant's unconscionable conduct. ¹⁷⁷ Still others exist by virtue of policy justifications. ¹⁷⁸ The grounds of restitution are not closed. ¹⁷⁹ The burden is placed on the claimant to establish the factor which renders it unjust for the defendant to retain an enrichment, rather than a burden being placed on the defendant to establish that it was unjust for a liability to be imposed on him. ¹⁸⁰


Absence of basis

29-032

⚠ The historical development of the subject has affected the way the unjust enrichment principle manifests itself; thus English law has not recognised a general action for the recovery of money on the ground that it was not due, a *condictio indebiti*, but has recognised specific grounds which a claimant seeking restitution must establish. ¹⁸¹ Professor Birks, *Unjust Enrichment* ¹⁸² argued that there is a single reason for the reversal of unjust enrichment, namely the absence of legal justification for receipt of a benefit. In *Deutsche Morgan Grenfell Group Plc v IRC* ¹⁸³ Lord Walker tentatively welcomed the absence of basis analysis of unjust enrichment, by virtue of which it is sufficient that the claimant can establish that there was no basis for the defendant's enrichment (such as a contract, gift or statutory obligation), although he did not adopt the absence of basis approach. ¹⁸⁴ In *Test Claimants in the Franked Investment Income (FII) Group Litigation v Commissioners for Her Majesty's Revenue and Customs* ¹⁸⁵ ⚠ Lord Sumption confirmed the orthodox position. It follows that it remains necessary for the claimant to establish that the claim falls within one of the established grounds of restitution.

^{1.} For a full treatment of the subject matter of this chapter, see: Burrows, *The Law of Restitution*, 3rd edn (2011); Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016); Virgo, *The Principles of the Law of Restitution*, 3rd edn (2015). See also Beatson, *The Use and Abuse of Unjust Enrichment* (1991); Birks, *An Introduction to the Law of Restitution* (1985); Birks, *Unjust Enrichment*, 2nd edn (2005); Maddaugh and McCamus, *The Law of Restitution*, 2nd edn (2004); McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014); Mason, Carter and Tolhurst, *Restitution Law in Australia*, 2nd edn (2008); Palmer, *The Law of Restitution* (1978) (four Vols); The American Law Institute's Restatement of the Law Third,

Restitution and Unjust Enrichment (2011).

- [176.](#) Burrows at pp.85–95; Goff and Jones, Pt 5; Virgo at Ch.6.
- [177.](#) See, for example, *Rowe v Vale of White Horse DC* [2003] EWHC 388 (Admin), [2003] 1 Lloyd's L.R. 418 where free acceptance was recognised as a ground of restitution, albeit not established on the facts, where services were provided in circumstances where the defendant had not rejected them when there was an opportunity to do so and the defendant, as a reasonable person, should have known that the claimant expected to be paid for the services. See also *Sharab v Prince Al-Waleed Bin Talal Bin Abdul-Aziz Al-Saud* [2012] EWHC 1798 (Ch), [2012] 2 C.L.C. 612 at [68]; *Professional Cost Management Group Ltd v Easynet Ltd Unreported July 9, 2012* (QBD District Registry, Manchester), at [90].
- [178.](#) Restitution from public authorities on the ground of ultra vires receipt has been rationalised in this way. See below, para.29-090.
- [179.](#) *CTN Cash and Carry Ltd v Gallaher* [1994] 4 All E.R. 714, 720 (Sir Donald Nicholls V.C.).
- [180.](#) *Rowe v Vale of White Horse DC* [2003] 1 Lloyd's L.R. 418, 422 (Lightman J.). See also *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 A.C. 349, 408 (Lord Hope).
- [181.](#) See *Uren v First National Home Finance Ltd* [2005] EWHC 2529 (Ch) at [16], (Mann J.); *NEC Semi-Conductors Ltd v IRC* [2006] EWCA Civ 25, [2006] S.T.C. 606 at [161] (Mummery L.J.); *Primlake Ltd (In Liquidation) v Matthews Associates* [2006] EWHC 1227 (Ch) at [335] (Lawrence Collins J.); *Marine Trade SA v Pioneer Freight Futures Co Ltd* [2009] EWHC 2656 (Comm), [2010] 1 Lloyd's Rep. 631 at [62] (Flaux J.); *Investment Trust Companies v Commissioners for Her Majesty's Revenue and Customs* [2012] EWHC 458 (Ch), [2012] S.T.C. 1150 at [74] (Henderson J.). See also *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* [2013] SGCA 36 at [134] (Singapore CA).
- [182.](#) 2nd edn (2005). See also Burrows, *Mapping the Law: Essays in Honour of Peter Birks* (2006), p.33; Baloch (2007) 123 L.Q.R. 636; Virgo in Robertson and Wu, *The Goals of Private Law* (2009), Ch.20. A claim for restitution based on unjust enrichment of the EU requires proof of enrichment by the EU for which there is no legal basis and impoverishment on the part of the applicant which is linked to the enrichment: *Masdar (UK) Ltd v Commission of the European Communities (C-47/07 P)* [2009] 2 C.M.L.R. 1 at [46] and [49]; *Agrana Zucker GmbH v Bundesminister für Land und Forstwirtschaft, Umwelt und Wasserwirtschaft (C-309/10)* [2012] C.M.L.R. 6 at [53].
- [183.](#) [2006] UKHL 49, [2007] 1 A.C. 558 at [158].
- [184.](#) See also Lord Hoffmann in *Deutsche Morgan Grenfell Group Plc v IRC* [2006] UKHL 49, [2007] 1 A.C. 558 at [21].
- [185.](#)  [2012] UKSC 19, [2012] A.C. 337, at [162]. See also *Zurich Insurance Plc UK Branch v International Energy Group Ltd* [2015] UKSC 33, [2015] 2 W.L.R. 1471, [68] (Lord Mance) (a general rule of no claim where there is a contract, but subject to exceptions). cf. [187] (Lord Sumption); *Patel v Mirza* [2016] UKSC 42, [2017] A.C. 467 at [246] (Lord Sumption); *Richards v Worcestershire County Council* [2016] EWHC 1954 (Ch) at [34] (Newey J.).

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 9 - Restitution

Chapter 29 - Restitution ¹

Section 2. - Unjust Enrichment

(e) - Mistake ¹⁸⁶

Enrichment

29-033

Although most of the cases involving restitution for mistake concern money payments, there may be restitution of other benefits conferred as the result of a mistake, such as a transfer of property made under a mistake, ¹⁸⁷ services rendered under a mistake, ¹⁸⁸ such as improvements to land and chattels made as a result of a mistake, ¹⁸⁹ and where credit has been given in an account as a result of a mistake as to a material fact. ¹⁹⁰

Definition of mistake

29-034

⚠ A mistake encompasses two states of mind, namely an incorrect conscious belief or an incorrect tacit assumption ¹⁹¹ as to a present matter of fact or law, but does not encompass mere causative ignorance but for which the claimant would not have acted as he did. ¹⁹² ⚠ A mistake is different from ignorance, inadvertence and misprediction as to the future. ¹⁹³ A misprediction as to the nature of a future transaction does not provide the basis for a claim to recover money as having been paid under a mistake, because the payer is a risktaker. ¹⁹⁴

Nature of mistake

29-035

It has long been clear that money paid under a mistaken belief of the payer as to the existence of a liability to pay is recoverable. ¹⁹⁵ Although restitution on the ground of mistake was restricted to such "liability mistakes", in fact the "supposed liability" rule itself could not explain all the decisions and it could have no application to cases of mistaken gifts of money. In fact "liability" mistakes were merely the commonest instance of what sufficed to ground recovery, especially where the payment is associated with the performance of contractual obligations. ¹⁹⁶ Thus, in *Kerrison v Glynn Mills, Currie & Co* ¹⁹⁷ the House of Lords permitted recovery of money mistakenly paid in anticipation of a future liability, despite this preferably being analysed as a misprediction rather than a mistake, which would not now satisfy the definition of mistake following the decision of the Supreme Court in *Pitt v Holt*. ¹⁹⁸ Again, in *Sybron Corp v Rochem Ltd* ¹⁹⁹ a payment of accrued benefits under a pension scheme, which provided that in cases of early retirement such benefits were to be dealt with at the discretion of the trustees, was made in ignorance of the payee's breach of duty to disclose the fraud of his subordinates with whom he acted. The accrued benefits had been paid under a mistake of fact induced by the payee's breach of duty and the Court of Appeal allowed the payer to recover. Moreover, an agent who pays money to a third party mistakenly believing that he has his principal's

authority to make the payment, may recover it even where the principal is in fact liable to the third party payee. ²⁰⁰ A payment made by an agent acting under a mistake of fact is recoverable although the principal himself, or another agent, knows the true facts. ²⁰¹ In *Larner v L.C.C.* ²⁰² payments made by a local authority in the mistaken belief that it was under a moral obligation to pay were recovered. The authority had voluntarily promised, “until further order”, to pay all their employees on war service the difference between their service pay and civilian pay. Larner was overpaid because he failed to inform the authority of increases in his service pay, but he defended the action by alleging that the payments were voluntary and were not made in discharge of any legal liability. The Court of Appeal rejected this, saying that, although under no legal obligation to pay, the authority:

“... for good reasons of national policy, made a promise to the men which they were in honour bound to fulfil. The payments ... were not mere gratuities. They were made as a matter of duty.” ²⁰³

These decisions show that it is not necessary for the mistake to induce belief in a legal liability to pay. ²⁰⁴ It has sometimes been recognised that a mistake must be fundamental to ground a restitutionary claim, ²⁰⁵ although the use of the term “fundamental” may be misleading because of the danger of confusing the basis upon which mistaken payments are recovered with that upon which a contract is avoided for mistake. ²⁰⁶ It has been said that recovery of mistaken payments can legitimately be granted on a generous basis where there is no contract that would need to be avoided because the policy favouring finality of contract does not apply if there is no transaction to set aside except the payment itself. ²⁰⁷ However, although the policy favouring finality of contract may be stronger than that favouring finality in other transactions, there is no a priori reason for this to be the case. In any event, whatever the reason for the difference, it would seem that the test of mistake in restitution is broader than that in contract. ²⁰⁸ Thus, mistakes as to creditworthiness and arithmetical mistakes have sufficed to allow the recovery of payments ²⁰⁹ and the mistake need not be shared by the payee, nor need he know of it. ²¹⁰ It is possible that the requirement that the mistake be fundamental in fact involves no more than that, without the mistake, the payment would not have been made. ²¹¹ If, however, the payment is due under a contract between the payer and the payee, the payment cannot be recovered unless the contract itself is held void or is discharged. ²¹² Today the relevant test to determine whether a mistake is sufficient to ground a claim for restitution is whether the mistake caused the enrichment to be transferred. ²¹³ This encompasses mistakes as to liability to transfer the enrichment and fundamental mistakes, but will also encompass other mistaken transfers.

Causative mistake

29-036

⚠ The recognition of the principle of unjust enrichment puts into question tests based on the nature of the mistake. ²¹⁴ In *Barclays Bank Ltd v W.J. Simms, Son and Cooke (Southern) Ltd* it was recognised that:

“... if a person pays money to another under a mistake of fact which causes him to make the payment, he is prima facie entitled to recover it.” ²¹⁵

Support for this causation test, which has since been recognised by the High Court of Australia, ²¹⁶ is found in speeches in several decisions of the House of Lords, ²¹⁷ including in *Kleinwort Benson Ltd v Lincoln CC* where it was stated that the payer “must prove that he would not have made the payment had he known of his mistake at the time when it was made”, and that the function of mistake is to show that the benefit which had been received was an unintended benefit. ²¹⁸ ⚠

Burden of proof

29-037

It appears that the burden of proving the causative effect of the mistake will not be heavy, at any rate if the mistake is serious, and it has been said that it is an “irresistible inference” that a payer who is mistaken about or ignorant of a material fact would not have made the payment had he known the true position. ²¹⁹ Where, however, the payer would not have appreciated the significance of a fact, recovery may be refused on the ground that the payment was made in settlement of a claim. ²²⁰

Doubt as to the liability to pay

29-038

⚠ If the payer was aware that there was doubt as to whether the payment was due but paid without waiting to resolve that doubt, it will not be recoverable: “a state of doubt is different from that of mistake” ²²¹; a person who pays when in doubt takes the risk that he may be wrong. ²²² In *Deutsche Morgan Grenfell Group Plc v IRC* ²²³ it was recognised that a claimant who suspects that there is no liability to pay the defendant but does so, may not be able to recover the payment, although their Lordships gave a variety of reasons for this conclusion. Lord Brown considered that suspicion negated the mistake, ²²⁴ whereas Lord Hoffmann considered that the suspicious claimant might be considered to be a risk-taker. ²²⁵ The preferable view is that of Lord Hope, ²²⁶ namely that the claimant’s suspicions will mean that the payment will not have been caused by the mistake but because the claimant has taken a calculated risk about the existence of the liability to pay. In *Marine Trade SA v Pioneer Freight Futures Co Ltd* ²²⁷ ⚠ Flaux J. recognised that a payer can still be considered to be mistaken if he has doubts as to the liability to pay, but only if he had concluded that it was more likely than not that he was liable. If the payer thought it was more likely than not that he was *not* liable to pay, but paid nonetheless, he should not be considered to be mistaken. In *BP Oil International Ltd v Target Shipping Ltd* ²²⁸ Andrew Smith J. recognised that, even where the claimant did consider that he was probably liable to pay in circumstances where there was actually no such liability, it does not necessarily follow that the claimant was mistaken because he may have decided to take the risk of mistake. Further, in that case Andrew Smith J. recognised that a mistake made by an agent or employee may be attributed to the principal or employer. In such a case, however, the state of mind of an employee other than a paying agent may be sufficient to defeat the mistake claim if that employee was responsible for the transaction, knew or suspected that the money was not due and did not object to or prevent the transaction. So, for example, if one employee authorised the transaction, but another employee authorised the payment of the subsequent invoice and was mistaken about the liability to pay, the fact that the former employee was not mistaken or was a risk-taker will defeat the employer’s claim for restitution. If the claimant pays the money intentionally, waiving any inquiry into the facts, e.g. a payment made in submission to an honest claim, it is irrecoverable. ²²⁹ ⚠

Negligence: payer with means of knowledge

29-039

The fact that the payer was in a position to discover all the relevant circumstances concerning the payment, may possibly, as a matter of evidence, support the inference that he had actual knowledge of those circumstances or that he has represented that reasonable care was used in making and checking the payment. There is, however, no conclusive rule of law that, because a person has the means of knowledge, he must be taken to have actual knowledge. ²³⁰ Thus, a person paying money under a mistake of fact is not prevented from recovering it merely because he was negligent in failing to discover the true facts. ²³¹ Parke B., in *Kelly v Solari*, said that recovery was possible, “however careless the party paying may have been in omitting to use due diligence to inquire into the fact”. ²³² So money paid to a defendant under a mistake of fact can be recovered even though the claimant had forgotten the facts which disentitled the defendant from receiving it, ²³³ or the money was paid in ignorance of a fact which the claimant could have discovered at the time of payment if he had availed himself of his means of knowledge. ²³⁴ In *Dextra Bank & Trust Co Ltd v Bank of Jamaica* ²³⁵ the Privy

Council rejected the concept of “relative fault” or any suggestion to “balance the equities” between payer and recipient for the purposes of the defence of change of position, provided the recipient acted in good faith.

Qualification to causation principle

29-040

This broad principle of recovery is attractive where the payee still has the money, for there is then a true superfluity in his assets. But, unless the payee has a wide range of defences available, for instance to protect changes of position and security of transactions, it can operate unfairly. This was recognised in *Barclays Bank Ltd v W.J. Simms, Son and Cooke (Southern) Ltd* by Robert Goff J. who qualified the principle of recovery by stating ²³⁶ that a claim may fail if:

“(a) ... the payer intends that the payee shall have the money at all events, whether the fact be true or false, or is deemed in law so to intend; or (b) the payment is made for good consideration, in particular if the money is paid to discharge and does discharge, a debt owed to the payee (or a principal on whose behalf he is authorised to receive the payment) by the payer or by a third party by whom he is authorised to discharge the debt; or (c) the payee has changed his position in good faith, or is deemed in law to have done so.”

The first two qualifications did not apply in that case and it was held there was no evidence of any change of position, so the judge did not have to consider these questions. ²³⁷

Payments made for good consideration

29-041

Money paid in discharge of a genuine legal obligation cannot be recovered merely because the payer was induced to fulfil his legal obligation by a mistake. In *Fairfield Sentry Ltd v Migani* ²³⁸ Lord Sumption recognised that a mistaken payment cannot be recovered “to the extent [it] discharges a contractual debt of the payee”. But he went on to recognise that, “[s]o far as the payment exceeds the debt properly due, then the payer is in principle entitled to recover the excess”. In that case restitution was not awarded where the claimant was contractually bound to make the payments which it sought to recover. As Lord Hope recognised in *Kleinwort Benson Ltd v Lincoln CC*, “The payee cannot be said to have been unjustly enriched if he was entitled to receive the sum paid to him”. ²³⁹ For example, ²⁴⁰ where the claimant paid money due under a contract to agents of a foreign government in ignorance of the fact that a revolution had broken out which subsequently led to the downfall of the government, it was not recoverable even though the claimant would not have made the payment had he known what was happening ²⁴¹.

“... the money was paid, not under a mistake of fact as to the existence of an obligation; it was paid in pursuance of an obligation which in fact existed” ²⁴²

and was effective to discharge that obligation. Where, however, the claimant paid money under a contract to agents of the other party in ignorance of the fact that the contract had already been repudiated by the other party, it was held that the payment was recoverable because it did not discharge any legal obligation. ²⁴³ *Aiken v Short*, ²⁴⁴ which was the basis for the view that only “liability” mistakes sufficed to permit repayment, is in fact an example of failure to recover a payment which was effective to discharge a debt. The plaintiff bankers paid a sum of money to the defendant in discharge of a debt owed by one Carter to the defendant which was secured by a mortgage on property which supposedly belonged to Carter. The plaintiffs purchased the property from Carter subject to the defendant’s interest on the understanding that they would pay off Carter’s debt to the

defendant. The plaintiffs paid the defendant because they believed that they were getting rid of the encumbrance on their title and, when it transpired that Carter did not in fact own the property, they claimed to recover the sum as having been paid under a mistake of fact. The Court of Exchequer held that the money was irrecoverable. The payment was authorised by Carter ²⁴⁵ and was effective to discharge the debt; the defendant therefore gave good consideration for the payment. ²⁴⁶ The operation of this rule is also illustrated by cases in which a bank mistakenly pays a third party who presents a cheque drawn upon it by a customer. The question whether the bank may recover the payment depends on whether the payment was with or without mandate. ²⁴⁷ Thus, where the bank pays, having overlooked notice of the customer's death or his instructions countermanding the cheque, the bank will be able to recover the payment. ²⁴⁸ Because it has paid without mandate the bank cannot debit the customer's account and the payment does not discharge the customer's debt to the payee. Where, however, the bank mistakenly thinks the customer has sufficient funds or overdraft facilities to meet the cheque, the payment will be irrecoverable. ²⁴⁹ The payment is within the bank's mandate, the bank is therefore entitled to have recourse to the customer and the payment does discharge the customer's debt to the payee.

Other bars to recovery

29-042

⚠ Payments made in submission to a claim ²⁵⁰ and under compromises are normally irrecoverable. ²⁵¹ If parties agree in good faith to compromise a disputed claim, the compromise is binding, even though the claim might in fact be without proper foundation. ²⁵² Furthermore, a mistaken payment which is prima facie recoverable might not be recovered on grounds of public policy where granting a remedy would indirectly frustrate the policy of a statutory rule. ²⁵³ ⚠ Thus, in *Morgan v Ashcroft* ²⁵⁴ a bookmaker, by a clerical mistake, overpaid the defendant on a betting account, and sued to recover the excess. The Court of Appeal rejected his claim, primarily because the court could not examine the state of the account between the parties since that would be to recognise wagering transactions as producing legal obligations (contrary to the Gaming Act 1845). As Scott L.J. said, the:

“... statutory veto upon the reception of evidence about gaming transactions ... creates a special impediment, and in effect constitutes a special defence to the action for money had and received”,

by which “the law prevents the plaintiff from saying that he intended anything but a present”. ²⁵⁵

Previous notice and demand

29-043

It has been said that in order to entitle a party to bring an action to recover money on the ground that it was paid by mistake, notice of the mistake must have been given to the defendant and a demand made for the return of the money. ²⁵⁶ But it has been held that a right of restitution arises immediately following overpayment ²⁵⁷ and it is submitted that failure to give notice of the claim before action should be relevant only to the court's discretion in awarding costs. ²⁵⁸ It may be, however, that the giving of notice is a condition precedent to the right to bring an action, but not to the liability to repay. In another case, where the payer and payee were acting under the same mistake, this rule requiring a previous demand was not applied and the period of limitation was held to run from the date of payment. ²⁵⁹

Mistake of law: formerly not a ground for restitution

29-044

Despite a dubious legal foundation ²⁶⁰ and the difficulty of drawing any clear dividing line between “law” and “fact”, ²⁶¹ for many years as a general rule money paid under a mistake as to the general law, or as to the legal effect of the circumstances under which it is paid, but with full knowledge of the facts, was irrecoverable. ²⁶² The rule reflected concern to protect security of receipts, ²⁶³ especially in the absence of a defence of change of position. ²⁶⁴ A mistake as to the existence or construction of a statute is clearly one of law, ²⁶⁵ as is a mistaken view of regulations issued under statutory authority. ²⁶⁶ Mistakes as to the effect of general rules of Common Law or of Equity also constitute mistakes of law. Thus, where a tenant paid rent to an equitable mortgagee with notice that the mortgagee claimed it in that capacity, the payments were made under a mistake of law. ²⁶⁷ Mistakes in construing a will, ²⁶⁸ such as a mistake as to the technical requisites for the creation of a valid charitable trust, ²⁶⁹ are also mistakes of law.

⚠ There were, however, exceptional cases in which payments made under a mistake of law were recoverable. Some of these were in fact cases in which the payer could establish an alternative ground for restitution. ²⁷⁰ Thus, where an illegal payment was made under a contract, but the parties were not in *pari delicto*, ²⁷¹ the payment could be recovered although it was made under a mistake of law in that neither party knew that the contract was illegal. ²⁷² Similarly, recovery was permitted where the mistake of law which led to the payment was caused by an *ultra vires* demand by the revenue or possibly any public authority, ²⁷³ by fraud, undue influence or breach of a fiduciary duty on the part of the recipient ²⁷⁴ or where it was caused by oppression ²⁷⁵ and, possibly, compulsion. ²⁷⁶ Other exceptions to the rule occurred where the payment was made by the court or an officer of the court, ²⁷⁷ and where public funds were disbursed without legal authority. ²⁷⁸ The House of Lords in *Cooper v Phibbs* ²⁷⁹ held that ignorance of the existence of a private right of property was a mistake of fact, although this ignorance was based on a mistaken interpretation of the law. Equity has, in certain cases, given relief when a payment has, at least in part, depended on a mistake of law; thus a trustee or personal representative who has overpaid a beneficiary through a mistake of law may deduct the overpayment from future payments due to the beneficiary. ²⁸⁰ Furthermore, the court will not allow one of its officers, such as a trustee in bankruptcy or official receiver, to retain money paid to him under a mistake of law where it would be contrary to fair dealing to do so. ²⁸¹ The principle in these cases, known as the rule in *Ex p. James*, ²⁸² is not restricted to payments under mistake of law and appears to be based on the need to prevent unjust enrichment. ²⁸³ ⚠

Criticism of the bar to restitution

29-045

The main criticisms of the bar were as follows. ²⁸⁴ First, it allowed a payee to retain a payment which would not have been made but for the payer’s mistake, “whereas justice appears to demand that money so paid should be repaid unless there are special circumstances justifying its retention”. ²⁸⁵ Secondly, the distinction between mistakes of fact which could ground liability and mistakes of law which could not produced results which appeared to be capricious. So a payment by an insurer would be irrecoverable where, as in *Bilbie v Lumlie*, ²⁸⁶ the underwriter had failed to appreciate that he could repudiate the policy for non-disclosure, but not where, as in *Kelly v Solari*, ²⁸⁷ he forgot that the premium had not been paid. Thirdly, the rule became uncertain and unpredictable in its application because of the difficulty of drawing the distinction between mistakes of fact and law and because of the many exceptions and qualifications to the rule. In practice the scope of the rule was narrowed by the artificial distinction made between mistakes of general law and mistakes as to private rights, since the latter grounded recovery. ²⁸⁸ Many of the cases in which the rule was applied can in fact be explained as examples of the irrecoverability of payments made in settlement of an honest claim. ²⁸⁹

Rejection of the mistake of law bar to restitution

29-046

The rule has been held not to be part of the law of Scotland ²⁹⁰ and has been rejected by the Supreme Court of Canada, the High Court of Australia and the Appellate Division of the Supreme Court of South Africa. ²⁹¹ In England the acceptance in 1991 ²⁹² of the principle of unjust enrichment made it

difficult to continue to defend a distinction between mistakes of fact and law, and the recognition of a defence of change of position ²⁹³ at the same time dealt with some of the legitimate concerns about the security of receipts. In 1994 the Law Commission recommended the abolition of the rule ²⁹⁴ and in 1998 the House of Lords in *Kleinwort Benson Ltd v Lincoln City Council* ²⁹⁵ held that it was not part of English law. In that case, the claimant bank sought to recover payments made to the defendants under interest rate swaps contracts believed to be binding but subsequently held ultra vires. ²⁹⁶ Over half of the payments had been made more than six years before the claim was brought, but less than six years after the House of Lords held that the contracts were ultra vires. It followed that the claim was statute barred unless it was for relief from the consequences of a mistake, in which case s.32(1) of the Limitation Act 1980 provided that the period of limitation only began to run when the bank either discovered the mistake or could with reasonable diligence have discovered it. The bank could not have discovered the true position until it was held that the contracts were ultra vires. It was held that the rule barring restitutionary claims to money paid under a mistake of law should no longer be maintained as part of English law. There is therefore a general right to recover money paid under a mistake, whether of fact or law, subject to the defences available in the law of unjust enrichment. Although there was unanimity as to the desirability in principle of abrogating the rule, their Lordships were divided as to whether this should be done judicially. This was due to a difference of opinion as to the position where, after a payment has been made, the law changed by judicial decision. The majority held that a payment made under a settled understanding of the law which is subsequently departed from by judicial decision was recoverable on the ground of mistake of law. The judges in the minority considered that such a payment was not made under a mistake, and were not prepared to abolish the rule barring restitution in respect of payments made under a mistake of law if that meant that such a payment would be recoverable. This aspect of the decision is considered further below. ²⁹⁷

Mistake of law: principles governing recovery

29-047

It was held in *Kleinwort Benson Ltd v Lincoln City Council* ²⁹⁸ that the questions raised in a claim for restitution of money paid under a mistake of law are the same as those raised in a claim for restitution of money paid under a mistake of fact: was there a mistake, did the mistake cause the payment, and did the payee have a right to receive the sum which was paid to him? Retention of the money is prima facie unjust if the payer paid because he thought he was obliged to do so and it subsequently turns out that he was not. Lord Hope stated that, although it may be more difficult to establish that there has been a mistake of law than a mistake of fact, there is no essential difference in principle with regard to the payer's state of mind or with regard to the state of facts or the law, which must be determined at the time of payment. ²⁹⁹ But his Lordship considered that there was no reason in principle for the mistake to be one that is capable of being discovered at the same time as when the payment was made. ³⁰⁰ The prima facie right to recover a mistaken payment is subject to the ordinary defences to restitutionary claims which are concerned to protect the stability of closed transactions, i.e. change of position, compromise ³⁰¹ and settlement of an honest claim, the last of which is likely to assume an increased importance despite its current somewhat uncertain scope, since many of the cases in which recovery was barred by the mistake of law rule can be explained as examples of such settlements. ³⁰² The House considered, but rejected, a number of other limits to recovery. Thus, the suggestion that restitution is barred where the payee honestly believes that he was entitled to the money, which would exclude recovery in a very large proportion of cases, was rejected. ³⁰³ It was also held that restitution is not barred where the transaction under which the money was paid has been fully performed (although this would bar a restitutionary claim grounded on total failure of basis). ³⁰⁴ Moreover, a bare majority held that a payment made under a settled understanding of the law which is subsequently departed from by judicial decision is made under a mistake of law and is therefore recoverable. ³⁰⁵ Nevertheless Lord Goff left open the possibility that other defences might be developed from judicial decisions in the future. ³⁰⁶

Changes in the law ³⁰⁷

29-048

Where the law is changed by *legislation* a payment made or service rendered in accordance with the previous law cannot be recovered since there was clearly no mistake when it was made. ³⁰⁸ Where

the law is changed by a *judicial decision*, however, the position differs. Such a change may occur either by the overruling of an earlier decision, or by changing what had previously been commonly regarded as the law. The traditional working assumption upon which the common law proceeds is that judges declare law but do not make it. Thus, where the common law changes, a legal fiction (known as the declaratory theory) means that the law is regarded as having always been what the judicial decision has stated it to be. By a bare majority, the House of Lords held in *Kleinwort Benson Ltd v Lincoln City Council* ³⁰⁹ that the logical consequence of the declaratory theory is that the pre-decision payment must be regarded as mistaken and is therefore recoverable. ³¹⁰ This is so both where the law was established by a judicial decision which is subsequently overruled and where, as in *Kleinwort Benson Ltd* itself, the law was arguably “settled” as a matter of practice but without a decision in point. ³¹¹ The position may well differ, however, where the payment was made pursuant to a judgment of the court and that judgment is afterwards overruled by a higher court in a different case: “the obligation to pay is to be found in the order which has been made by the court”. ³¹² Lord Browne-Wilkinson and Lord Lloyd took a different view of the general effect of a change in the law or a settled understanding of the law by judicial decision. They considered that such a payment was not made under a mistake because, where a decision of a court has in fact changed the law, “retrospectivity cannot falsify history”. ³¹³ If at the date of the payment it was the law that the payer was liable, the payer was not labouring under a mistake at that date: the subsequent change in the law could not create a cause of action which, *ex hypothesi*, did not exist at the relevant time.

Advantages of mistake of law as a ground of restitution

29-049

A mistake as to a liability to pay tax to the Inland Revenue also constitutes a mistake of law. ³¹⁴ In such circumstances the taxpayer can choose to bring a claim founded on mistake of law or on the *ultra vires* nature of the receipt. ³¹⁵ The advantage of founding the claim on mistake of law is that it will enable the claimant to gain the benefit of an extended limitation period under s.32(1)(c) of the Limitation Act 1980, which applies to claims involving a mistake and for which time does not begin to run until the mistake could reasonably have been discovered. ³¹⁶

Personal and proprietary remedies

29-050

! The normal remedy for the recovery of money paid under mistake is a personal remedy for the value of the enrichment. However, the effect of the claimant’s mistake may sometimes operate so that the claimant retains or is given a new proprietary interest in the property which was received by the defendant. Where the claimant retains or is given an equitable proprietary interest, equitable proprietary remedies may be available. ³¹⁷ !

Equitable remedies

29-051

The equitable remedy of rescission of a contract on the ground of misrepresentation ³¹⁸ may have restitutionary consequences, since a consequence of rescission includes the restitution of benefits transferred by the representee in pursuance of the contract and an indemnity against liabilities necessarily incurred by the representee as a result of the contract. ³¹⁹ Similarly, rectification ³²⁰ of a written document which by a mistake fails to give effect to a prior oral agreement may also lead to restitutionary relief. Full discussion of these remedies will be found in previous Chapters. ³²¹

Mistaken voluntary dispositions

29-052

⚠ There is an equitable jurisdiction to rescind voluntary dispositions which have been made by mistake. The operation of this equitable jurisdiction is more restrictive than the Common Law regime for the recovery of mistaken payments. The nature of this equitable jurisdiction was examined by the

Supreme Court in *Pitt v Holt*.³²² ⚠ There are three interlinked elements: (i) the donor was mistaken at the time of the disposition³²³; (ii) the mistake was sufficiently serious, but it need not be fundamental in the manner which is required to set aside a contract; and (iii) the assertion of the donee's rights would be objectively unjust or unconscionable, rendering the mistake of sufficient gravity to rescind the disposition. On the facts of that case it was held that a mistake as to the tax consequences of a disposition was sufficiently serious to trigger the equitable jurisdiction to rescind the disposition for mistake, although probably it is only in exceptional cases that such mistakes will render the disposition voidable. Where a settlor or trustee has conferred a benefit on the donees in a tax-efficient manner as contemplated by statute, this will be characterised as legitimate such that it

would be unconscionable not to rescind the disposition for mistake.³²⁴ ⚠ Although the jurisdiction to rescind voluntary deeds of dispositions for mistake is equitable, the principles identified by the Supreme Court have been considered to be applicable at Common Law to limit claims for restitution of gifts transferred by mistake even though there was no underlying deed to rescind.³²⁵ ⚠

Mistaken repairs or improvements to another's goods

29-053

The position of a person who has mistakenly expended money or effort in repairing or improving goods belonging to another person depends on whether a claim is made against him by the owner of the goods for wrongful interference with them, or whether the claim is brought against the owner by the repairer or improver for the value of the repairs or improvement.

Claims by owner: statutory allowance

29-054

Where the owner brings a claim for wrongful interference under the Torts (Interference with Goods) Act 1977 against a person who has improved³²⁶ the goods in the honest but mistaken belief that he had title to them, s.6(1) of the Act provides that an allowance shall be made in respect of the improvement to the extent to which the value of the goods is attributable to it.³²⁷ Section 6(2) provides for an equivalent allowance where the action is brought against a bona fide transferee from the improver, whether or not the improver was in good faith; but s.6(3) provides that where a transferee who is a purchaser has received this allowance, then, in proceedings by him against the seller for recovery of the price on the ground of total failure of consideration,³²⁸ a bona fide seller (who may be the improver) shall be entitled to the allowance. Where the owner seeks an order for delivery to him of the goods under s.3(2) of the Act in circumstances in which an allowance under s.6 would have been made, the court is given discretion to require, as a condition for delivery of the goods, that the allowance be made to the defendant. The Act, however, only applies where the improver acts in the honest belief that he had good title³²⁹ to the goods and it has no application where the owner has reacquired the goods without the aid of the court.³³⁰ It would appear that the Act is, in some respects, narrower than the common law which indirectly permitted an allowance in respect of improvements by fixing the damages in actions for conversion as the value of the goods in their unimproved state, even where there was no mistake as to title.³³¹

Claims by the improver

29-055

The position is less easy to state in view of the paucity of authority. Where the owner of the goods has requested, freely accepted or acquiesced in the improvement, the improver should, by analogy to the cases on improvements to land, be entitled to claim.³³² The nature of the relief will depend on the

circumstances of the case but, in principle, the improver should be entitled to the reasonable value of his services even if this is not reflected in the value of the goods. Apart from cases of acquiescence, the present state of the authorities ³³³ would seem to preclude the improver having any claim, even one limited to any increase in the value of the goods attributable to the improvement. In *Greenwood v Bennett* ³³⁴ Cairns L.J. doubted that such a claim could be made. ³³⁵ However, Lord Denning M.R. was prepared to allow a person, who had improved a car honestly believing himself to be its owner, a direct claim against the owner ³³⁶.


“The court will order the plaintiffs, if they recover the car, or its improved value, to recompense the innocent purchaser for the work he has done on it. No matter whether the plaintiffs recover it with the aid of the court, or without it, the innocent purchaser will recover the value of the improvements he has done to it.” ³³⁷

In the context of that case, in which the true owner had realised the increased value by selling the car, this may be unexceptionable, but it should be noted that where an increase in value has not been realised it is only possible to regard it as a benefit for the purpose of a restitutionary claim if one is willing to force a sale upon the owner. ³³⁸


Mistaken improvement to land



29-056


Equity will offer relief to the mistaken improver of land only where the land owner has acted unconscionably, for example by knowingly acquiescing in the improver's work. ³³⁹

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1. For a full treatment of the subject matter of this chapter, see: Burrows, *The Law of Restitution*, 3rd edn (2011); Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016); Virgo, *The Principles of the Law of Restitution*, 3rd edn (2015). See also Beatson, *The Use and Abuse of Unjust Enrichment* (1991); Birks, *An Introduction to the Law of Restitution* (1985); Birks, *Unjust Enrichment*, 2nd edn (2005); Maddaugh and McCamus, *The Law of Restitution*, 2nd edn (2004); McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014); Mason, Carter and Tolhurst, *Restitution Law in Australia*, 2nd edn (2008); Palmer, *The Law of Restitution* (1978) (four Vols); The American Law Institute's Restatement of the Law Third, Restitution and Unjust Enrichment (2011).
 - ^{186.} Burrows at Ch.9; Goff and Jones at Ch.9; Virgo at Ch.9; Sheehan (2000) L.S. 538.
 - ^{187.} *Gibbon v Mitchell* [1990] 1 W.L.R. 1304; *Lady Hood of Avalon v Mackinnon* [1909] 1 Ch. 476; *Re Butlin's S.T.* [1976] 1 Ch. 251.
 - ^{188.} See below, para.29–053.
 - ^{189.} See below, paras 29–053, 29–056.
 - ^{190.} *Skyring v Greenwood* (1825) 4 B. & C. 281; *Ward & Co v Wallis* [1900] 1 Q.B. 675, 679; *Branwhite v Worcester Works Finance Ltd* [1969] 1 A.C. 552. Contrast *British and North European Bank Ltd v Zalstein* [1927] 2 K.B. 92.
 - ^{191.} See *Leslie v Farrar Construction Ltd* [2015] EWHC 58 (TCC), [255] (Judge Stephen Davies).
 - ^{192.}  *Pitt v Holt* [2013] UKSC 26, [2013] 2 A.C. 108 at [108] (Lord Walker). See *Lowick Rose LLP v Swynson Ltd* [2017] UKSC 32, [2017] 2 W.L.R. 116 at [80] (Lord Mance).
 - ^{193.} *Pitt v Holt* [2013] UKSC 26, [2013] 2 A.C. 108 at [104] (Lord Walker). See Seah [2007] R.L.R.


- 93.
- [194.](#) *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All E.R. (Comm) 193 PC. cf. *Kerrison v Glynn Mills, Currie & Co* (1911) 81 L.J.K.B. 465. See para.29–036, below.
- [195.](#) *Kelly v Solari* (1841) 9 M. & W. 54; 11 L.J. Ex. 10; *Aiken v Short* (1856) 1 H. & N. 210, 215; 25 L.J. Ex. 321; *Deutsche Bank v Beriro & Co Ltd* (1895) 1 Com. Cas. 255, 259; *Re Bodega Co Ltd* [1904] 1 Ch. 276, 286; *Steam Saw Mills Co Ltd v Baring Bros & Co Ltd* [1922] 1 Ch. 244, 250 (Lord Sterndale M.R.). See also the formulation of the rule in *National Westminster Bank Ltd v Barclays Bank International Ltd* [1975] Q.B. 654, 675 (Kerr J.).
- [196.](#) *Morgan v Ashcroft* [1938] 1 K.B. 49, 64, 71 (Scott L.J.).
- [197.](#) (1911) 81 L.J.K.B. 465.
- [198.](#) [2013] UKSC 26, [2013] 2 A.C. 108. See para.29–034, above.
- [199.](#) [1984] Ch. 112. cf. *Horcal Ltd v Gatland* [1984] I.R.L.R. 288 (no breach of duty at relevant date).
- [200.](#) *Colonial Bank v Exchange Bank of Yarmouth, Nova Scotia* (1885) 11 App. Cas. 84; *Anglo-Scottish Beet Sugar Corp Ltd v Spalding U.D.C.* [1937] 2 K.B. 607; *Turvey v Dentons* (1923) Ltd [1953] 1 Q.B. 218. Money mistakenly paid by a third party to an agent for transmission to the principal is also recoverable before the agent has paid the money to the principal: *Buller v Harrison* (1777) 2 Cowp. 565; *British American Continental Bank v British Bank for Foreign Trade* [1926] 1 K.B. 328.
- [201.](#) *Anglo-Scottish Beet Sugar Corp Ltd v Spalding U.D.C.* [1937] 2 K.B. 607; *Turvey v Dentons* (1923) Ltd [1953] 1 Q.B. 218.
- [202.](#) [1949] 2 K.B. 683. cf. *Lowe v Wells Fargo & Co Express* (1908) 96 P. 74; *Lady Hood of Avalon v Mackinnon* [1909] 1 Ch. 476; *Re Butlin's S.T.* [1976] 1 Ch. 251; *Barder v Caluori* [1988] A.C. 20. See Seah [2007] R.L.R. 93.
- [203.](#) [1949] 2 K.B. 683, 688.
- [204.](#) See also *Rover International Sales Ltd v Cannon Film Sales Ltd* (No.3) [1989] 1 W.L.R. 912, 933 (Dillon L.J.); *Australian and New Zealand Banking Group Ltd v Westpac Banking Corp* (1988) 78 A.L.R. 157, 161 High Ct of Australia; *Nurdin and Peacock Plc v DB Ramsden and Co Ltd* [1999] 1 W.L.R. 1249.
- [205.](#) *Norwich Union Fire Insurance Society Ltd v W.H. Price Ltd* [1934] A.C. 455, 463 (Lord Wright). See also *Morgan v Ashcroft* [1938] 1 K.B. 49, 64–67, 77 (Scott L.J.); *Jones v Waring & Gillow Ltd* [1926] A.C. 670, 696 (Lord Sumner); *Bank of New South Wales v Murphett* [1983] V.R. 489; *Australia and New Zealand Banking Group Ltd v Westpac Banking Corp* (1988) 78 A.L.R. 157, 160–161.
- [206.](#) See above, paras 6-015, 6-028; below, para.29-167.
- [207.](#) Palmer at paras 11.2, 14.1; Palmer, *Mistake and Unjust Enrichment* (1962), pp.8, 25.
- [208.](#) e.g. *Midland Bank Plc v Brown Shipley & Co Ltd* [1991] 2 All E.R. at 690, 700–701 (Waller J.).
- [209.](#) *Kerrison v Glyn, Mills, Currie & Co* (1911) 81 L.J.K.B. 465; *Weld-Blundell v Synott* [1940] 2 K.B. 107. See also *Re Butlin's S.T.* [1976] 1 Ch. 251 (voluntary settlement).
- [210.](#) The mistake may be fraudulently induced by a third person: *R. E. Jones Ltd v Waring & Gillow Ltd* [1926] A.C. 670.
- [211.](#) *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 66 A.L.J.R. 768, 777; *Bank of New South Wales v Murphett* [1983] 1 V.R. 489; *Australia and New Zealand Banking Group*

- Ltd v Westpac Banking Corp* (1988) 78 A.L.R. 157, 161. On the causation test, see below, para.29–036.
- [212.](#) *Norwich Union v W.H. Price Ltd* [1934] A.C. 455; *Barclays Bank Ltd v W.J. Simms, Son and Cooke (Southern) Ltd* [1980] Q.B. 677, 695 (Robert Goff J.).
- [213.](#) See para.29–036, below.
- [214.](#) *Air Canada v British Columbia* [1989] S.C.R. 1161, 1200 (La Forest J.); *David Securities v Commonwealth Bank of Australia* (1992) 66 A.L.J.R. 768, 776, 787; *Woolwich Equitable Building Society v IRC* [1993] 1 A.C. 70, 192 (Lord Jauncey); *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 A.C. 349, 373 (Lord Goff).
- [215.](#) [1980] Q.B. 677, 695 (Robert Goff J.). See also *Lloyds Bank Plc v Independent Insurance Co Ltd* [2000] Q.B. 110. See further Vol.II, para.34–129.
- [216.](#) *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 66 A.L.J.R. 768, 777. *Cp. Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* [2014] HCA 14, para. 29–015, above.
- [217.](#) *Kleinwort, Sons and Co v Dunlop Rubber Co* (1907) 97 L.T. 263, 264 (Lord Loreburn); *Kerrison v Glyn, Mills, Currie and Co* (1912) 81 L.J.K.B. 465, 470 (Lord Atkinson), 471 (Lord Shaw), 472 (Lord Mersey); *R.E. Jones Ltd v Waring & Gillow Ltd* [1926] A.C. 670, 679–680 (Viscount Cave L.C.), 686 (Lord Shaw), 691, 692 (Lord Sumner); *Banque Financière de la Cité v Parc Battersea Ltd* [1999] 1 A.C. 221 and *Deutsche Morgan Grenfell Group Plc v IRC* [2006] UKHL 49, [2007] 1 A.C. 558.
- [218.](#)  [1999] 2 A.C. 349, 408 (Lord Hope). See also at 373 (Lord Goff). See also *Nuridin and Peacock Plc v DB Ramsden and Co Ltd* [1999] 1 W.L.R. 1249 (payment prima facie recoverable where there was a mistake and it related directly and closely to the payment and to the relationship between the payer and payee, particularly where there would have been no payment if the mistake had not been made); *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All. E.R. (Comm) 193 PC at [28]–[30]; *Maersk Air Ltd v Expeditors International (UK) Ltd* [2003] 1 Lloyd's Rep. 491; *Papamichael v National Westminster Bank Plc* [2003] 1 Lloyd's Rep. 34; *Marine Trade SA v Pioneer Freight Futures Co Ltd* [2009] EWHC 2656 (Comm), [2010] 1 Lloyd's Rep. 631 at [78] (Flaux J.). In *Fender v National Westminster Bank Plc* [2008] EWHC 2242 (Ch) this test of causative mistake was used to set aside in equity a deed of release from a guarantee. See also *BHL v Leumi Abi Ltd* [2017] EWHC 1871 (QB) at [205], where the “but for” test of causation was recognised and applied; *Jazztel Plc v Revenue and Customs Commissioners* [2017] EWHC 677 (Ch), [2017] S.T.C. 1422 at [29] (Marcus Smith J.).
- [219.](#) *Saronic Shipping Co Ltd v Huron Liberian Co Ltd* [1979] 1 Lloyd's Rep. 341, 362–366 (affirmed [1980] 2 Lloyd's Rep. 26).
- [220.](#) *Home and Colonial Insurance Co Ltd v London Guarantee Accident Co* (1928) 45 T.L.R. 134. See below, para.29–197.
- [221.](#) *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 A.C. 349, 410 (Lord Hope).
- [222.](#) *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 A.C. 349, 410 (Lord Hope); *Cobbold v Bakewell Management Ltd* [2003] EWHC 2289 (Ch) at [19] (Rimer J.). See below, para.29–198.
- [223.](#) [2006] UKHL 49, [2007] 1 A.C. 558.
- [224.](#) [2006] UKHL 49, [2007] 1 A.C. 558 at [162].
- [225.](#) [2006] UKHL 49, [2007] 1 A.C. 558 at [27]. Lord Hoffmann considered that this should be determined by an objective test. This has subsequently been analysed as not representing the law, but constituting instead a suggestion as to how the law might develop: *BP Oil International Ltd v Target Shipping Ltd* [2012] EWHC 1590 (Comm), [2012] 2 Lloyd's Rep. 245 at [245]




- (Andrew Smith J.). Lord Hoffmann's judgment was, however, commended by Lord Walker in *Pitt v Holt* [2013] UKSC 26, [2013] 2 A.C. 108 at [114].
- [226.](#) [2006] UKHL 49 at [65]. See also *BP Oil International Ltd v Target Shipping Ltd* [2012] EWHC 1590 (Comm), [2012] 2 Lloyd's Rep. 245 at [232] (Andrew Smith J.).
- [227.](#)  [2009] EWHC 2656 (Comm), [2010] 1 Lloyd's Rep. 631. In *Jazztel Plc v Revenue and Customs Commissioners* [2017] EWHC 677 (Ch), [2017] S.T.C. 1422 at [30], Marcus Smith J. recognised that the claimant would still be mistaken provided the level of doubt was below 50 per cent.
- [228.](#) [2012] EWHC 1590 (Comm), [2012] 2 Lloyd's Rep. 245 at [233].
- [229.](#)  *Beevor v Marler* (1898) 14 T.L.R. 289. See also *Kelly v Solari* (1841) 9 M. & W. 54, 58, 59; *Woolwich Equitable B.S. v IRC* [1993] A.C. 70, 98 (Glidewell L.J.), 165, 174 (Lord Goff), 200–201 (Lord Slynn); *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 66 A.L.J.R. 768, 774–776, 788; *Westdeutsche Landesbank Girozentrale v Islington LBC* [1994] 4 All E.R. 890 (affirmed [1996] A.C. 669); *Leslie v Farrar Construction Ltd* [2015] EWHC 58 (TCC) at [255] (Judge Stephen Davies) (conscious decision not to enquire constitutes a waiver of claim). See below, para.29–042. In *Leslie v Farrar Construction Ltd* [2016] EWCA Civ 1041, [2017] B.L.R. 21 it was recognised that a mistaken overpayment in respect of a construction contract could not be recovered where the claimant knew that he may have paid more than he owed but chose not to ascertain what the correct amount was, since the payment was made voluntarily. Restitution might, however, be awarded even in such circumstances if the mistake was induced by fraud or misrepresentation: at [40] (Jackson L.J.).
- [230.](#) *Bell v Gardiner* (1842) 4 M. & G. 11, 24; *Brownlie v Campbell* (1880) 5 App. Cas. 925.
- [231.](#) *Weld-Blundell v Synott* [1940] 2 K.B. 107; *Turvey v Dentons* (1923) Ltd [1953] 1 Q.B. 218, 224 (Pilcher J.); *Chase Manhattan Bank N.A. v Israel-British Bank (London) Ltd* [1981] Ch. 105. cf. s.4(3) of the Cheques Act 1957 (see Vol.II, para.34–371).
- [232.](#) (1841) 9 M. & W. 54, 59. The position in Scotland differs since the mistake must be “excusable” and this will be difficult to show where there is negligence: *Taylor v Wilsons Trustees* (1975) S.C. 146, 148, 156, 159.
- [233.](#) *Kelly v Solari* (1841) 9 M. & W. 54 (approved by PC in *Imperial Bank of Canada v Bank of Hamilton* [1903] A.C. 49 and by the House Lords in *R.E. Jones Ltd v Waring & Gillow Ltd* [1926] A.C. 670). See also *Lucas v Worswick* (1833) 1 Moo. & R. 293; *Commonwealth of Australia v McCormack* (1982) 69 F.L.R. 9; *R.B.C. Dominion Securities Inc v Dawson* (1994) 111 D.L.R. (4th) 230.
- [234.](#) *Townsend v Crowdy* (1860) 8 C.B.(N.S.) 477; *Durrant v Ecclesiastical Commissioners* (1880) 6 Q.B.D. 234; *Stanley Bros Ltd v Nuneaton Corp* (1913) 108 L.T. 986; *Avon CC v Howlett* [1983] 1 W.L.R. 605, 617–619 (Slade L.J.); *R.B.C. Dominion Securities Inc v Dawson* (1994) 111 D.L.R. (4th) 230; *Scottish Equitable Plc v Derby* [2001] 3 All E.R. 818.
- [235.](#) [2002] 1 All E.R. (Comm) 193.
- [236.](#) [1980] Q.B. 677, 695. See also *Lloyds Bank Plc v Independent Insurance Co Ltd* [2000] Q.B. 110.
- [237.](#) For the view that there was in fact a change of position, see Goode (1981) 97 L.Q.R. 254, 259.
- [238.](#) [2014] UKPC 9, at [18].
- [239.](#) [1999] 2 A.C. 349, 408. See also *Lloyds Bank Plc v Independent Insurance Co Ltd* [2000] Q.B. 110.

- [240.](#) *Kerrison v Glyn, Mills, Currie & Co* (1910) 15 Com. Cas. 241, 247–248; reversed on the facts (1911) 81 L.J.K.B. 465; 17 Com. Cas. 41; *Steam Saw Mills Co Ltd v Baring Bros & Co Ltd* [1922] 1 Ch. 244, 251, 254; *British American Continental Bank v British Bank for Foreign Trade* [1926] 1 K.B. 328, 336–337, 341, 344.
- [241.](#) *Steam Saw Mills Co Ltd v Baring Bros & Co Ltd* [1922] Ch. 244.
- [242.](#) [1922] Ch. 244, 254.
- [243.](#) *British American Continental Bank v British Bank for Foreign Trade* [1926] 1 K.B. 328; *Commonwealth of Australia v McCormack* (1982) 69 F.L.R. 9 (overpayment of sum due under lease paid having forgotten about previous part payment, recovered).
- [244.](#) (1856) 1 H. & N. 210.
- [245.](#) (1856) 1 H. & N. 210, 214, 215. This was said to be a “crucial” fact in the case: *Barclays Bank Ltd v W.J. Simms, Son and Cooke (Southern) Ltd* [1980] Q.B. 677, 687 (Robert Goff J.).
- [246.](#) cf. *Customs and Excise Commissioners v National Westminster Bank Plc* [2002] EWHC 2204 (Ch), [2003] 1 All E.R. (Comm) 327: unsolicited payment to a creditor’s bank account would not discharge a debt unless it was accepted as doing such.
- [247.](#) *Barclays Bank Ltd v W.J. Simms, Son and Cooke (Southern) Ltd* [1980] Q.B. 677, 699–700 (Robert Goff J.).
- [248.](#) [1980] Q.B. 677. This would appear to be the case whether or not the customer’s account was adequate to meet the cheque; Vol.II, para.34–130.
- [249.](#) *Pollard v Bank of England* (1871) L.R. 6 Q.B. 623; *Barclays Bank Ltd v W.J. Simms, Son and Cooke (Southern) Ltd* [1980] Q.B. 677, 699–700; *Lloyds Bank Plc v Independent Insurance Co Ltd* [2000] Q.B. 110.
- [250.](#) *Leslie v Farrar Construction Ltd* [2015] EWHC 58 (TCC) at [255] (Judge Stephen Davies).
- [251.](#) See generally, above, paras 4-051-4-056, 8-029,29–018 and, in the context of mistake; *Kelly v Solari* (1841) 9 M. & W. 54, 59; above, para.29–035; *Grains & Fourrages SA v Huyton* [1997] 1 Lloyd’s Rep. 628 (limits of contractual compromise); Andrews [1989] L.M.C.L.Q. 431; Arrowsmith, *Essays on the Law of Restitution* (1991), Ch.2.
- [252.](#) See above, para.4-052 and, on the question whether the compromise may be invalidated by common mistake, para.6-053; *Holmes v Payne* [1930] 2 K.B. 301. cf. *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* [1895] 2 Ch. 273.
- [253.](#)  Goff and Jones at paras 2-21–2-30.
- [254.](#) [1938] 1 K.B. 49. See also *Thavorn v Bank of Credit & Commerce SA* [1985] 1 Lloyd’s Rep. 259 .
- [255.](#) [1938] 1 K.B. 49, 71, 77. cf. *Lipkin Gorman v Karpnale Ltd* [1989] 1 W.L.R. 1340, 1366 (Parker L.J.), 1384 (Nicholls L.J.); [1991] 2 A.C. 548, 577 (Lord Goff). The Gaming Act 1845 was repealed by the Gambling Act 2005; see Vol.II, para.41–001.
- [256.](#) *Kelly v Solari* [1841] 9 M. & W. 54, 58; *Freeman v Jeffries* (1869) L.R. 4 Ex. 189, 199, 200. In cases of mistaken payment of a forged negotiable instrument notice must be given on the day of the payment: *Cocks v Masterman* (1829) 9 B. & C. 902; *National Westminster Bank Ltd v Barclays Bank International Ltd* [1975] 1 Q.B. 654; *Barclays Bank Ltd v W.J. Simms, Son and Cooke (Southern) Ltd* [1980] Q.B. 677, 701–703 (Robert Goff J.). See Vol.II, paras 34–126—34–130.
- [257.](#) *Fuller v Happy Shopper Markets Ltd* [2001] 2 Lloyd’s Rep. 49.


- [258.](#) In *Colonial Bank v Exchange Bank of Yarmouth, Nova Scotia* (1885) 11 App. Cas. 84, 90 the Privy Council said that the recipient, when first informed of the mistake in making the payment, would have been justified in not repaying until he had checked the facts.
- [259.](#) *Baker v Courage & Co* [1910] K.B. 56. See also *Anglo-Scottish Beet Sugar Corp v Spalding U.D.C.* [1937] 2 K.B. 607, 609. On the limitation period in such cases, see above, para.28–089.
- [260.](#) See Palmer at para.14.27; Evans, *An Essay on the Action of Money Had & Received* (1802) reprinted [1998] R.L. Rev. 1, 5–8; *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 A.C. 349. See on the whole topic, Winfield (1943) 59 L.Q.R. 327 (summarised in Winfield, *Quasi-Contracts* (1952), pp.38–51); Law Commission Consultation Paper No.120 (1991), Pt II.
- [261.](#) Winfield (1943) 59 L.Q.R. 327. cf. Wilson (1963) 26 M.L.R. 609. See also *Eaglesfield v Marquis of Londonderry* (1875) 4 Ch. D. 693, 703; *West London Commercial Bank v Kitson* (1884) 13 Q.B.D. 360, 363 (the same problem arose in connection with the rule that, to have legal effect, a representation had to be one of fact, not of law: see above, para.7-016).
- [262.](#) See *Bilbie v Lumley* (1802) 2 East 469; *Brisbane v Dacres* (1813) 5 Taunt. 143; *East India Co v Tritton* (1854) 3 B. & C. 280, 290; *Platt v Bromage* (1854) 24 L.J. Ex. 63; *R. v William Whiteley Ltd* (1910) 101 L.T. 741, 745; *Sawyer & Vincent v Window Brace Ltd* [1943] K.B. 32, 34; *Westdeutsche Landesbank Girozentrale v Islington LBC* [1994] 4 All E.R. 890, 933 (Hobhouse J.); affirmed [1996] A.C. 669.
- [263.](#) See Mistakes of Law and Ultra Vires Public Authority Receipt and Payments (Law Com. C.P. No.120, 1991), paras 2.28–2.35; (Law Com. No.227, Cm. 2731), paras 2.25–2.38, 5.18.
- [264.](#) See below, para.29–186.
- [265.](#) *Sharp Bros and Knight v Chant* [1917] 1 K.B. 771; *R. v National Pari-Mutuel Association Ltd* (1930) 47 T.L.R. 110; *Sawyer & Vincent v Window Brace Ltd* [1943] K.B. 32. See now Rent Act 1977 s.57. See also *Orphanos v Queen Mary College* [1985] A.C. 761 (mistake of law where contractual meaning given to phrase in mistaken belief that this is its statutory meaning).
- [266.](#) *Holt v Markham* [1923] 1 K.B. 504.
- [267.](#) *Finck v Tranter* [1905] 1 K.B. 427. But cf. *Newsome v Graham* (1829) 10 B. & C. 234; *Cripps v Reade* (1796) 6 T.R. 606; *Barber v Brown* (1856) 1 C.B.(N.S.) 121.
- [268.](#) *Rogers v Ingham* (1876) 3 Ch. D. 351.
- [269.](#) cf. *Ministry of Health v Simpson* [1951] A.C. 251 (in the CA, *Re Diplock* [1948] Ch. 465, 480 the mistake was also regarded as one of law, so that the common law remedy for money received was excluded).
- [270.](#) *Westdeutsche Landesbank Girozentrale v Islington LBC* [1994] 4 All E.R. 890, 933 (Hobhouse J.) affirmed [1996] A.C. 669.
- [271.](#) See above, para.16–194.
- [272.](#) *Kiriri Cotton Co Ltd v Dewani* [1960] A.C. 192; see above, para.16–202. cf. *Harse v Pearl Life Assurance Co* [1904] 1 K.B. 558.
- [273.](#) *Woolwich Equitable Building Society v IRC* [1993] A.C. 70; *Deutsche Morgan Grenfell Group Plc v IRC* [2006] UKHL 49, [2007] 1 A.C. 558; see below, para.29–090. In *Hemming v Westminster City Council* [2013] EWCA Civ 591 the right to restitution was recognised in respect of the payment of licence fees to a Council.
- [274.](#) *West London Commercial Bank Ltd v Kitson* (1884) 13 Q.B.D. 360, 363; *Ward & Co v Wallis* [1900] 1 Q.B. 675, 678; *Shelley v Paddock* [1980] Q.B. 348; *Rogers v Ingram* (1876) 3 Ch. D. 351, 355–356.

- [275.](#) *Smith v Bromley* (1760) 2 Doug. 696n, 697 (Lord Mansfield).
- [276.](#) Below, para.29–094. The commonest instances of such compulsion were payments to public bodies: *Steele v Williams* (1853) 8 Ex. 625; *Hooper v Exeter Corp* (1887) 56 L.J.Q.B. 457; *Eadie v Township of Brantford* [1967] S.C.R. 573; 63 D.L.R. (2d) 561; below, para.29–100.
- [277.](#) *Re Birkbeck Permanent Benefit Building Society* [1915] 1 Ch. 91.
- [278.](#) *R. v Auckland Harbour Board* [1924] A.C. 318, 326–327. See also *Charles Terence Estates Ltd v Cornwall County Council* [2011] EWHC 2542 (QB).
- [279.](#) (1867) L.R. 2 H.L. 149. The distinction is criticised by Palmer at para.16.4(c). The decision was applied in *Anglo-Scottish Beet Sugar Corp Ltd v Spalding U.D.C.* [1937] 2 K.B. 607, 615–617 (Atkinson J.); *Meadows v Grand Junction Waterworks Co* (1905) 69 J.P. 255; *Stanley Bros Ltd v Corp of Nuneaton* (1912) 107 L.T. 760. See also *Norwich Union Fire Insurance Society Ltd v W. H. Price Ltd* [1934] A.C. 455, 462–463 (Lord Wright found nothing in *Bell v Lever Bros Ltd* [1932] A.C. 161 to overrule Lord Westbury’s dicta in *Cooper v Phibbs*); *Sybron Corp v Rochem Ltd* [1984] Ch. 112.
- [280.](#) *Dibbs v Goren* (1849) 11 Beav. 439; *Re Musgrave* [1916] 2 Ch. 417; *Gibbon v Mitchell* [1990] 1 W.L.R. 1304, 1309 (Turner L.J.). See also *Pitt v Holt* [2013] UKSC 26, [2013] A.C. 108, para.29–052, below. cf. *Re Horne* [1905] 1 Ch. 76. See further *Stone v Godfrey* (1854) 5 De G.M. & G. 76, 90; *Allcard v Walker* [1896] 2 Ch. 369, 381; *Winfield* (1943) 59 L.Q.R. 327, 328–333. It is possible to trace in equity despite a mistake of law: *Sinclair v Brougham* [1914] A.C. 398, 452 (Lord Sumner) (below, para.29–172). See also the discussion in *Minister of Health v Simpson* [1951] A.C. 251, 269–275 (Lord Simonds). cf. *Re Diplock* [1948] Ch. 465, 479–480. In other contexts deductions have been said to be anomalous and have not been permitted: *R. v Tower Hamlets LBC Ex p. Chetnik Developments Ltd* [1988] A.C. 858, 876–877 (Lord Bridge); *Sharp Bros & Knight v Chant* [1917] 1 K.B. 771 CA.
- [281.](#) *Ex p. James* (1874) L.R. 9 Ch. App. 609; *Ex p. Simmonds* (1885) 6 Q.B.D. 308; *Re Opera Ltd* [1891] 2 Ch. 154 reversed on other grounds: [1891] 3 Ch. 260; *Re Tyler* [1907] 1 K.B. 865; *Re Thellusson* [1919] 2 K.B. 735; *Re Wigzell* [1921] 2 K.B. 835, 851 (Lord Sterndale M.R.); *Re Wyvern Developments Ltd* [1974] 1 W.L.R. 1097, 1105 (Templeman J.); *Re Sandiford (No.2)* [1935] Ch. 681; *Taylor v Wilson’s Trustees* (1975) S.C. 146; *Re Multi Guarantee Co Ltd* [1987] B.C.L.C. 257; *Re T.H. Knitwear (Wholesale) Ltd* [1988] Ch. 275.
- [282.](#) (1874) L.R. 9 Ch. App. 609; see above, para.20–022 for a fuller discussion.
- [283.](#)  *Government of India v Taylor* [1955] A.C. 491, 513 (Lord Keith); cf. *Re Clark (A Bankrupt)* [1975] 1 W.L.R. 559; *Re Byfield* [1982] Ch. 267; *Re Multi Guarantee Co Ltd* [1987] B.C.L.C. 257. See also *Hieber v Duckworth* (2016) (Case No.1313 of 2006), although the language of “unjust enrichment” appears to be simply a cypher for fairness.
- [284.](#) They are summarised by Lord Goff in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 A.C. 349, 370–372. For a fuller account see Law Com. C.P. No.120 (1991), paras 2.24–2.26 and Law Com. No.227 (1994), paras 2.5–2.15.
- [285.](#) [1999] 2 A.C. 349.
- [286.](#) (1802) 2 East 469.
- [287.](#) (1841) 9 M. & W. 54, above, para.29–035.
- [288.](#) *Cooper v Phibbs* (1867) L.R. 2 H.L. 149, 170 (Lord Westbury).
- [289.](#) e.g. *Bilbie v Lumlie* (1802) 2 East 469; *Home & Colonial Insurance Co Ltd v London Guarantee Accident Co* (1928) T.L.R. 135. See further below, para.29–197.
- [290.](#) *Morgan Guaranty Trust Co of New York v Lothian R.C.* (1995) S.C. 151.

- [291.](#) *Air Canada v British Columbia* [1989] S.C.R. 1161; *David Securities Pty v Commonwealth Bank of Australia* (1992) 66 A.L.J.R. 768; *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* (1992) (4) S.A. 202(A). It has been legislatively modified in New Zealand (Judicature Amendment Act 1958 s.94A) and Western Australia L.R. (Property, Perpetuities and Succession) Act 1962 ss.23, 24.
- [292.](#) In *Lipkin Gorman (A Firm) Ltd v Karpnale* [1991] 2 A.C. 548.
- [293.](#) Below, para.29–186.
- [294.](#) Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments (Law Com. No.227, 1994).
- [295.](#) [1999] 2 A.C. 349. See also *Deutsche Morgan Grenfell v IRC* [2006] UKHL 49, [2007] 1 A.C. 558.
- [296.](#) In *Hazell v Hammersmith & Fulham LBC* [1992] 2 A.C. 1, above, para.11–025.
- [297.](#) Below, para.29–048.
- [298.](#) [1999] 2 A.C. 349.
- [299.](#) [1999] 2 A.C. 349, 409 (Lord Hope). See above, paras 29–038—29–039. Also *Nurdin and Peacock Plc v D.B. Ramsden and Co Ltd* [1999] 1 W.L.R. 1249.
- [300.](#) [1999] 2 A.C. 349, 409 (Lord Hope).
- [301.](#) See *Brennan v Bolt Burdon* [2004] EWCA Civ 1017, [2005] Q.B. 303; above, para.6-053.
- [302.](#) Above, para.29–045.
- [303.](#) [1999] 2 A.C. 349, 384–385 (Lord Goff), 413 (Lord Hope). This had been suggested by Brennan J. in *David Securities Pty Ltd v Commonwealth Bank of Australia* (1991–92) 175 C.L.R. 353, 398–399.
- [304.](#) [1999] 2 A.C. 349, 385–387 (Lord Goff), 413 (Lord Hope); cf. Birks (1993) 23 U.W. Aus. L.R. 195.
- [305.](#) Below, para.29–048. In *Brennan v Bolt Burdon* [2004] EWCA Civ 1017, [2005] Q.B. 303 Maurice Kay L.J. stated that he was: “... reluctant to countenance as a mistake of law a situation in which it is generally known or ought to be known that the law in question is about to be reconsidered on appeal”. See above, para.6-053.
- [306.](#) *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 A.C. 349, 382.
- [307.](#) See generally Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments (Law Com. No.227, 1994), paras 5.1–5.13.
- [308.](#) *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 A.C. 349, 381 (Lord Goff). But the position may be different where the legislation is retrospective: at 400 (Lord Hoffmann).
- [309.](#) [1999] 2 A.C. 349, 381.
- [310.](#) [1999] 2 A.C. 349, 399 (Lord Hoffmann). See also at 379 (Lord Goff), 410 (Lord Hope). In *Deutsche Morgan Grenfell Group Plc v IRC* [2006] UKHL 49, [2007] 1 A.C. 558 at [23] Lord Hoffmann accepted that a mistake of law could be considered to be a “deemed” mistake. Following the decision of the House of Lords in *Spectrum Plus Ltd* [2005] UKHL 41, [2005] A.C. 680, the courts may exceptionally make a decision which is prospective in effect only. If a judgment only operates prospectively it will not be possible to construct a retrospective mistake.

- [311.](#) Payments made under public law transactions, such as taxes and similar charges, might, because of the large numbers of payments and considerations of the public interest, be treated differently from those under private law transactions: *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 A.C. 349, 381 (Lord Goff).
- [312.](#) [1999] 2 A.C. 349, 410 (Lord Hope). For Lord Browne-Wilkinson and Lord Lloyd, dissenting, this case is a fortiori their view of the general effect of a change in the law or a settled understanding of the law by judicial decision. But cf. Lord Goff and Lord Hoffmann, at 381–383, 399.
- [313.](#) [1999] 2 A.C. 349, 358 (Lord Browne-Wilkinson), 393 (Lord Lloyd). For support see *Henderson v Folkestone Waterworks Co* (1885) 1 T.L.R. 329 and, although less clearly, *Derrick v Williams* [1939] 2 All E.R. 559, 565 (Sir Wilfrid Greene M.R.). See also *Brennan v Bolt Burdon* [2004] EWCA Civ 1017, [2005] Q.B. 303 especially at [50] (Bodey J.). But see also *Mercury Machine Importing Corp v City of New York* (1957) 144 N.E. 2d 400 (New York); *Julian v Mayor of Auckland* [1927] N.Z.L.R. 453 (New Zealand); *Torrens Aloha Pty Co v Citybank NA* [1997] 72 F.C.R. 581 (Australian).
- [314.](#) *Deutsche Morgan Grenfell Group Plc v IRC* [2006] UKHL 49, [2007] 1 A.C. 558.
- [315.](#) *Woolwich Equitable Building Society v IRC* [1993] A.C. 70; *Deutsche Morgan Grenfell Group Plc v IRC* [2006] UKHL 49, [2007] 1 A.C. 558; *Test Claimants in the Franked Investment Income (FII) Group Litigation v Commissioners for Her Majesty's Revenue and Customs* [2012] UKSC 19, [2012] 2 A.C. 337, below, para.29–091.
- [316.](#) See above, para.28–089. It is unlikely that the claimant could reasonably have discovered the mistake before the decision of the court which changed the law. See *Test Claimants in the FII Group Litigation v HMRC* [2014] EWHC 4302 (Ch), [2015] S.T.I. 49, at [461] (Henderson J.).
- [317.](#)  See below, para.29–179. *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669, 714–715 (Lord Browne-Wilkinson) considering *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch. 105; *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), [2013] Ch 156. See Virgo at pp.632–641. See also *Angove's Pty Ltd v Bailey* [2016] UKSC 47, [2016] 1 W.L.R. 3179.
- [318.](#) See above, paras 7-111 et seq.
- [319.](#) See above, paras 7-123 et seq.
- [320.](#) See above, paras 3-057 et seq. In *Peak Hotels and Resorts Ltd v Tarek Investments Ltd* [2015] EWHC 1997 (Ch) it was recognised that a declaration of rescission conditional on counter-restitution being made does not constitute a money judgment against the applicant.
- [321.](#) See above, paras 3-057 et seq., 7-111 et seq.
- [322.](#)  [2013] UKSC 26, [2013] A.C. 108. See Davies and Virgo [2013] R.L.R. 73. See also *Kennedy v Kennedy* [2014] EWHC 4129 (Ch); *Wright v National Westminster Bank Plc* [2014] EWHC 3158 (Ch); *Freedman v Freedman* [2015] EWHC 1457 (Ch); *Van der Merwe v Goldman* [2016] EWHC 790 (Ch), [2016] 4 W.L.R. 71; *Bainbridge v Bainbridge* [2016] EWHC 898 (Ch), [2016] W.T.L.R. 943. In *Co-operative Bank Plc v Hayes Freehold Ltd* [2017] EWHC 1820 (Ch) at [130] Carr J. recognised that the jurisdiction to rescind did not apply where the transaction was neither a gift nor a voluntary disposition. In that case a deed of release from a landlord's covenants was not characterised as a voluntary disposition because in return an underlease was surrendered and so consideration was provided.
- [323.](#) In *Wright v National Westminster Bank Plc* [2014] EWHC 3158 (Ch) at [11], Norris J. confirmed that there was no need to establish that the mistake was induced by misrepresentation or fraud.
- [324.](#)  *Kennedy v Kennedy* [2014] EWHC 4129 (Ch), [2015] W.T.L.R. 837, [39] (Etherton C). In

Gresh v RBC Trust Co (Guernsey) Ltd (2016) 18 I.T.E.L.R. 753 the Royal Court of Guernsey held that a request by a member of a pension fund to be paid a lump sum distribution in the mistaken belief that it was not subject to tax, did not constitute an equitable mistake because there was nothing which rendered the retention of the distribution unconscionable as between the member and the pension fund.

325.  *Pagel v Farman* [2013] EWHC 2210 (Comm); *Spaul v Spaul* [2014] EWCA Civ 679 at [52] (Rimer L.J.). See further Dodds [2016] R.L.R. 129.
326. This would appear to include all acts of the defendant which increase the value of goods but not the mere maintenance of goods: Palmer on Bailment, 3rd edn (2009), p.378.
327. This would appear to enact the pre-existing common law: *Greenwood v Bennett* [1973] 1 Q.B. 195 (following *Peruvian Guano Ltd v Drefus Bros & Co* [1892] A.C. 166, 175–176; and *Livingstone v Raywards Coal Co* (1880) 5 App. Cas. 25). See Weir (1973) C.L.J. 23 and Anderson (1973) 36 M.L.R. 89; Birks (1974) 27 C.L.P. 13, 19 et seq.; Matthews (1981) C.L.J. 340; Sutton, *Essays on Restitution*, Ch.7.
328. See below, para.29-057. Section 6(2) refers to the recovery of damages by the transferee but this would seem to be a reference to the action for the price mentioned in s.6(3).
329. This would not include an improvement done with knowledge that title was disputed. cf. at common law, *Reid v Fairbanks* (1853) 13 C.B. 692.
330. Quaere whether the owner of the goods that have been improved is liable for conversion of the “improvement” unless it has become part of the goods by accession. Accession will occur where the improver has acted wrongfully: *Spence v Union Marine Insurance Co* (1868) L.R. 3 C.P. 427, 437–438; *Indian Oil Corp v Greenstone Shipping SA (Panama)* [1988] Q.B. 345.
331. *Munro v Willmott* [1949] 1 K.B. 295 (a claim in detinue). cf. *Sachs v Miklos* [1948] 2 K.B. 23 (value of the goods bailed appreciated over time). Although the Torts (Interference with Goods) Act 1977 s.12 would give a bailee who has taken reasonable steps to communicate with the bailor the right to sell the bailed goods, he is obliged to account to the bailor for the proceeds of sale less any costs of sale, but not apparently for the value attributable to an improvement unless it can be said to be a cost incurred in the adoption of the best method of sale reasonably available: s.12(5)(a).
332. Below, para.29-056.
333. In particular the cases on “voluntariness”, below, para.29-115, especially *Falke v Scottish Imperial Insurance Co* (1886) 34 Ch. D. 234; (below, para.29-121). See also *Forman & Co Proprietary Ltd v Ship “Liddesdale”* [1900] A.C. 190; *Sumpter v Hedges* [1898] 1 Q.B. 673.
334. [1973] 1 Q.B. 195, 203 (Cairns L.J.). See also Matthews (1981) C.L.J. 340, 351–358.
335. [1973] 1 Q.B. 195.
336. The third member of the court, Phillimore L.J., did not advert to this point.
337. [1973] 1 Q.B. 195, 202.
338. See *B.P. Exploration Co (Libya) Ltd v Hunt (No.2)* [1979] 1 W.L.R. 783, 799, 803 (Robert Goff J.); Beatson (1981) 97 L.Q.R. 389, 410–411; Matthews (1981) C.L.J. 340, 366 for the difficulty in treating this as a benefit.
339. *Blue Haven Enterprises Ltd v Tully* [2006] UKPC 17; *J S Bloor Ltd v Pavillion Developments Ltd* [2008] EWHC 724 (TCC) at [48]. See further para.29-169, below.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 9 - Restitution

Chapter 29 - Restitution ¹

Section 2. - Unjust Enrichment

(f) - Failure of Basis ³⁴⁰

General principles

29-057

❗ Where money has been paid under a transaction that is or becomes ineffective, the payer may recover the value of the money provided that the basis for the payment has totally failed. Although this ground of restitution is traditionally called “failure of consideration”, increasingly the courts are replacing the language of consideration, with its contractual connotations, with that of basis. ³⁴¹ Consequently, the language of “failure of basis” is used in this chapter, except when referring to decisions or statutes that used the language of failure of consideration. Although the ground of failure of basis is not confined to contracts ³⁴² ❗ most of the cases are concerned with failed contracts. In that context failure of basis occurs where there has been a complete failure of the performance for which the payer had bargained. ³⁴³ Thus, the failure is judged from the payer’s point of view and:

“... when one is considering the law of failure of consideration and of the quasicontractual right to recover money on that ground, it is generally speaking, not the promise which is referred to as the consideration, but the performance of the promise.” ³⁴⁴

The failure has to be total because the consideration is “whole and indivisible”. This is partly because one cannot assume that all parts of the payee’s performance are equally valuable and that the contract price is earned incrementally, ³⁴⁵ but historically it was also because of the non-recognition in English law of the principle of unjust enrichment. ³⁴⁶ Thus, any ³⁴⁷ performance of the actual thing promised, *as determined by the contract*, is fatal to recovery under this heading. As Lord Goff said in *Stocznia Gdanska SA v Latvian S.S. Co* ³⁴⁸:

“... the test is not whether the promisee has received a specific benefit, but rather whether the promisor has performed any part of the contractual duties in respect of which the payment is due.”

In *Giedo van der Garde BNV v Force India Formula One Team Ltd* ³⁴⁹ Stadlen J. interpreted this as meaning that the consideration will not have failed totally where the promisee had received a benefit under the contract, but this could be established even though the promisee had not directly received anything if the promisor had performed an obligation which was in some other way of advantage to the promisee. In *Barnes v Eastenders Cash and Carry Plc* ³⁵⁰ it was recognised that the relevant basis did not necessarily require “failure of a promised counterperformance” but might include “failure of a state of affairs on which the agreement was premised”. This might be a non-promissory state of affairs or event. In that case, where a receiver had provided services in managing property for the Crown Prosecution Service, the relevant basis for the receiver’s claim for payment for the services

was that the receiver would obtain remuneration from the property he managed, a basis which failed totally.

Total failure of basis and collateral benefits

29-058

At common law a total failure of basis may occur even though the promisor has incurred expense in partly performing his side of the contract, though this will turn on whether that performance can be considered to have been “bargained-for”.³⁵¹ If it is not bargained-for it can be considered to be collateral and discounted. Whether a benefit is collateral does not depend on whether it is a large or small benefit in the context of the entirety of the benefits to be conferred, but rather whether it forms part of the main benefit bargained for under the contract.³⁵² This should be determined from the perspective of the promisee and by reference to his purpose in entering into the contract, albeit determined objectively, although the promisee’s subjective motive or purpose for entering into the contract can be taken into account if it has been communicated to the promisor before the contract was made.³⁵³ But the line between collateral and bargained-for benefit may be very fine, and sometimes can appear to turn solely upon the formal classification of the contract in question. Thus, where a contract for the sale of textile machines was later discharged for frustration, the fact that the seller had done a considerable amount of work in manufacturing them did not prevent the buyer recovering a prepayment as having been paid on a total failure of consideration.³⁵⁴ On the other hand, in a shipbuilding contract for work and materials, it has been said that work done by the builders in drawing up plans and starting the construction amounted to a contractual benefit which prevented there from being a total failure of consideration.³⁵⁵ What is relevant is the bargained-for performance and not the formal classification of the contract as one for sale or sale and services. The classification merely reflects the fact that in contracts for work and materials the purchaser is paying for the work as well as for the end-product, while in contracts of sale he is only paying for the end-product.³⁵⁶ In the former cases the reliance on the form of services rendered by the promisor is to be regarded as the bargained-for performance, in other cases it is not. Thus, where a prepayment was made under a distributorship agreement, it was recoverable despite the fact that, after entering the agreement, the licensor-payee had paid a substantial sum to a third party to buy back rights to films subject to the agreement.³⁵⁷ The bargained-for performance was the opportunity for the licensee to earn a share of gross receipts under the distributorship and thus the consideration had wholly failed as a result of the invalidity of the agreement.

Illustrations of total failure of basis

29-059

⚠ Where money was paid to brokers to purchase goods in accordance with instructions, but the brokers did not make the contract authorised by their principals, it was held that the money could be recovered by the principals on the basis of a total failure of consideration.³⁵⁸ Similarly, bondholders who had subscribed money for a purpose which failed were entitled to recover their money from the bank which held the subscriptions.³⁵⁹ In another case sellers were bound to deliver at Antwerp a quantity of rye then in a ship en route to Antwerp, and the buyers paid the price against a delivery order directed to the sellers’ agents at Antwerp; but the Germans occupied the town and the cargo was sold by the sellers in Lisbon where the ship discharged. The House of Lords held that the consideration had wholly failed so that the buyers were entitled to recover the price.³⁶⁰ Again, where the names of the drawer and the acceptor were forged to a bill of exchange, and the bill was discounted by the plaintiffs for the defendants (who had indorsed it), it was held that, since the genuineness of the acceptance was of the essence of the description of a bill, there was a total failure of consideration entitling the plaintiffs to recover from the defendants the amount paid to them.³⁶¹ Where an ultra vires issue of shares is made, the subscribers are entitled to recover their money by virtue of the invalidity of the transaction.³⁶² Although it has been recognised that where a subscriber to an ultra vires issue of shares has sold his shares he cannot allege that there has been a total failure of consideration,³⁶³ the better view is that there will have been a total failure because the subscribers did not acquire the legal right to the shares.³⁶⁴ ⚠

Artificiality of distinctions

29-060

❗ The role of the contractual specification means that it is not true to say that there can be a total failure of basis only where the payer received no benefit at all in return for the payment. ³⁶⁵ ❗ The concept of total failure of basis can ignore real benefits received by the payer if they are not the benefits bargained for and despite significant detrimental reliance by the payee. Thus, in cases of the sale of a car by a non-owner, the price paid has been recovered despite substantial intermediate enjoyment of the car by the purchaser, ³⁶⁶ even where the vendor is subsequently able to perfect his title ³⁶⁷ and where the value of the car has depreciated considerably. ³⁶⁸ This is because the benefit for which the payer had bargained, namely title to the car, had not been obtained. Similarly, if the purchaser of an estate pays the purchase money and enters into possession of the land but, before the conveyance is executed, he is evicted in consequence of a defect in the vendor's title, he can recover the purchase-money. ³⁶⁹ Again, an instalment paid under a film distributorship agreement was said to be recoverable despite the receipt of films because the relevant bargain was the opportunity to earn a share of gross receipts with the certainty of recouping the advance and no receipts had been earned. ³⁷⁰

Contract discharged or ineffective

29-061

❗ Money will only be recoverable by virtue of a total failure of basis where the contract is discharged. ³⁷¹ This requirement has practical importance where, as in the case of breach of contract, discharge operates at the election of the innocent party. ³⁷² A contract-breaker will therefore only be able to recover money where the other party has elected to accept the breach as discharging the contract. ³⁷³ The requirement is irrelevant where the contract is ineffective ab initio ³⁷⁴ (e.g. for informality or incapacity) or where, as in the case of frustration, it is discharged automatically. ³⁷⁵ Where the payer has received a benefit from the payee it must, as a general rule, be restored before he can recover his money. ³⁷⁶ Further, at least in some cases of breach of contract and frustration, recovery is only possible where there is no express or implied term in the contract making the payment irrecoverable

³⁷⁷ ❗ Despite the general rule that restitution will only be available where the contract is discharged, in *Barnes v Eastenders Cash and Carry Plc* ³⁷⁸ restitution was awarded despite the continued validity of the contract. The case concerned a receiver who entered into a contract with the Crown Prosecution Service (CPS) to manage assets on its behalf. The receiver expected that remuneration for his services would be obtained from the assets he managed by means of a lien. The lien was held to be invalid. However, despite the continued validity of the contract between the CPS and the receiver, it was held that the receiver could recover the value of the services provided by a claim in unjust enrichment. Since the receiver had expected to be remunerated from the property being managed, and this basis had failed completely, it was held that the claim for restitution should succeed. The Supreme Court relied specifically on the decision of the High Court of Australia in *Roxborough v Rothmans of Pall Mall Australia Ltd*, ³⁷⁹ and the notion of severance of benefits received, to justify the result despite the continued validity of the contract, although it is unclear how severance was relevant on the facts since the receiver had obtained no payment for his services, suggesting that there was a total failure of basis. The result is difficult to justify, particularly because it was found that the receiver had accepted the risk that the assets he was managing might be of insufficient value to provide appropriate remuneration. It appears, therefore, that the risk of insufficient remuneration was allocated to the receiver by the contract. Despite this, it appears that the Supreme Court considered that he had not taken the risk of not being remunerated at all, so the claim for restitution succeeded.

Comparison with damages ³⁸⁰

29-062

Where the payee is in breach of contract the unjust enrichment claim is an alternative to an action for damages for breach of contract. ³⁸¹ This will be an attractive option in cases in which the payer has made a bad bargain ³⁸² or where his damages will be limited or irrecoverable. This may be the result of requirements such as remoteness, the duty to mitigate and restrictions as to the kind of loss that is recoverable. Restitution, therefore, has a clear advantage over a claim for compensation for reliance losses, since such a claim will not succeed if the defendant shows the reliance loss is greater than the expected profit. ³⁸³ Apart from this, the unjust enrichment claim has procedural and evidential advantages in that it is a liquidated claim. ³⁸⁴ It will also be attractive in those exceptional cases in which a total failure of basis is established despite the receipt of a benefit by the payee. This is because an action for damages, but not an action for money had and received, would take account of such benefits. ³⁸⁵ The ground of total failure of basis may also trigger a proprietary restitutionary claim, at least where the defendant knew of the total failure when money was received from the claimant. ³⁸⁶ However, the unjust enrichment claim does have disadvantages. The most obvious is that the claimant's loss of profits are only recoverable as damages and not by an action for money had and received, but there are others. Thus, in cases of sale, where a buyer has paid in advance for goods that he is entitled to reject, in principle he can return the goods and recover the money. ³⁸⁷ But if he has spent money on the goods while they are in his possession, this will be recoverable in an action for damages ³⁸⁸ but not in an action for restitution of the price. ³⁸⁹

Recovery of money paid as damages for wasted expenditure

29-063

It has been recognised that a claimant who has paid money under a contract which was subsequently terminated for breach cannot claim all the money paid as damages for wasted expenditure where there was no total failure of basis, ³⁹⁰ because awarding such a remedy would undermine the requirement that the basis must fail totally. ³⁹¹ Where the basis has failed totally, and the value of the expected benefit has not fallen below the price paid for it, it makes no difference whether recovery of the money paid is claimed under the law of unjust enrichment or as damages for wasted expenditure. Where the payee has provided some of the bargained for benefit, so there is a partial failure of basis, the payer cannot recover all of the money paid as damages for wasted expenditure, because the payer will have received some of the performance for which he had paid. ³⁹² It is unclear whether the payer is able to recover part of the money paid as damages for wasted expenditure, with a reduction to reflect the value of the benefit provided by the payee. The better view is that such damages can be awarded but they should be calculated to ensure that the claimant does not recover more than the value of the anticipated total contractual performance. ³⁹³ So, for example, if the claimant had paid £10 million to the defendant to design and build a ship and, after completing the design amounting to £1 million of work, the defendant breached the contract, the starting point would be that the claimant should be able to recover £10 million as damages for wasted expenditure; but that figure would then be reduced to take account of the factors mentioned. First, if the claimant had received the designs from the defendant, the damages for wasted expenditure should be reduced by the value of the benefit received. It is unclear whether there would be a similar reduction had the defendant prepared the designs as he was contractually obliged to do but they had not been received by the claimant. Such preparation of the designs would prevent the basis for the payment from failing totally, ³⁹⁴ but if the services had not benefited the claimant they should not result in a reduction in the damages awarded because such damages operate to compensate the claimant for loss suffered, and if the claimant had not received the benefit of the design his loss following payment of the price would not have been reduced by the defendant's work. Secondly, in either case, if the actual value of the completed ship would have been £8 million, this would affect the amount of damages. If the claimant had received nothing, £8 million would be the ceiling which the claimant could recover by way of damages. If the claimant had received designs worth £1 million, that sum would be deducted so that the recovery would be £7 million.

Partial failure of basis: statute

29-064

Under the provisions of the Law Reform (Frustrated Contracts) Act 1943, ³⁹⁵ where a contract is

frustrated, money paid under the contract may be recovered (subject to a claim or set-off for expenses incurred by the recipient of the payment) even though there has been only a partial failure of basis.³⁹⁶ The Act would now apply to a case like *Ferns v Carr*,³⁹⁷ where a solicitor had received a premium from an articled clerk, who was to be in his office for five years, but the solicitor died before the five years were completed; under the common law it was held that the clerk could not recover any part of the premium from the solicitor's estate. The court is empowered by the Law Reform (Frustrated Contracts) Act 1943 s.1(3) to order a party to a contract which is subsequently frustrated to pay for a "valuable benefit" obtained by him under the contract.³⁹⁸ It has been said that:

"... the fundamental principle underlying the Act itself, is prevention of the unjust enrichment of either party to the contract at the other's expense."³⁹⁹

Where a partnership is prematurely determined, the court has statutory power to order the return of all or part of a premium paid by a partner for admission to the firm.⁴⁰⁰

Partial failure of basis: common law

29-065

Apart from these cases, and unless the contract is divisible,⁴⁰¹ an unjust enrichment claim to recover money paid does not lie if the claimant has derived some of the benefit for which he bargained.⁴⁰² So, where a vendor sold a patent right and the purchaser paid the price, used the patent right and enjoyed a benefit from it, but it afterwards appeared that the patent was invalid, it was held that the purchaser could not claim restitution of the purchase-money.⁴⁰³ Again, a passenger on a cruise ship which sank on the 10th day of a 14-day cruise could not claim restitution of the cruise fare.⁴⁰⁴ In another case⁴⁰⁵ a hirer paid an initial sum of £186 to a finance company under a hire-purchase agreement "in consideration of the option to purchase" a car. He used the car for over 12 months, paying the monthly instalments under the agreement, but then the finance company validly terminated the agreement because the hirer allowed a judgment creditor to levy execution against him. The hirer claimed recovery of his initial payment on the ground that there had been a total failure of consideration in that he never obtained the option, but the Court of Appeal rejected this contention, holding that the option was an existing right from the moment of signing the contract, notwithstanding that it could not be exercised until certain conditions had been fulfilled. The question whether the retention of all the money received by the finance company amounted to the retention of a penalty and not liquidated damages was apparently not raised in this case.⁴⁰⁶ In *Marks and Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd*⁴⁰⁷ it was recognised that, where rent had been paid quarterly in advance and the lease ended through the exercise of a break clause on a specified date in the middle of the quarter, the excess rent could not be recovered since there would not have been a total failure of consideration. On the facts, however, a term was implied to repay a proportionate amount for the period following the operation of the break clause. It was acknowledged that restitution of a surplus amount in respect of hire of a ship would be awarded on the ground of partial failure of consideration under a charterparty, but this was not considered to reflect the general law outside the shipping context.⁴⁰⁸

Partial failure of basis in a divisible contract

29-066

A claim in restitution to recover part of the money already paid to the defendant will sometimes lie where the contract can be regarded as divisible, and some part of the basis relating to a divisible part of the contract has wholly failed. Lord Porter has said⁴⁰⁹:

"If a divisible part of the contract has wholly failed, and part of the consideration can be attributed to that part, that portion of the money so paid can be recovered."

Thus, where the plaintiff ordered and paid for a specified tonnage of goods at a price of “18s. per cwt.”, but, on delivery of the goods, it was discovered that less than the specified tonnage had been shipped, it was held that the plaintiff might recover the sum overpaid. ⁴¹⁰ The question of divisibility may also arise in contracts where delivery is to be made in instalments. ⁴¹¹ Whether a contract is divisible and whether apportionment can take place has traditionally been an issue of construction based on the presumed intention of the parties. However, in *Goss v Chilcott* the Privy Council suggested that apportionment is not limited to the intention of the parties and may also occur as a matter of law in those cases in which it can be carried out without difficulty, for instance, where the benefit received by the payer was, as in that case, a monetary one. ⁴¹² In that case it was acknowledged that a loan could be apportioned between principal and interest. This is not controversial, but Lord Goff, delivering the judgment of the Board, suggested that, if required, he would also apportion the principal so that any repayments made of the principal would not prevent there being a restitutionary claim based on failure of consideration but would merely reduce the restitutionary claim to the balance of the loan. In *Giedo van der Garde BV v Force India Formula One Team Ltd* it was recognised that whether the consideration is in its nature apportionable may turn on the nature of the subject matter of the promised consideration and the circumstances in which it is to be delivered or performed, and apportionment is possible even where the consideration is expressed as a lump sum for goods or services. ⁴¹³ It was also acknowledged that the court should adopt a flexible and robust approach to the apportionment of the basis. In *Barnes v Eastenders Cash and Carry Plc* ⁴¹⁴ Lord Toulson acknowledged that the courts are willing to sever the consideration “where it reflects commercial reality”. It was recognised in *Marks and Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* ⁴¹⁵ that it will not usually be appropriate to divide up a single consideration on a time apportionment basis.

Reconsideration of the total failure requirement

29-067

The recognition of the principle of unjust enrichment in English law may lead to reconsideration of the requirement that the failure of basis be total. Although the Law Commission has recommended that it be maintained ⁴¹⁶ this has been criticised ⁴¹⁷ as leading to asymmetry between the position of claims for the recovery of money and claims for recompense for services where quantum meruit will lie even where some counter-performance has been rendered. ⁴¹⁸ It is also inconsistent with the approach of Equity to rescission. In neither situation have the courts regarded the difficulty of placing a value upon the contractual performance rendered as insurmountable. The fine and sometimes artificial distinctions produced by the concept of total failure of basis has already been noted ⁴¹⁹ as has the distinction between entire and divisible contracts. ⁴²⁰ It is also the case that courts are willing to avoid the total failure of basis rule by apportioning the consideration, sometimes artificially, and holding that there has been a total failure in relation to the parts not performed. ⁴²¹ In the High Court of Australia it has been said that “if counter-restitution is relatively simple ... insistence on total failure of consideration can be misleading or confusing” ⁴²² and that:

“... where both parties have impliedly acknowledged that the consideration can be ‘broken up’ or apportioned ... any rationale for adhering to the traditional rule requiring total failure of consideration disappears.” ⁴²³

The Privy Council has shown support for one of these methods of relaxing the requirement for total failure of basis, namely apportionment. ⁴²⁴ Moreover, in *Westdeutsche Landesbank Girozentrale v Islington LBC*, ⁴²⁵ Lord Goff expressed support for the reformulation of the total failure of consideration rule. However, he subsequently affirmed the total failure requirement in *Stocznia Gdanska SA v Latvian S.S. Co, Latreefers Inc*, ⁴²⁶ so the requirement that the basis must fail totally remains. ⁴²⁷

Recovery of deposits ⁴²⁸

29-068

⚠ Where a sum of money is paid under a contract and the contract is not completed, the right of the payer to claim the return of the money depends on the construction of the particular terms of the contract. ⁴²⁹ If it is called a “deposit” then, if nothing is said expressly about the conditions governing it, it will be taken to be required as a security for the completion of the contract by the payer and will be forfeited to the other party if the payer fails to perform his side of the contract. ⁴³⁰ If only part of the agreed deposit has actually been paid, the better view is that, provided the obligation to make the payment has accrued, the innocent party can sue to recover the balance of the deposit. ⁴³¹ A deposit may be recovered in the case of purchase on a condition which is not performed. ⁴³² It is also prima facie recoverable where it is paid during the negotiations for a contract and no binding contract is concluded. ⁴³³ Where a deposit is paid in respect of a contract which is void for failure to comply with

statutory formalities, it can only be recovered where the failure of basis is total. ⁴³⁴ ⚠ As regards contracts for the sale or exchange of any interest in land, the court has a discretion to order repayment of any deposit where the justice of the case requires it. ⁴³⁵ It may also be possible to seek equitable relief from forfeiture in respect of deposits and other payments required as security for performance where the forfeiture provision is penal ⁴³⁶ and it would be unconscionable for the payee to retain the payment. This jurisdiction, based on *Stockloser v Johnson*, ⁴³⁷ is fully discussed in Ch.26.

⁴³⁸



Part payments not intended to be deposits ⁴³⁹

29-069

Different principles apply if there is a substantial prepayment of the purchase price which is not intended to be in the nature of a deposit or earnest. In this situation the payer may still have a claim for recovery, despite the fact that the non-performance of the contract was due to his own fault. Thus, where a buyer repudiated his contract to purchase goods, he was nevertheless held to be entitled to recover a substantial prepayment made by him, subject to a deduction in respect of the actual damage suffered by the seller through the breach of contract. ⁴⁴⁰ This was because the right to the payment was conditional upon the subsequent completion of the contract. ⁴⁴¹ However, where, as in a contract for work and materials, the contractual obligations of the party to whom a part payment or an instalment is made mean that he is bound to incur expenses before completing performance, the right to the payment will be unconditional and the payment will be irrecoverable although it is not required as security for due performance. ⁴⁴²

Quantum valebat to fix a price for goods

29-070

If no price for goods sold has been fixed in a contract of sale, the law will imply that a reasonable price is to be paid, and, in an action for quantum valebat, the court will, as “a question of fact dependent on the circumstances of each particular case”, decide what is a reasonable price. ⁴⁴³

Quantum meruit to fix remuneration

29-071

In a contract for work to be done, if no scale of remuneration is fixed, the law imposes an obligation to pay a reasonable sum (quantum meruit). ⁴⁴⁴ The circumstances must clearly show that the work is not to be done gratuitously before the court will, in the absence of an express contract, infer that there was a valid contract with an implied term that a reasonable remuneration would be paid. ⁴⁴⁵ The court may infer from the facts a contract to pay for services to be rendered, even though this entails disregarding the actual intention of the parties at the time; as, for instance, where both parties, under a mistake of fact, assumed that the defendant was entitled to claim, without charge, the services of the particular fire brigade he had summoned. ⁴⁴⁶ But no contractual obligation arises unless there is an express or implied request from the defendant to the claimant for the work to be done or the

services to be rendered. Any claim in these circumstances would be founded on the contract rather than by reference to the unjust enrichment principle. Apart from the exceptional cases of salvage,⁴⁴⁷ agency of necessity,⁴⁴⁸ and services or benefits provided in an emergency,⁴⁴⁹ or of limited cases where the claimant mistakenly repairs or improves the defendant's chattels,⁴⁵⁰ English law has been hostile to claims for services rendered or work done in the absence of a contract (express or implied) between the parties.⁴⁵¹ However, following decisions of the House of Lords⁴⁵² and Supreme Court,⁴⁵³ where claims for the reasonable value of services provided outside of contract have been recognised, English law has now clearly embraced unjust enrichment claims involving the provision of services, although it must be established that the defendant was enriched by the receipt of the service, which will turn on whether the defendant had any real option to accept or reject the service⁴⁵⁴ or whether the service can be considered to be incontrovertibly beneficial.⁴⁵⁵ In *Sharab v Prince Al-Waleed Bin Talal Bin Abdul-Aziz Al-Saud*⁴⁵⁶ Sir William Blackburne correctly recognised that if a claim to quantum meruit is not contractual in nature then it can only succeed by virtue of the principle of unjust enrichment. In that case⁴⁵⁷ and in *Professional Cost Management Group Ltd v Easynet Ltd*⁴⁵⁸ free acceptance was recognised as justifying the quantum meruit to be awarded. In the latter case it was recognised that this depended on the services not being performed under a contractual obligation and not being merely incidental to what was required to be done under a contract; the quantum meruit claim must not be inconsistent with the express remuneration provisions of any contract; the defendant must have freely accepted the services and should have realised that the claimant expected to be paid for them. This is significant, since it suggests that free acceptance is a ground of restitution in its own right, distinct from failure of basis.⁴⁵⁹ The term quantum meruit is also used where the parties have not performed the terms of their contract, but it can be inferred from their conduct that they have tacitly agreed to substitute another contract for the first one. Here any relief is granted under the contract rather than through the operation of the law of restitution. In *Steven v Bromley & Son*⁴⁶⁰ Bankes L.J. summarised the facts by saying:

“When the charterers tendered a cargo which was outside the charterparty, and for which no rate of freight had been agreed, the inference is justified that they made an offer to the owners to pay a reasonable freight if the cargo were accepted for carriage.”

In the same case Atkin L.J. gave an illustration from the law as to the sale of goods⁴⁶¹:

“If I order from a wine merchant twelve bottles of whisky at so much a bottle and he sends me ten bottles of whisky and two of brandy and I accept them, I must pay a reasonable price for the brandy.”

The obligation in such a case is genuinely contractual rather than restitutionary.

Quantum meruit for work done where the contract is terminated by breach

29-072

Alderson B. recognised that:

“Where one party has absolutely refused to perform, or has rendered himself incapable of performing, his part of the contract, he puts it in the power of the other party either to sue for a breach of it, or to rescind the contract and sue on a quantum meruit for the work actually done.”⁴⁶²

Although the matter is not free from doubt, the better view is that such a quantum meruit claim is grounded on failure of basis.⁴⁶³ In a leading case, *Planché v Colburn*,⁴⁶⁴ the defendants engaged Planché to write a volume for publication in the defendant's proposed series of “The Juvenile Library”. After Planché had written some of his work, the defendants abandoned the whole publication, and it was held that Planché might, without tendering his completed work, sue to recover reasonable

remuneration for his work already done.⁴⁶⁵ In *Prickett v Badger*⁴⁶⁶ an agent was employed to sell land at a certain price, but, although he found a purchaser, the owner refused to sell and wrongfully revoked the agent's authority. The agent successfully sued for reasonable remuneration for his work and labour up to that date.

Quantum meruit and contractual remedies

29-073

In *Taylor v Motability Finance Ltd*⁴⁶⁷ a distinction was drawn between claims involving goods and services and claims involving money, with the assumption being that the ground of total failure of basis only applied to the latter claim. In that case the defendant had terminated an employment contract with the claimant. The claimant argued that this constituted a repudiatory breach so that a restitutionary remedy could be awarded outside of the contract for the work done grounded on total failure of basis. This argument was rejected because the claimant had fully performed the contract by providing services to the defendant and so, although the primary obligation to perform had been revoked, the contractual regime subsisted in terms of the secondary obligation to pay damages for breach. It appears from this decision that, where a claimant has paid money to the defendant and has received nothing in return, the contractual regime no longer applies once the contract has been discharged, so that a restitutionary claim will lie.⁴⁶⁸ Where, however, goods or services are provided by the claimant who has substantially performed the contract, the contractual regime still governs the award of remedies despite the repudiation of the contract.⁴⁶⁹ This distinction was approved in *Howes Percival LLP v Page*⁴⁷⁰ where it was held that, where a solicitor had a conditional right to receive payment for services if litigation was successful, once the defendant had committed a repudiatory breach of the contract there was no right to obtain a quantum meruit for the services provided by the solicitor, but only damages for the breach of contract. This would be particularly significant where the defendant was likely to lose the litigation, for then the solicitor would not have suffered any loss. It was recognised that a similar result would be achieved if a contract with an estate agent was breached, where the conditions necessary for the payment of commission to the estate agent had not been met. The creation of such a distinction dependent on the nature of the enrichment received by the defendant is difficult to defend. In *Sopov v Kane Constructions Pty Ltd (No.2)*⁴⁷¹ the Victorian Court of Appeal held that, where a building contract had been repudiated by the landowner after building work had been substantially performed, the builder could elect to claim a quantum meruit rather than compensatory damages, although the court only reached this decision because the judges considered themselves to be bound by authority. They felt that the arguments in favour of confining the claimant to compensatory damages were very powerful,⁴⁷² but that this was a matter for the High Court of Australia to resolve. The High Court refused leave to appeal. In *Elek v Bar-Tur*⁴⁷³ David Donaldson QC reluctantly accepted that a claimant who has provided services pursuant to a contract which has been repudiated following breach by the defendant, can bring a restitutionary claim to recover the value of the services. However, following *Taylor v Motability Finance*,⁴⁷⁴ he recognised that this only applies where the claimant has been unable to complete his contractual performance and as a result the defendant's counter-performance is not yet due. Where, however, the claimant has fully performed and is entitled to payment under the contract, the claimant cannot bring a claim for unjust enrichment.

Quantum meruit and bad bargains

29-074

Where the innocent party has made a bad bargain the damages for breach may well be less than the reasonable value of the work he has done. In such circumstances the claimant would wish to obtain a restitutionary remedy, rather than damages which would be affected by the contractual limit. It has been unclear whether a restitutionary remedy is available to the innocent party in such circumstances or whether any claim for reasonable remuneration will be limited to a rateable proportion of the contract price. The weight of United States authority favours the view that the quantum meruit should not be limited in this way,⁴⁷⁵ the Privy Council has held that the measure of relief in a quantum meruit is the actual value of the work and that the profitability of the contract is irrelevant⁴⁷⁶ and the Law Commission has recommended that a quantum meruit granted to an innocent party should not be based on the contract price.⁴⁷⁷ Until relatively recently the matter does not appear to have been

considered explicitly in England. ⁴⁷⁸ However, in *Taylor v Motability Finance Ltd* ⁴⁷⁹ Cooke J. stated that there is no justification for the award of a restitutionary remedy which is in excess of the contractual limit, since the award of such a remedy would put the claimant in a better position than he would have been in had the contract been fulfilled, which would be unjust. He emphasised that, when determining the quantum meruit, regard should be had to the contract both as a guide to the value which the parties put on the service and to ensure justice between the parties.

Relevance of the contract price

29-075

⚠ Although it might be thought wrong to allow the innocent party to “reverse” the contractual allocation of risks ⁴⁸⁰ and difficult to value the benefit without regard to the contract price, ⁴⁸¹ it has also been argued that the contract price was agreed in the context of a contemplated complete performance and that this would not necessarily have been agreed for part performance. ⁴⁸² The presence of economies of scale may mean that it does not follow that a person who agrees to pave 10 miles of road for a specified price would have agreed to pave 10 yards at a prorated price. ⁴⁸³ Furthermore, to allow a party in breach to reduce the award by reference to the contract price in effect awards him “a portion of his anticipated profit on the contract despite the fact that he was the contract breaker”. ⁴⁸⁴ Finally, the contrast with claims for the recovery of money paid under contracts on the ground that there has been a total failure of basis should be noted. In those cases the objection that recovery might reverse the contractual allocation of risks does not appear to have been taken. ⁴⁸⁵ An alternative to prorating the contract price is to limit the quantum meruit to the total contract price. This has been justified on the ground that it fully protects the claimant’s expectations but avoids giving him a “windfall”. ⁴⁸⁶ ⚠ However, it does so by awarding the person who has committed a repudiatory breach which has led to the contract being discharged ⁴⁸⁷ a portion of his contractual expectations, and has the consequence of producing disequilibrium between the position of a claimant who has done a small proportion of the work, where the contract price limit would in fact rarely apply, and the position of one who has done the bulk of the work, where the limit would be more likely to apply. ⁴⁸⁸ In *Sopov v Kane Constructions Pty Ltd (No.2)* ⁴⁸⁹ the Victorian Court of Appeal held that, when assessing the reasonable value of work done, the contract price should not act as a ceiling to the award, because quantum meruit is based on a fiction that the contract ceases to exist ab initio so that it cannot limit the quantum meruit. ⁴⁹⁰ Rather, the contract price is merely evidence of the reasonable value of the benefit received, but it is not necessarily the best evidence. ⁴⁹¹ ⚠ Further, a profit margin could be included as part of the quantum meruit, since this is consistent with the restitutionary objective of measuring the value of the benefit conferred on the defendant. ⁴⁹²

Additional remuneration

29-076

A claim for quantum meruit may allow recovery of a reasonable sum as additional remuneration for extra work performed by a building contractor, where, although the contract permitted the owner to order extra work, the amount of extra work actually ordered was so great as to go beyond the scope of the contract and entitle the builder to claim that he should not be limited to the maximum profit fixed by the contract. ⁴⁹³ The same principle has been applied to a contract of employment, where, in lieu of an increase of salary, the employer promised to pay a bonus on the net trading profits of the business, but the method of assessing the bonus was never agreed. ⁴⁹⁴ In another case ⁴⁹⁵ the claimant was requested by the defendant to do some additional work as a property consultant outside of the scope of the contract between them, for which no remuneration was fixed under the contract. It was held that the defendant was liable to pay the claimant for this work, with the award determined on a quantum meruit basis.

Anticipated contracts

29-077

The remedy of quantum meruit may extend to services performed in anticipation that negotiations will lead to the conclusion of a contract, provided that the services were requested or acquiesced in by the recipient,⁴⁹⁶ or can be considered to be incontrovertibly beneficial.⁴⁹⁷ It has been said that, in this context, quantum meruit is not truly restitutionary, since it is only “an incident in assessing the amount due under an ordinary contract where the amount is blank”.⁴⁹⁸ It is, however, difficult to accept this in the case of services rendered in anticipation that a contract would be entered into later⁴⁹⁹ and, in such a case, a quantum meruit is not subject to contractual defences such as a claim for late delivery.⁵⁰⁰ In *British Steel Corp v Cleveland Bridge & Engineering Co Ltd*⁵⁰¹ Robert Goff J. said that the obligation imposed in such cases sounds in restitution and not in contract, and the typical ground of restitution will be total failure of consideration.⁵⁰² In *MSM Consulting Ltd v United Republic of Tanzania*⁵⁰³ Clarke J. identified various principles relating to quantum meruit claims arising from work done in anticipation of a contract which did not materialise, including that it is not possible to claim for the cost of bidding for the contract; a remedy will not be available where the claimant took the risk of being reimbursed only if a contract was concluded; and the court might impose an obligation on the defendant who has received a benefit if they have behaved unconscionably in declining to pay for it.⁵⁰⁴

Valuing the quantum meruit

29-078

In *Benedetti v Sawiris*⁵⁰⁵ the Supreme Court considered fundamental principles relating to the valuation of the quantum meruit. In that case the claimant had facilitated an investment in a company. The claimant sought to recover remuneration for the services he had provided. It was held that the value of the services should be assessed by reference to their market value without reference to a later compromise offer made by the defendant because it was not possible to award more than the objective value of the enrichment, although a lesser sum might be awarded if the defendant valued the enrichment below the market value. In determining the objective market value of an enrichment it was appropriate to have regard to the defendant's position, such as his buying power to negotiate a lower price or his credit rating. This is relevant to the objective value of the enrichment since it is the type of circumstance which would be taken into account by the market in determining the value of the enrichment.

Claim of the party in breach


29-079

Normally, the party in breach cannot recover for goods supplied or services rendered, even if the innocent party terminates further performance of the contract⁵⁰⁶; he may, however, be able to claim payment for the performance of a divisible part of a contract which is not an “entire” contract,⁵⁰⁷ or in certain special situations.⁵⁰⁸

Payments made under a void contract

29-080

! Many instances of restitution on the ground of total failure of basis may arise where payments have been made under a void contract. If a contract is void ab initio for mistake⁵⁰⁹ any payment or credit received⁵¹⁰ made under the apparent contract is recoverable.⁵¹¹ Thus, where the plaintiff paid the purchase-money for an annuity on the life of A, but both parties were ignorant of the fact that A had died some days previously, he was entitled to recover the whole of the money since the contract lacked subject-matter and was therefore void: the consideration for the payment had totally failed.⁵¹² Again, where a company paid instalments under a distributorship agreement which had in fact been made before its incorporation, it was entitled to recover such instalments as were paid after its incorporation; the agreement was void and the consideration for the instalments had totally failed.⁵¹³ Similarly, where money was lent to a bank in circumstances where it lacked the capacity to borrow the

money, the loan could be recovered by the lender ⁵¹⁴; and where money was lent by a bank to public authorities which lacked the capacity to borrow the money, the loan could be recovered on the ground of total failure of consideration. ⁵¹⁵ Where a contract is rendered void by statute, it is a matter of statutory interpretation to discover whether money paid under such an apparent contract is recoverable. ⁵¹⁶ For example, where a wagering contract was void under the Gaming Act 1845, money paid to the winner of the wager could not be recovered by the loser ⁵¹⁷; but money advanced on a bill of sale which is void for want of form or for non-registration may be recovered, with reasonable interest. ⁵¹⁸ Where a borrowing contract was void for lack of capacity the lender could recover the money lent, save where restitution would be contrary to the policy of the statute rendering the contract void. ⁵¹⁹ But restitution of money paid in respect of a void contract can only be recovered by reference to failure of basis where that failure is total. So, where a deposit was paid in respect of a contract which was void for failure to comply with statutory formalities, the claimant was unable to recover it because he had obtained the benefit for which the payment was made, namely that the defendant had taken the property off the market. ⁵²⁰ 


Absence of basis

29-081


Recovery in cases of payments under a void contract has sometimes been put on a basis wider than that of total failure of basis. It has been held that money paid under void interest rate swap agreements can be recovered because it has been paid for “no consideration” or in the “absence of a basis”, even if benefits have been received by the payer and the contract has been fully performed. ⁵²¹ Where payments have been made both ways restitution is only available to a party if he gives credit for what he has received ⁵²² and if it is possible to return the parties to their original positions. ⁵²³ In *Haugesund Kommune v Depfa ACS Bank* ⁵²⁴ Aikens L.J. said that the distinction between total failure and absence of consideration or basis was simply a matter of choosing the most apt terminology and had no legal implications. But the preferable view is that it does matter whether the ground of restitution is analysed as total failure or absence of basis, since the latter ground will be applicable even where the payer has obtained a benefit from the recipient of the payment.

Services rendered or goods supplied under a void contract

29-082

 In *Craven-Ellis v Canons Ltd* ⁵²⁵ Craven-Ellis was appointed managing director of a company by an agreement under the company’s seal, and his remuneration was fixed. But this contract was void, since neither Craven-Ellis nor the directors who purported to execute the contract had obtained their qualification shares within two months after appointment (as required by the articles of association). The “directors” could therefore not bind the company, but the Court of Appeal held that the fact that Craven-Ellis had done work under a contract which was void did not disentitle him from recovering on a quantum meruit, since the company (either through qualified directors or through its shareholders) had accepted the benefit of his services, ⁵²⁶ knowing that the services were not intended to be gratuitous. Greer L.J. said ⁵²⁷:

“The obligation to pay reasonable remuneration for the work done when there is no binding contract between the parties is imposed by a rule of law, and not by an inference of fact from the acceptance of services or goods.”

The Lord Justice thus appears to adopt the view that in these circumstances the obligation is purely restitutionary. As regards the identification of enrichment, there are difficulties with establishing this with reference to free acceptance ⁵²⁸ because, at the material time, there was no one with authority to act, acquire knowledge, make a request or enter an agreement for the company. ⁵²⁹ The case is better seen as an early example of liability imposed because of incontrovertible benefit. ⁵³⁰  Greer L.J. pointed out that if the services “had not been performed by the plaintiff, [the company] would

have had to get some other agent to carry [them] out". ⁵³¹ The Court of Appeal in *Rover International Ltd v Cannon Film Sales (No.3)* ⁵³² appears to support this view of *Craven-Ellis*, in so far as it did not consider whether anything in the nature of an express or implied request was necessary to found a claim for a quantum meruit by a company for services rendered after its incorporation but under a pre-incorporation contract. Kerr L.J. said that the task of the court was to carry out a process of equitable restitution. The Court also held that the quantum meruit was not to be limited by reference to the claimant's entitlement under the purported contract, primarily because that was irrelevant to a remedy which only arose due to the invalidity of the contract.

Money paid under illegal contracts

29-083

⚠ If money is paid under a contract which is illegal it has been recognised that restitution should not be awarded because of the taint of illegality. ⁵³³ ⚠ However, following the decision of the Supreme

Court in *Patel v Mirza*, ⁵³⁴ ⚠ as a general rule restitution will be awarded if the elements of the unjust enrichment claim can be established, which will usually be possible because an illegal transaction will always involve a failure of consideration since the basis for the transaction will be void, save where the court considers that the taint of illegality should defeat the claim for restitution. In determining whether the defence of illegality should operate the court should have regard to a "trio of considerations", namely examination of the reason for making the conduct illegal; identification of the policies which would be adversely affected by denying the claim; and proportionality. ⁵³⁵ ⚠ Lord Toulson recognised that various factors will be relevant to determine whether it is disproportionate to refuse relief, although he did not consider that it was possible to produce a definitive list because of the infinite variety of cases which might raise illegality. Factors he identified include the seriousness of the conduct, its centrality to any contract, whether the conduct was intentional and whether there was a marked disparity in the parties' respective culpability. ⁵³⁶ ⚠

29-083A

⚠ In *Patel v Mirza* ⁵³⁷ ⚠ itself the respondent had transferred £620,000 to the appellant to be used by the latter to bet on share price movements based on inside information. Such insider dealing is a crime under Pt V of the Criminal Justice Act 1993. The inside information was not forthcoming and so the agreement was not carried out. The respondent sought restitution of the money paid on the ground that the appellant had been unjustly enriched at his expense, the ground of restitution being that the basis for the transfer had failed totally. In the Supreme Court the nine Justices unanimously held that the respondent should recover the money he had paid to the appellant. The general approach of the Supreme Court was that it was appropriate to return the parties to the status quo ante despite the illegality of the transaction because, as Lord Sumption recognised, ⁵³⁸ ⚠ "an order for restitution would not give effect to the illegal act or to any right derived from it". It follows that there is only a very limited role for the defence of illegality in the law of restitution, since the courts will be willing to unwind the transaction because the claimant will not profit from it, save perhaps where the

illegality is considered to be particularly serious. ⁵³⁹ ⚠ The old rule ⁵⁴⁰ ⚠ that the defence of illegality would apply whenever the claimant needs to rely on the illegality to establish a claim was rejected by the Supreme Court in *Patel v Mirza*. ⁵⁴¹ ⚠ The majority did not examine the old doctrine of locus poenitentiae, by virtue of which a claim will not be defeated by illegality if the claimant has voluntarily withdrawn from the transaction before any part of the illegal purpose has been achieved, ⁵⁴² ⚠ but it is likely that this doctrine will be considered to have been subsumed into the new "trio of considerations" approach of the majority. ⁵⁴³ ⚠

Services provided under illegal contracts

29-084

⚠ When an innocent party learns that the other party to the contract has an illegal object in mind, the innocent party, although he must refuse to continue with the performance of the contract, may sue for a quantum meruit for the lawful work he has already done. ⁵⁴⁴ ⚠

Money paid under unenforceable contract**29-085**

The mere fact that one party has paid money to another under a contract which he cannot enforce against the latter, either because of non-compliance with a statute requiring written evidence or on grounds of public policy, will not entitle the payer to recover the money automatically, for such a contract is not void, but merely unenforceable. ⁵⁴⁵ A total failure of basis must be proved before restitution can be claimed in these circumstances and restitution will not, in any event, be given if it would run counter to the policy of the statute in question. ⁵⁴⁶

Work done under an unenforceable contract**29-086**

A person who renders services under a contract that is unenforceable will be entitled to a quantum meruit if the other party has failed to carry out his part, provided the restitutionary claim does not undermine the policy of the statute (or common law rule) rendering the contract unenforceable. ⁵⁴⁷ This availability of a restitutionary claim in such circumstances was recognised by the House of Lords in *Cobbe v Yeoman's Row Management Ltd*, ⁵⁴⁸ where the claimant had entered into an oral agreement in principle with the defendant to buy the defendant's land. No written contract was made. The claimant successfully made an application for planning permission to develop the land. Negotiations broke down and the claimant sought, inter alia, a restitutionary remedy from the defendant, since the oral contract was unenforceable. Lord Scott, with whom the other Lordships agreed, recognised three common law in personam remedies, namely unjust enrichment, quantum meruit and total failure of consideration. Each remedy was not to be assessed with regard to the increased value of the property as a result of the planning permission being obtained, since the effect of the planning permission was simply to unlock the value of the development potential inherent in the property, but instead was to be assessed with regard to the value of the claimant's services in obtaining planning permission. That the claimant could obtain a personal restitutionary remedy is not controversial; that the claimant had three distinct remedies is. The only claim available was one in unjust enrichment, for which the appropriate remedy is quantum meruit (the reasonable value of the services provided) and for which the unjust element would be satisfied by showing that there had been a total failure of basis.

In *Degelman v Guaranty Trust Co of Canada and Constantineau*, ⁵⁴⁹ a nephew, who rendered services to his aunt under an oral agreement by which she had agreed to bequeath a house to him, was entitled to reasonable remuneration for the services on her failure to do so, since she had received the benefits of full performance of the contract. Again, in *Pavey & Matthews Pty Ltd v Paul*, ⁵⁵⁰ a quantum meruit was granted to a licensed builder who had renovated a cottage under an unenforceable oral contract. It was held that the claim was an independent restitutionary claim arising from the acceptance of the benefits accruing to the defendant from the plaintiff's execution of the work for which the ineffective contract provided. In the last two cases it was accepted that the contract had been fully performed by the claimant. ⁵⁵¹ Where it is not, or where performance is alleged to be defective, if the basis of the claim is the acceptance of performance, the defendant who has not in fact received the bargained-for performance might not be deemed to have accepted non-conforming performance and might not therefore be liable. ⁵⁵² Alternatively, in the case of a contract unenforceable for lack of writing, where there is an allegation of non-conformity with the promised performance, then, if the purpose of the statutory requirement is to avoid disputes as to what was agreed, this might be undermined by a restitutionary quantum meruit.

Minors' contracts

29-087

⚠ Money paid by a minor under a contract which is unenforceable against him, ⁵⁵³ will be recoverable provided there has been a total failure of basis. ⁵⁵⁴ ⚠ Where money is paid to a minor, at common law ⁵⁵⁵ the adult will not be permitted to recover in restitution on the ground of a total failure of basis if that would “in a roundabout way” contravene the policy of the law and indirectly enforce the unenforceable contract. ⁵⁵⁶ By s.3(1) of the Minors' Contracts Act 1987 the court is given discretion to require the minor to transfer to the other party “any property” acquired under the contract “or property representing it” if it is just and equitable to do so. Although the matter is not entirely free from doubt, it is possible that “property” will be held to include money, since otherwise there would be no power to order the transfer of the proceeds if the minor has resold the goods he bought under the unenforceable contract. ⁵⁵⁷

Recovery of premiums where a policy of insurance is avoided

29-088


The premium paid under a policy of insurance may be recovered if the risk insured against does not exist, and this fact was not known to the parties ⁵⁵⁸: the basis for the payment will have totally failed. Where a policy of marine insurance is avoided by the insurer on the ground of the misrepresentation or concealment by the assured of a material fact, the assured, if not guilty of fraud, may recover all premiums which he has paid under the policy. ⁵⁵⁹



Consumer's right to restitution


29-089

Under the Consumer Protection from Unfair Trading Regulations 2008 as amended, ⁵⁶⁰ when a consumer has unwound a contract with a trader or made a payment to a trader which was not otherwise due by reason of a relevant prohibited practice, covering misleading actions or aggressive practises, the consumer will be able to recover any payment made if the payment was not otherwise due. ⁵⁶¹ Under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, ⁵⁶² which in part relate to the consumer's rights of cancellation in off-premises and most distance contracts, on cancellation or withdrawal of an offer by the consumer, the trader must reimburse all payments received from the consumer other than those which are for delivery, subject to an allowance in respect of the diminution in value of the goods as a result of their handling by the consumer. ⁵⁶³ Under the Consumer Rights Act 2015 ⁵⁶⁴ a consumer who has exercised the right to reject goods, ⁵⁶⁵ so that the contract is treated as at an end, has a right to recover money paid to the trader under the contract, ⁵⁶⁶ or other thing transferred under the contract, save if it cannot be returned in its original state, in which case the consumer will be entitled to damages. ⁵⁶⁷ Any refund to the consumer may be reduced by a deduction for the consumer's use of the goods. ⁵⁶⁸

1. For a full treatment of the subject matter of this chapter, see: Burrows, *The Law of Restitution*, 3rd edn (2011); Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016); Virgo, *The Principles of the Law of Restitution*, 3rd edn (2015). See also Beatson, *The Use and Abuse of Unjust Enrichment* (1991); Birks, *An Introduction to the Law of Restitution* (1985); Birks, *Unjust Enrichment*, 2nd edn (2005); Maddaugh and McCamus, *The Law of Restitution*, 2nd edn (2004); McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014); Mason, Carter and Tolhurst, *Restitution Law in Australia*, 2nd edn (2008); Palmer, *The Law of Restitution* (1978) (four Vols); The American Law Institute's Restatement of the Law Third, Restitution and Unjust Enrichment (2011).

- [340.](#) Burrows at Chs 14 and 15; Goff and Jones Chs 12-16; Virgo at Ch.13; Virgo, *Unjustified Enrichment: Key Issues in Comparative Perspective* (2002), Ch.4; Stoljar (1959) 75 L.Q.R. 53; Pecuniary Restitution on Breach of Contract (Law Com. No.121, 1983), paras 1.6–1.8, 3.1–3.11.
- [341.](#) See *Spaul v Spaul* [2014] EWCA Civ 679 at [50] (Rimer L.J.); *Barnes v Eastenders Cash and Carry Plc* [2014] UKSC 26, [2015] A.C. 1 at [105] (Lord Toulson); Goodwin [2013] R.L.R. 24. Sometimes “failure of condition” has been used. See *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] A.C. 32, 64–5 (Lord Wright); *Anderson v McPherson* (No.2) [2012] WASC 19, [235] (Edelman J.).
- [342.](#)  *Martin v Andrews* (1856) 7 E. & B. 1 (recovery of conduct money paid to subpoenaed witness when action settled before trial); *Chillingworth v Esche* [1924] 1 Ch. 97 (recovery of deposit paid under transaction expressed to be “subject to contract” when no contract concluded through actions of payer); *Valencia v Llupar* [2012] EWCA Civ 396 (recovery of money paid pursuant to an agreement made subject to contract, where no contract was made). See also *Spaul v Spaul* [2014] EWCA Civ 679, at [46], where Rimer L.J. recognised that the ground of restitution could apply where there was a failure of an informal arrangement which fell short of a binding contract, but he emphasised that, in such circumstances, there had to be a joint endeavour between the parties. cf. *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66, [2016] A.C. 176 where it was accepted that the ground of total failure of consideration applied (Lord Clarke at [21]) without analysis of whether there was a joint endeavour between respondent and appellant, which could not have been established because the appellant was unaware of the basis for the transfer of the enrichment. In *Lowick Rose LLP v Swynson Ltd* [2017] UKSC 32, [2017] 2 W.L.R. 1161 at [30] Lord Sumption recognised that the basis had to be mutually shared by the claimant and the defendant, save where the remedy of subrogation is sought. See below, para.29-180. See also *Barnes v Eastenders Cash and Carry Plc* [2014] UKSC 26, [2015] AC 1 at [109] (Lord Toulson). See also below, para.29-080 (void contracts).
- [343.](#) *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] A.C. 32 (above, para.23-072); *Comptoir d’Achat et de Vente du Boerenbond Belge SA v Luis de Ridder Limitada* [1949] A.C. 293 (below, para.29-059); *Branwhite v Worcester Works Finance Ltd* [1969] 1 A.C. 552; *Rover International Ltd v Cannon Film Sales Ltd* (No.3) [1989] 1 W.L.R. 912, noted Beatson (1989) 105 L.Q.R. 179; *Stocznia Gdanska SA v Latvian S.S. Co, Latreefers Inc* [1998] 1 W.L.R. 574; *Roxborough v Rothmans of Pall Mall Australia Ltd* (2002) 76 A.L.J.R. 203 (High Ct of Australia), paras 16, 101-109, 164-173 and cases cited in following footnotes.
- [344.](#) *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] A.C. 32, 48, per Viscount Simon. Where, as in certain insurance contracts, the payer bargains for the promise the general rule will not apply: *Tyrie v Fletcher* (1777) 2 Cowp. 666. For reconsideration of the requirement of totality, see *Goss v Chilcott* [1996] A.C. 788 and see below, para.29-067.
- [345.](#) *Whincup v Hughes* (1871) L.R. 6 C.P. 78, 81.
- [346.](#) (1871) L.R. 6 C.P. 78, 82, 84. On this see above, para.29-011.
- [347.](#) There is no de minimis exception: *Giedo van der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373 (QB) at [287] (Stadlen J.), although provision of a small benefit might be discounted as a collateral benefit. See para.29-058, below.
- [348.](#) [1998] 1 W.L.R. 574, 588.
- [349.](#) [2010] EWHC 2372 (QB) at [264].
- [350.](#) [2014] UKSC 26, [2015] A.C. 1 at [106] (Lord Toulson).
- [351.](#) *Stocznia Gdanska SA v Latvian Shipping Co, Latreefers Inc* [1998] 1 W.L.R. 574, 588; *Giedo van der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373 (QB) at [276] (Stadlen J.).


- [352.](#) *Giedo van der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373 (QB) at [285] (Stadlen J.).
- [353.](#) *Giedo van der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373 (QB) at [285]–[286] (Stadlen J.); *Lissack v Manhattan Loft Corporation Ltd* [2013] EWHC 128 (Ch) at [87] (Roth J.).
- [354.](#) *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] A.C. 32, and see [1942] 1 K.B. 12, 14.
- [355.](#) *Hyundai Heavy Industries Ltd v Papadopoulos* [1980] 1 W.L.R. 1129, 1134, 1148 (Viscount Dilhorne and Lord Fraser); *Stocznia Gdanska SA v Latvian Shipping Co, Latreefers Inc* [1998] 1 W.L.R. 574; *Salvage Association v C.A.P. Financial Services Ltd* [1995] F.S.R. 654. See also *Maersk Air Ltd v Expeditors International (UK) Ltd* [2003] 1 Lloyd's Rep. 491, 497.
- [356.](#) Beatson (1981) 97 L.Q.R. 398, 402–403, 407–408, 412–413; Palmer, *The Law of Restitution* (1978), para.4.2.
- [357.](#) *Rover International Ltd v Cannon Film Sales Ltd (No.3)* [1989] 1 W.L.R. 912, 932, 936–937 (Dillon L.J.).
- [358.](#) *Bostock v Jardine* (1865) 3 H. & C. 700.
- [359.](#) *R. v Royal Bank of Canada* [1913] A.C. 283. See also *National Bolivian Navigation Co v Wilson* (1880) 5 App. Cas. 176.
- [360.](#) *Comptoir d'Achat et de Vente du Boerenbond Belge SA v Luis de Ridder Limitada* [1949] A.C. 293. (This was really a case of frustration (at 313) but since the facts occurred before 1943, the House of Lords did not refer to the Law Reform (Frustrated Contracts) Act 1943, but followed the common law principles laid down in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] A.C. 32 (above, para.23-072). Had it been a normal CIF contract the case would have been decided differently: cf. the view of the facts taken by the Court of Appeal [1947] 2 All E.R. 443.)
- [361.](#) *Gurney v Womersley* (1854) 4 E. & B. 133.
- [362.](#) See below para.29-080.
- [363.](#) *Linz v Electric Wire Co of Palestine Ltd* [1948] A.C. 371; *Steinberg v Scala (Leeds) Ltd* [1923] 2 Ch. 452. cf. *Wilkinson v Lloyd* (1845) 7 Q.B. 27 (recovery of purchase price of shares when directors refused to register the transfer).
- [364.](#)  Goff and Jones, para.13-30. See *Guinness Mahon & Co Ltd v Kensington & Chelsea RLBC* [1999] Q.B. 215, 240 (Robert Walker L.J.) Quaere, if the subscriber retains the shares and has received a dividend: *Linz v Electric Wire Co of Palestine Ltd* [1948] A.C. 371, 377.
- [365.](#)  Carter and Tolhurst (2001) 9(1) A.P.L.R. 1. See *Marsfield Automotive Inc v Siddiqi* [2017] EWHC 187 (Comm) at [24] (Teare J.).
- [366.](#) *Rowland v Divall* [1923] 2 K.B. 500; 129 L.T. 755. See further *Barber v N.W.S. Bank* [1996] 1 W.L.R. 641. This rule does not apply where the payer parts with the property for value: *Linz v Electric Wire Co of Palestine Ltd* [1948] A.C. 371. But see above para.29-059.
- [367.](#) *Butterworth v Kingsway Motors Ltd* [1954] 1 W.L.R. 1286.
- [368.](#) [1954] 1 W.L.R. 1286. The car was bought for £1,275 and used for nearly a year. When it was returned it was worth about £800. For criticisms of this and other similar cases, and proposals for reform, see Law Com. Working Paper No.65 (1975), Pt IV. The same principles apply to hire purchase: *Karflex Ltd v Poole* [1933] 2 K.B. 251; *Warman v Southern Counties Finance Corp*

- Ltd* [1949] 2 K.B. 576; Vol.II, para.39-316. cf. *Yeoman Credit Ltd v Apps* [1962] 2 Q.B. 508, 521, 525; *Kelly v Lombard Banking Co Ltd* [1959] 1 W.L.R. 41, below, para.29-065.
369. *Johnson v Johnson* (1802) 3 B. & P. 162. See also *Wright v Colls* (1849) 8 C.B. 150. Aliter if the purchaser negligently fails to discover an error in the title until after completion (*Allen v Richardson* (1879) 13 Ch. D. 524), or if after the conveyance has been executed the purchaser is evicted by a title to which the covenants in the conveyance do not extend (*Clare v Lamb* (1875) L.R. 10 C.P. 334, 338; *Clayton v Leech* (1889) 41 Ch. D. 103; *Debenham v Sawbridge* [1901] 2 Ch. 98). cf. also *Hunt v Silk* (1804) 5 East 449.
370. *Rover International Ltd v Cannon Film Sales Ltd (No.3)* [1989] 1 W.L.R. 912, 924–925, per Kerr L.J. See also *Westdeutsche Landesbank Girozentrale v Islington LBC* [1994] 4 All E.R. 890, 929 (Hobhouse J.); affirmed [1996] A.C. 669.
371. *Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 2 Q.B. 459, 475 (Devlin J.); *Weston v Downes* (1778) 1 Doug. 23; *Goodman v Pocock* (1850) 15 Q.B. 576.
372. Above, para.24-001.
373. *Dies v British and International Mining and Finance Corp Ltd* [1939] 1 K.B. 724, discussed below, para.29-069; *Newland Shipping and Forwarding Ltd v Toba Trading FZC* [2014] EWHC 661 (Comm). But cf. *Roxborough v Rothmans of Pall Mall Australia Ltd* (2002) 76 A.L.J.R. 203 (High Ct of Australia).
374. *Rover International Ltd v Cannon Film Sales Ltd (No.3)* [1989] 1 W.L.R. 912; *Westdeutsche Landesbank Girozentrale v Islington LBC* [1994] 4 All E.R. 890, 929 (Hobhouse J.), [1996] A.C. 669; *Eastbourne BC v Foster* [2001] EWCA Civ 1091 (employee bound to return monies received under void employment arrangement but at the same time entitled to a defence of change of position).
375. Above, para.23-071.
376. *Towers v Barratt* (1786) 1 T.R. 133; *Baldry v Marshall* [1925] 1 Q.B. 260. In certain circumstances, as in the cases of sale by a non-owner, above, para.29-060, where the goods have been repossessed by the true owner, the payer is relieved from the duty to restore. N.B. that certain benefits, such as use of chattels (but cf. *Rowland v Divall* [1923] 2 K.B. 500, above, para.29-060), occupation of land or receipt of services, are non-returnable and in such cases the money will be irrecoverable: *Hunt v Silk* (1804) 5 East 449; *Harrison v James* (1862) 7 H. & N. 804. Although, if the benefit received can be valued, quare whether money paid can be recovered if the claimant transfers the value of the benefit received to the defendant.
377.  *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] A.C. 32, 67 (Lord Wright). See also the Law Reform (Frustrated Contracts) Act 1943 s.2(3) and the power to contract out of other rights to restitution; Goff and Jones at paras 15-51–15-57; Virgo at pp.141–142.
378. [2014] UKSC 26, [2015] A.C. 1.
379. (2001) 185 A.L.R. 335.
380. *Dawson* (1959) 20 Ohio St.L.J. 175; Peel, *Treitel on The Law of Contract*, 13th edn (2011), pp.1142–1143; Palmer, *The Law of Restitution* (1978), paras 4.1 et seq.; Birks [1987] L.M.C.L.Q. 421; Goodhart [1995] Rest. L. Rev. 3; Beale (1996) 112 L.Q.R. 205, 208. For comparison of damages and quantum meruit, see below, para.29-073 and on the availability of gain-based remedies for breach of contract, see below, para.29-158.
381. See above, Ch.24. Although in *D.O. Ferguson & Associates v Sohl* (1992) 62 Build. L.R. 92 the claimant was awarded both restitution on the ground of total failure of consideration and nominal damages for breach of contract. See also *Giedo van der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373 (QB) at [291] (Stadlen J.).

- [382.](#) *Bush v Canfield* (1818) 2 Conn. 485; *B.P. Exploration Co (Libya) Ltd v Hunt (No.2)* [1979] 1 W.L.R. 783, 800 (Robert Goff J.); affirmed [1981] 1 W.L.R. 232 CA, [1983] 2 A.C. 352 HL. Although the latter case concerned claims under the Law Reform (Frustrated Contracts) Act 1943 s.1(2), the principle would appear to be the same. The objection that this reverses the contractual allocation of risks has not apparently been accepted, possibly because the law favours liquidated claims, because the stringency of the requirements needed to establish a total failure of basis mean that the issue will rarely arise and because, on facts such as those in *Bush v Canfield*, the payee-seller would otherwise get something for nothing. See also Palmer, *The Law of Restitution* (1978), Vol.1, pp.382–383, 392–393.
- [383.](#) *C.C.C. Films (London) Ltd v Impact Quadrant Films Ltd* [1985] Q.B. 16; above, paras 26-024, 26-028.
- [384.](#) *Biggerstaff v Rowatt's Wharf* [1896] 2 Ch. 93, 105.
- [385.](#) *Rowland v Divall* [1923] 2 K.B. 500; above, para.29-060; but compare *Warman v Southern Counties Car Finance Corp Ltd* [1959] 2 K.B. 576, 582–583 (any enrichment at expense of owner not seller). On damages, see *Harling v Eddy* [1951] 2 K.B. 739.
- [386.](#) *Re Farepak Food and Gifts Ltd* [2006] EWHC 3272, [2008] B.C.C. 22 See also *Nestlé Oy v Lloyd's Bank Plc* [1983] 2 Lloyd's Rep. 658. See below, para.29-168.
- [387.](#) e.g. *Baldry v Marshall* [1925] 1 Q.B. 260, above, para.29-061.
- [388.](#) *Mason v Burningham* [1949] 2 K.B. 545.
- [389.](#) See above, para.29-054 for the provisions of s.6(3) of the Torts (Interference with Goods) Act 1977 in relation to actions for the return of the price on the ground of total failure of consideration.
- [390.](#) See above para.26-026.
- [391.](#) *Khan v Malik* [2011] EWHC 1319 (Ch) at [130] (Christopher Nugee Q.C.).
- [392.](#) *Khan v Malik* [2011] EWHC 1319 (Ch) at [132].
- [393.](#) See above para.26-026.
- [394.](#) *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 W.L.R. 574. See above para.29-057.
- [395.](#) The Act is fully discussed above in paras 23-074 et seq.
- [396.](#) *B.P. Exploration Co (Libya) Ltd v Hunt (No.2)* [1979] 1 W.L.R. 783, 800 (Robert Goff J.); affirmed [1981] 1 W.L.R. 232 CA; [1983] 2 A.C. 352 HL. The common law rule was limited to total failure of consideration; *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] A.C. 32, above, para.23-072.
- [397.](#) (1885) 28 Ch. D. 409; and see *Whincup v Hughes* (1871) L.R. 6 C.P. 78.
- [398.](#) For full details, see above, paras 23-084 et seq.
- [399.](#) *B.P. Exploration Co (Libya) Ltd v Hunt (No.2)* [1979] 1 W.L.R. 783, 799 (Robert Goff J.); affirmed [1981] 1 W.L.R. 232 CA; [1982] 2 A.C. 352 HL. In contrast, the Court of Appeal got “no help from the use of words which are not in the statute” [1981] 1 W.L.R. 232, 243.
- [400.](#) Partnership Act 1890 s.40.
- [401.](#) Below, para.29-066. On partial performance of an “entire” contract, see above, paras 21-028–21-038.

- [402.](#) *Hunt v Silk* (1804) 5 East 449. cf. *Steinberg v Scala (Leeds) Ltd* [1923] 2 Ch. 452 (above, para.9-045); *Linz v Electric Wire Co of Palestine Ltd* [1948] A.C. 371 (above, para.29-059); *Michalinos & Co Ltd v Scourfield* (1950) 83 Ll.L. Rep. 494.
- [403.](#) *Taylor v Hare* (1805) 1 B. & P.N.R. 260; and see *Lawes v Purser* (1856) 6 E. & B. 930; *The Salvage Association v C.A.P. Financial Services Ltd* [1995] F.S.R. 654.
- [404.](#) *Baltic S.S. Co v Dillon* (1993) 67 A.L.J.R. 228 High Ct of Australia.
- [405.](#) *Kelly v Lombard Banking Co Ltd* [1959] 1 W.L.R. 41. See also *Yeoman Credit Ltd v Apps* [1962] 2 Q.B. 508, 521, 525. cf. *Warman v Southern Counties Car Finance Corp Ltd* [1949] 2 K.B. 576 (above, para.29-060: intermediate enjoyment of a car is not a “benefit” where vendor has no title).
- [406.](#) See *Stockloser v Johnson* [1954] 1 Q.B. 476 (above, para.26-210); *Dies v British and International Mining and Finance Corp Ltd* [1939] 1 K.B. 724; *Mayson v Clouet* [1924] A.C. 980 (below, para.29-069). cf. *Galbraith v Mitchenall Estates Ltd* [1965] 2 Q.B. 473 (Vol.II, para.39-344); *Sport International Poussum BV v Inter-Footwear Ltd* [1984] 1 W.L.R. 776.
- [407.](#) [2013] EWHC 1279 (Ch), [2013] L. & T.R. 31.
- [408.](#) *Wehner v Dene Steam Shipping Co* [1905] 2 K.B. 92 and *The Mihalios Xilas* [1979] 1 W.L.R. 1018.
- [409.](#) *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] A.C. 32, 77.
- [410.](#) *Deveaux v Conolly* (1849) 8 C.B. 640. See also *Biggerstaff v Rowatt’s Wharf Ltd* [1896] 2 Ch. 93; *Behrend & Co Ltd v Produce Brokers Co Ltd* [1920] 3 K.B. 530; *Ebrahim Dawood Ltd v Heath Ltd* [1961] 2 Lloyd’s Rep. 512.
- [411.](#) See above, paras 23-091, 24-046.
- [412.](#) [1996] A.C. 788, 798. See also *Giedo van der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373 (QB) at [303] (Stadlen J.).
- [413.](#) [2010] EWHC 2373 (QB) at [304] (Stadlen J.); *Winterton and Wilmot-Smith* (2012) 128 L.Q.R. 23. See also *Whincup v Hughes* (1870–1871) L.R. 6 C.P. 78; *D.O. Ferguson & Associates v Sohl* (1992) 62 Build. L.R. 95.
- [414.](#) [2014] UKSC 26, [2015] A.C. 1 at [114].
- [415.](#) [2013] EWHC 1279 (Ch), [2013] EWHC 1279 (Ch) at [42].
- [416.](#) “Pecuniary Restitution on Breach of Contract” (Law Com. No.121, 1983). See also *Wilmot-Smith* [2013] C.L.J. 414.
- [417.](#) *Burrows* (1984) 47 M.L.R. 762 at pp.333–336; *Virgo* at pp.325–329; *Mitchell* (2010) 29 U.Q.L.J. 191.
- [418.](#) Below, paras 29-071 et seq.
- [419.](#) Above, paras 29-060, 29-065.
- [420.](#) Above para.21-028.
- [421.](#) Above, para.29-066.
- [422.](#) *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 66 A.L.J.R. 768, 779. See also *Roxborough v Rothmans of Pall Mall Australia Ltd* (2002) 76 A.L.J.R. 203 High Ct of Australia (tax included in cost of goods but held to be a distinct part of the consideration paid by

buyers).

- [423.](#) (1992) 66 A.L.J.R. 768, 780. Note also *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669, 682–683 (Lord Goff); *D.O. Ferguson & Associates v Sohl* (1992) 62 *Build. L.R.* 92; *White Arrow Express Ltd v Lamey's Distribution Ltd* (1995) 15 *Tr. L.R.* 69 CA, noted Beale (1996) 112 *L.Q.R.* 205. But cf. *Pan Ocean Shipping Co Ltd v Creditcorp Ltd* [1994] 1 *W.L.R.* 161, 164–166 (Lord Goff).
- [424.](#) *Goss v Chilcott* [1996] A.C. 788, above, para.29-066.
- [425.](#) [1996] A.C. 669, 682–683. See also *Giedo van der Garde BV v Force India Formula One Team Ltd* [2010] *EWHC* 2373 (QB) at [367] (Stadlen J.).
- [426.](#) [1998] 1 *W.L.R.* 574, 590.
- [427.](#) In *Barnes v Eastenders Cash and Carry Plc* [2014] *UKSC* 26, [2015] A.C. 1 at [114], Lord Toulson acknowledged “the lively academic debate” as to whether the failure of basis had to be total, but the issue was not fully argued and did not need to be determined in that case, because the basis could be apportioned. See generally Wilmot-Smith (2013) *C.L.J.* 414.
- [428.](#) On recovery of a deposit paid to the other party’s agent, see Vol.II, para.31-109.
- [429.](#) *Howe v Smith* (1884) 27 *Ch. D.* 89, 97–98; *Harrison v Holland* [1922] 1 *K.B.* 211. See also *Smith v Butler* [1900] 1 *Q.B.* 694; *Shuttleworth v Clews* [1910] 1 *Ch.* 176. cf. *R. V. Ward Ltd v Bignall* [1967] 1 *Q.B.* 534; *Workers’ Trust and Merchant Bank Ltd v Dojap Investments Ltd* [1993] A.C. 573. In the sale of land, the conditions of sale will usually contain express provisions relating to the deposit.
- [430.](#) *Howe v Smith* (1884) 27 *Ch. D.* 89, 97–98. But see the proposals of the Law Commission’s Working Paper No.61 (1975), paras 49–67.
- [431.](#) *Hinton v Sparkes* (1868) *L.R.* 3 *C.P.* 161, 166; *The Blankenstein* [1985] 1 *W.L.R.* 435. cf. *Lowe v Hope* [1970] 1 *Ch.* 94; *Johnson v Jones* [1972] *N.Z.L.R.* 313, 318. But *Hinton v Sparkes* was not cited to Pennycuik J. in *Lowe v Hope* and *Johnson v Jones* concerned an express forfeiture clause which only applied to “moneys paid”. These cases appear inconsistent with the principle that discharge of contract only operates prospectively; applied to moneys due as instalments in *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 1 *W.L.R.* 1129; *Stocznia Gdanska SA v Latvian S.S.* [1998] 1 *W.L.R.* 574, below, para.29-069. See also Law Com. Working Paper No.61, para.59; Carter and Tolhurst (2001) 9(1) *A.P.L.R.* 1.
- [432.](#) *Wright v Newton* (1835) 2 *C.M. & R.* 124.
- [433.](#) *Chillingworth v Esche* [1924] 1 *Ch.* 97. Analysed in *Sharma v Simposh Ltd* [2011] *EWCA Civ* 1383, [2013] *Ch.* 23.
- [434.](#)  *Sharma v Simposh Ltd* [2011] *EWCA Civ* 1383, [2013] *Ch.* 23. See below, para.29-080. This also applies where no contract was made due to lack of authority: *Rabiu v Marlbray Ltd* [2016] *EWCA Civ* 476, [2016] 1 *W.L.R.* 5147, although Gloster L.J. acknowledged (at [90]) that restitution of the deposit might lie despite there not being a total failure of basis if the bargain was unconscionable or the defendant’s behaviour was overbearing.
- [435.](#) Law of Property Act 1925 s.49(2). See above, para.26-207.
- [436.](#) Despite their similar functions, clauses requiring payment as security for performance are distinguished from penalty clauses (above, para.26-178) which provide for payment *after* breach. Although *Public Works Commissioners v Hills* [1906] A.C. 368 supports the application of the rules governing penalty clauses and liquidated damages clauses to stipulations for security for due performance, in the present state of the law, this is doubtful; *Linggi Plantations Ltd v Jagatheesan* (1972) 1 *M.L.J.* 89, 91, per Lord Hailsham L.C. cf. *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd* [1995] A.C. 573. See Law Commission Working Paper No.61

(1975), paras 57–67.

[437.](#) [1954] 1 Q.B. 476.

[438.](#)

! See above, paras 26-205, 26-210. See also Goff and Jones at paras 14-25–14-29.

[439.](#)

Beatson (1981) 97 L.Q.R. 389; *The Use and Abuse of Unjust Enrichment* (1991), Ch.3; above, para.26-209.

[440.](#)

Dies v British and International Mining and Finance Corp Ltd [1939] 1 K.B. 724. See above, para.26-207 (distinguished in *Elson v Prices Tailors Ltd* [1963] 1 W.L.R. 287; followed in *Newland Shipping and Forwarding Ltd v Toba Trading FZC* [2014] EWHC 661 (Comm)). For the same principle in other types of contract, see *Mayson v Clouet* [1924] A.C. 980; *McDonald v Dennys Lascelles Ltd* (1933) 48 C.L.R. 457 (contracts for the sale of land); *Rover International Ltd v Cannon Film Sales Ltd (No.3)* [1989] 1 W.L.R. 912, 932 (Kerr L.J.), 936 (Dillon L.J.) (film distribution contract). In *Cadogan Petroleum Holdings Ltd v Global Process Systems* [2013] EWHC 214 (Comm), [2013] 2 Lloyds Rep. 216 Eder J. assumed, but did not decide, that total failure of consideration may be established where the failure of performance results from a breach of contract committed by the party seeking restitution. *Dies* was analysed as a case which turned on the parties' contractual intentions rather than unjust enrichment, although it was accepted that this was probably because at the time total failure of consideration was only applicable where the contract was void. See further Burrows at pp.354–355.

[441.](#)

Palmer v Temple (1839) 9 A. & E. 508, 521; *McDonald v Dennys Lascelles Ltd* (1933) 48 C.L.R. 457, 477; *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] A.C. 32, 65 (Lord Wright); *Guardian Ocean Cargos Ltd v Banco de Brasil SA (Nos 1 and 3)* [1994] 2 Lloyd's Rep. 152.

[442.](#)

Hyundai Heavy Industries Co Ltd v Papadopoulos [1980] 1 W.L.R. 1129. Although that case does not make it entirely clear whether the distinction from *Dies v British International Mining and Finance Corp Ltd* [1939] 1 K.B. 724 is based on the fact that in *Dies* the consideration for the payment had totally failed or on the need, on facts such as those in *Hyundai* [1980] 1 W.L.R. 1129 (above, para.29-058), to protect the reliance of the performer (on which, see Beatson, *The Use and Abuse of Unjust Enrichment* (1991), pp.56–61), in *Rover International Ltd v Cannon Film Sales Ltd* [1989] 1 W.L.R. 912, it was said to be based on total failure of consideration. See also *Stocznia Gdanska SA v Latvian S.S. Co* [1998] 1 W.L.R. 574.

[443.](#)

Sale of Goods Act 1979 s.8(2); *Foley v Classique Coaches Ltd* [1934] 2 K.B. 1. (cf. above, paras 2-135 et seq.).

[444.](#)

e.g. *Way v Latilla* [1937] 3 All E.R. 759 HL; *William Lacey (Hounslow) Ltd v Davis* [1957] 1 W.L.R. 932; *British Steel Corp v Cleveland Bridge & Engineering Co Ltd* [1984] 1 All E.R. 504; *Debenham, Tewson & Chinnocks v Rimington* [1990] 34 E.G. 55. See Ball (1983) 99 L.Q.R. 572; McKendrick (1988) 8 O.J.L.S. 197. See also *Lagos v Grunwaldt* [1910] 1 K.B. 41, 48; *Robins v Power* (1858) 4 C.B.(N.S.) 778. cf. *Re Richmond Gate Property Co Ltd* [1965] 1 W.L.R. 335. If the person at whose request the work is done subsequently promises a definite sum as remuneration, the so-called rule in *Lampleigh v Braithwaite* (1615) Hob. 105 may apply: see above, para.4-030. See also *Benedetti v Sawiris* [2013] UKSC 50, [2014] A.C. 938 where Lord Clarke recognised, at [9], that where there is a contract between the parties the court may imply a term to pay reasonable remuneration. This has sometimes been called a claim in quantum meruit. The focus is on the intention of the parties objectively ascertained. Where there is no contract, the quantum meruit operates within the law of unjust enrichment, and the focus is on the benefit to the defendant.

[445.](#)

Lampleigh v Braithwaite (1615) Hob. 105.

[446.](#)



Upton-on-Severn R.D.C. v Powell [1942] 1 All E.R. 220.

[447.](#)

Below, para.29-142. On improvements to land carried out by a limited owner or tenant see Munkman, *The Law of Quasi-Contracts* (1950) at p.95, and cf. below, para.29-169.

- [448.](#) Below, para.29-136; Vol.II, para.31-035.
- [449.](#) Below, para.29-137.
- [450.](#) Above, para.29-053.
- [451.](#) *Falcke v Scottish Imperial Insurance Co* (1887) L.R. 34 Ch. D. 234, 248–249; *RTS Flexible Systems Ltd v Molkerei Alios Müller GmbH* [2010] UKSC 14, [2010] 1 W.L.R. 753. But see *Whittle Movers Ltd v Hollywood Express Ltd* [2009] EWCA Civ 1189, where Waller L.J., at [15], concluded that a court should not strain to find a contract, because a restitutionary remedy could solve many of the problems.
- [452.](#) *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752. See para.29-086, below. For an illustration of a restitutionary remedy being awarded for services provided where there was no express or implied contract see *Spencer v S Franses Ltd* [2011] EWHC 1269 (QB). See also *Singh v Sinal* [2014] EWHC 3058 (Ch) (quantum meruit in respect of services provided by barrister).
- [453.](#) *Benedetti v Sawiris* [2013] UKSC 50, [2014] A.C. 938. See para.29-078, below.
- [454.](#) See para.29-020, above. *Forman & Co Proprietary Ltd v Ship "Liddesdale"* [1900] A.C. 190. See also *Taylor v Laird* (1856) 1 Hurl. & N. 266; *Sumpter v Hedges* [1898] 1 Q.B. 673 (see below, para.29-086); *Bookmakers Afternoon Greyhound Services Ltd v Wilfred Gilbert Staffordshire Ltd* [1994] F.S.R. 723. cf. *Owen v Tate* [1976] Q.B. 402 (see below, paras 29-115–29-119).
- [455.](#) See para.29-021, above.
- [456.](#) [2012] EWHC 1798 (Ch), [2012] 2 C.L.C. 612 at [58].
- [457.](#) [2012] EWHC 1798 (Ch), [2012] 2 C.L.C. 612 at [68].
- [458.](#) *Unreported*, July 9, 2012 (QBD District Registry, Manchester) at [90].
- [459.](#) See also para.29-031 n.163, above.
- [460.](#) [1919] 2 K.B. 722, 726; *The Batis* [1990] 1 Lloyd's Rep. 345, 352–353 (Hobhouse J.).
- [461.](#) [1919] 2 K.B. 722, 728. cf. *Chandris v Isbrandtsen-Moller Co Inc* [1951] 1 K.B. 240, 248 et seq., (Devlin J.) where this principle is discussed in a charterparty case; *Sumpter v Hedges* [1898] 1 Q.B. 673, where the principle was recognised, although the plaintiff failed on the facts. See also above, para.21-034.
- [462.](#) *De Bernardy v Harding* (1853) 8 Ex. 822, 824. See to the same effect *Luxor (Eastbourne) Ltd v Cooper* [1941] A.C. 108, 140–141 (Lord Wright).
- [463.](#) Burrows at pp.346–347; Virgo at p.311. Although in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752 the House of Lords recognised a claim for quantum meruit in respect of work done in anticipation of a contract being made, which was distinct from a separate claim apparently founded on total failure of basis, which was itself apparently distinct from a claim in unjust enrichment; it is unclear what the difference between the three claims is. See also *Butler-Creagh v Hershman* [2011] EWHC 2525 (QB) at [129] (Eady J.). In the same way that partial failure of basis should be a sufficient ground of restitution for claims for restitution for money (see para.29-067, above), so too partial failure of basis should be sufficient to ground claims for the reasonable value of services.
- [464.](#) (1831) 8 Bing. 14, 16, Tindal C.J. said: "I agree that when a special contract is in existence and open, the plaintiff cannot sue on a quantum meruit", also reported in 5 Car. & P. 58 and 1 M. & S. 51. See, on this point, *Weston v Downes* (1778) 1 Doug. 23.





- [465.](#) It is, however, unclear how the defendant can be considered to have been enriched since no benefit had been received by the defendant. See *Burrows* at p.46; *Virgo* at p.68. cf. *Birks* at pp.126–127, 129.
- [466.](#) (1856) 1 C.B.(N.S.) 296. The position of such an agent employed to effect a sale was fully considered by the House of Lords in *Luxor (Eastbourne) Ltd v Cooper* [1941] A.C. 108. See Vol.II, paras 31-140 et seq.
- [467.](#) [2004] EWHC 2619 (Comm).
- [468.](#) [2004] EWHC 2619 (Comm) at [25] (Cooke J.).
- [469.](#) [2004] EWHC 2619 (Comm).
- [470.](#) [2013] EWHC 4104 (Ch).
- [471.](#) [2009] VSCA 141.
- [472.](#) [2009] VSCA 141 at [11]. See also *Elek v Bar-Tur* [2013] EWHC 207 (Ch), [2013] 2 E.G.L.R. 159 at [12], David Donaldson Q.C.
- [473.](#) [2013] EWHC 207 (Ch), [2013] 2 E.G.L.R. 159.
- [474.](#) [2004] EWHC 2619 (Comm).
- [475.](#) The most notable instance is *Boomer v Muir* (1933) 24 P. 2d 570, in which \$258,000 was awarded as the value of the work done over and above the price paid, although only \$20,000 was still due under the contract. See also the authorities cited by Palmer, *The Law of Restitution* (1978), Vol.I, pp.389–390.
- [476.](#) *Slowey v Lodder* [1904] A.C. 442; affirming (1900) N.Z.L.R. 321; *Reynard Construction (ME) Pty Ltd v Minister of Public Works* (1992) 26 N.S.W.L.R. 234; *Newton Woodhouse v Trevor Toys Ltd* Unreported December 20, 1991 (CA); *Rover International Ltd v Cannon Film Sales Ltd* (No.3) [1989] 1 W.L.R. 912 (below, para.29-082; see also above, para.29-058) supports this approach although the contract in that case was void.
- [477.](#) Law Comm. No.121, para.2.52. See in general, *Birks* [1987] L.M.C.L.Q. 421.
- [478.](#) *Inchbold v Western Neilgherry Coffee, etc.* (1864) 17 C.B.(N.S.) 733 may suggest the use of the contract price as a ceiling but the judgments make no clear distinction between damages and a quantum meruit. See also *Burchall v Gowrie & Blockhouse Collieries* [1910] A.C. 614 (contract price used to value services). cf. *De Bernardy v Harding* (1853) 8 Ex. 822; *Prickett v Badger* (1856) 1 C.B.(N.S.) 296.
- [479.](#) [2004] EWHC 2619 (Comm) at [26].
- [480.](#) *Burrows* at pp.349-350 would restrict the quantum meruit to a proration of the contract price unless there is incontrovertible benefit.
- [481.](#) *Burchall v Gowrie & Blockhouse Collieries* [1910] A.C. 614; *B.P. Exploration Co (Libya) Ltd v Hunt* (No.2) [1979] 1 W.L.R. 783, 822, 825 (Robert Goff J.). See also Law Com. Working Paper No.65 (1975), paras 26-32 for other difficulties of valuation. See further Law Com. No.121, paras 2.50-2.57. In *ERDC Group Ltd v Brunel University* [2006] EWHC 687 (TCC) quantum meruit was assessed with reference to the contract price where the claim arose for work done after the expiry of a letter of appointment which had provided a contractual basis for the previous work.
- [482.](#) Palmer (1959) 20 Ohio State L.J. 264; *The Law of Restitution* (1978), Vol.I, pp.404-406.
- [483.](#) *The Law of Restitution* (1978), Vol.I, pp.404-406. This example is taken from the facts of *Kehoe*











- v Rutherford* (1893) 27 A. 912 in which only a proportionate part of the price was recovered.
484. Palmer at p.401. See also *Prickett v Badger* (1856) 1 C.B.(N.S.) 296, 306.
485. Above, para.29-059.
486.  Goff and Jones at paras 3-47–3-51.
487. On discharge, see above, Chs 22-24.
488. Beatson at pp.14-15. In the road example, if the contract price was £1 million, and the market price was £2 million, the limit would only affect a claimant who had completed more than half the work.
489. [2009] VSCA 141.
490. [2009] VSCA 141 at [21].
491.  In *MacInnes v Gross* [2017] EWHC 46 (QB) Coulson J. recognised (at [166]) that an agreement as to remuneration for services may unusually be the best evidence of the objective market value of the services provided, but usually other objective evidence would be required, such as expert evidence.
492. [2009] VSCA 141 at [35].
493. *Sir Lindsay Parkinson & Co Ltd v Commissioners of Works* [1949] 2 K.B. 632. cf. *Gilbert & Partners v Knight* [1968] 2 All E.R. 248.
494. *Powell v Braun* [1954] 1 W.L.R. 401. But cf. Vol.II, para.40-079.
495. *Cooke v Hopper* [2012] EWCA Civ 175.
496. *William Lacey (Hounslow) Ltd v Davis* [1957] 1 W.L.R. 932; *Peter Lind & Co Ltd v Mersey Docks and Harbour Board* [1972] 2 Lloyd's Rep. 234; *Sabemo v N. Sydney Municipal Council* [1977] 2 N.S.W.L.R. 880; *Marston Construction Co Ltd v Kigass Ltd* [1989] 46 B.L.R. 109; *Regalian Properties Plc v London Dockland Development Corp* [1995] 1 W.L.R. 212; *Countrywide Communications Ltd v ICL Pathway Ltd* [2000] C.L.C. 324; *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W.L.R. 1752; *MSM Consulting Ltd v United Republic of Tanzania* [2009] EWHC 121 (QB); *Killen v Horseworld Ltd* [2011] EWHC 1600 (QB) cf. *Brewer Street Investments Ltd v Barclays Woollen Co Ltd* [1954] 1 Q.B. 428.
497. See para.29-021, above.
498. Winfield, *Quasi-Contracts* (1952), p.53.
499. *William Lacey (Hounslow) Ltd v Davis* [1957] 1 W.L.R. 932, 939; *Brewer Street Investments Ltd v Barclays Woollen Co Ltd* [1954] 1 Q.B. 428, 435-436. See also Goff and Jones at Ch.16.
500. *British Steel Corp v Cleveland Bridge & Engineering Co Ltd* [1984] 1 All E.R. 504.
501. [1984] 1 All E.R. 504, 511; *Countrywide Communications Ltd v ICL Pathway Ltd* [2000] C.L.C. 324.
502. *Benedetti v Sawiris* [2013] UKSC 50, [2014] AC 938 at [86] (Lord Reed) and [175] (Lord Neuberger); *Valencia v Llupar* [2012] EWCA Civ 396, [51] (Mummery L.J.).
503. [2009] EWHC 121 (QB) at [171]. See also *Lissack v Manhattan Loft Corp Ltd* [2013] EWHC 128 (Ch) at [86] (Roth J.); *Elek v Bar-Tur* [2013] EWHC 207 (Ch), [2013] 2 E.G.L.R. 159 (no restitution where the claimant had received the expected counter-performance from the


defendant but then renounced it); *Benedetti v Sawiris* [2013] UKSC 50, [2014] A.C. 938. See generally Havelock [2011] R.L.R. 72.

504. See also *Whittle Movers Ltd v Hollywood Express Ltd* [2009] EWCA Civ 1189 at [22] (Waller L.J.) (and see Davies (2010) 126 L.Q.R. 175); *Tahar Benourad v Compass Group Plc* [2010] EWHC 1882 (QB) at [106] (Beatson J.) (quantum meruit awarded primarily because the defendant had requested the claimant to provide the service); *Killen v Horseworld Ltd* [2011] EWHC 1600 (QB) (where Cox J. inappropriately described, at [66], quantum meruit as a cause of action). See Wilmot-Smith (2011) 127 L.Q.R. 610 (no role for risk-taking reasoning when determining liability; this can be dealt with instead through the construction of the relevant condition for the work).
505. [2013] UKSC 50, [2014] A.C. 938.
506. See in general, Pecuniary Restitution on Breach of Contract (Law Com. No.121, 1983), Pt II.
507. See by analogy, *Roberts v Havelock* (1832) 3 B. & Ad. 404; *Taylor v Laird* (1856) 25 L.J. Ex. 328. See also *Miles v Wakefield MBC* [1987] A.C. 539 but cf. *Wiluszynski v Tower Hamlets LBC* [1989] I.C.R. 493.
508. Above, paras 21-033—21-039. Note especially the doctrine of substantial performance, above, para.21-033, acceptance of short delivery under an entire contract for the sale of goods, Sale of Goods Act 1979 s.30(1); Vol.II, paras 44-256 et seq., and the position of freight after a deviation, *Hain S.S. Co Ltd v Tate & Lyle Ltd* (1934) 39 Com. Cas. 259, 271-272; (1936) 41 Com. Cas. 350, 358, 367-368, 373. cf. Beatson (1981) 97 L.Q.R. 389, 413-414. See also *Miles v Wakefield MBC* [1987] A.C. 539, but cf. *Wiluszynski v Tower Hamlets LBC* [1989] I.C.R. 493. See also *Item Software v Fassihi* [2004] EWCA Civ 1244, [2005] I.C.R. 450, where the Apportionment Act 1870 was applied to enable an employee who had been dismissed to recover a proportionate part of his monthly salary for the period he had actually worked, despite his breach of the contract of employment.
509. See above, para.6-008.
510. A credit received, albeit only in account, is equivalent to payments for this purpose: *Branwhite v Worcester Works Finance Ltd* [1969] 1 A.C. 552.
511. *Branwhite v Worcester Works Finance Ltd* [1969] 1 A.C. 552. See the discussion of *Bell v Lever Brothers* [1932] A.C. 161 (above, para.6-026) between Landon and Tylor: (1935) 51 L.Q.R. 650; (1936) 52 L.Q.R. 27, 478; (1937) 53 L.Q.R. 118.
512. *Strickland v Turner* (1852) 7 Ex. 208; *Kennedy v Thomassen* [1929] 1 Ch. 426. For a review of the authorities, see *Westdeutsche Landesbank Girozentrale v Islington LBC* [1994] 4 All E.R. 890, 921-924 (Hobhouse J.).
513. *Rover International Ltd v Cannon Film Sales Ltd* [1989] 1 W.L.R. 912.
514. *National Bank of Egypt International Ltd v Oman Housing Bank SAOC* [2002] EWHC 1760 (Comm), [2003] 1 All E.R. (Comm) 246.
515. *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579, [2012] Q.B. 549.
516. On restitution of money transferred under an ultra vires contract, see *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669, above, para.10-017. See also *Equuscorp Pty Ltd v Haxton* [2012] HCA 7.
517. *Morgan v Ashcroft* [1938] 1 K.B. 49, above, para.29-042. The Gaming Act 1845 was repealed by the Gambling Act 2005: see Vol.II, Ch.41. cf. *Lipkin Gorman v Karpnale Ltd* [1991] 2 A.C. 548 (where owner of stolen money recovered it from casino). See Vol.II, para.41-029.
518. *Davies v Rees* (1886) 17 Q.B.D. 408; *North Central Wagon Finance Co Ltd v Brailsford* [1962]

1 W.L.R. 1288.

- [519.](#) *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579, [2012] Q.B. 549.
- [520.](#)  *Sharma v Simposh Ltd* [2011] EWCA Civ 1383, [2013] Ch. 23. See also *Marlbray Ltd v Laditi* [2016] EWCA Civ 476 (no recovery of deposit where no failure of consideration).
- [521.](#) *Westdeutsche Landesbank Girozentrale v Islington LBC* [1994] 4 All E.R. 890; affirmed [1996] 2 A.C. 669; *Guinness Mahon & Co Ltd v Kensington & Chelsea RLBC* [1998] 2 All E.R. 272. See also *Woolwich Equitable B.S. v IRC* [1993] A.C. 70, 197 (Lord Browne-Wilkinson). On “no basis” see also *Friends’ Provident Life Office v Hillier Parker May & Rowden (A Firm)* [1997] Q.B. 85, 98; *Primlake Ltd (In Liquidation) v Matthews Associates* [2006] EWHC 1227 (Ch) at [335] (Lawrence Collins J.). cf. *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 C.L.R. 51, 67.
- [522.](#) *Guinness Mahon & Co Ltd v Kensington & Chelsea RLBC* [1998] 2 All E.R. 272. Where the payer has received a non-monetary benefit, he will probably be liable to pay for the reasonable value of that benefit, above, para.29-078.
- [523.](#) *Kleinwort Benson Ltd v S. Tyneside MBC* [1994] 4 All E.R. 972, 987-990 (Hobhouse J.); *Eastbourne BC v Foster* [2002] I.C.R. 234.
- [524.](#) [2010] EWCA Civ 579, [2012] Q.B. 549 at [62].
- [525.](#) [1936] 2 K.B. 403 (distinguished in *Re Richmond Gate Property Co Ltd* [1965] 1 W.L.R. 335). See Lord Denning (1939) 55 L.Q.R. 54; Evans (1966) 29 M.L.R. 608; [1971] C.L.P. 110, 119-122. See now *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669, above, para. 29-081. cf. *Guinness Plc v Saunders* [1990] 2 A.C. 663; *Lawford v Billericay R.D.C.* [1903] 1 K.B. 772; *Société Franco Tunisienne D’Armement v Sidermar SpA* [1961] 2 Q.B. 278, 313 (Pearson J.) (above, para.23-098: the continued performance of a contract following frustration); the decision was overruled by the Court of Appeal on the issue of frustration: *Ocean Tramp Tankers Corp v V/O Sovfracht (The Eugenia)* [1964] 2 Q.B. 226 (above, para.23-059); (1964) 27 M.L.R. 351; (1961) 24 M.L.R. 173.
- [526.](#) It was assumed that the directors had had the opportunity either to accept or reject the plaintiff’s services. cf. *Boulton v Jones* (1857) 27 L.J. Ex. 117 and the cases cited above, para.29-071.
- [527.](#) *Craven-Ellis v Canons Ltd* [1936] 2 K.B. 403, 412.
- [528.](#) See above, para.29-020.
- [529.](#) [1936] 2 All E.R. 1066, 1069, per Croom Johnson K.C. *arguendo*.
- [530.](#)  See above, para.29-021. Birks [1971] 24 C.L.P. 110, 120 et seq. argues convincingly for this explanation. See also Birks at pp.118-119, 229; Goff and Jones at para.4-35. cf. Lord Denning (1939) 55 L.Q.R. 54 (acceptance by whole body of shareholders); Lord Templeman in *Guinness Plc v Saunders* [1990] 2 A.C. 663.
- [531.](#) [1936] 2 K.B. 403, 412.
- [532.](#) [1989] 1 W.L.R. 912; (1989) 105 L.Q.R. 179. See also *Cotronic (UK) Ltd v Dezonie* [1991] B.C.L.C. 721.
- [533.](#)  e.g. *Parkinson v College of Ambulance Ltd* [1925] 2 K.B. 1.
- [534.](#)  [2016] UKSC 42, [2017] A.C. 467. See also above, paras 16-014A et seq. See Grabiner (2017) 76 C.L.J. 168; Goudkamp (2017) 133 L.Q.R. 14; Strauss [2016] R.L.R. 145.

535.  [2016] UKSC 42 at [101].
536.  [2016] UKSC 42 at [107].
537.  [2016] UKSC 42, [2017] A.C. 467. See also above, paras 16-014A et seq.
538.  [2016] UKSC 42 at [268].
539.  [2016] UKSC 42 at [116] (Lord Toulson).
540.  See *Tinsley v Milligan* [1994] 1 A.C. 340.
541.  [2016] UKSC 42, [2017] A.C. 467 at [110] (Lord Toulson).
542.  See *Tribe v Tribe* [1996] Ch. 107.
543.  [2016] UKSC 42 at [101]; see above, para.29-083.
544.  *Clay v Yates* (1856) 1 H. & N. 73 (above, para.16-020). See also *Mohamed v Alaga & Co* [1999] 3 All E.R. 699. This was confirmed in *Patel v Mirza* [2016] UKSC 42, [2017] A.C. 467 at [119] (Lord Toulson).
545. On requirements of writing, see *Sweet v Lee* (1841) 3 Man. & G. 452, 467-468. See also *Shaw v Woodcock* (1827) 7 B. & C. 73, 84; *Thomas v Brown* (1876) 1 Q.B.D. 714, 723, and see Ch.5, above. On public policy, see *Aratra Potato Co Ltd v Taylor Joynson Garrett (A Firm)* [1995] 4 All E.R. 695; Ch.16, above.
546. *Orakpo v Manson Investments Ltd* [1978] A.C. 95. See also *Dimond v Lovell* [2002] 1 A.C. 384, H.L. In *Close v Wilson* [2011] EWCA Civ 5 it was recognised that, where money had been paid to the defendant to be used for bets which were successful, the claimant would have a restitutionary claim for the winnings, because the defendant will have received the winnings on behalf of the claimant; similarly if the defendant had used the money for his own purposes.
547. *Pavey & Matthews Pty Ltd v Paul* (1987) 69 A.L.R. 577, 584-585, on which see Beatson (1988) 104 L.Q.R. 13; Ibbetson (1988) 8 O.J.L.S. 312.
548. [2008] UKHL 55, [2008] 1 W.L.R. 1752. See Getzler (2009) 125 L.Q.R. 196 and Goymour [2009] C.L.J. 37. *Scarisbrick v Parkinson* (1869) 20 L.T. 175; *Pulbrook v Lawes* (1876) 1 Q.B.D. 284; *Scott v Pattison* [1923] 2 K.B. 723 (and see, on the relevance of the local custom, the fuller reports in: 39 T.L.R. 557; 129 L.T. 830; 92 L.J.K.B. 886); *James v Thomas H. Kent & Co Ltd* [1951] 1 K.B. 551, 555-556 (Somervell L.J.); *Vedatech Corp v Crystal Decisions (UK) Ltd* [2002] EWHC 818 (Ch) (a claim for quantum meruit and unjust enrichment in the alternative in respect of provision of services in return for software revenue under alleged oral agreement); *Proactive Sports Management Ltd v Rooney* [2010] EWHC 1807 (QB) (contract unenforceable on grounds of restraint of trade but quantum meruit available since the services had been freely accepted).
549. [1954] 3 D.L.R. 785.
550. (1987) 69 A.L.R. 577.
551. In *Pavey & Matthew Pty Ltd v Pauls* (1987) 69 A.L.R. 577 the owner of the cottage denied the reasonableness of the charges claimed by the builder.
552. *Sumpter v Hedges* [1898] 1 Q.B. 673. See also *Wiluszynski v Tower Hamlets LBC* [1989] I.C.R.

493. But cf., albeit in another context, *British Steel Corp v Cleveland Bridge & Engineering Ltd* [1984] 1 All E.R. 504 (above, para.29-077) where allegedly non-conforming performance gave rise to a quantum meruit.
553. On the Minors' Contracts Act 1987, see above, Ch.9.
554.  *Steinberg v Scala (Leeds) Ltd* [1923] 2 Ch. 452; *Pearce v Brain* [1929] 2 K.B. 310. cf. *Valentini v Canali* (1889) 24 Q.B.D. 166 (claim may lie where restitutio in integrum is possible). But note that the first case concerned a voidable contract and the other two contracts were "absolutely void" under the Infants Relief Act 1874, which was repealed by the Minors' Contracts Act 1987. Goff and Jones at paras 24-20–24-23. See Häcker in Defences in Unjust Enrichment (ed. Dyson, Goudkamp and Wilmot-Smith) (2016), Ch.9.
555. Common law restitutionary remedies are preserved by the Minors' Contracts Act 1987 s.3(2).
556. *R. Leslie Ltd v Sheill* [1914] 3 K.B. 607, 613 (Lord Sumner); *Thavorn v Bank of Credit & Commerce SA* [1985] 1 Lloyd's Rep. 259. cf. *Cowern v Neild* [1912] 2 K.B. 419.
557. "Law of Contract Minors' Contracts" (Law Com. No.134, 1984), para.4.21; above, para.9-061.
558. *Pritchard v The Merchant's and Tradesman's Mutual Life Assurance Society* (1858) 3 C.B.(N.S.) 622; *Tyrie v Fletcher* (1777) 2 Cowp. 666, 668 (Lord Mansfield); *Re Cavalier Insurance Co Ltd* [1989] 2 Lloyd's Rep. 430.
559. *Anderson v Thornton* (1835) 8 Ex. 425, 428; and see Marine Insurance Act 1906 s.84(1). cf. *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 Q.B. 267, 293 (Devlin J.).
560. SI 2008/1277, as amended by the Consumer Protection (Amendment) Regulations 2014 (SI 2014/870). See below, Vol.II, paras 38-153—38-191.
561. 2008 Regulations reg.27H. See Vol.II, para.38-182.
562. SI 2013/3134. See Vol.II, para.38-057.
563. 2013 Regulations reg.34(1) referring to reg.34(10).
564. See below Vol.II, paras 38-334 et seq.
565. Consumer Rights Act 2015 s.20.
566. Consumer Rights Act 2015 s.20(10) and (13)-(18). No provision is made for the right to reject digital content, or to terminate the contract, for breach of the statutory terms as to conformity or the trader's right to supply the digital content, but the consumer may be entitled to a refund, which may be of 100 per cent of the price paid (see below, Vol.II, para.38-521). The consumer may have the usual right to terminate for breach of an express term of a contract to supply digital content, and then a right to restitution may arise at common law, but it will be necessary for the consumer to establish that there has been a total failure of basis. The position is similar as regards service contracts: see Consumer Rights Act 2015 s.54(7)(b); below, Vol.II, para.38-544.
567. Consumer Rights Act 2015 s.20(11)-(12), 18(b) and 19.
568. Consumer Rights Act 2015 s.24(8). See below Vol.II, para.38-484.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 9 - Restitution

Chapter 29 - Restitution ¹

Section 2. - Unjust Enrichment

(g) - Ultra vires Receipts by the Revenue and Public Authorities ⁵⁶⁹

Ultra vires demands

29-090

In *Woolwich Equitable Building Society v IRC* ⁵⁷⁰ it was held that a payment made pursuant to a demand for tax that was ultra vires because of the invalidity of the relevant subordinate legislation was recoverable. Lord Goff stated that:

“... money paid by a citizen to a public authority in the form of taxes or other levies paid pursuant to an ultra vires demand by the authority is prima facie recoverable by the citizen as of right.” ⁵⁷¹




In holding this the House consciously reformulated the law which hitherto precluded recovery unless the payment was made under mistake or compulsion. ⁵⁷² The reasons given for enunciating a new restitutionary right lay in constitutional law and, in particular, art.4 of the Bill of Rights 1688, ⁵⁷³ the existence of a right to repayment of sums levied by a public body contrary to rules of EU law, ⁵⁷⁴ the unattractive contrast with the position of money paid by the Crown which, if paid without authority, is recoverable, ⁵⁷⁵ and the fact that demands by the Revenue and other governmental bodies are implicitly backed by the coercive powers of the state and may well entail unpleasant economic and social consequences.

Scope of right

29-091



⚠ The *Woolwich* principle is applicable when money has been paid to a public authority as a result of a mistake of law. ⁵⁷⁶ In *Deutsche Morgan Grenfell Group Plc v IRC* ⁵⁷⁷ the House of Lords recognised that, if statutory provisions for recovery of taxes are not available, ⁵⁷⁸ claims for restitution of tax paid by mistake can be founded at common law either on the *Woolwich* principle or on the ground of mistake of law and the claimant can choose the preferable ground. ⁵⁷⁹ The practical consequence of this decision is that the claimant can choose to rely on the extended limitation period under s.32(1)(c) of the Limitation Act 1980 which applies to claims involving mistake and for which time does not begin

to run until the mistake could reasonably have been discovered. ⁵⁸⁰ ⚠ The *Woolwich* principle extends to cases in which the public authority has made no demand for payment, for example where an ultra vires tax is paid in reasonable anticipation of a demand. ⁵⁸¹ Although Lord Goff and Lord Slynn in *Woolwich* expressly reserved the question of whether the principle extends to cases in which the tax or other levy has been wrongfully exacted for reasons other than that the demand was ultra vires, for example because the authority has misconstrued the relevant statute or regulation, ⁵⁸² such misconstruction is likely to be ultra vires ⁵⁸³ and will anyway constitute a mistake of law. In *Investment*

Trust Companies (In Liquidation) v Revenue and Customs Commissioners ⁵⁸⁴ it was held that the *Woolwich* principle is only available to those claimants who were themselves directly liable for the payment of overpaid tax, because such claimants were subject to the coercive powers of the state. The claimants in that case, who were contractually liable to third parties for the payments which were then transferred to the Revenue, could bring a claim grounded on mistake instead. ⁵⁸⁵ The *Woolwich* principle has been held not to apply where a landlord, who had received overpayments of housing benefits, repaid them to the local authority, although a defect in the notice meant that the council could not in fact have enforced the recovery of the money. ⁵⁸⁶ Although the council's demand was defective, it was not backed by coercive powers and it would have been open to the council to go through the process correctly and make a second regular and valid demand. ⁵⁸⁷  Whilst it is clear that the *Woolwich* principle extends beyond taxation to licence fees ⁵⁸⁸ it is not yet clear whether it extends to unauthorised charges for the provision of services by statutory utilities, hitherto dealt with under the *colore officii* principle. ⁵⁸⁹  While explicit guidance was not given on the range of bodies subject to the principle, it is submitted that it should apply to public bodies whose authority to charge is subject to and limited by public law principles, and to other bodies whose authority to charge is solely the product of statute, and thus limited. ⁵⁹⁰ Although the *Woolwich* claim is based on the ultra vires nature of the receipt, it appears that it is not a precondition to recovery that this be established in judicial review proceedings. ⁵⁹¹ The right of recovery is a private law right, albeit one arising from the background of public law. ⁵⁹² 



Statutory provisions


29-092

 The restitutionary right is, in the context of taxation, limited by statutory provisions for the recovery of overpayments. The broadest is the right to recover any payment of VAT that is not due ⁵⁹³ ; the narrowest is the more discretionary remedy in s.33 of the Taxes Management Act 1970 for the recovery of overpaid income tax and capital gains tax ⁵⁹⁴ by reason of an error or mistake in a tax return as is "reasonable and just". ⁵⁹⁵ There is no right of recovery where the error reflected "the practice generally prevailing" when the return was made. Where, moreover, a statutory appeal mechanism is applicable to the facts, the payee will be required to seek its remedy through the statutory framework. ⁵⁹⁶

Defences

29-093

 Restitution will not be awarded where the payment was made to close the transaction. ⁵⁹⁷ Further, the recognition of the defence of change of position means that, in principle where a public authority can show that it has so changed its position that it would be inequitable to allow the claim, it should have a defence. ⁵⁹⁸ This defence is not available where the claim for restitution relates to the receipt of taxes which was unlawful by EU law, regardless of whether it is grounded on mistake or the *Woolwich* principle. ⁵⁹⁹ Where the receipt of the payment was unlawful by English law the defence of change of position is also unavailable where the claim is grounded on the *Woolwich* principle, ⁶⁰⁰ because allowing the defence would stultify the constitutional policy underpinning this principle. In *FII Group Litigation v HMRC (No.2)* ⁶⁰¹ Henderson J. left open whether the change of position defence is available where the restitutionary claim is grounded on mistake, although he had previously held that the defence was available in such circumstances. ⁶⁰²  Allowing the defence where the ground of restitution is mistake but denying it where the *Woolwich* ground is engaged, would reflect the difference between mistake as a private law ground of restitution and *Woolwich* as a public law ground. Although it is not necessary to show a precise link between receipt of tax and Government expenditure, ⁶⁰³ it will be difficult for the Revenue to establish that its position has changed as a result of the receipt of the tax payment, and this could not be established in the *FII Group Litigation* case. Although Lord Goff in *Woolwich* doubted the advisability of imposing special limits upon recovery in the case of ultra vires levies to deal with the problem that a right of recovery might lead to serious

disruption of public finances,⁶⁰⁴ the question of whether a payer who has “passed on” to others, for instance by price increases, the higher cost he has borne because of the overpayment should be precluded from recovery, was left open.⁶⁰⁵ This defence is permitted by EU law⁶⁰⁶ provided it is shown that the charge has been borne entirely by a party other than the payer, so that reimbursement would unjustly enrich the payer.⁶⁰⁷ The provision in s.80(3) of the Value Added Tax Act 1994 that recovery of VAT should not be allowed if the payee can show that the payer would be unjustly enriched if he recovered the payment,⁶⁰⁸  may reflect its rationale. However, it has been criticised⁶⁰⁹ and arguments for a similar limit were not accepted by the High Court of Australia⁶¹⁰ or in the context of restitution in respect of money paid under an ultra vires contract.⁶¹¹ The legitimacy of the unjust enrichment defence has been affirmed by the Grand Chamber of the Court of Justice in respect of claims for the reimbursement of taxes which are incompatible with EU law, but this defence is to be interpreted restrictively.⁶¹²

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1. For a full treatment of the subject matter of this chapter, see: Burrows, *The Law of Restitution*, 3rd edn (2011); Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016); Virgo, *The Principles of the Law of Restitution*, 3rd edn (2015). See also Beatson, *The Use and Abuse of Unjust Enrichment* (1991); Birks, *An Introduction to the Law of Restitution* (1985); Birks, *Unjust Enrichment*, 2nd edn (2005); Maddaugh and McCamus, *The Law of Restitution*, 2nd edn (2004); McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014); Mason, Carter and Tolhurst, *Restitution Law in Australia*, 2nd edn (2008); Palmer, *The Law of Restitution* (1978) (four Vols); The American Law Institute’s Restatement of the Law Third, Restitution and Unjust Enrichment (2011).
 - ⁵⁶⁹. Burrows at Ch.20; Goff and Jones at Ch.22; Virgo at Ch.15; Williams, *Unjust Enrichment and Public Law: A Comparative Study of England, France and the EU* (2010); Restitution of Overpaid Tax (eds Elliott, Häcker and Mitchell) (2013).
 - ⁵⁷⁰. [1993] 1 A.C. 70. See also Beatson (1993) 109 L.Q.R. 401; Birks [1992] P.L. 580; Alder (2002) 22(2) L.S. 165.
 - ⁵⁷¹. [1993] 1 A.C. 70, 177. See also 196 (Lord Jauncey), 198 (Lord Browne-Wilkinson); *British Steel Plc v Customs and Excise Commissioners* [1997] 2 All E.R. 366 CA.
 - ⁵⁷². [1993] 1 A.C. 70, 168 (Lord Goff), 171 (Lord Goff), 196 (Lord Jauncey), 204 (Lord Slynn). See also *Att-Gen v Wilts United Dairies Ltd* (1921) 37 T.L.R. 884 CA; (1922) 127 L.T. 822 HL; *R. v Brocklebank Ltd* [1925] 1 K.B. 52 (although recovery there was barred by the Indemnity Act 1920); *Congreve v Home Office* [1976] Q.B. 629, 652 (Lord Denning M.R.); Birks, *Essays in Restitution*, pp.164 et seq.; Cornish (1987) 14 Jo. Mal. and Comp. 41. See also *R. v Tower Hamlets LBC Ex p. Chetnik Developments Ltd* [1988] A.C. 858 (judicial review of refusal to exercise express discretion to repay overpayment of rates).
 - ⁵⁷³. [1993] 1 A.C. 70, 172 (Lord Goff).
 - ⁵⁷⁴. [1993] 1 A.C. 177 (Lord Goff). See *Case 199/82 Amministrazione delle Finanze dello Stato v SpA San Giorgio* [1983] E.C.R. 3595; *Metallgesellschaft Ltd v IRC (C-397/98)* [2001] Ch. 620, noted Virgo (2002) 1 B.T.R. 4.
 - ⁵⁷⁵. [1993] 1 A.C. 70; *R. v Auckland Harbour Board* [1924] A.C. 318; *Charles Terence Estates Ltd v Cornwall County Council* [2011] EWHC 2542 (QB), [2012] 1 P. and C.R. 2
 - ⁵⁷⁶. [1993] A.C. 70, 177, 205.
 - ⁵⁷⁷. [2006] UKHL 49, [2007] 1 A.C. 558. See Virgo [2007] B.T.R. 27.
 - ⁵⁷⁸. See below, para.29-092.
 - ⁵⁷⁹. See also *Test Claimants in the Franked Investment Income (FII) Group Litigation* [2012] UKSC

19, [2012] AC 337; *Investment Trust Companies (in liquidation) v HMRC* [2013] EWHC 665 (Ch) at [51] (Henderson J).

580.

❗ See above, para.28-089. In *Test Claimants in the Franked Investment Income (FII) Group Litigation v Commissioners for Her Majesty's Revenue and Customs* [2012] UKSC 19, [2012] 2 A.C. 337 the Supreme Court held that, to fall within the section, the mistake had to be an essential element of the cause of action and not just a causal reason for the overpayment, so the extended limitation period will not be available to claims founded on the *Woolwich* principle. Where the unlawfulness of the tax has been determined by the CJEU it has been held that time will begin to run once that court declared the payment of the tax to be unlawful: *Test Claimants in the FII Group Litigation v HMRC* [2014] EWHC 4302 (Ch) [2015] S.T.I. 49 [465] (Henderson J). Where, however, the unlawfulness of the tax has been declared by the domestic courts, if this was determined by the Supreme Court, time will only begin to run from that point, even if the unlawfulness of the tax has been established at first instance, since finality would only be achieved with the decision of the final court of appeal, and even though the claimant had brought proceedings for restitution earlier: *Test Claimants in the FII Group Litigation v HMRC* [2014] EWHC 4302 [2015] S.T.I. 49 at [461]. The application of this extended limitation period was abrogated by statute as regards claims for recovery of taxes: Finance Act 2004 s.320 and Finance Act 2007 s.107. The latter provisions have been held to infringe EU law as regards its application to the restitution of taxes paid in breach of EU law: *Test Claimants in the FII Group Litigation v IRC (C-362/12)* [2014] 2 C.M.L.R. 33, as regards the former provision; *Test Claimants in the Franked Investment Income (FII) Group Litigation v Commissioners for HM Revenue and Customs* [2012] UKSC 19, [2012] 2 A.C. 337, as regards the latter provision. See further on the former provision *Jazztel Plc v Revenue and Customs Commissioners* [2017] EWHC 677 (Ch), [2017] S.T.C. 1422 at [100(vi)] where the provision was disapplied for the recovery of overpaid taxes where the right had accrued before the statute came into force, but this right was only discovered subsequently: so called "hidden retrospectivity".

581. *Test Claimants in the Franked Investment Income (FII) Group Litigation v Commissioners for Her Majesty's Revenue and Customs* [2012] UKSC 19, [2012] 2 A.C. 337. Noted Virgo and Goymour (2012) C.L.J. 488.

582. [1993] A.C. 70, 177 (Lord Goff), 205 (Lord Slynn).

583. *Re Racal Communications Ltd* [1981] A.C. 374.

584. [2013] EWHC 665 (Ch), [2013] S.T.I. 1490.

585. See further para.29-028, above.

586. *Norwich City Council v Stringer* (2001) 33 H.L.R. 15.

587. ❗ In *Ipswich Town Football Club Co Ltd v Chief Constable of Suffolk* [2017] EWHC 375 (QB) the *Woolwich* principle applied even though the demand for payment was not backed by legal compulsion, save that the defendant, the Police, had an economic power through monopoly to compel payment. Compulsion was considered (at [73]) to be a trait of a *Woolwich* claim but was not a requisite part of the test.



588. *Hemming v Westminster City Council* [2013] EWCA Civ 591.

589.

❗ *Steele v Williams* (1853) 8 Ex Ch. 625; *Hooper v Exeter Corp* (1887) 56 L.J.Q.B. 457; *Queens of the River S.S. Co Ltd v Conservators of the River Thames* (1899) 15 T.L.R. 474 (harbour dues and pier charges); *South of Scotland Electricity Board v British Oxygen Co Ltd* [1959] 1 W.L.R. 587 (electricity charges). See below, paras 29-100—29-102; *Att-Gen v Wilts United Dairies Ltd* (1921) 37 T.L.R. 884; *R. v Brocklebank Ltd* [1925] 1 K.B. 52; *Mason v New South Wales* (1959) 102 C.L.R. 108. In *Ipswich Town Football Club Co Ltd v Chief Constable of Suffolk* [2017] EWHC 375 (QB) the *Woolwich* principle applied to recover payments for services provided by the police, for which payment was not lawfully due, even though the charges could not be characterised as fiscal.

590. [1993] A.C. 70, 79, 138 (Glidewell and Butler-Sloss L.J.J.); *AEM (Avon) Ltd v Bristol City Council* [1999] L.G.R. 93. See Beatson (1993) 109 L.Q.R. 401, 406-418. cf. *Green v Portsmouth Stadium Ltd* [1953] 2 Q.B. 190 (where the principle would not apply because, but for the statute, there would have been no limit on the amount the defendant would have been able to charge). See *Waikato Regional Airport Ltd v The Att-Gen (on behalf of the Director General of Agriculture and Forestry)* [2003] UKPC 50, [2004] 3 N.Z.L.R. 1, where the *Woolwich* principle was extended to the recovery of governmental levies, and *Hemming v Westminster City Council* [2013] EWCA Civ 591, where it was applied to that part of licence fees paid to run sex shops which was unlawfully demanded.
591. [1993] A.C. 70, 200 (Lord Slynn) and see Lord Goff's suggestion (at 174) that the right of recovery might need to be limited by strict time limits which implies that the three-month time limit for judicial review proceedings does not apply. In *Woolwich* there had been judicial review proceedings: *R. v IRC Ex p. Woolwich Equitable Building Society* [1990] 1 W.L.R. 1400, and see [1993] A.C. 70, 169 (Lord Goff).
592. **!** See *Lonrho Plc v Tebbit* [1992] 4 All E.R. 280, 288; *Roy v Kensington and Chelsea and Westminster F.P.C.* [1992] 1 A.C. 624. It is now possible to obtain a restitutionary remedy in an application for judicial review: CPR r.54.3(2). Such proceedings are subject to a three-month limitation period. It is possible to seek restitution without prior judicial review proceedings and so avoid this shorter limitation period (*British Steel v Customs and Excise Commissioners* [1997] 2 All E.R. 366) although this has been criticised as an abuse of process: *NEC Semi-Conductors v IRC* [2006] EWCA Civ 25, [2006] S.T.C. 606 at [97] (Sedley L.J.); *Jones v Powys Local Health Board* [2008] EWHC 2562 (Admin). The validity of the non-judicial review route to obtain restitution from a public authority remains unclear after the decisions of the House of Lords in *Deutsche Morgan Grenfell Group Plc v IRC* [2006] UKHL 49, [2007] 1 A.C. 558 and *Sempre Metals Ltd v IRC* [2007] UKHL 34, [2008] 1 A.C. 561, although the recognition that the claimant taxpayer could rely on the ground of mistake of law to gain the benefit of the extended limitation period under the Limitation Act 1980 might suggest that there is no intrinsic objection to using the non-judicial review procedure. In *Hemming v Westminster City Council* [2013] EWCA Civ 591 Beatson L.J. at [138] endorsed the private law nature of the right to restitution such that the time limit for judicial review claims does not apply to claims for restitution against public bodies. In *Richards v Worcestershire County Council* [2016] EWHC 1954 (Ch) the claimant was allowed to pursue a private law claim for restitution arising from the claimant discharging the defendant's statutory obligations, even though this raised questions as to whether the defendant had performed public law duties. This conclusion was reached both because the claimant only sought financial redress rather than any other relief and because the strict time limit for judicial review proceedings was inappropriate for a private law claim for restitution. Simple interest can be awarded, under Senior Courts Act 1981 s.35A, in respect of such claims: *R. (Kemp) v Denbighshire Local Health Board* [2006] EWHC 181 (Admin), [2007] 1 W.L.R. 639.
593. **!** Value Added Tax Act 1994 s.80 as amended by the Finance (No.2) Act 2005. See Virgo [1998] B.T.R. 582. Where the statutory scheme for the recovery of overpaid VAT applies, it is exclusive and excludes common law claims for restitution founded on mistake or the *Woolwich* principle: *Littlewoods Ltd v Commissioners for Her Majesty's Revenue and Customs* [2015] EWCA Civ 515; *Revenue and Customs Commissioners v Investment Trust Companies* [2017] UKSC 29, [2017] 2 W.L.R. 1200, [88] (Lord Reed); In *Revenue and Customs Commissioners v Investment Trust Companies* [2017] UKSC 29, [2017] 2 W.L.R. 1200 at [94] Lord Reed held that the statutory exclusion of the common law claim for restitution was compatible with EU law. When the matter was reconsidered in the English court, the Court of Appeal held that compound interest would be awarded: *Littlewoods Ltd v HMRC* [2015] EWCA Civ 515.
594. Claims for recovery which fall under this provision cannot be brought at common law: *Monro v H.M. Revenue and Customs* [2008] EWCA Civ 306, [2009] Ch 69. See also *R. (on the application of Child Poverty Action Group) v Secretary of State for Work and Pensions* [2010] UKSC 54, [2011] 2 A.C. 15 where the statutory scheme for the recovery of overpaid social security benefits under s.71 of the Social Security Administration Act 1992 was held to exclude the common law claim to restitution. The statutory scheme only applies where a payment of a benefit has been made as a result of an erroneous award arising from misrepresentation or

non-disclosure and does not extend to the recovery of payments made as a result of a mistake in assessing the award. Where, however, an unauthorised payment has been made in excess of the amount awarded this can be recovered on the ground of mistake.

- [595.](#) See also Inheritance Tax Act 1984 s.241; Council Tax (Administration and Enforcement) Regulations 1992 (SI 1992/613).
- [596.](#) *Woolwich Equitable Building Society v IRC* [1993] A.C. 70, 168-170 (Lord Goff).
- [597.](#) *Woolwich Equitable Building Society v IRC* [1993] A.C. 70, 98 et seq., 121, 135-136, 140 CA; 165, 174, 178, 192, 196, 200-201 HL; *FII Group Litigation v HMRC* [2012] UKSC 19, [2012] A.C. 337 at [79] (Lord Walker); *Air Canada v British Columbia* [1989] S.C.R. 1161, 1200; *David Securities Pty Ltd v Commonwealth Bank of Australia* [1992] 66 A.L.J.R. 768, 774-775. See above, para.29-042, below, paras 29-197—29-201. For the suggestion that only contractual compromise should be a defence see Burrows at pp.603-604. cf. Law Com. No.227 (1994), paras 2.25-2.38.
- [598.](#) Below, paras 29-186 et seq. cf. the narrower defence in *Rural Municipality of Storthoaks v Mobil Oil Canada Ltd* [1975] 55 D.L.R. (3d) 1, 13. See generally Hu [2011] R.L.R. 112.
- [599.](#) *FII Group Litigation v HMRC (No 2)* [2014] EWHC 4302 (Ch), [2015] S.T.I. 49 at [406] (Henderson J.).
- [600.](#) *FII Group Litigation v HMRC (No 2)* [2014] EWHC 4302 (Ch), [2015] S.T.I. 49 at [315] (Henderson J.), relying on the analysis of Bant [2009] L.M.C.L.Q. 166, 172.
- [601.](#) [2014] EWHC 4302 (Ch).
- [602.](#)  In *FII Group Litigation v HMRC (No.1)* [2008] EWHC 2893 (Ch), [2009] S.T.C. 254. See also *Bloomsbury International Ltd v Sea Fish Industry Authority* [2009] EWHC 1721, at [133]-[144] (Hamblen J.). For consideration of evidence relating to the establishment of change of position by a public authority, see *Jazztel Plc v Revenue and Customs Commissioners* [2017] EWHC 677 (Ch), [2017] S.T.C. 1422.
- [603.](#) *Bloomsbury International Ltd v Sea Fish Industry Authority* [2009] EWHC 1721 (QB), [2010] 1 C.M.L.R. 12, [137] (Hamblen J.); *Test Claimants in the FII Group Litigation v HMRC* [2014] EWHC 4302 (Ch), [2015] S.T.I. 49 at [356] (Henderson J.).
- [604.](#) *Woolwich* [1993] A.C. 70, 175-176. See also *Air Canada v British Columbia* (1989) 59 D.L.R. (4th) 161, 193-197. cf. 169 (Wilson J.); *Sargood Bros v Commonwealth* (1910-11) 11 C.L.R. 258, 303 (Isaacs J.). See also Law Com. Consultation Paper No.120, paras 3.70-3.73; Burrows at pp.512-513; Jones, *Restitution in Public and Private Law* (1991), pp.24-28. In *Deutsche Morgan Grenfell Group Plc v IRC* [2006] UKHL 49, [2007] 1 A.C. 558 the House of Lords rejected a defence that the money was paid when there was a settled view as to the state of the law: at [18] (Lord Hoffmann) and at [145] (Lord Walker).
- [605.](#) [1993] A.C. 70, 177-178.
- [606.](#) *Amministrazione delle Finanze dello Stato v SpA San Giorgio* (199-82) [1983] E.C.R. 3595; *Case 309/06 Marks and Spencer Plc v Commissioners of Customs and Excise*; *Lady and Kid v Skatteministeriet (C-398/09)* [2012] S.T.C. 854; *Ministre du Budget, des Comptes Publics et de la Fonction Publique v Accor SA (C-310/09)* [2012] S.T.C. 438.
- [607.](#) *Kapniki Mikhailidis AE v Idrima Kinonikon Aspaliseon (IKA) (C-441/98)* [2001] 1 C.M.L.R. 13 (partial repayment could be made in such cases). Under UK legislation the defence is available to the Customs even though the payments had been made owing to an error on their part: *RIBA Publications v Commissioners of Customs and Excise* [1999] B.V.C. 2201.
- [608.](#)  As amended by the Finance (No.2) Act 2005 s.3. See *Baines and Ernst Ltd v Commissioners*

for Her Majesty's Revenue and Customs [2006] EWCA Civ 1040; *Weber's Wine World Handels GmbH v Abgabenberufungskommission Wien* C-147/01 [2005] All E.R. (EC) 224; *British Association of Leisure Parks, Piers and Attractions Ltd v Revenue and Customs Commissioners* [2011] UKFTT 622 (TC). In *Marks and Spencer Plc v Her Majesty's Commissioners of Customs and Excise* [2009] UKHL 8, [2009] 1 All E.R. 939 the House of Lords, following a decision of the ECJ (Case 309/06 *Marks and Spencer Plc v Commissioners of Customs and Excise*), did not apply the defence in respect of a claim for the recovery of overpaid VAT which was incompatible with EU law, on the ground that its application would have been discriminatory. In *Revenue and Customs Commissioners v Investment Trust Companies* [2017] UKSC 29, [2017] 2 W.L.R. 1200 at [81] Lord Reed characterised this as a statutory defence of passing on.

[609.](#) Rudden and Bishop (1981) 6 E.L.R. 243; Law Commission Consultation Paper No.120, paras 3.82-3.85.

[610.](#) *Mason v New South Wales* (1959) 102 C.L.R. 108, 136, 146; *Roxborough v Rothmans of Pall Mall Australia Ltd* (2002) 76 A.L.J.R. 203 High Ct of Australia.

[611.](#) *Kleinwort Benson Ltd v South Tyneside MBC* [1994] 4 All E.R. 972; *Kleinwort Benson Ltd v Birmingham CC* [1997] Q.B. 380. See also *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 C.L.R. 51 and *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 C.L.R. 155. See further above, para.29-030. cf. *Allied Air Conditioning v British Columbia* (1992) 76 B.C.L.R. 2d 218 (distinguishing specific and direct "passing on" of tax and merely treating it as a business cost).

[612.](#) *Lady and Kid A/S v Skatteministeriet* (C-398/09) [2012] 1 C.M.L.R. 14.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 9 - Restitution

Chapter 29 - Restitution ¹

Section 2. - Unjust Enrichment

(h) - Compulsion ⁶¹³

Compulsory transfer of benefit to the defendant

29-094

Where the claimant has transferred a benefit to the defendant by wrongful or illegitimate compulsion, or under extortion *colore officii*, the defendant is under an obligation to make restitution to the claimant. Usually the benefit transferred will be received directly by the defendant, but sometimes the benefit may take the form of the claimant paying a third party, the effect of which is to discharge a liability borne primarily or ultimately by the defendant. ⁶¹⁴ In both situations the claim for restitution will fail if the transfer of the benefit can be considered to be voluntary. ⁶¹⁵

Unlawful or illegitimate compulsion

29-095

! The question of what amounts to unlawful or illegitimate compulsion will depend on the circumstances of the particular case. Although the reported cases deal mainly with issues of duress of goods ⁶¹⁶ and extortion *colore officii*, ⁶¹⁷ duress of the person is included ⁶¹⁸ and other forms of pressure on the person who pays, including economic duress, will be recognised. ⁶¹⁹ As a general rule, to constitute duress the pressure must be exerted by a threat to commit an unlawful act, ⁶²⁰ but it has been recognised that a lawful threat can be illegitimate, particularly where it was coupled with prior unlawful conduct. ⁶²¹ **!** Although, in the absence of legislative guidance, ⁶²² distinguishing legitimate from illegitimate demands is likely to be controversial, the courts may be assisted by drawing on cases of conspiracy where no unlawful means are used, ⁶²³ and by having regard to usual trade practice. The coercive force ⁶²⁴ of the compulsion will depend on its immediacy, ⁶²⁵ on the ability of the payer to obtain legal advice or legal protection before making the payment, ⁶²⁶ and, in some circumstances, on the availability of an effective alternative remedy or course of action open to the payer. ⁶²⁷ It was sometimes said that economic duress had to coerce the claimant's will so as to vitiate his consent, ⁶²⁸ but this approach has been criticised and the better view is to ask whether, where pressure has been applied, that pressure went beyond what the law considers legitimate. ⁶²⁹ If the payment amounts to a genuine compromise of a disputed claim honestly made by the payee, ⁶³⁰ or the payment is made in the course of or under threat of legal proceedings, ⁶³¹ or the transaction is affirmed, ⁶³² it cannot be recovered. Similarly, if the claimant cannot offer the defendant counter-restitution. ⁶³³

Duress of the person

29-096

Duress of the person ⁶³⁴ entitles a party to a contract to avoid it ⁶³⁵; consequently, restitution of

benefits conferred under the voidable contract will be ordered by the court, following rescission by the innocent party. Even if there has been no contract, benefits conferred on the defendant as the result of duress by him should, in principle, be recoverable from him by a claim in restitution. ⁶³⁶ The duress will usually amount to a tort and recovery can also be founded on the principles governing restitution for wrongdoing considered below. ⁶³⁷

Actual or threatened seizure or distress of the claimant's goods

29-097

Lord Reading C.J. in the leading case of *Maskell v Horner* ⁶³⁸ said:

"If a person pays money, which he is not bound to pay, under the compulsion of urgent and pressing necessity or of seizure, actual or threatened, of his goods, he can recover it as money had and received. The money is not paid under duress in the strict sense of the term, as that implies duress of person, but under the pressure of seizure or detention of goods which is analogous to that of duress."

In this case, the defendant owned a market and exacted from the plaintiff market tolls (to which he was not entitled) by threatening to distrain on the plaintiff's goods. The plaintiff paid the tolls under protest, but the Court of Appeal later upheld his claim to recover the payments on the ground that they were not voluntary. It would have been unreasonable to expect a man in the plaintiff's position to forgo the use of his goods while the matter was litigated. ⁶³⁹ Similarly, where a sheriff had seized certain goods, which were claimed by the assignees of a bankrupt as belonging to the bankrupt's estate, and in order to prevent a sheriff from proceeding to a sale, which he threatened to do, the assignees paid the sum claimed under the writ, it was held that they were entitled to recover such sum as money which had been paid by compulsion. ⁶⁴⁰

Wrongful demand by defendant detaining goods ⁶⁴¹

29-098

If chattels are wrongfully taken or detained from the claimant by the defendant, and money is paid to the defendant by the claimant simply for the purpose of recovering possession of the chattels, the money can be recovered by the claimant, since it was not a voluntary payment, especially if it was paid under protest. ⁶⁴² Thus, in *Astley v Reynolds*, ⁶⁴³ where the claimant had pawned plate with the defendant and the latter would not part with it unless the claimant paid him more than legal interest, it was held that the excess paid to redeem the goods might be recovered, even though the claimant could have brought an action for trover on tendering the sum legally due to the defendant. ⁶⁴⁴ The same principle applies where a carrier refuses to deliver goods except on payment of excessive charges, ⁶⁴⁵ or where goods are seized by a sheriff and the owner can redeem them only by paying him an amount in excess of the proper levy. ⁶⁴⁶

Wrongful demand by defendant detaining title deeds

29-099

Where money was paid under protest by a mortgagor in order to obtain possession of his title deeds, which were withheld by the solicitor of the mortgagee in reliance on an unfounded claim of lien, it was held that the money might be recovered by a claim in restitution. ⁶⁴⁷ Similarly, where the solicitor of a mortgagee, who was about to sell, refused to stop the sale or deliver up the title deeds of the mortgaged property except on payment by the mortgagor of certain expenses with which he was not properly chargeable, it was held that the administratrix of the mortgagor, who had paid the excess under protest, could recover it. ⁶⁴⁸

Extortion colore officii ⁶⁴⁹**29-100**

⚠ If a public officer demands an illegal or an excessive fee for performing duties imposed on him by law, it amounts to extortion colore officii and the fee or excess is recoverable by a claim in restitution. ⁶⁵⁰ It may also be recoverable under the principle laid down in *Woolwich Equitable Building Society v*

I.R.C. ⁶⁵¹ It is not yet clear whether that is an additional principle or subsumes colore officii cases. ⁶⁵²

⚠ A public officer is not on equal terms with a private citizen, who is likely to accept the correctness of an official demand and to believe that, unless he pays, he will suffer some penalty or exclusion from some benefit; it is likely to be held to be a payment under coercion if the official is in a position to prevent the payer from doing an act he wishes to do, ⁶⁵³ or to seize the goods of the payer. ⁶⁵⁴ But there may be extortion colore officii although the officer has not withheld a right or privilege in order to exact the fee, ⁶⁵⁵ and honestly believed that the fee was properly charged. ⁶⁵⁶ Thus, a fee illegally demanded from a publican as a condition of granting his licence may be recovered ⁶⁵⁷; as also may fees charged by a parish clerk, contrary to a statute, for extracts taken from a register book of burials and baptisms, ⁶⁵⁸ or charges by an electricity company contravening statutory restrictions. ⁶⁵⁹ Similarly, a party to an arbitration may recover an excessive fee fixed by the arbitrator and paid to him in order to obtain delivery of the award. ⁶⁶⁰ The fact that the payer was acting under a mistake of law is no defence to an action for extortion colore officii, as where a sheriff claimed and was paid a larger fee than he was entitled to by law. ⁶⁶¹ But in some circumstances, if no improper pressure or threat is used and the payer has full knowledge of all the facts, fees illegally collected by an official may be irrecoverable on the ground that they were paid voluntarily ⁶⁶²; the court will assess the possible alternative courses of action open to the payer, such as how, if at all, would he have suffered if he had refused to pay and was the only way in which the authority could enforce its demand by suing the payer? ⁶⁶³

Express threat unnecessary**29-101**

⚠ The requirement, in some cases, that the authority accompany its demand with an express threat does not apply to the restitutionary right in the *Woolwich* case, ⁶⁶⁴ and has been criticised on two grounds. First, that demands made with the weight of an apparently valid governmental authority are far more coercive than demands made by private individuals whether or not there is:

“... any actual threatened withholding of something to which the payer was entitled, or actual threatened impeding of him in the exercise of some right or liberty.” ⁶⁶⁵

Secondly, it is contrary to principles of public law for such an authority to keep money obtained in such a manner. ⁶⁶⁶ Even if there is no need for an express threat under the colore officii principle, it is still narrower than the restitutionary right in the *Woolwich* case, which is not based on compulsion but on ultra vires. On the other hand, insofar as it applies to arbitrators and common carriers, colore officii may prove to apply to a wider class of payees. ⁶⁶⁷ ⚠

Compliance with invalid local authority notices**29-102**

A principle analogous to extortion colore officii allowed recovery of money expended where the claimants were under the impression that they were bound to comply with a notice from the local authority to repair a drain, and did so under pressure practically amounting to compulsion, although the notice was not a statutory one with which they were bound to comply. ⁶⁶⁸

Compulsory payment of an excessive amount. ⁶⁶⁹**29-103**

In *Great Western Ry v Sutton* ⁶⁷⁰ the railway refused to carry the claimant's goods unless he paid freight at an excessive rate not permitted by law; the House of Lords held that the claimant was entitled to recover the excess on the ground that, since the claimant could not have had his goods carried without meeting the railway's demand, it was a case of compulsion. Willes J. said:

"When a man pays more than he is bound to do by law for the performance of a duty which the law says is owed to him for nothing, or for less than he has paid, there is a compulsion ... in respect of which he is entitled to recover the excess by *condictio indebiti*, or action for money had and received." ⁶⁷¹

Payment made in the course of, or under the threat of, legal proceedings ⁶⁷²**29-104**


The general rule is that where a payment has been made in the course of legal proceedings, it is voluntary and irrecoverable; the same rule is generally true when legal proceedings are threatened. ⁶⁷³ In such cases legal advice can be taken and, if payment is made without doing so, the payer is deemed to have settled or compromised the dispute: "[t]here must be an end of litigation, otherwise there would be no security for any person". ⁶⁷⁴ However, if the payee has acted fraudulently or illegally, such a payment may be recoverable ⁶⁷⁵; and where money is paid under a void judgment, e.g. because an inferior court had no jurisdiction or because the correct procedure was not followed, it may be recovered. ⁶⁷⁶

Compulsory payments to a third person. ⁶⁷⁷**29-105**

⚠ In *Moule v Garrett*, ⁶⁷⁸ ⚠ Cockburn C.J. approved the following statement from Leake on Contracts:

"Where the plaintiff has been compelled by law to pay, or, being compellable by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability; under such circumstances the defendant is held indebted to the plaintiff in the amount."

⚠ The payment made by the claimant must have discharged a legal liability of the defendant ⁶⁷⁹; therefore, it must have been compulsory, since the general rule is that a *stranger* who pays another's debt to the creditor does not thereby obtain a discharge of the debtor's liability to the creditor: a voluntary payment is effective to discharge the debtor's liability only if it was made on his behalf and was subsequently ratified by him. ⁶⁸⁰ If, however, the claimant is compelled to make the payment to the third person, the cases cited in this section assume that the payment discharges the defendant's liability to the third person. ⁶⁸¹ ⚠ The compulsion may take the form of a secondary legal liability, but other forms of practical compulsion have also been recognised. It is sufficient, for instance, that the claimant was faced with the choice of either paying in order to recover possession of his chattel or

being prevented from obtaining possession of it. ⁶⁸² The payment of a third party's debt in order to release a security and perfect an independent right of reimbursement is a compulsory payment. ⁶⁸³ There are many cases on what amounts to such a compulsory payment, and although the majority of reported cases are grouped under headings in the succeeding paragraphs, there may well be other miscellaneous cases of compulsory payments outside these headings. ⁶⁸⁴ The liability of a principal debtor to indemnify his surety ⁶⁸⁵ will also be discussed under this heading of compulsory payment, though a distinction might be drawn in that a surety in the first place voluntarily assumes potential liability for the debt. In *Revenue and Customs Commissioners v Investment Trust Companies* ⁶⁸⁶  Lord Reed recognised that where the claimant discharges a debt owed by the defendant to a third party, the defendant can be considered to be directly enriched at the claimant's expense. If the transfer of value to the defendant through the discharge of the debt is defective, rendering the enrichment unjust, the law will reverse it by subrogating the claimant to the rights formerly held by the third party against the defendant. Lord Reed did not consider this to be a restitutionary remedy as such, since it does not restore the parties to their pre-transfer position, although the effect invariably will be to restore to the claimant the value which had been transferred to the third party.

Tortfeasor compelled to pay twice

29-106

Where a tortfeasor is compelled to pay damages to two or more claimants for wrongful interference with the same goods, a statutory right to reimbursement arises under the Torts (Interference with Goods) Act 1977. Section 7(4) provides that:

“... where, as the result of enforcement of a double liability, any claimant is unjustly enriched to any extent, he shall be liable to reimburse the wrongdoer to that extent.” ⁶⁸⁷

The defendant must be under a legal liability to pay the third person

29-107

If the defendant is under no legal liability to pay the money, he is not liable to make restitution to the claimant, although it may appear that indirectly the payment by the claimant has benefited the defendant. ⁶⁸⁸ So, where a police authority was under a statutory obligation to pay constables while incapacitated through an injury received in the course of their duty, and a constable was injured by the negligence of the defendant, the Court of Appeal held that the authority could not recover from the defendant the wages paid to the constable during his period of incapacity, although the defendant had not been required to pay anything in respect of loss of earnings to settle the constable's claim for damages for negligence. ⁶⁸⁹ The defendant had paid to the constable all the damages he was legally liable to pay, and so had not derived an unjust benefit through the authority's payment of wages. ⁶⁹⁰

The defendant must be primarily or ultimately liable to pay the third Person

29-108

In *Brook's Wharf and Bull Wharf Ltd v Goodman Bros* ⁶⁹¹ Lord Wright said:

“The essence of the rule is that there is a liability for the same debt resting on the plaintiff and the defendant and the plaintiff has been legally compelled to pay, but the defendant gets the benefit of the payment, because his debt is discharged either entirely or pro tanto, whereas the defendant is primarily liable to pay as between himself and the plaintiff.”

In this case the plaintiffs, as bonded warehousemen, were compelled by statute to pay duties on skins stored with them by the defendants; since the defendants were primarily liable to pay these duties, they were required to reimburse the plaintiffs. In *McCarthy v McCarthy and Stone Plc* ⁶⁹² tax paid by an employer under the PAYE system in respect of share options could not be deducted from salary because the employee had left the firm. It was held that the tax could be recovered from the former employee on the ground of legal compulsion because the former employee bore the ultimate liability for the tax.

Actual seizure of the claimant's goods in respect of the defendant's debt

29-109

"Speaking generally, and excluding exceptional cases, where a person's goods are lawfully seized for another's debt, the owner of the goods is entitled to redeem them, and to be reimbursed by the debtor against the money paid to redeem them, and in the event of the goods being sold to satisfy the debt, the owner is entitled to recover the value of them from the debtor ... The right to indemnity or contribution in these cases exists, although there may be no agreement to indemnify or contribute and although there may be, in that sense, no privity between the plaintiff and the defendant." ⁶⁹³

Thus, where the claimant's goods, having been placed on the demised premises with the tenant's consent, ⁶⁹⁴ were distrained by the landlord for rent due from the tenant, and the claimant was obliged to pay the rent to redeem his goods, he was entitled to recover the rent from the tenant. ⁶⁹⁵ A similar situation arose where the mortgagees of some shares in a vessel paid a claim to redeem the vessel from arrest so that they could take possession under their mortgage; the co-owners of the vessel, who were liable to pay the claim, were compelled to repay the mortgagees. ⁶⁹⁶

Effect of bankruptcy

29-110

The effect of the debtor's bankruptcy on a claim for restitution on this ground has been clarified by the Insolvency Act 1986. Formerly, a payment made to secure the release of goods lawfully distrained for the debt of a person who subsequently became bankrupt was neither provable in the bankruptcy nor barred by an order of discharge, since it was not a claim by reason of any contract or promise. ⁶⁹⁷ However, under the 1986 Act a liability arising out of an obligation to make restitution is a bankruptcy debt and is provable in the bankruptcy. ⁶⁹⁸ This will be so whether the payment is made before the commencement of the bankruptcy or after that time, since the Act provides that it is immaterial whether the liability is present or future, or certain or contingent. ⁶⁹⁹

Threat to seize the claimant's goods in respect of the defendant's Debt

29-111

Restitution on the ground of legal compulsion is also applicable where the third person threatens to levy distress on the claimant's goods to satisfy the defendant's debt. Thus, if an underlessee, under threat of distress or eviction by the head lessor, pays ground rent due from his immediate lessor to the head lessor, the underlessee may recover it as money paid to the use of his immediate lessor. ⁷⁰⁰ In these circumstances, the Law of Distress Amendment Act 1908 enables the underlessee, by adopting a certain procedure, to avoid seizure of his goods. But, where one underlessee of part of the premises comprised in the head lease has, under a threat of distress, paid the whole rent due under the head lease, he cannot recover from another underlessee, as money paid to his use, the proportion of rent due from him. ⁷⁰¹

Assignees of a lease

29-112

Despite the fact that there have been successive assignments of the term, the original lessee may still be held liable for rent or for breach of covenant under the terms of the lease. In *Moule v Garrett* ⁷⁰² it was held that in these circumstances the original lessee may claim an indemnity from a subsequent assignee, even though each assignee may have covenanted expressly to indemnify his own assignor against any breach of covenant committed after the assignment to him. The original lessee's right of indemnity from a subsequent assignee is less important in practice since the liability of both the original parties to a lease and of their assignees has been limited in respect of agreements for leases made or leases granted after January 1, 1996 by the Landlord and Tenant (Covenants) Act 1995.

Other illustrations concerning land

29-113

Another illustration of the general principle of legal compulsion concerns a statutory notice served by a sanitary authority on the occupier of premises requiring ⁷⁰³ him to abate a nuisance; if the occupier pays for the required work to abate the nuisance, he may recover the cost from the owner of the premises if, as between the occupier and the owner, the owner is primarily liable. ⁷⁰⁴ Again, a tenant may obtain restitution from his landlord when the tenant is compelled to pay a tax which the landlord is ultimately liable to pay. ⁷⁰⁵ The same principle of restitution of a compulsory payment was applied where land charged with the repair of a bridge was occupied by a lessee; the occupier was, in the first instance, responsible to the public for the repair of the bridge, but he successfully claimed restitution from the owner in an action for money paid to the owner's use, since the owner was ultimately liable. ⁷⁰⁶

Bills of exchange

29-114

If, when the indorser of a bill of exchange is sued by the holder, the indorser pays him the whole or part of the amount of the bill, the indorser can recover the amount paid from the acceptor as money paid to his use. ⁷⁰⁷

Voluntary payments ⁷⁰⁸

29-115

If the payment is regarded by the law as voluntary, it cannot normally ⁷⁰⁹ be recovered. ⁷¹⁰ In one case Swinfen Eady J. said:

"If A voluntarily pays B's debt, B is under no obligation to repay A. There must be a previous request, express or implied, to raise such an obligation, and in this respect I can see no difference between the discharge of a statutory liability and the discharge of a contractual liability." ⁷¹¹

So where the claimant, drawer of a bill for the accommodation of the defendant, paid the holder a part of the bill after its dishonour, but without notice of dishonour and without any request from the defendant, this was held to be a voluntary payment which could not be recovered. ⁷¹² Again, the mere fact that a company promoter paid the fees and stamp duty on the registration of a company did not in itself entitle him to recover them from the company. ⁷¹³ Where, without any request from the mortgagee, a mortgagor, who is the ultimate owner of the equity of redemption in a life insurance

policy, pays a premium due on the policy in order to prevent its lapse, the mortgagor is not entitled to recover the amount from the mortgagee, despite the fact that the latter has benefited from the payment. ⁷¹⁴ But a payment made under mistake is not a voluntary payment. ⁷¹⁵

Secondary liabilities voluntarily incurred

29-116

The principle of voluntariness applies to secondary liabilities that are voluntarily incurred. In *Owen v Tate*, ⁷¹⁶ Scarman L.J. stated that:

“If without an antecedent request a person assumes an obligation ... for the benefit of another, the law will, as a general rule, refuse him a right of indemnity.”

Thus, where, without consulting the debtor, a person guaranteed a debt in order to release a friend from an earlier guarantee in respect of the same debt, it was held that no action for restitution would lie. The principle also applies where the intervener fulfils the defendant's obligation by performing a service. In one case, ⁷¹⁷ the defendants were under a statutory duty to repair a road bridge over their canal, but refused to repair it when the claimants, who were the highway authority, called upon them to do so. The claimants then did the work themselves, but they were not able to recover from the defendants the cost incurred by them, since they were under no legal liability to repair the bridge, and accordingly had acted as mere volunteers.

Payment under protest

29-117

The fact that a protest is made at the time of payment may often indicate that a payment is not “voluntary”, but the mere absence of a protest does not necessarily mean that a payment is voluntary. It is a question of fact whether the protests of the payer amount to no more than “grumbling acquiescence”, ⁷¹⁸ or whether the circumstances indicate a payment under protest, even where no express words are used. ⁷¹⁹ Thus a payment is not voluntary which:

“... is made for the purpose of averting a threatened evil, and is made not with the intention of giving up a right but under an immediate necessity and with the intention of preserving the right to dispute the legality of the demand.” ⁷²⁰

In one case, where a tenant at first protested against the refusal of his landlord to allow, as a deduction from rent due, land tax paid by the tenant, yet later during five successive years he paid the land tax without renewing his objection to the landlord, it was held that he could not recover any of the sums paid for land tax as money paid to the landlord's use, since they were voluntary payments. ⁷²¹ Payments made in the course of, or under threat of, legal proceedings are not recoverable, ⁷²² since the payer should take legal advice if he wishes to dispute his liability.

Exceptional cases where a voluntary payment is recoverable

29-118

A voluntary payment may be recoverable in the following exceptional circumstances:

- (1)
where the circumstances justify the inference of an implied request by the defendant to make the payment ⁷²³;
- (2)
where the special equitable doctrine accepted by the Court of Appeal in *Re Cleadon Trust Ltd* ⁷²⁴ applies:

“Where money is borrowed on behalf of a principal by an agent ... though it turns out that his act has not been authorised, or ratified, or adopted by the principal, then, although the principal cannot be sued in law, yet in equity, to the extent to which the money borrowed has in fact been applied in paying legal debts and obligations of the principal, the lender is entitled to stand in the same position as if the money had originally been borrowed by the principal.”
- (3)
where one person has innocently repaired or improved another’s chattel, he may in some circumstances obtain restitution, directly or indirectly ⁷²⁵;
- (4)
where the doctrines of ratification in agency ⁷²⁶ and of agency of necessity ⁷²⁷ apply;
- (5)
where the claimant has reasonably intervened on behalf of the defendant in an emergency ⁷²⁸;
- (6)
although a “voluntary” payment to a third person which in fact benefits the defendant cannot normally create an obligation upon the defendant to indemnify the payer, there are dicta supporting a wider principle in *Owen v Tate*. ⁷²⁹ Scarman L.J. said ⁷³⁰ that, despite the general rule, if the intervener can show:

“... that in the particular circumstances of the case there was some necessity for the obligation to be assumed, then the law will grant him a right of reimbursement if in all the circumstances it is just and reasonable to do so.”

In the same case, Stephenson L.J. also assumed that there may be circumstances where a volunteer could recover if “it is obviously unjust that a debtor should be enriched by accepting the benefit”. ⁷³¹ Scarman L.J.’s formulation suggests that cases of necessitous intervention might suffice, and it has been followed, ⁷³² although Stephenson L.J. preferred not to give instances of the type of situation in which a “volunteer” may recover an indemnity ⁷³³ and Ormrod L.J. reserved his opinion on the whole question. ⁷³⁴

Payment to a third party at the defendant’s request

29-119

For many years reimbursement has been available through the action “for money paid” to recover money paid by a person to a third person at the request,⁷³⁵ express or implied, of the defendant, and with an undertaking, express or implied, on his part to repay it⁷³⁶; and it is immaterial whether or not the defendant is relieved from a legal liability by the payment.⁷³⁷ This type of claim is not obviously contractual, since the implied undertaking to repay is often fictional⁷³⁸; furthermore the claimant need not have been under any contractual obligation to make the payment, and the defendant’s request may not have referred to a precise sum of money. The ground for recovery is akin to the principle of the law of agency which imposes on the principal an obligation to indemnify his agent against any liability which he may incur in the exercise of his authority.⁷³⁹ However, although it is treated here for convenience, it is not necessarily restitutionary, since the claimant will be entitled to be indemnified even though his payment has conferred no benefit on the defendant.⁷⁴⁰ Where the payment has benefited the defendant, liability can be explained by reference to the unjust enrichment principle.

The payment must be to the use of the defendant

29-120

The obligation to reimburse the claimant arises only when the money was paid to the use of the defendant. So if A by agreement with B binds himself to pay either to B or to a third party a sum of money which B is primarily liable to pay, and B is afterwards called upon to pay and does pay such sum, his only remedy against A is on the special agreement. For the money so paid by B, having been paid in discharge of his own liability, was not money paid to the use of A.⁷⁴¹

The payment must be made at the request of the defendant

29-121

It is also necessary for the claimant to prove the defendant’s express or implied request to the claimant to pay the money for his use. It is not sufficient to prove that the defendant was liable to a third person and that the claimant paid the third person: it must be proved that the claimant did so at the instance, either express or implied, of the defendant,⁷⁴² or, where the defendant had the option whether or not to ratify the payment, that he exercised his option to ratify it.⁷⁴³ For no legal right to repayment will be established by the mere voluntary payment of the debt of another person; a man cannot make himself the creditor of another without his knowledge and consent,⁷⁴⁴ except by the process of assignment.⁷⁴⁵ The words of Bowen L.J. in *Falcke v Scottish Imperial Insurance Co*⁷⁴⁶ have been frequently quoted:

“The general principle is, beyond all question, that work and labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs, any more than you can confer a benefit upon a man against his will⁷⁴⁷ There can, as it seems to me, according to the common law be only one principle upon which a claim for repayment can be based, and that is where you can find facts from which the law will imply a contract to repay or to give a lien.”

Implied request by the defendant

29-122

The courts have often inferred from the circumstances an implied request by the defendant to the

claimant to make the payment, ⁷⁴⁸ especially where the money paid by the claimant was in discharge of a liability which the claimant had undertaken at the defendant's instance, or by his authority. Lord Greene M.R. has said:

"... if a person knows that the consideration is being rendered for his benefit with an expectation that he will pay for it, then if he acquiesces in its being done, taking the benefit of it when done, he will be taken impliedly to have requested its being done; and that will import a promise to pay for it." ⁷⁴⁹

In one case ⁷⁵⁰ the claimant, who had done work for the provisional committee of a projected railway company, had been induced by the defendant, a member of the committee, to sue certain other members of the committee for his bill. The claimant incurred legal costs in bringing those actions, which it was held he could recover from the defendant as money paid at his implied request. The implied request is normally inferred from the circumstances existing at the time of the intervention by the claimant who will otherwise be regarded as a volunteer. But even a volunteer, who initially takes the risk of getting no return, may be relieved of that risk by the acquiescence of his beneficiary who, provided he has an opportunity to choose:

"... is bound by all the rules of honesty not to be quiescent, but actively to dissent, when he knows that others have for his benefit put themselves in a position of disadvantage, from which, if he speaks or acts at once, they can extricate themselves, but from which, after a lapse of time, they can no longer escape." ⁷⁵¹

Earlier paragraphs in the present chapter, on "compulsory payments to a third person", ⁷⁵² cite a number of cases which could be regarded as falling within the scope of an implied undertaking to reimburse the claimant for money expended on the defendant's behalf.

Payment by agent for principal

29-123

From the relationship of principal and agent the law will imply a promise by which the principal undertakes to indemnify the agent in respect of all liabilities which the agent has properly incurred in the course of the agency. ⁷⁵³ If, by the custom of trade or of the Stock Exchange, an agent is obliged, without any default on his part, to pay money on account of a contract made for his principal, the law will imply a promise on the part of the latter to repay it as money which has been paid to his use; and this will be the case whether or not he was acquainted with the custom by which the agent's contracts were governed. ⁷⁵⁴ But if the expense was incurred by the agent as the result of some default on his own part, there is no such implied promise, although the loss is sustained in a matter connected with his agency. ⁷⁵⁵

Tenancy in common

29-124

In ordinary circumstances it will be difficult to infer a request from one tenant in common to another to expend money upon the property held in common. If one tenant in common chooses to repair a house held in common, he cannot, without a previous express request from the co-owner, recover any part of the expense from him, however much the co-owner may be benefited. ⁷⁵⁶

Payment by guarantors ⁷⁵⁷

29-125

Where one person becomes a guarantor for another at his request, the law implies a promise by the latter that he will repay the guarantor whatever the guarantor may be compelled to pay the creditor; the guarantor may recover the amount paid to the creditor as money paid to the use of the debtor. ⁷⁵⁸ But if the debtor was not consulted before the guarantee was made, the guarantor cannot recover an indemnity from the debtor for the amount paid by the guarantor to the creditor ⁷⁵⁹ unless the guarantor had acted in a way which was “reasonably necessary” in the interests of the debtor and it was just and reasonable to grant a right of reimbursement. ⁷⁶⁰

Indemnity against liability incurred when acting at the request of another

29-126

When an act, ⁷⁶¹ which is neither manifestly illegal nor illegal to the knowledge of the person doing it, is done by one person at the request of another, ⁷⁶² and the act turns out to be injurious to the rights of a third person, the person doing the act is entitled to an indemnity against his liability towards the third person, from the person who requested that the act should be done. ⁷⁶³ Thus, where the transferee under a forged transfer of stock requests the corporation to register the transfer to him, the transferee is obliged to indemnify the corporation against the consequences of the forgery. ⁷⁶⁴

The right to contribution

29-127

⚠ At common law, apart from the cases discussed above ⁷⁶⁵ where a right to reimbursement arises in favour of a non-volunteer who discharges the obligation of another, a right to contribution will only arise when a person, who owes with another a duty to a third party and is liable with that other to a common demand, discharges more than his proportionate share of that duty. ⁷⁶⁶ ⚠ The amount recoverable is determined by a broad rule of Equity:

“If, as between several persons or properties all equally liable at law to the same demand, it would be equitable that the burden should fall in a certain way, the court will so far as possible, having regard to the solvency of the different parties, see that, if that burden is placed inequitably by the exercise of the legal right, its incidence should be afterwards adjusted.” ⁷⁶⁷ ⚠

In general, persons who are liable to the same demand are made to share the burden of that liability equally. ⁷⁶⁸ This is subject to contrary agreement, since a claim to contribution may be modified or limited by a contractual provision. It will also not apply where the parties undertake a liability in unequal shares or up to differing limits, as for instance occurs in contracts of insurance and guarantee. ⁷⁶⁹ The rationale of the law of contribution is to ensure that one party is not unjustly enriched at the expense of the other. ⁷⁷⁰ The above rules still apply in respect of contribution proceedings between persons jointly liable for the same *debt* but the position of parties liable in respect of the same *damage*, ⁷⁷¹ whether jointly or otherwise, is now governed by the Civil Liability (Contribution) Act 1978. In a case falling within that statute the rules of Equity do not apply and the right to contribution is to be:

“... such as may be found by the court to be just and equitable having regard to the extent of that person’s responsibility for the damage in question.” ⁷⁷²

By s.6(1):

“A person is liable in respect of any damage for the purposes of this Act if the person who suffered it (or anyone representing his estate or dependants) is entitled to recover compensation from him in respect of that damage (whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise).”

The Act therefore covers liability arising out of breaches of different contractual obligations, ⁷⁷³ situations in which one person's liability is in contract but the other's is in tort, ⁷⁷⁴ situations where one person's liability is in either contract or tort and the other's is in unjust enrichment, ⁷⁷⁵ as well as the case where the liability of both persons is in tort. ⁷⁷⁶ In *BRB (Residuary) Ltd v Connex South Eastern Ltd (formerly South Eastern Train Co Ltd)* ⁷⁷⁷ it was recognised that a claim for contribution lay under the Act even where the party seeking contribution had mistakenly admitted liability. The Act does not affect any express contractual provision regulating or excluding a right to contribution. ⁷⁷⁸ The effects of this Act are discussed in the chapter on Joint Obligations earlier in this work. ⁷⁷⁹

The common law requirement: liability to a common demand

29-128

Apart from the statute, there can be no question of contribution where the parties are not liable to a common demand. In *Johnson v Wild* ⁷⁸⁰ a lessee assigned part of the land to the claimant for the residue of the term and gave the defendants an underlease of the other part of the land. In each case the lessee covenanted to pay the rent due to the head lessor, but on the lessee's bankruptcy the head lessor threatened to distrain on the claimant's part of the land, and the claimant paid the whole of the rent due under the head lease. Chitty J. held that the claimant had no right of contribution against the defendant:

“Now he does not demand contribution from a person liable to a common demand, because the defendants are not liable for the rent; and the defendants are not only not liable for the rent but nobody can sue them in respect of this supposed liability unless it be the plaintiff; whereas, in a common demand for which two persons are liable, if one pays then there is a right of contribution on the part of the other who makes the payment against the one who does not.” ⁷⁸¹

The main instances of contribution will now be outlined. The purpose of collecting these instances is to facilitate the use of analogies, since an analogy taken from one category of contribution may well be useful in another category, ⁷⁸² but it should be noted that the extent of the right to contribution will depend on whether the particular case is governed by the equitable rules or by the statutory discretion.

Guarantees

29-129

The leading illustration of contribution comes from the law relating to guarantors or sureties. ⁷⁸³ If several persons become sureties for the same debt, either jointly or severally, and whether by the same or different instruments, and one surety pays more than his proportionate share of the debt, he may recover ⁷⁸⁴ from his co-sureties proportionate shares of the excess. ⁷⁸⁵ If, however, a surety has guaranteed the debtor's obligations in respect of matters other than the payment of money, for instance by entering a performance bond, the rules of Equity do not apply and the right to contribution is governed by the exercise by the court of the statutory discretion. ⁷⁸⁶ The High Court of Australia has recognised that the right to contribution remains available as between co-sureties even though the creditor had covenanted not to sue the surety whose liability was discharged by the other surety. ⁷⁸⁷ This is because such a covenant does not discharge the surety's liability and such a ruling prevents the creditor from defeating a co-surety's right to contribution.

Joint contractors or debtors

29-130

Where two or more persons are joint contractors, ⁷⁸⁸ and one is required to perform more than his proportionate share of a common liability under the contract, he may recover contribution from the other joint contractors. ⁷⁸⁹ Thus, where several defendants to an action agreed to employ a solicitor to manage their defence on their joint responsibility, the one defendant who paid the solicitor's costs was held entitled to recover contributions from the others. ⁷⁹⁰ Likewise, when two parties employed an arbitrator and one, in taking up the award, paid the arbitrator's fees, he was entitled to recover half the fees from the other party. ⁷⁹¹

Trustees

29-131

Trustees who commit a breach of trust are jointly and severally liable for any resulting loss of the trust property. If one trustee is made responsible for more than his share of the loss, he may recover contribution from the other trustees, ⁷⁹² but the former rule, which subjected a passive trustee, who allows his co-trustee to administer the trust, to equal liability has now been replaced by the statutory discretion to allow such contribution as is "just and equitable having regard to the extent of responsibility for the damage in question". ⁷⁹³

Directors

29-132

Directors who employ the assets of a company on an ultra vires undertaking are liable to indemnify the company in respect of any loss resulting; if one director pays more than his proportionate share of the loss, he may recover contribution from those of his co-directors who are also liable. ⁷⁹⁴ Again, the extent of the right to contribution is governed by the statutory discretion.

Partners

29-133

Partners are jointly liable for partnership debts and obligations ⁷⁹⁵ and one partner who bears more than his own share of a common obligation is entitled to contribution from the other partners, ⁷⁹⁶ although, if the partnership still subsists, the right to contribution may be enforced only in an action for a general partnership account. ⁷⁹⁷

Insurers


29-134

Subject to the provisions of any special contribution clause in the relevant insurance policies, one insurer who has paid more than his proportionate share of a single loss, where several insurance policies cover the same interest in the same property, may recover contribution from the other insurers. ⁷⁹⁸

General average contribution


29-135

Parties to a common maritime adventure are required, by the principle of general average contribution, to contribute towards certain extraordinary losses or expenses incurred in time of peril in order to preserve the ship or its cargo. ⁷⁹⁹ All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo comes within general average, and must be borne proportionately by all those who are interested. ⁸⁰⁰


1. For a full treatment of the subject matter of this chapter, see: Burrows, *The Law of Restitution*, 3rd edn (2011); Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016); Virgo, *The Principles of the Law of Restitution*, 3rd edn (2015). See also Beatson, *The Use and Abuse of Unjust Enrichment* (1991); Birks, *An Introduction to the Law of Restitution* (1985); Birks, *Unjust Enrichment*, 2nd edn (2005); Maddaugh and McCamus, *The Law of Restitution*, 2nd edn (2004); McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014); Mason, Carter and Tolhurst, *Restitution Law in Australia*, 2nd edn (2008); Palmer, *The Law of Restitution* (1978) (four Vols); The American Law Institute's Restatement of the Law Third, Restitution and Unjust Enrichment (2011).
- ^{613.} Winfield (1944) 60 L.Q.R. 341; Burrows at Ch.10; Goff and Jones at Ch.10; Virgo at Ch.10.
- ^{614.} See below, para.29-105.
- ^{615.} Below, para.29-115.
- ^{616.} Below, para.29-097.
- ^{617.} Below, para.29-100.
- ^{618.} Below, para.29-096.
- ^{619.} e.g. threats of duress to goods will suffice: *Maskell v Horner* [1915] 3 K.B. 106 (see below, para.29-097), as will threats to commit other torts: *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 A.C. 366. Threats to commit a breach of contract can amount to duress, and a payment in excess of the contract price which is made as the result of a coercive threat by the payee to commit a breach of his contractual obligations unless the excess payment is made, may be recovered in a restitutionary claim: see *Pao On v Lau Yiu Long* [1980] A.C. 614; *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] Q.B. 705; *B. & S. Contracts and Design Ltd v Victor Green Publications Ltd* [1984] I.C.R. 419; *The Alev* [1989] 1 Lloyd's Rep. 138; *Atlas Express Ltd v Kafco (Importers and Distributors) Ltd* [1989] Q.B. 833; *C.T.N. Cash and Carry Ltd v Gallagher Ltd* [1994] 4 All E.R. 714 and the Australian cases of *Nixon v Furphy* (1925) 25 S.R. (N.S.W.) 151 and *Sundell & Sons v Emm Yannoulatos (Overseas) Pty Ltd* (1956) 56 S.R. (N.S.W.) 323; cf. *Crescendo Management Pty Ltd v Westpac Banking Corp* (1988) 19 N.S.W.L.R. 40. On economic duress see above, para.8-015; *D. & C. Builders Ltd v Rees* [1966] 2 Q.B. 617 (above, paras 4-134, 8-020).
- ^{620.} See *R. v Att-Gen for England and Wales* [2002] UKPC 22.
- ^{621.}  *Borelli v Ting* [2010] UKPC 21; *Progress Bulk Carriers Ltd v Tube City IMS LCC* [2012] EWHC 273 (Comm), [2012] 1 Lloyd's Rep 501 (Comm) at [42] (Cooke J). See also *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 A.C. 366, 384 (Lord Diplock), 401 (Lord Scarman); *Dimskal S.S. Co Ltd v ITWF* [1992] 2 A.C. 152; *R v Attorney-General for England and Wales* [2003] UKPC 22 at [113]; *Thorne v Motor Trade Association* [1937] A.C. 797; *Norreys v Zeffer* [1939] 2 All E.R. 186; Burrows at pp.277-282; Goff and Jones at para.10-12. cf. *C.T.N. Cash and Carry Ltd v Gallagher Ltd* [1994] 4 All E.R. 714; *Leyland Daf Ltd v Automotive Products Plc* [1994] 1 B.C.L.R. 244; *Royal Boskalis Westminster NV v Mountain* [1999] Q.B. 674, 730-731.
- ^{622.} Such as the Trade Union legislation in the *Universe Tankships case* [1983] 1 A.C. 366, although the threat there was to commit a tort.

- [623.](#) *Crofter Hand-Woven Harris Tweed Ltd v Veitch* [1942] A.C. 435; *Sorrell v Smith* [1925] A.C. 700, 712.
- [624.](#) *Skeate v Beale* (1841) 11 Ad. & E. 983, 990 (“the fear ... does not deprive anyone of his free agency who possesses that ordinary degree of firmness which the law requires all to exert”). But see *Barton v Armstrong* [1976] A.C. 104.
- [625.](#) *Maskell v Horner* [1915] 3 K.B. 106, 118 (Lord Reading C.J.) (“under the compulsion of urgent and pressing necessity”). cf. *Twyford v Manchester Corp* [1946] Ch. 236, and *Somes v British Empire Shipping Co* (1860) 8 H.L.C. 338.
- [626.](#) *Maskell v Horner* [1915] 3 K.B. 106, 120. See below, para.29-097.
- [627.](#) The presence of an alternative remedy has been said to be irrelevant in cases involving detention of the payer’s property (*Astley v Reynolds* (1731) 2 Str. 915, below, para.29-098; *Kanhaya Lal v National Bank of India* (1913) 29 T.L.R. 314, 315. cf. *Ashmole v Wainwright* (1842) 2 Q.B. 837, 845) but would appear to be relevant where there is no such detention (*Knibbs v Hall* (1794) Peake 276; *Twyford v Manchester Corp* [1946] Ch. 236, 241-242; *Pao On v Lau Yiu Long* [1980] A.C. 614, 635; *B. & S. Contracts and Design Ltd v Victor Green Publications Ltd* [1984] I.C.R. 419; *The Alev* [1989] 1 Lloyd’s Rep. 138, 146-147; *Hennessy v Craigmyle & Co* [1986] I.C.R. 461. cf. *North Ocean Shipping v Hyundai Construction Co Ltd* [1979] Q.B. 705, 715, 719.
- [628.](#) *The Siboen and The Sibotre* [1976] 1 Lloyd’s Rep. 293, 336; *North Ocean Shipping v Hyundai Construction Co Ltd* [1979] Q.B. 705, 717, 719; *Pao On v Lau Yiu Long* [1980] A.C. 614, 635.
- [629.](#) *Universe Tankships Inc of Monrovia v I.T.W.F.* [1983] 1 A.C. 366, 384, 400; *B. & S. Contracts and Design Ltd v Victor Green Publications Ltd* [1984] I.C.R. 419, 426-428; *Dimskal S.S. Co Ltd v I.T.W.F.* [1992] 2 A.C. 152, 165-166.
- [630.](#) *Atlee v Backhouse* (1838) 2 M. & W. 633; *Wakefield v Newbon* (1844) 6 Q.B. 276, 281; *Callisher v Bischoffsheim* (1870) L.R. 5 Q.B. 449; *Miles v New Zealand Alford Estate Co* (1885) 32 Q.B.D. 266, 291; *The Siboen and the Sibotre* [1976] 1 Lloyd’s Rep. 293, 334. See above, paras 4-053—4-054.
- [631.](#) See below, para.29-104.
- [632.](#) *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] Q.B. 705, 720-721; *B. & S. Contracts and Design Ltd v Victor Green Publications Ltd* [1984] I.C.R. 419, 428.
- [633.](#) See *Halpern v Halpern (Nos 1 and 2)* [2007] EWCA Civ 291, [2008] Q.B. 195.
- [634.](#) Above, para.8-012.
- [635.](#) Above, paras 8-055-8-057.
- [636.](#) In the analogous situation of duress of goods, there is ample authority permitting such recovery: see below, paras 29-097—29-099. cf. *Williams v Bayley* (1866) L.R. 1 H.L. 200; *Kaufman v Gerson* [1904] 1 K.B. 591.
- [637.](#) Below, paras 29-147 et seq.
- [638.](#) [1915] 3 K.B. 106, 118. See *Kanhaya Lal v National Bank of India* (1913) 29 T.L.R. 314; *Somes v British Empire Shipping Co* (1860) 8 H.L.C. 338.
- [639.](#) The goods may be merely in the possession of the claimant, and not owned by him: *Fell v Whittaker* (1871) L.R. 7 Q.B. 120. cf. *Scarfe v Halifax* (1840) 7 M. & W. 288. Duress of goods is also discussed, above, para.8-013.
- [640.](#) *Valpy v Manley* (1845) 1 C.B. 594. On the position where the money is paid under duress to an

agent of a third person, *Oates v Hudson* (1851) 6 Ex. 346; *Owen & Co v Cronk* [1895] 1 Q.B. 265; *T.D. Keegan Ltd v Palmer* [1961] 2 Lloyd's Rep. 449, 459. See Vol.II, para.31-109. cf. the position where the claimant is coerced by the defendant to pay money to a third party: *Re Hooper and Grass' Contract* [1949] V.L.R. 269.

- [641.](#) This is another instance where restitution for wrongdoing might also be available (see below, para.29-147) since the defendant would usually be liable in the tort of conversion.
- [642.](#) *Atlee v Backhouse* (1838) 3 M. & W. 633, 650. See also *Shaw v Woodcock* (1827) 7 B. & C. 73; *Green v Duckett* (1883) 11 Q.B.D. 275 (excessive sum demanded on distress damage feasant); *North v Walthamstow U.D.C.* (1898) 62 J.P. 836; *T.D. Keegan Ltd v Palmer* [1961] 2 Lloyd's Rep. 449; cf. *Maskell v Horner* [1915] 3 K.B. 106 (above, para.29-097).
- [643.](#) (1732) 2 Stra. 915.
- [644.](#) "The plaintiff might have such an immediate want of his goods, that an action of trover would not do his business" (*Astley* (1732) 2 Stra. 915, 916).
- [645.](#) Common Carrier: *Ashmole v Wainwright* (1842) 2 Q.B. 837; cf. *Skeate v Beale* (1841) 11 A. & E. 983; *G.W. Ry v Sutton* (1869) L.R. 4 H.L. 226 (below, para.29-099). See also Vol.II, para.36-016. Other carriers: *The Alev* [1989] 1 Lloyd's Rep. 138.
- [646.](#) *Scarfe v Hallifax* (1840) 7 M. & W. 288, 290.
- [647.](#) *Wakefield v Newbon* (1844) 6 Q.B. 276; *Turner v Deane* (1849) 3 Ex. 836; and see *Pratt v Vizard* (1833) 5 B. & Ad. 808; *Smith v Sleaf* (1844) 12 M. & W. 585; *Oates v Hudson* (1851) 6 Ex. 346. cf. *Re Llewellyn* [1891] 3 Ch. 145.
- [648.](#) *Close v Phipps* (1844) 7 M. & G. 586; and see *Fraser v Pendlebury* (1861) 31 L.J.C.P. 1. The PC has applied a similar rule to detention of land: *Kanhaya Lal v National Bank of India* (1913) 29 T.L.R. 314.
- [649.](#) Burrows at pp.266-267; Goff and Jones at paras 10-46–10-53; Virgo at pp.205, 395-396. On recovery of money paid by exploitation, see below, para.29-143.
- [650.](#) *Morgan v Palmer* (1824) 2 B. & C. 729; cf. *Traherne v Gardner* (1856) 5 E. & B. 913; *Hooper v Exeter Corp* (1887) 56 L.J.Q.B. 457 (harbour dues); *Marshall Shipping Co v Board of Trade* [1923] 2 K.B. 343; *R. v Brocklebank* [1925] 1 K.B. 52; *R. & W. Paul Ltd v The Wheat Commission* [1937] A.C. 139; *Mason v State of N.S.W.* (1959) 102 C.L.R. 108; *Bell Bros Pty Ltd v Shire of Serpentine-Jarrahdale* (1969) 44 A.L.J.R. 26.
- [651.](#) [1993] A.C. 70; above, para.29-090.
- [652.](#)  For the view that it does not, see Goff and Jones at paras 10-42–10-45. For the view that it could, see Beatson (1993) 109 L.Q.R. 401, 404-410; Burrows at p.267; Virgo at p.396; Enonchong in Elliott, Häcker and Mitchell, *Restitution of Overpaid Tax*, 85.
- [653.](#) e.g. *Morgan v Palmer* (1824) 2 B.C. 729; *Steele v Williams* (1853) 8 Ex. 625.
- [654.](#) e.g. *Atlee v Backhouse* (1838) 3 M. & W. 633.
- [655.](#) *Steele v Williams* (1853) 8 Ex. 625.
- [656.](#) *Morgan v Palmer* (1824) 2 B.C. 729.
- [657.](#) (1824) 2 B.C. 729.
- [658.](#) *Steele v Williams* (1853) 8 Ex. 625.
- [659.](#) *South of Scotland Electricity Board v British Oxygen Ltd (No.2)* [1959] 1 W.L.R. 587 (recovery

not directed since facts not found), discussed in *Woolwich Equitable Building Society v IRC* [1993] A.C. 70, 133-134, 159-160, 165, 187-188.

- [660.](#) *Fernley v Branson* (1851) 20 L.J.Q.B. 178; *Barnes v Braithwaite* (1857) 2 H. & N. 569; *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] Q.B. 705, 716.
- [661.](#) *Dew v Parsons* (1819) 2 B. & Ald. 562. On mistake of law, see above, paras 29-044 et seq.
- [662.](#) *Twyford v Manchester Corp* [1946] Ch. 236 (criticised by Marsh (1946) 62 L.Q.R. 333). On voluntary payments see below, paras 29-115 et seq. cf. *R. v William Whiteley Ltd* (1909) 101 L.T. 741 (criticised by Munkman, *The Law of Quasi-Contracts* pp.39-40); *Sebel Products Ltd v Commissioners of Customs and Excise* [1949] Ch. 409. Note, however, that the plaintiff in *Maskell v Horner* [1915] 3 K.B. 106 (above, para.29-097) did not bring an action challenging the tolls until he had been paying them for 12 years.
- [663.](#) *Twyford v Manchester Corp* [1946] Ch. 236, 239, 242; *R. v William Whiteley Ltd* (1909) 101 L.T. 74.
- [664.](#) Which does not even require proof of a demand: *Test Claimants in the Franked Investment Income (FII) Group Litigation v Commissioners for Her Majesty's Revenue and Customs* [2012] UKSC 19, [2012] 2 A.C. 337. See para.29-091, above.
- [665.](#) *Mason v New South Wales* (1959) 102 C.L.R. 108, 116-117 (Dixon J.). See also, at 126-127, 146; *Steele v Williams* (1853) 8 Ex. 625; *Hooper v Exeter Corp* (1887) 56 L.J.Q.B. 457; *Queens of the River S.S. Co Ltd v Conservators of the River Thames* (1899) 15 T.L.R. 474; *South of Scotland Electricity Board v British Oxygen Co Ltd (No.2)* [1959] 1 W.L.R. 587; *Rogers v Louth CC* [1981] I.R. 265. See further *Woolwich Equitable B.S. v IRC* [1993] A.C. 70, 173 (Lord Goff).
- [666.](#) Above, para.29-090.
- [667.](#)  Above, para.29-100. See also Goff and Jones at para.10-44.
- [668.](#) *North v Walthamstow U.D.C.* (1898) 67 L.J.Q.B. 972. See also *Gebhardt v Saunders* [1892] 2 Q.B. 452; *Andrew v St Olave's Board of Works* [1898] 1 Q.B. 775; *Ellis v Bromley R.D.C.* (1899) 81 L.T. 224; *Wilson's Music & General Printing Co v Finsbury BC* [1908] 1 K.B. 563; cf. *Thompson and Norris Manufacturing Co Ltd v Hawes* (1895) 73 L.T. 369; *Oliver v Camberwell BC* (1904) 90 L.T. 285.
- [669.](#) Similar principles apply where the payee was legally obliged to act without payment: see extortion *colore officii*, above, para.29-100.
- [670.](#) *Great Western Ry v Sutton* (1869) L.R. 4 H.L. 226. cf. *South of Scotland Electricity Board v British Oxygen Co Ltd* [1959] 1 W.L.R. 587. On the position of a common carrier, see Vol.II, paras 36-007 et seq., especially para.36-016.
- [671.](#) *Great Western Ry v Sutton* (1869) L.R. 4 H.L. 226, 249. See also *Parker v G.W. Ry* (1844) 7 M. & G. 253; *Denaby Main Colliery Co Ltd v M.S. & L. Ry* (1885) 11 App. Cas. 97; *North Staffs Ry v Edge* [1920] A.C. 254. Recovery has been permitted although part of the excess was received by the defendant company as agent for a third party: *Parker v Bristol and Exeter Ry* (1851) 6 Ex. 702.
- [672.](#) See also the rule permitting the compromise of an invalid claim, above, paras 4-051—4-057.
- [673.](#) *Marriot v Hampton* (1797) 7 T.R. 269; *Hamlet v Richardson* (1833) 9 Bing. 644; *Moore v Vestry of Fulham* [1895] 1 Q.B. 399; *Self v Hove Commissioners* [1895] 1 Q.B. 685, 690; *R. v William Whiteley Ltd* (1910) 101 L.T. 741; *Maskell v Horner* [1915] 3 K.B. 106, 121-122; *Sawyer and Vincent v Window Brace Ltd* [1943] K.B. 32; *Woolwich Equitable Building Society v IRC* [1993] A.C. 70, 98, 121, 135-136, 140, 165, 174, 178, 196, 198, 200-201. cf. *Rogers v Ingham* (1876) 3 Ch. D. 351; *Caird v Moss* (1886) 33 Ch. D. 22, 36; *Binder v Alachouzou* [1972] 2 Q.B. 151. (The rule also applies to payment in the course of foreign litigation: *Clydesdale Bank Ltd v*


Schroder & Co [1913] 2 K.B. 1.) See generally above, para.8-052.

674. 651 *Marriot v Hampton* (1797) 7 T.R. 269; *Binder v Alachouzos* [1972] 2 Q.B. 151.

675. *Ward & Co v Wallis* [1900] 1 Q.B. 675. cf. *Pitt v Coomes* (1835) 2 A. & E. 459; *Duke de Cadaval v Collins* (1836) 4 A. & E. 858.


676. *Newdigate v Davy* (1701) 1 Ld. Raym. 742; *Farrow v Mayes* (1852) 18 Q.B. 516; *Re Smith* (1888) 20 Q.B.D. 321. cf. *O'Connor v Isaacs* [1956] 2 Q.B. 288. In *Jim Ennis Construction Ltd v Premier Asphalt Ltd* [2009] EWHC 1906 (TCC) it was recognised that restitution lay where an adjudication award, and by analogy an arbitration award, was set aside, with specific reference to the ground of compulsion.

677. Burrows at Ch.17; Goff and Jones at Ch.19-21; Virgo at pp.233-253; Winfield (1944) 60 L.Q.R. 341 (also his *Quasi-Contracts* (1952), pp.62-88). On compulsory payments to the defendant, see above, paras 29-094 et seq. and on duress or undue influence, which renders a contract voidable, see above, paras 8-003, 8-058, 29-094—29-099, below, paras 29-143—29-144.

678.  (1872) L.R. 7 Ex. 101, 104 (which passage was in turn quoted with approval in *Brook's Wharf and Bull Wharf Ltd v Goodman Brothers* [1937] 1 K.B. 534, 543-544). See below, para.29-107. See also *Niru Battery Manufacturing Co v Maritime Freight Services Ltd* [2004] EWCA Civ 487, [2004] 2 All E.R. (Comm) 289 where the “principles of recoupment” were applied, although the effect was to recognise a restitutionary claim founded on the ground of legal compulsion; *Berghoff Trading Ltd v Swinbrook Developments Ltd* [2008] EWHC 1785 (Comm) (recognition of right to recoupment from one debtor in favour of another). In *Angove's Pty Ltd v Bailey* [2016] UKSC 47, [2016] 1 W.L.R. 3179 at [16(4)] (Lord Sumption) *Moule v Garrett* was specifically approved and was explicitly justified by reference to the law of unjust enrichment.

679. See below, para.29-107.

680. *Simpson v Eggington* (1855) 10 Ex. 845, 847; *Smith v Cox* [1940] 2 K.B. 558. (These authorities were not considered in *Owen v Tate* [1976] Q.B. 402 (below, para.29-112).) See *Birks and Beatson* (1976) 92 L.Q.R. 188-202; and below, para.29-121. But cf. *Friedmann* (1983) 99 L.Q.R. 534. On voluntary payments, see below, paras 29-113 et seq.


681.  e.g. *Moule v Garrett* (1871-72) L.R. 7 Ex. 101; *Brook's Wharf and Bull Wharf Ltd v Goodman Bros* [1937] 1 K.B. 534, 544. In *Ibrahim v Barclays Bank Plc* [2012] EWCA Civ 640, [2013] Ch. 400 Lewison L.J. recognised at [49] that payment under legal compulsion (there by a bank honouring a letter of credit) automatically discharged the debt, even if the legal compulsion arose from a contractual obligation voluntarily assumed by the payer. See also *Angove's Pty Ltd v Bailey* [2016] UKSC 47, [2016] 1 W.L.R. 3179 at [16(4)] (Lord Sumption).

682. See below, paras 29-109—29-113.

683. *Kleinwort Benson Ltd v Vaughan* [1996] C.L.C. 620.

684. e.g. *Kendal v Wood* (1871) L.R. 6 Ex. 243. See also payments made by necessity, below, para.29-118; *Owen v Tate* [1976] Q.B. 402, 412 (Scarman L.J.); *The “Zuhal K”* [1987] 1 Lloyd's Rep. 151. But cf. *Re Gasbourne Pty Ltd* [1984] V.R. 801, 840-845 (practical commercial compulsion not a ground for restitution). Quaere whether this is consistent with the development of economic duress, above, para.8-015. See also *Peel (Regional Municipality) v Canada* [1992] 3 S.C.R. 762 (local authority which was required by ultra vires statute to maintain delinquents could not recover from federal government because benefit was incidental or collateral).

685. Below, para.29-125. Analogous to this is the surety's right to claim contribution from a co-surety (below, para.29-129). Also analogous are other claims to contribution, such as the right of one joint tortfeasor to claim contribution from another (s.1(1) of the Civil Liability (Contribution) Act 1978) (below, para.29-127).

- [686.](#)  [2017] UKSC 29, [2017] 2 W.L.R. 1200 at [49]. See also *Lowick Rose LLP v Swynson Ltd* [2017] UKSC 32, [2017] 2 W.L.R. 1161 at [29] (Lord Sumption).
- [687.](#) The subsection gives as an example of its operation the case where a converter of goods pays damages first to a finder and then to the true owner. The finder is unjustly enriched unless he accounts to the true owner who is himself then unjustly enriched and becomes liable to reimburse the converter.
- [688.](#) *Receiver for the Metropolitan Police District v Croydon Corp* [1957] 2 Q.B. 154 (*Receiver for the Metropolitan Police District v Tatum* [1948] 2 K.B. 68, though not referred to in this case, must be taken to have been impliedly overruled by it). See *Monmouthshire CC v Smith* [1956] 1 W.L.R. 1132; *affirmed* [1957] 2 Q.B. 154. See also *Re Nott and Cardiff Corp* [1918] 2 K.B. 146 reversed by the House of Lords on a different point: [1919] A.C. 337.
- [689.](#) *Receiver for the Metropolitan Police District v Croydon Corp* [1957] 2 Q.B. 154.
- [690.](#) Lord Goddard C.J., *Croydon Corp* [1957] 2 Q.B. 154, 162, pointed out that the real loss sustained by the police authority was the loss of the constable's services, but that recovery for that loss by an action per quod servitium amisit was excluded because a constable was not a "servant" of the authority: *Att-Gen for New South Wales v Perpetual Trustee Co Ltd* [1955] A.C. 457. See, however, the recommendation of the 11th Report of the Law Reform Committee, Cmnd. 2017.
- [691.](#) [1937] 1 K.B. 534, 544. This has been taken to mean that the claimant and the defendant must have been subject to a *common demand* for money, which the defendant was ultimately liable to pay: *Bonner v Tottenham and Edmonton Permanent Investment Building Society* [1899] 1 Q.B. 161, 171-174, but the cases on pressure falling short of secondary liability (below, paras 29-109—29-111) show that this is not so: *Whitham v Bullock* [1939] 2 K.B. 81, 85. *Bonner's* case itself can be explained on the ground that no debt was discharged. See also *Niru Battery Manufacturing Co v Milestone Trading Ltd (No.2)* [2004] EWCA Civ 487, [2004] 2 All E.R. (Comm) 289 where restitution was available even though the claimant and the defendant were not subject to a common demand.
- [692.](#) [2007] EWCA Civ 664, [2008] 1 All E.R. 221.
- [693.](#) *Edmunds v Wallingford* (1885) 14 Q.B.D. 811, 814-815. See also *Dawson v Linton* (1822) 5 B. & Ald. 521; *Ex p. Elliot* (1838) 3 Deac. 343; *Johnson v Skafta* (1869) L.R. 4 Q.B. 700.
- [694.](#) If the plaintiff had, as a trespasser, placed his goods there without authority, his payment of rent to the landlord to redeem his goods would give him no right to indemnity from the tenant, since he would have: "... by his own voluntary act, and without any request of the defendant, express or implied, placed his goods in a position to enable the landlord to seize them". *England v Marsden* (1866) L.R. 1 C.P. 529, 533. In *Edmunds v Wallingford* (1884) 14 Q.B.D. 811, 816, the court thought that the decision in *England v Marsden* was wrong on the facts.
- [695.](#) *Exall v Partridge* (1799) 8 T.R. 308. See also *Bevan v Waters* (1828) 3 C. & P. 520.
- [696.](#) *The Orchis* (1890) 15 P.C. 38; *Johnson v Royal Mail Steam Packet Co* (1867) L.R. 3 C.P. 38. See also *The Heather Bell* [1901] P. 143; *affirmed* on another point, at 272.
- [697.](#) *Johnson v Skafta* (1869) L.R. 4 Q.B. 700. cf. *Re Button* [1907] 2 K.B. 180, 188, 190 (in respect of goods bailed to debtor).
- [698.](#) Insolvency Act 1986 s.382(4).
- [699.](#) Insolvency Act 1986 s.382(3).
- [700.](#) *Sapsford v Fletcher* (1792) 4 T.R. 511; *Jones v Morris* (1849) 3 Ex. 742, 747; *Underhay v Read* (1887) 20 Q.B.D. 209. The mere fact that the head lessor grants the underlessee time to pay does not prevent its being a compulsory payment: *Carter v Carter* (1829) 5 Bing. 406.



- [701.](#) *Hunter v Hunt* (1845) 1 C.B. 300. See also *Johnson v Wild* (1890) 44 Ch. D. 146 (below, para.29-128); *Langan* (1967) 31 Conv.(N.S.) 38.
- [702.](#) (1872) L.R. 7 Ex. 101 (above, para.29-105). See also Law of Property Act 1925 s.77, as amended (implied covenant by assignee to indemnify against breach of covenant); *Dickinson UK Ltd v Zwebner* [1989] Q.B. 208; *Re Healing Research Trustee Ltd* [1992] 2 All E.R. 481.
- [703.](#) cf. a mere recommendation: *Silles v Fulham BC* [1903] 1 K.B. 829.
- [704.](#) *Gebhardt v Saunders* [1892] 2 Q.B. 452, 456, 458 (reimbursement was granted on common law grounds, as well as under the relevant statute). See also the cases cited above, para.29-102; *Hackett v Smith* [1917] 2 I.R. 508.
- [705.](#) *Dawson v Linton* (1822) 5 B. & Ald. 521; cf. *Eastwood v McNab* [1914] 2 K.B. 361; *Hales v Freeman* (1819) 1 B. & B. 391. An illustration from a (now repealed) statutory provision was the right of a tenant who paid Sch.A tax to deduct the amount from his next payment of rent: Income Tax Act 1952 s.173; *Hill v Kirshenstein* [1920] 3 K.B. 556; cf. the cases cited above, para.29-111.
- [706.](#) *Baker v Greenhill* (1842) 3 Q.B. 148. cf. *Macclesfield Corp v Great Central Ry* [1911] 2 K.B. 528.
- [707.](#) *Pownal v Ferrand* (1827) 6 B. & C. 439; cf. *Ex p. Bishop* (1880) 15 Ch. D. 400. But cf. ss.57 and 59(2) of the Bills of Exchange Act 1882 (Vol.II, para.34-124).
- [708.](#) cf. cases where the request of the defendant to make the payment will be implied: below, paras 29-122—29-125.
- [709.](#) For exceptional circumstances in which a voluntary payment may be recovered, see below, para.29-118.
- [710.](#) See Burrows at pp.459-452; Virgo at pp.36-37, 243-245; *Hope* (1929-1930) 15 Cornell L.Q. 25, 205. See, in addition to the cases cited below, *Stokes v Lewis* (1785) 1 T.R. 20; *Bates v Townley* (1848) 2 Ex. 152; *Re Cleadon Trust Ltd* [1939] Ch. 286; *Aktieselskabet Dampskibs Steinstad v William Pearson & Co* (1927) 137 L.T. 533; *Wilson v Audio-Visual Equipment Ltd* [1974] 1 Lloyd's Rep. 81. cf. *Pownal v Ferrand* (1827) 6 B. & C. 439, 443-444; *Owen v Tate* [1976] Q.B. 402, below, para.29-116; *Re Gasbourne Pty Ltd* [1984] V.R. 807; *Esso Petroleum Ltd v Hall Russell & Co* [1989] A.C. 643; *Kleinwort Benson Ltd v Vaughan* [1996] C.L.C. 620.
- [711.](#) *Re National Motor Mail Coach Co Ltd* [1908] 2 Ch. 515, 520 (approved, 523).
- [712.](#) *Sleigh v Sleigh* (1850) 5 Ex. 514 (distinguished in *Re Chetwynd's Estate* [1938] Ch. 13). cf. payment for honour supra protest (s.68(3) and (4) of the Bills of Exchange Act 1882; see Vol.II, para.34-143).
- [713.](#) *Re National Motor Mail Coach Co Ltd* [1908] 2 Ch. 515 (see above, para.10-015).
- [714.](#) *Falcke v Scottish Imperial Insurance Co* (1886) 34 Ch. D. 234 (below, para.29-121). cf. *Re Leslie* (1883) 23 Ch. D. 552 and note the developing law concerning restitution for interventions in cases of necessity and where an incontrovertible benefit is conferred, above, para.29-021, below, paras 29-136 et seq.
- [715.](#) Save where the claimant suspects that he was not liable to pay. See para.29-038, above. See also *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 A.C. 221, below, para.29-180.
- [716.](#) [1976] Q.B. 402, 411-412. The case has been criticised because it assumed, without considering and in the face of the authorities (above, para.29-105), that the payment discharged the debt. Had the authorities been considered it is arguable that a claim based on the acquiescence of the debtor (on which see above, para.29-020, below, para.29-122) would

have succeeded; Birks and Beatson (1976) 92 L.Q.R. 188, 208-212. cf. Friedmann (1983) 99 L.Q.R. 534. There should, moreover, be no objection to the volunteer deriving rights against the debtor by assignment or subrogation. McCamus (1978) 16 Osgoode Hall L.J. 516, 550-559. Subrogation does not appear to have been argued in *Owen v Tate*, on which see Mercantile Law Amendment Act 1856 s.5; Burrows at pp. 449-452.

- [717.](#) *Macclesfield Corp v Great Central Ry* [1911] 2 K.B. 528. cf. above, para.29-113 and see *Procter & Gamble Philippine Manufacturing Corp v Peter Cremer GmbH & Co* [1988] 3 All E.R. 843, 854-856 (recognition of incontrovertible benefit although not applicable on facts).
- [718.](#) *Maskell v Horner* [1915] 3 K.B. 106, 119, 127. See also *Twyford v Manchester Corp* [1946] Ch. 236 (above, para.29-100); *R. v William Whiteley Ltd* (1909) 101 L.T. 741; *Woolwich Equitable Building Society v IRC* [1993] A.C. 70, 165, 174, 178, 192, 196, 200.
- [719.](#) *Maskell v Horner* [1915] 3 K.B. 106, 119-120, 126.
- [720.](#) [1915] 3 K.B. 106, 118.
- [721.](#) *Spragg v Hammond* (1820) 2 Brod. & B. 59. cf. *Denby v Moore* (1817) 1 B. & Ald. 123.
- [722.](#) See above, para.29-104.
- [723.](#) See below, paras 29-122—29-125.
- [724.](#) [1939] Ch. 286, 302. See further below, para.29-180 (subrogation).
- [725.](#) See above, para.29-055 (cf. below, para.29-169).
- [726.](#) See Vol.II, paras 31-027 et seq.
- [727.](#) See below, para.29-136.
- [728.](#) See below, para.29-137.
- [729.](#) [1976] Q.B. 402 (noted Samuel (1975) 91 L.Q.R. 308; Cornish (1975) 38 M.L.R. 563; Oakley [1975] C.L.J. 202). See Birks and Beatson (1976) 92 L.Q.R. 188; cf. Friedmann (1983) 99 L.Q.R. 534.
- [730.](#) [1976] Q.B. 402, 411-412.
- [731.](#) [1976] Q.B. 402, 413.
- [732.](#) *The Zuhal K.* [1987] 1 Lloyd's Rep. 151. See also at *Re Berkeley Applegate Ltd* [1989] Ch. 32. cf. *Esso Petroleum Ltd v Hall Russell & Co* [1989] A.C. 643.
- [733.](#) [1976] Q.B. 402, 413.
- [734.](#) [1976] Q.B. 402, 414.
- [735.](#) cf. compulsory payments, above, paras 29-094, 29-105.
- [736.](#) *Brittain v Lloyd* (1845) 14 M. & W. 762, 773; approved in *Lewis v Campbell* (1849) 8 C.B. 541, 547-548 and in *Re A Debtor* [1937] Ch. 156, 163. See also *Re H.P.C. Productions Ltd* [1962] Ch. 466, 487. The transfer of property with a marketable value may be equivalent to the payment of money: *Fahey v Frawley* (1890) 26 L.R.Ir. 78, 89-90.
- [737.](#) *Brittain v Lloyd* (1845) 14 M. & W. 762.
- [738.](#) cf. *Secretary of State v Bank of India Ltd* [1938] 2 All E.R. 797, 800 (see below, para.29-126).

- [739.](#) See Vol.II, para.31-162; also below, para.29-123.
- [740.](#) e.g. making a payment which does not discharge a liability of the defendant; *Brittain v Lloyd* (1845) 14 M. & W. 762; *Warlow v Harrison* (1858) 1 E. & E. 295, 317.
- [741.](#) *Spencer v Parry* (1835) 3 A. & E. 331; *Lubbock v Tribe* (1838) 3 M. & W. 607.
- [742.](#) *Sleigh v Sleigh* (1850) 5 Ex. 514, 516. See also *Ibrahim v Barclays Bank Plc* [2011] EWHC 1897 (Ch), [2012] 1 B.C.L.C. 33 at [133] (Vos J).
- [743.](#) *Leigh v Dickeson* (1884) 15 Q.B.D. 60, 64-65.
- [744.](#) *Stokes v Lewis* (1785) 1 T.R. 20; *Owen v Tate* [1976] Q.B. 402 (discussed in Birks and Beatson (1976) 92 L.Q.R. 188); see also above, para.29-118; but see *Liggett (Liverpool) Ltd v Barclays Bank* [1928] 1 K.B. 48, for the liability of the defendant in Equity, although the meaning, if not the decision, in this case is put into question by *Re Cleadon Trust Ltd* [1939] Ch. 286, 316-318, 326-327.
- [745.](#) See above, paras 19-001 et seq.
- [746.](#) (1886) 34 Ch. D. 234, 248-249; *The Istros II* [1973] 2 Lloyd's Rep. 152, 157. But see *G.N. Ry v Swaffield* (1874) L.R. 9 Ex. 132 (carrier entitled to recover reasonable cost of caring for horse when consignee failed to take delivery of it); *Re Berkeley Applegate Ltd* [1989] Ch. 32 (allowance for expenses of administering trust property to liquidator); *Procter & Gamble Philippine Manufacturing Corp v Peter Cremer GmbH & Co* [1988] 3 All E.R. 843, 854-855.
- [747.](#) e.g. *Sorrell v Paget* [1950] 1 K.B. 252.
- [748.](#) cf. cases where the claimant has rendered services to the defendant at his implied request (above, para.29-071), or has salvaged the defendant's ship or its cargo (below, para.29-142), or has performed services for the defendant in an emergency (below, para.29-137).
- [749.](#) *Re Cleadon Trust Ltd* [1939] Ch. 286, 299, citing 1 Sm. L.C., 13th edn, at 156; cf. *Unity Joint Stock Mutual Banking Association v King* (1858) 25 Beav. 72; cf. also cases where the defendant acquiesces in improvements to his land being made by the claimant: below, para.29-169.
- [750.](#) *Bailey v Haines* (1849) 13 Q.B. 815, 832. See also *Brewer Street Investments Ltd v Barclays Woollen Co Ltd* [1954] 1 Q.B. 428; *William Lacey (Hounslow) Ltd v Davis* [1957] 1 W.L.R. 932.
- [751.](#) *City Bank of Sydney v McLaughlin* (1909) 9 C.L.R. 615, 625 (in the context of agency of necessity). See also above, paras 4-094, 4-147—4-148; *Phillips v Homfray* (1871) L.R. 6 Ch. App. 770, 778; *Brewer Street Investments Ltd v Barclays Woollen Co Ltd* [1954] 1 Q.B. 428, 431. See further *Stiles v Cooper* (1748) 3 Atk. 692; *Van der Berg v Giles* [1979] 2 N.Z.L.R. 111.
- [752.](#) Above, paras 29-105 et seq.
- [753.](#) See Vol.II, paras 31-162—31-163.
- [754.](#) *Westropp v Solomon* (1849) 8 C.B. 345; and see *Duncan v Hill* (1873) L.R. 8 Ex. 242; *Hartas v Ribbons* (1889) 22 Q.B.D. 254; *Hunt, Cox & Co v Chamberlain* (1896) 12 T.L.R. 186; *Beckhuson and Gibbs v Hamblet* [1900] 2 Q.B. 18. The custom must satisfy the test of reasonableness.
- [755.](#) *Allen v Wingrove* (1901) 17 T.L.R. 261; *Wilson v Audio-Visual Equipment Ltd* [1974] 1 Lloyd's Rep. 81. cf. *Bowlby v Bell* (1846) 3 C.B. 284.
- [756.](#) *Leigh v Dickeson* (1884) 15 Q.B.D. 60; *Re Jones* [1893] 2 Ch. 461, 476 et seq.; *Re Cook's Mortgage* [1896] 1 Ch. 923. On a partition, however, Equity may take account of expenditure between tenants in common. (This represents the law prior to 1926 as regards tenants in

common of land. After 1925 the legal estate will often be vested in the tenants in common as joint tenants on trust for sale and as trustees their liability may have been affected: Law of Property Act 1925 s.34.)

- [757.](#) On contracts of guarantee in general, see Vol.II, paras 45-001 et seq. On contribution between sureties, see below, para.29-129 and Vol.II, paras 45-125, 45-135—45-137.
- [758.](#) See Vol.II, para.45-125. The surety may also bring a quia timet action against the principal debtor: *Watt v Mortlock* [1964] Ch. 84.
- [759.](#) *Owen v Tate* [1976] Q.B. 402. (The guarantor might, however, obtain from the creditor an assignment of the debt: see Cornish (1975) 38 M.L.R. 563, 564-565 or, possibly, be subrogated to the creditor's rights, a point apparently not taken in the case; above, para.29-116.)
- [760.](#) *The Zuhal K.* [1987] 1 Lloyd's Rep. 151.
- [761.](#) One statement of the principle limits it to acts performed in the course of "a statutory or common law duty of a ministerial character": *Sheffield Corp v Barclay* [1905] A.C. 392, 399.
- [762.](#) The principle may apply even if the person acting was able to deliberate whether he should accede to the request: *Secretary of State v Bank of India Ltd* [1938] 2 All E.R. 797.
- [763.](#) *Sheffield Corp v Barclay* [1905] A.C. 392, 397 (citing the argument of Mr. Cave in *Dugdale v Lovering* (1875) L.R. 10 C.P. 196, 197) and 399; *Secretary of State v Bank of India Ltd* [1938] 2 All E.R. 797, 800; see also *Stathlorne S.S. Co Ltd v Andrew Weir & Co* (1934) 40 Com. Cas. 168. For a similar principle in the law of agency, see Vol.II, para.31-162; cf. *W. Cory & Son Ltd v Lambton and Hetton Collieries Ltd* (1916) 86 L.J.K.B. 401.
- [764.](#) *Sheffield Corp v Barclay* [1905] A.C. 392. See also *Att-Gen v Odell* [1906] 2 Ch. 47; *Bank of England v Cutler* [1908] 2 K.B. 208; *Secretary of State v Bank of India Ltd* [1938] 2 All E.R. 797; *Yeung Kai Yung v Hong Kong and Shanghai Banking Corp* [1981] A.C. 787.
- [765.](#) Above, paras 29-105—29-114. This is referred to as indemnity by the Law Commission: Law Com. No.79, 1977, para.16.
- [766.](#)  See above, Ch.17; Burrows at 458-460; Goff and Jones at paras 20-02–20-47; Virgo at 246-251. See also Report on Contribution (Law Com. No.79, 1977); Mitchell, *The Law of Contribution and Reimbursement* (2003).
- [767.](#)  *Whitham v Bullock* [1939] 2 K.B. 81, 85 (quoting Rowlatt, *Principal and Surety*, 3rd edn, p.173). In New Zealand the award of equitable contribution depends on there being shared liability for the same damage and a judicial assessment of what is just and reasonable: *Hotchin v New Zealand Guardian Trust Co Ltd* [2016] NZSC 24. See Stace (2017) 133 L.Q.R. 20.
- [768.](#) See Williams, *Joint Obligations* (1949), Ch.10; above, Ch.17; Law Comm. No.79, 1977, paras 13-15, 27-29.
- [769.](#) Vol.II, Ch.42, Ch.44.
- [770.](#) *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 A.C. 366 at [76] (Lord Hobhouse); *Lavin v Toppi* [2015] HCA 4.
- [771.](#) *Royal Brompton Hospital NHS Trust v Hammond* [2002] UKHL 14, [2002] 1 W.L.R. 1397: "same damage" is not to be interpreted to mean "substantially or materially similar damage"; no glosses, extensive or restrictive to the natural and ordinary meaning of the words, are warranted. Damage does not mean "damages" but "harm". So a claim under the Act will not be available where one party is liable for breach of contract and the other for unjust enrichment. However, in *Niru Battery Manufacturing Co v Milestone Trading Ltd (No.2)* [2004] EWCA Civ 487, [2004] 2 All E.R. (Comm) 289 the Court of Appeal suggested that, if it had been necessary

to decide the point, the dicta in *Royal Brompton Hospital Trust* concerning the meaning of “damage” were obiter and that it was bound by the earlier decision of the Court of Appeal in *Friends’ Provident Life Office v Hillier Parker May and Rowden (A Firm)* [1997] Q.B. 85, which held that a claim for restitution could be treated as a claim for compensation for the purposes of the 1978 Act, so that claims for breach of contract or tort and for unjust enrichment could be treated as claims for the same damage. See also *City Index Ltd v Gawler* [2007] EWCA Civ 1382, [2008] Ch. 313 where the restitutionary remedy for the action of unconscionable receipt was characterised as compensatory so that the defendant to that claim could be considered to be liable for the same damage as tortfeasors. See Virgo [2008] 67 C.L.J. 254, Goymour [2008] R.L.R. 113 and Gardner (2009) 125 L.Q.R. 20. See also *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579, [2012] Q.B. 549.

- [772.](#) Civil Liability (Contribution) Act 1978 s.2(1). This follows the form of words in the Law Reform (Married Women and Tortfeasors) Act 1935 s.6(2), which it replaces, and the principles used in determining what is “just and equitable” under the 1935 Act will be relevant; see Law Commission No.79, 1977, paras 68-79. See also *Weaver v Commercial Process Co Ltd* (1947) 63 T.L.R. 466; *The Miraflores and The Abadesa* [1967] A.C. 826, 845. cf. *Collins v Herefordshire CC* [1947] K.B. 598.
- [773.](#) e.g. the facts of *McConnell v Lynch-Robinson* [1957] N.I. 70.
- [774.](#) e.g. *Batty v Metropolitan Realisations Ltd* [1978] Q.B. 554.
- [775.](#) *Friends’ Provident Life Office v Hillier Parker May and Rowden (A Firm)* [1997] Q.B. 85. cf. n.747, above.
- [776.](#) See Law Com. No.79, 1977. See Clerk & Lindsell on Torts, 20th edn (2010), paras 4-12 et seq. Similar provisions permit contribution between vessels responsible for collisions at sea: Merchant Shipping Act 1995 ss.187-189.
- [777.](#) [2008] EWHC 1172 (QB), [2008] 1 W.L.R. 2867.
- [778.](#) Civil Liability (Contribution) Act 1978 s.7(3)(b).
- [779.](#) Above, Ch.17.
- [780.](#) (1890) 44 Ch. D. 146.
- [781.](#) (1890) 44 Ch. D. 146, 150.
- [782.](#) e.g. *Spottiswoode’s Case* (1855) 6 De G.M. & G. 345, 371-372.
- [783.](#) See Vol.II, paras 45-001 et seq.
- [784.](#) In an action for contribution in the Chancery Division, or in a Common Law action for money paid to the defendant’s use.
- [785.](#) See above, para.17-027, and Vol.II, paras 45-125 et seq.
- [786.](#) Civil Liability (Contribution) Act 1978 s.2(1) (discussed above, para.17-029).
- [787.](#) *Lavin v Toppi* [2015] HCA 4.
- [788.](#) Or joint and several contractors.
- [789.](#) See above, para.17-027.
- [790.](#) *Edger v Knapp* (1843) 5 M. & G. 753.
- [791.](#) *Marsack v Webber* (1860) 6 H. & N. 1.

- [792.](#) *Bahin v Hughes* (1886) 31 Ch. D. 390; *Chillingworth v Chambers* [1896] 1 Ch. 685; *Robinson v Harkin* [1896] 2 Ch. 415.
- [793.](#) Civil Liability (Contribution) Act 1978 s.2(1).
- [794.](#) *Spottiswoode's Case* (1855) 6 De G.M. & G. 345, 372; *Ashhurst v Mason* (1875) L.R. 20 Eq. 225; *Re Alexandra Palace Co* (1882) 21 Ch. D. 149; *Ramskill v Edwards* (1885) 31 Ch. D. 100. cf. *Walsh v Bardsley* (1931) 47 T.L.R. 564 (the breach of duty benefited only the director seeking contribution).
- [795.](#) Partnership Act 1890 ss.9-12.
- [796.](#) *Re Royal Bank of Australia, Robinson's Executors* (1856) 6 De G.M. & G. 572, 587-588; Lindley and Banks on Partnership, 19th edn (2010), paras 20-04 et seq. cf. Partnership Act 1890 ss.24(1) and(2), 44.
- [797.](#) *Sedgewick v Daniell* (1857) 2 H. & N. 319.
- [798.](#) *North British and Mercantile Insurance Co v London, Liverpool and Globe Insurance Co* (1876) 5 Ch. D. 569, 581; *Commercial Union Assurance Co Ltd v Hayden* [1977] Q.B. 804; *Legal & General Assurance Co Ltd v Drake Insurance Co Ltd* [1992] 1 Q.B. 877; *Zurich Insurance Plc UK Branch v International Energy Group* [2015] UKSC 33, [2015] 2 W.L.R. 1471. cf. *Eagle Star Insurance Co Ltd v Provincial Insurance Plc* [1993] 3 All E.R. 1. See also the Marine Insurance Act 1906 s.80.
- [799.](#) Lowndes & Rudolf on General Average and York Antwerp Rules, 14th edn (2013); Carver on Carriage by Sea, 13th edn (1982), Ch.14.
- [800.](#) *Birkley v Presgrave* (1801) 1 East 220, 228-229 (Lawrence J). cf. the Marine Insurance Act 1906 s.66(1). It has been doubted whether general average is a form of restitutionary liability: cf. *Milburn & Co v Jamaican Fruit Importing Co* [1900] 2 Q.B. 540, 548, and Winfield, Province of the Law of Tort, p.182. cf. Virgo at p.307 where the restitutionary claim is analysed in terms of necessitous intervention. See also Rose (1997) 113 L.Q.R. 569.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 9 - Restitution

Chapter 29 - Restitution ¹

Section 2. - Unjust Enrichment

(i) - Necessity ⁸⁰¹

Agency of necessity

29-136

! Where there is a relationship of principal and agent (or a similar relationship) between the parties, and the agent, in an emergency, has acted reasonably to protect the interests of his principal, the principal is obliged to reimburse the agent his reasonable expenses incurred in so acting, despite the fact that the agent exceeded his authority. ⁸⁰² The agent must show that it was impracticable at the time of the emergency for him to get instructions from his principal. ⁸⁰³

Necessitous intervention on behalf of the defendant

29-137

! Except in cases of agency of necessity, ⁸⁰⁴ or of salvage, ⁸⁰⁵ English law has usually refused to give a remedy to a person who intervenes in the affairs of another, even where the purpose of his intervention is to benefit that other in an emergency or to rescue the other's property from danger. ⁸⁰⁶

There is, however, support ⁸⁰⁷ **!** for the emergence of a principle that, in an emergency, provided the claimant has acted reasonably and bona fide in the interests of the defendant, in order to protect the defendant's property, health, or other important interests, the claimant may recover the expenses he incurred and, possibly, reasonable remuneration for his services. It is a condition for recovery that it was impracticable to obtain the defendant's instructions or authority.

Acting in the public interest

29-138

Where the public interest demands that the claimant should have acted, the courts are most likely to permit restitution. For instance, where circumstances make it reasonable that the claimant should voluntarily incur expense in burying a person, the executors of the deceased, if they have assets, are liable to repay the expenses incurred by the claimant. ⁸⁰⁸ Where a married woman dies leaving an estate sufficient to pay her funeral expenses, her executors (and not, as formerly, her husband) are liable to pay them. ⁸⁰⁹ Similarly, when human life or limb is at risk, the courts are likely to award restitution to a claimant who has incurred expense or expended effort in a reasonable attempt to preserve life or limb. In a Canadian case, ⁸¹⁰ a surgeon who intended to charge for his services was held entitled to recover remuneration for his professional services in his reasonable, but unsuccessful, attempt to revive a person who committed suicide. Legislation ⁸¹¹ in the United Kingdom entitles a hospital or doctor to charge for emergency treatment given after a road accident.

Analogous categories

29-139

There are a number of other situations where principles analogous to necessitous intervention have been used to justify restitution or reimbursement. ⁸¹² Where there is an existing or a previous relationship between the parties, the courts are naturally more willing to allow recovery. ⁸¹³ Sometimes recovery might be permitted in an indirect way, as has been done in the cases where one person, acting innocently, has expended money or effort in repairing or improving a chattel belonging to another ⁸¹⁴ or where an accident victim has recovered the value of nursing services rendered by a relative and holds the money for the relative. ⁸¹⁵ For the principle of intervention to apply, there would need to be proof of a real “emergency” or “necessity” ⁸¹⁶ to entitle the intervener to sue. ⁸¹⁷ If the intervener was officious, ⁸¹⁸ or thought that he was protecting his own interests, ⁸¹⁹ or did not, at the time of his intervention on behalf of the other, intend to charge for it, ⁸²⁰ no recovery should be allowed.

Reasonable and non-gratuitous intervention

29-140

The need for the intervention to be reasonable and for the intervener to intend to charge for it will preclude the recovery of remuneration for services rendered in many cases and will restrict claims simply to reimbursement of expenses. ⁸²¹ Where the intervener is a professional acting as such he will be more likely to recover remuneration. ⁸²²

Necessaries supplied to a minor, drunken person or person who lacks capacity to contract

29-141

There are specific statutory obligations, which can be classified as restitutionary, namely the obligation of a minor or drunken person who is incompetent to contract to pay a reasonable price where necessities are sold or delivered to him. ⁸²³ A similar, but wider, provision applies to a person who lacks mental capacity to contract for necessary goods or services who must pay a reasonable price for goods or services supplied. ⁸²⁴


Salvage ⁸²⁵


29-142

⚠ The obligation of the owner of a ship or its cargo to pay compensation to a person who rescues it from peril is a good example of a restitutionary claim, as none of the elements of ordinary contract may exist, although in some cases there may be an opportunity for bargaining before the services are rendered. ⁸²⁶ But in many cases this is not so; the services are rendered and the question then is what are the salvors to be paid. In *The Five Steel Barges* ⁸²⁷ Sir James Hannen P. said:

“The right to salvage may arise out of an actual contract; but it does not necessarily do so. It is a legal liability arising out of the fact that property has been saved, that the owner of the property who has had the benefit of it shall make remuneration to those who have conferred the benefit on him, notwithstanding that he has not entered into any contract on the subject.”

In claims for saving life, the shipowner, in the interests of humanity, is compelled to pay for something from which he has derived no personal benefit. ⁸²⁸ In a case ⁸²⁹ where “salvage” was claimed in

respect of a policy of life insurance, Bowen L.J., after pointing out that neither a liability nor a benefit could be forced upon a man in order to create a legal obligation at common law, distinguished the law as regards salvage, general average and contribution on the ground that the maritime law differs from the common law: “no similar doctrine applies to things lost upon land, nor to anything except ships or goods in peril at sea”.⁸³⁰ But, although salvage in tidal waters⁸³¹ is restricted to ships and their cargoes, there is some authority for a similar principle applicable to property on land. In an early case, where a person found timber where it had been carried by the tide, and brought it to safety, it was held that he had no lien on the timber for his trouble and expense.⁸³² The decision, however, probably leaves open the possibility that the finder could sue the owner of the timber for quantum meruit⁸³³ for the value of his services. A carrier was able to recover reasonable expenses incurred in providing for the safety of the horse he carried when the consignee refused to take delivery of it.⁸³⁴ In these cases the claimant was a bailee of the defendant’s property. In such cases (including involuntary bailment⁸³⁵) the right to charge the property-owner for reasonable steps to preserve the property can be seen as the correlative of the bailee’s duty to the owner in respect of the property.⁸³⁶ However, recovery is not confined to cases of bailment. Thus, a crane hire firm, called in by the police, recovered a reasonable fee from a lorry owner for freeing the lorry which was stuck under a bridge.⁸³⁷ 

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1. For a full treatment of the subject matter of this chapter, see: Burrows, *The Law of Restitution*, 3rd edn (2011); Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016); Virgo, *The Principles of the Law of Restitution*, 3rd edn (2015). See also Beatson, *The Use and Abuse of Unjust Enrichment* (1991); Birks, *An Introduction to the Law of Restitution* (1985); Birks, *Unjust Enrichment*, 2nd edn (2005); Maddaugh and McCamus, *The Law of Restitution*, 2nd edn (2004); McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014); Mason, Carter and Tolhurst, *Restitution Law in Australia*, 2nd edn (2008); Palmer, *The Law of Restitution* (1978) (four Vols); The American Law Institute’s Restatement of the Law Third, Restitution and Unjust Enrichment (2011).
 - ^{801.} Burrows at Ch.18; Goff and Jones at Ch.18; Virgo at Ch.12. For criticism of necessity as a generalised ground of restitution, see Day [2016] R.L.R. 26.
 - ^{802.} See Vol.II, paras >31-035—31-037; Merchant Shipping Act 1995 s.40; *Guildford BC v Hein* [2005] EWCA Civ 979 at [33] (Clarke L.J.) and [80] (Waller L.J.).
 - ^{803.} Vol.II, para.31-035.
 - ^{804.} Above, para.29-136.
 - ^{805.} See below, para.29-142. See also Merchant Shipping Act 1995 s.73(2) (obligation to repay expenses in bringing shipwrecked seamen ashore and burial expenses).
 - ^{806.} *Falcke v Scottish Imperial Insurance Co* (1886) 34 Ch. D. 234 (above, para.29-121); *Owen v Tate* [1976] Q.B. 402 (above, para.29-118); *China Pacific SA v Food Corp of India* [1982] A.C. 939, 961. See the discussion of “voluntary payments”, above, paras 29-115 et seq.
 - ^{807.}  Birks at pp.193-203; Hope (1929) 15 Cornell L.R. 25, 42-47; Jones (1977) 93 L.Q.R. 273; Goff and Jones at paras 18-71–18-81; Rose (1989) 9 O.J.L.S. 167; Stoljar (1989) 10 Int. Encl. Comp. Law Ch.17; The American Law Institute’s, *Restatement of the Law Third, Restitution and Unjust Enrichment* (2011), p.286; Virgo at p.301. See also *Owen v Tate* [1976] Q.B. 402, 411-412 (Scarman L.J.); *The Zuhal K.* [1987] 1 Lloyd’s Rep. 151 (above, para.29-118, suggesting that necessity negatives “officiousness” or “voluntariness” in the case of discharge of another’s obligation). cf. *The Goring* [1988] A.C. 831. See also *ENE Kos 1 Ltd v Petroleo Brasileiro SA (No.2)* [2012] UKSC 17, [2012] 2 A.C. 164 at [30] (Lords Sumption and Walker) and at [55] (Lord Mance).
 - ^{808.} *Tugwell v Heyman* (1812) 3 Camp. 298; *Rogers v Price* (1829) 3 Y. & Jer. 28. See now Public Health (Control of Disease) Act 1984 ss.46-48.

- [809.](#) *Rees v Hughes* [1946] K.B. 517. Quaere whether the husband is still liable, under the old common law rule, if his wife leaves insufficient estate to cover her funeral expenses. Before modern legislation altered the legal position of married women, the common law allowed a stranger who had, without any request from the husband, voluntarily incurred and paid such expenses in burying the wife, to recover them from the husband: see *Ambrose v Kerrison* (1851) 10 C.B. 776; *Jenkins v Tucker* (1788) 1 H.Bl. 90; cf. *Bradshaw v Beard* (1862) 12 C.B.(N.S.) 344 (deceased's brother).
- [810.](#) *Matheson v Smiley* [1932] 2 D.L.R. 787. Quaere whether services rendered by a non-professional would justify recovery of remuneration for services.
- [811.](#) Road Traffic Act 1988 ss.157-159.
- [812.](#) e.g. the Bills of Exchange Act 1882 ss.65(1), 66(1) and 68(5) (acceptance of a bill of exchange for the honour of the drawer). See also *Re Berkeley Applegate Ltd* [1989] Ch. 32, above, para.29-121 and see *Procter & Gamble Philippine Manufacturing Corp v Peter Cremer GmbH & Co* [1988] 3 All E.R. 843, 854-855 for support for the principle of recovery for incontrovertible benefit. See above, para.29-021.
- [813.](#) e.g. agency of necessity (above, para.29-136; Vol.II, para.31-035); the principle in *Re Cleadon Trust Ltd* [1939] Ch. 286, 302 (above, para.29-118); the supply of necessities to persons under a disability (below, para.29-141); the recovery of expense incurred when the innocent party attempted to mitigate his loss following a breach of contract (above, para.26-102); the relationship of carrier and consignee (*G.N. Ry v Swaffield* (1874) L.R. 9 Ex. 132 (above, para.29-121)); and a quantum meruit claim when the bailee has acted reasonably in dealing with the goods following frustration of the contract (above, para.23-098); and a claim for reimbursement of expenses incurred by a bailee in looking after property which was originally bailed under a contract which has been terminated, where there is a continuing duty to care for the property: *China Pacific SA v Food Corp of India* [1982] A.C. 961; *ENE Kos 1 Ltd v Petroleo Brasileiro SA (No.2)* [2012] UKSC 17, [2012] 2 A.C. 164.
- [814.](#) See above, paras 29-053 et seq.
- [815.](#) *Cunningham v Harrison* [1973] Q.B. 942, 952; *Donnelly v Joyce* [1974] Q.B. 454; *Mehmet v Perry* [1977] 2 All E.R. 529. But not where the carer is the tortfeasor: *Hunt v Severs* [1994] 2 A.C. 350; *Dimond v Lovell* [2002] 1 A.C. 384 HL (no recovery where provider of services intended to be paid but agreement unenforceable).
- [816.](#) cf. the concept of "necessity" in agency of necessity: above, para.29-136 and see *Re F. (Mental Patient: Sterilisation)* [1990] 2 A.C. 1, 75; *Re T. (Adult: Refusal of Treatment)* [1993] Fam. 95. In the bailment cases of *Sachs v Miklos* [1948] 2 K.B. 23 and *Munro v Willmott* [1949] 1 K.B. 295, there was no real emergency to justify the bailee's sale of goods without communicating with the bailor and obtaining his authority (see above, para.29-054).
- [817.](#) cf. the dicta in *Owen v Tate* [1976] Q.B. 402, 411–412 (Scarman L.J.), 413 (Stephenson L.J.) (quoted above, para.29-118 which suggest that necessity may negative officiousness).
- [818.](#) cf. the situations covered by the Unsolicited Goods and Services Act 1971.
- [819.](#) In *Falcke v Scottish Imperial Insurance Co* (1886) 34 Ch. D. 234 (above, para.29-121) the intervener thought that he was preserving his own property. But cf. *Greenwood v Bennett* [1973] 1 Q.B. 195, and the other cases cited above, para.29-55.
- [820.](#) *Re F. (Mental Patient: Sterilisation)* [1990] 2 A.C. 1, 75. cf. *Re Rhodes* (1890) 44 Ch. D. 94 (necessaries supplied to a lunatic: see above, para.9-095, below, para.29-141); *Brown and Davis Ltd v Galbraith* [1972] 1 W.L.R. 997.
- [821.](#) *Shallcross v Wright* (1850) 12 Beav. 558, 561–562.
- [822.](#) *Matheson v Smiley* [1932] 2 D.L.R. 787 (above, para.29-138); *J.D. White v Troups Transport*

[1976] C.L.Y. 33 (below, para.29-142). See also the burial cases, above, para.29-138, from which it would appear that where the intervention takes the form of employing someone else to do the necessary act the two measures will not differ. See in particular *Ambrose v Kerrison* (1851) 10 C.B. 777.

823. Sale of Goods Act 1979 s.3.

824. Mental Capacity Act 2005 s.7 (considered above, para.9-096).

825. See Kennedy and Rose on the Law of Salvage, 9th edn (2017); Burrows at pp.474–476; Goff and Jones at paras 18-05–18-35; Virgo at pp.305–307.

826. *Semco Salvage & Marine Pte Ltd v Lancer Navigation Co Ltd* [1997] A.C. 455. In *The Troilus* [1950] P. 92, it was pointed out that salvage, an obligation imposed by law irrespective of any contract express or implied, must be distinguished from towage which only arises from an express or implied contract.

827. (1890) 15 P.D. 142, 146.

828. Kennedy and Rose at pp.13–14.

829. *Falcke v Scottish Imperial Insurance Co* (1886) 34 Ch. D. 234, 248–249.

830. See *Sorrell v Paget* [1950] 1 K.B. 252 (claim for salvage of a heifer).

831. *The Goring* [1988] A.C. 831. cf. [1987] Q.B. 687, 693, 707 for criticism of the restriction to tidal waters.


832. *Nicholson v Chapman* (1793) 2 H.Bl. 254. The claim in *Falcke v Scottish Imperial Insurance Co* (1886) 34 Ch. D. 234 was also for a lien. cf. the position in tort where damages are recoverable by a person injured when trying to rescue property endangered by a fire caused by the defendant's negligence: *Hyett v G.W. Ry* [1948] 1 K.B. 345.

833. See above, para.29-071.

834. *G.N. Ry v Swaffield* (1874) L.R. 9 Ex. 132. During the carriage the carrier is under a duty to take reasonable care of the goods, and the case implies a continuation of this duty. It was cited with approval in *China Pacific SA v Food Corp of India* [1982] A.C. 939, 960.

835. See Vol.II, para.33-036.

836. *China Pacific SA v Food Corp of India* [1982] A.C. 939, 960. See also *ENE Kos 1 Ltd v Petroleo Brasileiro SA (No.2)* [2012] UKSC 17, [2012] 2 A.C. 164; Birks at p.201.

837.  J.D. *White v Troups Transport* [1976] C.L.Y. 33. See *Waters v Weigall* (1795) 2 Anst. 575; Goff and Jones at para.18-75 n.81.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 9 - Restitution

Chapter 29 - Restitution ¹

Section 2. - Unjust Enrichment

(j) - Exploitation ⁸³⁸

Undue influence ⁸³⁹

29-143

Undue influence entitles a party to a contract to avoid it. ⁸⁴⁰ Consequently, restitution of benefits conferred under the voidable contract will be ordered by the court, following rescission by the innocent party. ⁸⁴¹

Unconscionable bargains

29-144

Equity may also grant relief from certain unconscionable bargains, especially where the claimant was suffering from a special disability or was placed in a special situation of disadvantage as against the defendant. ⁸⁴²

^{1.} For a full treatment of the subject matter of this chapter, see: Burrows, *The Law of Restitution*, 3rd edn (2011); Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016); Virgo, *The Principles of the Law of Restitution*, 3rd edn (2015). See also Beatson, *The Use and Abuse of Unjust Enrichment* (1991); Birks, *An Introduction to the Law of Restitution* (1985); Birks, *Unjust Enrichment*, 2nd edn (2005); Maddaugh and McCamus, *The Law of Restitution*, 2nd edn (2004); McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014); Mason, Carter and Tolhurst, *Restitution Law in Australia*, 2nd edn (2008); Palmer, *The Law of Restitution* (1978) (four Vols); The American Law Institute's Restatement of the Law Third, Restitution and Unjust Enrichment (2011).

^{838.} See Burrows at Chs 11 and 12; Goff and Jones at Ch.11; Virgo at Ch.11.

^{839.} Above, paras 8-058 et seq.

^{840.} Above, para.8-058. See *Yorkshire Bank Plc v Tinsley* [2004] EWCA Civ 816, [2004] 1 W.L.R. 2380.

^{841.} *Allcard v Skinner* (1887) 36 Ch. D. 145; *Yorkshire Bank Plc v Tinsley* [2004] EWCA Civ 816, [2004] 1 W.L.R. 2380; *Smith v Cooper* [2010] EWCA Civ 722, [2010] 2 F.L.R. 1521; *Royal Bank of Scotland v Chadra* [2011] EWCA Civ 192. See above, paras 8-105 et seq.

^{842.} *Earl of Chesterfield v Janssen* (1751) 2 Ves. Sen. 125, 157. See above, paras 8-133 et seq.; Vol.II, para.39-281; Bamforth [1995] L.M.C.L.Q. 538.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 9 - Restitution

Chapter 29 - Restitution ¹

Section 3. - Restitution for Wrongs ⁸⁴³

(a) - General Principles

Disgorgement for wrongs

29-145

Where the defendant has benefited from the commission of a wrong, a restitutionary remedy will sometimes be available to deprive the defendant of the benefit and to transfer it to the claimant. In such cases the remedy may sometimes literally be restitutionary, in the sense of restoring to the claimant what he has lost, or it may amount to disgorgement ⁸⁴⁴ where the defendant benefited without causing a loss to the claimant. In such circumstances there is nothing which can be restored. However, although there is no loss to the claimant in the sense of a diminution in his wealth, in some of these cases (typified by cases where the defendant has used the claimant's property to make a profit) the claimant will have lost the opportunity to charge the defendant for permission to carry on the activity which has led to the defendant's enrichment, which is mirrored by the amount the defendant saved in not having to pay the claimant. ⁸⁴⁵

Nature of the obligation to make restitution

29-146

Two different analyses of restitution for wrongdoing have been identified. The first treats the restitutionary obligation as a secondary and parasitic obligation, which arises upon the violation of the primary obligation not to commit a wrong. ⁸⁴⁶ Alternatively, the cases can be analysed as instances of situations in which one set of facts gives rise to two alternative but independent causes of action, one in wrongdoing and one in unjust enrichment. ⁸⁴⁷ Although the authorities appear to favour the former, ⁸⁴⁸ on that view it is difficult to see why factors which bar the claim founded on the wrong should not also bar the claim in restitution. ⁸⁴⁹ However, there are cases which are consistent only with the latter view. ⁸⁵⁰ The scope of the claim in restitution depends on which is adopted. If it is the former then it is a sine qua non that a wrong has been committed before restitutionary relief can be awarded, but if it is the latter then restitutionary relief should be available even though the wrong has not technically been committed. ⁸⁵¹ The preferable view is that claims for restitution for wrongs are founded on the commission of a particular wrong rather than on unjust enrichment. ⁸⁵² Once it has been established that the wrong has been committed it is then necessary to determine whether the award of restitutionary remedies is appropriate. This will depend on the type of wrong which has been committed. On this interpretation of the law, restitutionary remedies would be available where the defendant has profited from the commission of certain torts, ⁸⁵³ including breach of statutory duties, ⁸⁵⁴ equitable wrongdoing, ⁸⁵⁵ and, exceptionally, for breach of contract. ⁸⁵⁶ Even though the defendant has committed a wrong it might still be possible for the claimant to establish an alternative claim grounded on unjust enrichment. For example, if the defendant has obtained a benefit as the result of fraud the claimant may have alternative claims in the tort of deceit or unjust enrichment grounded on mistake.

1. For a full treatment of the subject matter of this chapter, see: Burrows, *The Law of Restitution*, 3rd edn (2011); Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016); Virgo, *The Principles of the Law of Restitution*, 3rd edn (2015). See also Beatson, *The Use and Abuse of Unjust Enrichment* (1991); Birks, *An Introduction to the Law of Restitution* (1985); Birks, *Unjust Enrichment*, 2nd edn (2005); Maddaugh and McCamus, *The Law of Restitution*, 2nd edn (2004); McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014); Mason, Carter and Tolhurst, *Restitution Law in Australia*, 2nd edn (2008); Palmer, *The Law of Restitution* (1978) (four Vols); The American Law Institute's Restatement of the Law Third, Restitution and Unjust Enrichment (2011).
843. Burrows at Pt IV; Virgo at Pt III; Winfield, *Province of the Law of Tort* (1931), pp.168–176 (also *The Law of Quasi-Contracts* (1952), pp.91–102); Wright (1941) 57 L.Q.R. 184; Fridman (1955) 18 M.L.R. 1; Friedmann (1980) 80 Col.L.Rev. 504; Hedley (1984) 100 L.Q.R. 653. Note also the power of a criminal court, under s.148 of Powers of Criminal Courts (Sentencing) Act 2000, to order restitution upon conviction: *R. v Ferguson* [1970] 1 W.L.R. 1246; *R. v Church* (1970) 55 Cr. App. R. 65; *R. v Parker* [1970] 2 All E.R. 458. cf. *Malone v Metropolitan Police Commissioner* [1980] Q.B. 49. The courts are also empowered by s.130 of the Powers of Criminal Courts (Sentencing) Act 2000 to make a compensation order against a convicted offender: *R. v Inwood* (1975) 60 Cr. App. R. 70; *R. v Kneeshaw* [1975] Q.B. 57; *R. v Daly* [1974] 1 W.L.R. 133; *R. v Vivian* [1979] 1 All E.R. 48. Magistrates' courts may also make orders for the delivery of property in the possession of the police to the person appearing to be the owner: Police (Property) Act 1897; *Raymond Lyons & Co v Metropolitan Police Commissioner* [1975] Q.B. 321. The Proceeds of Crime Act 2002 creates a statutory framework for the confiscation of assets of defendants convicted of a crime. See *Waya* [2012] UKSC 51, [2013] 1 A.C. 294; Virgo [2009] R.L.R. 29. Under Pt V of the Act state officials can apply to the High Court to recover the proceeds of crime: see *Serious Organised Crime Agency v Perry* [2012] UKSC 35, [2013] 1 A.C. 182. The victim of a crime can apply to the court for a declaration that property which might otherwise be recovered by the state as the proceeds of crime, was property or represents property of which the victim was deprived by unlawful conduct: Proceeds of Crime Act 2002 s.281; *The National Crime Agency v Robb* [2014] EWHC 4384 (Ch), [2015] 3 W.L.R. 23.
 844. Smith (1992) 71 Can. B.R. 672, 696. See also Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (2002); *Murad v Al-Saraj* [2005] EWCA Civ 1235, [2005] W.T.L.R. 1573 at [108] (Jonathan Parker L.J.).
 845. e.g. *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 Q.B. 246; *Penarth Dock Engineering Co v Pounds* [1963] 1 Lloyd's Rep. 359; *Seager v Copydex Ltd (No.2)* [1969] 1 W.L.R. 809. The first two cases concerned actions in tort in which relief in respect of such enrichment was described as restitutionary. See also below, paras 29-147 et seq. On actions in contract for relief in respect of such enrichment, see below, paras 29-158 et seq.; *Surrey CC v Bredero Homes Ltd* [1993] 1 W.L.R. 1361; cf. *Jaggard v Sawyer* [1995] 1 W.L.R. 269. Cases of bribery of agents might be susceptible to this explanation because the principal is presumed to have foregone the opportunity of a higher sale price or a lower purchase price (*Hovenden v Millhoff* (1900) 83 L.T. 41, 43; *Industries & General Mortgage Co v Lewis* [1949] 2 All E.R. 573).
 846. *Oughton v Seppings* (1830) 1 B. & Ad. 241, 243; *Young v Marshall* (1831) 8 Bing. 43; *Turner v Camerons Coalbrook Steam Coal Co* (1850) 5 Ex. 932; *United Australia Ltd v Barclays Bank Ltd* [1941] 1 A.C. 18, 35; *Commercial Banking Co of Sydney v Mann* [1961] A.C. 1, 8. See also *Beaman v A.R.T.S. Ltd* [1948] 2 All E.R. 89, 92–93; *Redrow Homes Ltd v Bett Bros Plc* [1999] 1 A.C. 197.
 847. See, for instance, *Phillips v Homfray* (1883) 24 Ch. D. 439, 463; [1892] 1 Ch. 465, 470, 471; *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 A.C. 366, 385, 401.
 848. See especially *United Australia Ltd v Barclays Bank Ltd* [1941] 1 A.C. 18, 18 and 35 and *Chesworth v Farrar* [1969] 1 Q.B. 407, 417.
 849. See *Chesworth v Farrar* [1969] 1 Q.B. 407 where the plaintiff was allowed to bring a

restitutionary claim despite the fact that the tortious limitation period had passed.

[850.](#) See below, para.29-157.

[851.](#) *Heilbut & Rocca v Nevill* (1870) L.R. 5 C.P. 478 (technical requirements of tort not satisfied); *Asher v Wallis* (1707) 11 Mod. 146 (no action in trover because plaintiff had never possessed the money). See also *Anon* (1700) 12 Mod. 415. The cases on money obtained by fraud, deceit (below, para.29-155) and oppression (below, para.29-157) support this view because the action for money had and received antedated the development of the torts of deceit (Jackson, *The History of Quasi-Contract in English Law* (1936), pp.73–75) and intimidation (Beatson at p.221). See also *Mahesan v Malaysia Government Officers' Co-operative Housing Society Ltd* [1979] A.C. 374; *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 A.C. 366, 385, 401; *National Trust Co v Gleason* (1879) 77 N.Y. 400, 403–404.

[852.](#) *Macmillan Inc v Bishopsgate Investment Trust Plc (No.3)* [1995] 1 W.L.R. 978, 988 (Millett J.). The doctrine of waiver of tort is consistent with this interpretation; see below, para.29-147. cf. *Halifax Building Society v Thomas* [1996] Ch. 217, 224 (Peter Gibson L.J.).

[853.](#) See below, paras 29-148 et seq.

[854.](#) *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2008] EWCA Civ 1086, [2009] Ch. 390, below, para.29-149.

[855.](#) See below, paras 29-163 et seq.

[856.](#) See below, paras 29-158 et seq.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 9 - Restitution

Chapter 29 - Restitution ¹

Section 3. - Restitution for Wrongs ⁸⁴³

(b) - Tort

“Waiver of tort”

29-147

If a person commits a tort and in so doing enriches himself by taking or using the property of another, the latter may, if certain conditions are satisfied, recover the value of that which has been wrongfully taken or used instead of suing for damages for the injury done. The remedies of compensation and restitution are not concurrent and the claimant is compelled to elect which he will pursue. ⁸⁵⁷ If he elects to seek restitution, he is said to “waive the tort”. ⁸⁵⁸ Historically, there were a number of advantages of suing for restitution rather than damages, ⁸⁵⁹ e.g. avoidance of special pleading and of immunity from suit in tort, ⁸⁶⁰ a different period of limitation, the ability to prove for the claim in the tortfeasor’s bankruptcy ⁸⁶¹ and circumvention of the rule preventing survival of an action in tort against the estate of a tortfeasor. Some advantages may, however, continue today, such as the avoidance of the necessity to prove the actual loss suffered by the claimant (e.g. the exact value of goods lost through conversion) by claiming instead the sum received by the defendant. ⁸⁶² Furthermore it may be possible to recover more than the loss sustained by claiming any profit made by the defendant which is attributable to the tort. ⁸⁶³ These last two advantages may, however, be less important than they were in view of the relevance of the defendant’s gain in assessing compensatory damages in certain actions in tort. ⁸⁶⁴

Torts which may give rise to a restitutionary claim

29-148

Not all torts give rise to a claim for restitution, but only those where the tortfeasor receives a definite sum of money, or a definite benefit which can be readily assessed in money, and this benefit derives directly or indirectly from the claimant. ⁸⁶⁵ Restitutionary awards have most commonly been made in cases concerning what have been termed the “proprietary torts”. ⁸⁶⁶ They have been made in the following cases: conversion ⁸⁶⁷ (as where the defendant tortiously takes the claimant’s goods, sells them and receives the proceeds, ⁸⁶⁸ or wrongfully presents and collects the proceeds of his cheque ⁸⁶⁹); other wrongful interference or trespass to goods ⁸⁷⁰ (which the defendant has turned into money, ⁸⁷¹ or where the defendant tortiously takes and retains the claimant’s money) ⁸⁷²; trespass to land ⁸⁷³; fraud or deceit ⁸⁷⁴; intimidation ⁸⁷⁵; inducing breach of contract ⁸⁷⁶; passing off ⁸⁷⁷; infringement of intellectual property rights ⁸⁷⁸; usurpation of an office ⁸⁷⁹ and some miscellaneous actions. ⁸⁸⁰

Torts which do not give rise to a restitutionary claim

29-149

In *Devenish Nutrition Ltd v Sanofi-Aventis SA* ⁸⁸¹ the Court of Appeal recognised that a restitutionary remedy was not available for the tort of breach of statutory duty, involving infringement of competition

law. This was both because the Court was bound by previous authority to hold that a gain-based award was not available for non-proprietary torts ⁸⁸² and because compensatory damages remained an adequate remedy, even though the claimant had passed on its loss to customers and would not have been able to obtain compensatory damages.

Effect of statute

29-150

If a statute is held to bar actions “in respect of any tortious act”, the claimant cannot avoid the statute by “waiving” the tort and suing for restitution. ⁸⁸³ Where, however, the statute (or a common law rule) is held only to bar “actions in tort”, it is still open to the claimant to sue in what is now recognised as a claim in unjust enrichment, ⁸⁸⁴ unless to allow him to do so would undermine the policy of the statutory (or common law) rule. ⁸⁸⁵ Moreover, where there is detailed legislation in an area, it has been said that “the courts should not indulge in parallel creativity by the extension of general common law principles”. ⁸⁸⁶

The nature of the benefit

29-151

In *Phillips v Homfray* ⁸⁸⁷ a majority of the Court of Appeal held that a trespass to land could only be waived so as to give a restitutionary remedy against the deceased tortfeasor’s estate if the “property or the proceeds of property, belonging to another, have been appropriated by the deceased person and added to his own estate or moneys”. ⁸⁸⁸ In that case the tortfeasor had made unauthorised use of roads over, and passages under, the plaintiff’s land and this was held not to give rise to a remedy in restitution. This appropriation or accretion requirement has been criticised as confusing the role of personal and proprietary claims in restitution and as isolating the requirement of benefit from the question of what constitutes benefit in other restitutionary claims. ⁸⁸⁹ As Baggallay L.J., in a strong dissent, stated:

“... a gain or acquisition to the wrongdoer by the work and labour of another does not necessarily, if it does at all, imply a diminution of the property of such other person.” ⁸⁹⁰

There are indications in the cases of a broader approach ⁸⁹¹ and dicta suggesting that the rule in *Phillips v Homfray* should be discarded. ⁸⁹² However, it has been followed at first instance. ⁸⁹³ In practice the rule should not prove a serious obstacle to a claimant since it is now possible to use the measure of the defendant’s benefit (rather than what the claimant lost ⁸⁹⁴) in an action in tort in respect of the wrongful use by the defendant of the claimant’s land ⁸⁹⁵ or chattels. ⁸⁹⁶ The sum awarded in these cases, the reasonable hiring rate or licence fee, should not be regarded as necessarily compensatory since it is calculated by reference to what the defendant has saved by not having to rent or hire, rather than what the claimant had lost. It is irrelevant that the owner suffered no loss because he would not have used the property during the period of use by the defendant or could not have hired it out. ⁸⁹⁷ The argument that the owner has been deprived of the opportunity of charging a fee and that the remedy is therefore compensatory ⁸⁹⁸ is only realistic if it is clear that the owner would have been willing to do so. ⁸⁹⁹ In *Stadium Capital Holdings v St Marylebone Properties Co Plc* ⁹⁰⁰ Peter Smith J. recognised that it is possible to assess a restitutionary remedy for trespass to land with reference to the use of the land made by the defendant trespasser. The basis for assessment is flexible and in an extreme case the court might award all of the profits earned by the defendant from the exploitation of the land, although in most cases the award will be assessed with reference to a reasonable hypothetical licence fee for the occupation of the land. This was further considered in *Ramzan v Brookwide Ltd* ⁹⁰¹ where Miss Geraldine Andrews Q.C. held that a full account of profits would be reserved for the most serious cases of trespass to land. In that case, where land had been expropriated rather than exploited, it was held that the most appropriate measure of assessing damages would be with reference to a percentage return on the agreed capital value of the expropriated land, which would serve to compensate the claimant for actual loss suffered. In *Jones v Ruth*, ⁹⁰² a case of trespass to land involving interference rather than expropriation, the

hypothetical licence fee was assessed as one third of the increase in the value of the defendant's land arising from the trespass.

Profits made by the defendant

29-152

Apart from a reasonable hiring fee in respect of wrongful use of land or chattels, there is the question whether further profits ⁹⁰³ may be recoverable by suing for restitution rather than for damages. In some cases it will be difficult to attribute profits exclusively to the defendant's tort. ⁹⁰⁴ This may not be the case where the defendant has committed the tort deliberately, ⁹⁰⁵ but in such cases it is possible that exemplary damages will be awarded in tort. ⁹⁰⁶

Election of remedy

29-153

The remedies in tort for damages and restitution are alternative, and the claimant cannot recover judgment on both, though he may pursue both remedies together. ⁹⁰⁷ The claimant does not elect one remedy merely by commencing an action in which he claims it ⁹⁰⁸; as Lord Atkin said:

"I ... think that on a question of alternative remedies no question of election arises until one or other claim has been brought to judgment. Up to that stage the plaintiff may pursue both remedies together, or pursuing one may amend and pursue the other; but he can take judgment only for the one, and his cause of action on both will then be merged in the one." ⁹⁰⁹

However, Viscount Simon went further:

"What would be necessary to constitute a bar ... would be that, as the result of such judgment or otherwise, the appellant should have received satisfaction" ⁹¹⁰

and partial satisfaction may not suffice. ⁹¹¹ The claim in tort may, of course, be waived in other ways, such as by a genuine ratification of an agent's unauthorised act, ⁹¹² or by acceptance of the proceeds obtained by the defendant's tortious dealing with the claimant's property, ⁹¹³ or by affirming a mortgage, ⁹¹⁴ and the claimant cannot thereafter sue the wrongdoer in tort. ⁹¹⁵ Similarly, where the claimant definitely elects in writing to treat the defendant as a wrongdoer and obtains damages from him on that footing, he cannot also maintain a claim for a further amount in restitution, based on approbation of the defendant's tortious act in using assets to make a profit for himself. ⁹¹⁶

Money obtained by fraud or deceit

29-154

An important instance of the award of restitutionary remedies is where the claimant seeks to recover money obtained from him by fraud or deceit. ⁹¹⁷ It has been held that, while restitution is available in respect of money paid by the claimant to the defendant by virtue of the defendant's fraud or deceit, an account of the profits made by the defendant as a result of the fraud does not lie. ⁹¹⁸ Thus, where the defendant obtained payment of a promissory note payable to the plaintiff, by means of a false or forged representation of authority from the plaintiff, the plaintiff was entitled to sue the defendant in restitution to recover the money which the defendant had received. ⁹¹⁹ The defendant is liable to such an action even where the fraud was committed by his partner and agent, and not by him personally. ⁹²⁰ So, where payments of premiums on a policy were continued by the plaintiff because of false

representations by the defendant's agent, it was held that the premiums could be recovered by the plaintiff in a claim for restitution. ⁹²¹ On the other hand, if the defendant obtains money by fraud from an agent, either the agent or his principal may recover it from him. ⁹²²

Services or property obtained by fraud

29-155

If the defendant, without intending to pay for it, fraudulently induces the claimant to perform a service for him, the claimant may sue either for the tort of deceit, or in unjust enrichment for reasonable remuneration. ⁹²³ Where a sale by auction is advertised or stated by the auctioneer to be "without reserve", the secret employment by the vendor of a puffer to bid for him, without notice, renders the sale void and entitles the purchaser to recover his deposit from the auctioneer by a claim in restitution. ⁹²⁴

Limits on the right to rescind for fraud

29-156

A person induced by fraud to enter into a contract under which he pays money may not rescind the contract and recover the price ⁹²⁵ if he can no longer restore the parties to the status quo ante (e.g. if he cannot return what he has received under the contract in the same condition as that in which he received it). ⁹²⁶ His only remedy is a claim for damages in an action for fraud. ⁹²⁷ The right to rescind may also be lost by affirmation. ⁹²⁸ Thus, if a person is induced to purchase an article by the seller's fraudulent misrepresentations about it, and after discovering the fraud he continues to deal with the article as his own, for example by selling it, ⁹²⁹ he cannot recover from the seller the price paid to him for it. ⁹³⁰ Again, if a party, after he has discovered a fraud which induced him to enter into a contract, voluntarily pays a sum of money under it with knowledge of the facts, he cannot claim a return of the money so paid. ⁹³¹

Money obtained by oppression or extortion

29-157

Money obtained by illegal oppression or extortion or by taking advantage of the weak and needy may be recovered. ⁹³² This is another instance of a restitutionary remedy being awarded for an action in tort, since it is, in general, a tort to obtain money by unlawful intimidation. ⁹³³ Thus, a claim lies against a broker to recover excessive charges on a distress for rent, paid by the tenant in order to prevent a sale, even though the tenant may have applied for and obtained time in consideration of his promise to pay the charges. ⁹³⁴ But, where excessive charges are paid to satisfy a claim purporting to be made by virtue of a statute, but the person paying them is not oppressed or imposed on in any way, it depends on the interpretation of the particular statute whether he is entitled to recover the excess. ⁹³⁵

1. For a full treatment of the subject matter of this chapter, see: Burrows, *The Law of Restitution*, 3rd edn (2011); Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016); Virgo, *The Principles of the Law of Restitution*, 3rd edn (2015). See also Beatson, *The Use and Abuse of Unjust Enrichment* (1991); Birks, *An Introduction to the Law of Restitution* (1985); Birks, *Unjust Enrichment*, 2nd edn (2005); Maddaugh and McCamus, *The Law of Restitution*, 2nd edn (2004); McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014); Mason, Carter and Tolhurst, *Restitution Law in Australia*, 2nd edn (2008); Palmer, *The Law of Restitution* (1978) (four Vols); The American Law Institute's Restatement of the Law Third, Restitution and Unjust Enrichment (2011).

⁸⁴³. Burrows at Pt IV; Virgo at Pt III; Winfield, *Province of the Law of Tort* (1931), pp.168–176 (also

The Law of Quasi-Contracts (1952), pp.91–102); Wright (1941) 57 L.Q.R. 184; Fridman (1955) 18 M.L.R. 1; Friedmann (1980) 80 Col.L.Rev. 504; Hedley (1984) 100 L.Q.R. 653. Note also the power of a criminal court, under s.148 of Powers of Criminal Courts (Sentencing) Act 2000, to order restitution upon conviction: *R. v Ferguson* [1970] 1 W.L.R. 1246; *R. v Church* (1970) 55 Cr. App. R. 65; *R. v Parker* [1970] 2 All E.R. 458. cf. *Malone v Metropolitan Police Commissioner* [1980] Q.B. 49. The courts are also empowered by s.130 of the Powers of Criminal Courts (Sentencing) Act 2000 to make a compensation order against a convicted offender: *R. v Inwood* (1975) 60 Cr. App. R. 70; *R. v Kneeshaw* [1975] Q.B. 57; *R. v Daly* [1974] 1 W.L.R. 133; *R. v Vivian* [1979] 1 All E.R. 48. Magistrates' courts may also make orders for the delivery of property in the possession of the police to the person appearing to be the owner: Police (Property) Act 1897; *Raymond Lyons & Co v Metropolitan Police Commissioner* [1975] Q.B. 321. The Proceeds of Crime Act 2002 creates a statutory framework for the confiscation of assets of defendants convicted of a crime. See *Waya* [2012] UKSC 51, [2013] 1 A.C. 294; *Virgo* [2009] R.L.R. 29. Under Pt V of the Act state officials can apply to the High Court to recover the proceeds of crime: see *Serious Organised Crime Agency v Perry* [2012] UKSC 35, [2013] 1 A.C. 182. The victim of a crime can apply to the court for a declaration that property which might otherwise be recovered by the state as the proceeds of crime, was property or represents property of which the victim was deprived by unlawful conduct: Proceeds of Crime Act 2002 s.281; *The National Crime Agency v Robb* [2014] EWHC 4384 (Ch), [2015] 3 W.L.R. 23.

- [857.](#) On election, see below, para.29-153.
- [858.](#) This follows Keener, *A Treatise on the Law of Quasi-Contracts* (1893), p.159. The principle is fully discussed by the House of Lords in *United Australia Ltd v Barclays Bank Ltd* [1941] A.C. 1.
- [859.](#) Winfield, *Province of the Law of Tort* (1931), pp.143–146.
- [860.](#) e.g. the Crown's immunity before the Crown Proceedings Act 1947. See Williams, *Crown Proceedings* (1948), pp.11–13.
- [861.](#) See Law Reform (Miscellaneous Provisions) Act 1934 which was applied in *Chesworth v Farrar* [1967] 1 Q.B. 407. For the present position see, Insolvency Act 1986 s.382 and Insolvency Rules 1986 (SI 1986/1925) rr.13.1, 13.12.
- [862.](#) *King v Leith* (1787) 2 T.R. 141, 145; *Parker v Norton* (1796) 6 T.R. 695, 700; *Feltham v Terry* (1772) Lofft. 207, 208. This sum may exceed what could be recovered by claiming damages for loss suffered: *Bavins and Sims v London and South Western Bank Ltd* [1900] 1 Q.B. 270. See Marshall Evans (1966) 82 L.Q.R. 167–169.
- [863.](#) See below, para.29-152.
- [864.](#) See below, paras 29-151-29-152.
- [865.](#) *Hambly v Trott* (1776) 1 Cowp. 371, 376; *Phillips v Homfray* (1883) 24 Ch. D. 439; *Morris v Tarrant* [1971] 2 Q.B. 143, 160–162. See below, para.29-151.
- [866.](#) *Stoke on Trent CC v W. & J. Wass Ltd* [1988] 1 W.L.R. 1406, 1415.
- [867.](#) *Re Simms* [1934] Ch. 1 (see below, para.29-152).
- [868.](#) *Lamine v Dorrell* (1706) 2 Ld. Raym. 1216; *Marsh v Keating* (1834) 1 Bing. N.C. 198, 215–216; *Phillips v Homfray* (1883) 24 Ch. D. 439, 462. cf. *Lake v Bayliss* [1974] 1 W.L.R. 1073 (see below, para.29-168).
- [869.](#) *Bavins and Sims v London and South Western Bank Ltd* [1900] 1 Q.B. 270; *Morison v London County and Westminster Bank Ltd* [1914] 3 K.B. 356, 365; *Fenton Textile Association v Thomas* (1929) 45 T.L.R. 264.
- [870.](#) It was also permitted for detinue, now abolished by the Torts (Interference with Goods) Act 1977. Although many aspects of detinue are still actionable under another head (s.2(2)), not all

are: Palmer [1981] Conv.(N.S.) 62.

- [871.](#) *Oughton v Seppings* (1830) 1 B. & Ad. 241; *Rodgers v Maw* (1846) 15 M. & W. 444, 448; *Neate v Harding* (1851) 6 Ex. 349, 351.
- [872.](#) *Neate v Harding* (1851) 6 Ex. 349; *Bavins & Sims v London and South Western Bank Ltd* [1900] 1 Q.B. 270.
- [873.](#) *Powell v Rees* (1837) 7 A. & E. 426 (sale of coal extracted from land); *Bracewell v Appleby* [1975] Ch. 407 (damages in lieu of injunction took into account defendant's profits); *Ministry of Defence v Ashman* [1993] 2 E.G.L.R. 102; *Ministry of Defence v Thompson* [1993] 2 E.G.L.R. 107 (claim for mesne profit for trespass). *Cavenagh Investment Pte Ltd v Rajiv* [2013] SGHC 45, [2013] 2 S.L.R. 543 (Singapore HC). See also *Cooke* (1994) 110 L.Q.R. 420; *Inverugie Investments Ltd v Hackett* [1995] 1 W.L.R. 713; *Horsford v Bird* [2006] UKPC 3, see *Virgo* (2006) 65 C.L.J. 272; *Murad v Al-Saraj* [2005] EWCA Civ 1235, [2005] W.T.L.R. 1573 at [108] (Jonathan Parker L.J.); *Field Common Ltd v Elmbridge BC* [2008] EWHC 2079 (Ch), [2009] 1 P. & C.R. 1 (hypothetical negotiation measure adopted where trespass committed by defendant's tenants, characterised as restitutionary).
- [874.](#) Below, paras 29-155-29-156.
- [875.](#) Below, para.29-157.
- [876.](#) *Lightly v Clouston* (1808) 1 Taunt. 112; *Foster v Stewart* (1814) 3 M. & S. 191 (see the discussion of these cases in Winfield, *Quasi-Contracts* (1952), pp.98–99).
- [877.](#) *My Kinda Town v Soll* [1982] F.S.R. 147.
- [878.](#) Accounts of profits: *Hogg v Kirby* (1803) 8 Ves. J. 215, 223; *Colburn v Simms* (1843) 2 Ha. 543; *My Kinda Town Ltd v Soll* [1982] F.S.R. 147; *Potton Ltd v Yorkclose Ltd* [1990] F.S.R. 11. Damages and account of profits: Patents Act 1977 ss.61–62; Copyright, Designs and Patents Act 1988 ss.96, 97, 229. But cf. *Union Carbide Corp v B.P. Chemicals Ltd* [1998] F.S.R. 1, 6; *Redrow Homes Ltd v Bett Bros Plc* [1999] 1 A.C. 197. In *Twentieth Century Fox Film Corp v Harris* [2013] EWHC 159 (Ch), [2014] Ch. 1 it was held that a copyright owner does not have a proprietary claim to money derived from the infringement of copyright.
- [879.](#) *Rowland v Hall* (1835) 1 Scott 539; *Hall v Swansea Corp* (1844) 5 Q.B. 526; *King v Alston* (1848) 12 Q.B. 971; *Shoubridge v Clark* (1852) 12 C.B. 335; *Wildes v Russell* (1866) L.R. 1 C.P. 722; *Osgood v Nelson* (1872) L.R. 5 H.L. 636. See also *Howard v Wood* (1679) 2 Lev. 245; *Lamine v Dorrell* (1705) 2 Ld. Raym. 1216 (after revocation of his grant of administration, an administrator of an estate is accountable for assets received); *Brown & Green Ltd v Hays* (1920) 36 T.L.R. 330 (above, para.10-059) (recovery of salary as a director paid to defendant whose appointment was not confirmed, but see *Craven-Ellis v Canons Ltd* [1936] 2 K.B. 403 (above, para.29-082) for quantum meruit in such circumstances); *Re Berkeley Applegate Ltd* [1989] Ch. 32.
- [880.](#) e.g. where the defendant falsely assumes to act as the claimant's agent and collects rent from his tenants: *Lightly v Clouston* (1808) 1 Taunt. 112, 115; *Asher v Wallis* (1707) 11 Mod. 146; *Hasser v Wallis* (1708) 1 Salk. 28. cf. *Kettlewell v Refuge Assistance Co* [1908] 1 K.B. 545; [1909] A.C. 243; or for unlawful eviction: Housing Act 1988 ss.27–28. In *Walsh v Shanahan* [2013] EWCA Civ 411 it was recognised that account of profits might be available for the tort of misuse of private information, but this was a matter for the court's discretion rather than a right, and the remedy was not awarded on the facts. Their appropriateness in nuisance has been recognised: *Carr-Saunders v Dick McNeill Associates* [1986] 1 W.L.R. 922 (although as there was no evidence of profit no award was made). cf. *Stoke-on-Trent City Council v W. & J. Wass Ltd* [1988] 1 W.L.R. 1406, 1410; (no restitution where exclusive right to hold a market infringed); *Forsyth-Grant v Allen* [2008] EWCA Civ 505, [2008] Env. L.R. 41 (account of profits not available for tort of nuisance involving interference with right to light because this did not involve any misappropriation of the claimant's proprietary rights). In *Coventry v Lawrence* [2014] UKSC 13, [2014] A.C. 822 the Supreme Court left open the possibility of gain-based remedies being awarded for the tort of private nuisance.

- [881.](#) [2008] EWCA Civ 1086, [2009] Ch 390. See Odudu and Virgo [2009] C.L.J. 32; Sheehan (2009) 125 L.Q.R. 222; Rotherham (2009) 125 L.Q.R. 102.
- [882.](#) *Stoke-on-Trent City Council v W and J Wass Ltd* [1988] 1 W.L.R. 1406.
- [883.](#) *R. v Brocklebank Ltd* [1925] 1 K.B. 52 (Indemnity Act 1920); *Hardie and Lane Ltd v Chiltern* [1928] 1 K.B. 663, 695 (Trade Disputes Act 1906 s.4). See also *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 A.C. 366 HL; [1981] I.C.R. 129, 160–161 CA; Parker J., at 143–144 (Trade Union and Labour Relations Act 1974 s.13(1)).
- [884.](#) *Powell v Rees* (1837) 7 A. & E. 426; *Phillips v Homfray* (1883) 24 Ch. D. 439 (actio personalis moritur cum persona); *Chesworth v Farrar* [1967] 1 Q.B. 407 (Law Reform (Miscellaneous Provisions) Act 1934 s.1(3) as amended by Law Reform (Limitation of Actions) Act 1954 s.4).
- [885.](#) *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 A.C. 366, 385, 401; *Dimskal S.S. Co SA v International Transport Workers Federation* [1992] 2 A.C. 152, 161–162, 166–167; *Union Carbide Corp v B.P. Chemicals Ltd* [1998] F.S.R. 1, 6 (restitution cannot supplement patent law).
- [886.](#) *Chief Constable of Leicestershire v M* [1989] 1 W.L.R. 20, 23 (Hoffmann J.). See also *Halifax B.S. v Thomas* [1996] Ch. 217, 229–230; *Union Carbide Corp v B.P. Chemicals Ltd* [1998] F.S.R. 1.
- [887.](#) (1883) 24 Ch. D. 439. For other stages of this litigation see (1871) 6 Ch. App. 770; (1890) 44 Ch. D. 694; affirmed [1892] 1 Ch. 465. See generally Swadling in Swadling and Jones, *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (1999), pp.277–294.
- [888.](#) (1883) 24 Ch. D. 439, 454 (Bowen and Cotton L.J.J.). See also *Powell v Rees* (1837) 7 Ad. & El. 426. cf. *Kirk v Todd* (1882) 21 Ch. D. 484.
- [889.](#) Burrows at pp.654–656. cf. Gummow, *Essays on Restitution* (1990), pp.60–67; *Daniel v O’Leary* (1976) 14 N.B.R. (2d) 564 (quantum meruit awarded against trespasser who hooked his home on to plaintiff’s sewage system so that his waste was processed at plaintiff’s sewage farm).
- [890.](#) (1883) 24 Ch. D. 439, 471–472.
- [891.](#) *Lightly v Clouston* (1808) 1 Taunt. 112; *Rumsey v North Eastern Ry* (1863) 14 C.B.(N.S.) 641, 652. See also the claim of a principal against the person who bribed his agent for the amount of the bribe: *Hovenden & Sons v Millhoff* (1900) 83 L.T. 41, Vol.II, para.31-073; *Daniel v O’Leary* (1976) 14 N.B.R. (2d) 564.
- [892.](#) *Nissan v Att-Gen* [1968] 1 Q.B. 286, 341, 352; [1970] A.C. 179, 228. But cf. 213, 236, 241. The rule has been rejected in certain jurisdictions in the United States provided the trespass to land was deliberate: *Edwards v Lee’s Administrators* (1936) 265 Ky. 418; 96 S.W. 2d. 1028; *Red Raven Ash Coal Co v Bull* (1946) 39 S.E. 2d. 231.
- [893.](#) *Morris v Tarrant* [1971] 2 Q.B. 143, 158, although Lane J. did recognise that the defendant had been “enriched by his free occupation of property”. The case may reflect a policy of protecting spouses in possession of the matrimonial home pending divorce and a property settlement.
- [894.](#) See *Horsford v Bird* [2006] UKPC 3, where damages for trespass to land were assessed with reference to the benefit obtained by the defendant from the trespass: at [12]. See Virgo (2006) C.L.J. 272 and Edelman (2006) L.Q.R. 391.
- [895.](#) *Penarth Dock Engineering Co v Pounds* [1963] 1 Lloyd’s Rep. 359; *Ministry of Defence v Ashman* [1993] 2 E.G.L.R. 102; *Ministry of Defence v Thompson* [1993] 2 E.G.L.R. 107; *Horsford v Bird* [2006] UKPC 3. See also *Severn Trent Water Ltd v Barnes* [2004] EWCA Civ 570; *Carr-Saunders v Dick McNeill Associates* [1986] 1 W.L.R. 922; *Anchor Brewhouse Developments Ltd v Berkeley House (Docklands) Developments Ltd* (1987) 284 E.G. 626;

- Jaggard v Sawyer* [1995] 1 W.L.R. 269. cf. *Stoke-on-Trent CC v W. & J. Wass Ltd* [1988] 1 W.L.R. 1406 (nominal damages awarded).
- [896.](#) *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 Q.B. 246.
- [897.](#) *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 Q.B. 246, 252, 254, 256–257; *Penarth Dock Engineering Co v Pounds* [1963] 1 Lloyd's Rep. 359, 361–362; *Swordheath Properties Ltd v Tabet* [1979] 1 W.L.R. 285. See the United States cases: *Amatrudi v Watson* (1952) 88 A. 2d 7 (defendant who benefited innocently from the use by a third party of the plaintiff's equipment liable for its reasonable rental value). cf. *Dilmitis v Niland* (1965) (3) S.A. 492 (no proof of extent of defendant's enrichment); *Stoke-on-Trent CC v W. & J. Wass* [1988] 1 W.L.R. 1406.
- [898.](#) *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 Q.B. 246, per Somervell and Romer L.J.J.; *Hillesden Securities Ltd v Ryjack Ltd* [1983] 1 W.L.R. 959; *Anchor Brewhouse Developments Ltd v Berkeley House (Docklands) Developments Ltd* (1987) 284 E.G. 626, 633. See Sharpe and Waddams (1982) 2 O.J.L.S. 290.
- [899.](#) Hodder (1984) 42 U.Toronto Fac.L.Rev. 105; Burrows at p.665; Virgo at pp.431–432.
- [900.](#) [2010] EWCA Civ 952 at [13].
- [901.](#) [2010] EWHC 2453 (Ch), [2011] 2 All E.R. 38.
- [902.](#) [2011] EWCA Civ 804, [2012] 1 W.L.R. 1495
- [903.](#) As envisaged by *Strand Electric & Engineering Co Ltd v Brisford Entertainments* [1952] 2 Q.B. 246, 252, 255.
- [904.](#) *Re Simms* [1934] Ch. 1; Law Commission No.110, 1981 (Cmd.8388), para.4.86; Birks at pp.351–355. cf. *My Kinda Town Ltd v Soll* [1982] F.S.R. 147; [1983] R.P.C. 407; *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 C.L.R. 25.
- [905.](#) *Federal Sugar Refining Co v United States Sugar Equalisation Board* (1920) 268 F. 575; *Olwell v Nye & Nissen Co* (1883) 24 Ch. D. 439. There is apparently no English authority on the question and the rule in *Phillips v Homfray*, above, para.29–151, may prevent a restitutionary claim. See also breach of confidence: *Peter Pan Manufacturing Corp v Corsets Silhouette Ltd* [1964] 1 W.L.R. 96 (account of profits ordered where product could not have been manufactured without the confidential information). cf. *Seager v Copydex Ltd* [1967] 1 W.L.R. 923; (No.2) [1969] 1 W.L.R. 809 (payment for confidential information used innocently but negligently based on market value of information not profits); *Att-Gen v Guardian Newspapers* [1990] 1 A.C. 109; *Vercoe v Rutland Fund Management Ltd* [2010] EWHC 424 (Ch) at [339] (Sales J.). But see *English v Dedham Vale Properties Ltd* [1978] 1 W.L.R. 93, 111; *Universal Thermosensors Ltd v Hibben* [1992] 1 W.L.R. 840, 850–851.
- [906.](#) *Rookes v Barnard* [1964] A.C. 1129, 1220–1231; *Cassell & Co v Broome* [1972] A.C. 1027; *Kuddus v Chief Constable of Leicestershire* [2001] UKHL 29, [2002] 2 A.C. 122.
- [907.](#) *United Australia Ltd v Barclays Bank Ltd* [1941] A.C. 1; *Halifax B.S. v Thomas* [1996] Ch. 217; *Personal Representatives of Tang Man Sit v Capacious Investments Ltd* [1996] A.C. 514.
- [908.](#) [1941] A.C. 1. See also *Rice v Reed* [1900] 1 Q.B. 54; *Island Records Ltd v Tring International Plc* [1995] 3 All E.R. 444; cf. *Ernest Scragg & Sons Ltd v Perseverance Banking and Trust Co Ltd* [1973] 2 Lloyd's Rep. 101, 103.
- [909.](#) *United Australia Ltd v Barclays Bank Ltd* [1941] A.C. 1, 30 (Lord Wright discussed the case in (1941) 57 L.Q.R. 184); *Mahesan v Malaysia Government Officers' Co-operative Housing Society Ltd* [1979] A.C. 374.
- [910.](#) [1941] A.C. 1, 21 (see also Lord Porter, 50).

- [911.](#) *Personal Representatives of Tang Man Sit v Capacious Investments Ltd* [1996] A.C. 514, 526.
- [912.](#) *Verschures Creameries Ltd v Hull and Netherlands S.S. Co Ltd* [1921] 2 K.B. 608 (tort action against agent barred by unsatisfied judgment against third party in quasi-contract). See also *John v Dodwell* [1918] A.C. 563, 570–571.
- [913.](#) *Lythgoe v Vernon* (1860) 5 H. & N. 180.
- [914.](#) *Halifax B.S. v Thomas* [1996] Ch. 217.
- [915.](#) *Smith v Baker* (1873) L.R. 8 C.P. 350; cf. *Smith v Hodson* (1791) 4 T.R. 211; *Roe v Mutual Loan Fund Ltd* (1887) 19 Q.B.D. 347.
- [916.](#) *Re Simms* [1934] Ch. 1, 20, 25–26. See also *Halifax B.S. v Thomas* [1996] Ch. 217, 227–228.
- [917.](#) See *Billing v Ries* (1841) Car. & M. 26; *Bonzi v Stewart* (1842) 4 M. & G. 295, 325. cf. avoidance of conveyances made with intent to defraud creditors: Law of Property Act 1925 s.173(1).
- [918.](#) *Halifax B.S. v Thomas* [1996] Ch. 217. Sed quaere: the case is perhaps better interpreted as one involving ratification of the tort. See Virgo at p.463.
- [919.](#) *Vaughan v Matthews* (1849) 13 Q.B. 187, 190.
- [920.](#) *Crockford v Winter* (1807) 1 Camp. 124, 127; *Marsh v Keating* (1834) 1 Bing. N.C. 198 HL (discussed in *Jacobs v Morris* [1902] 1 Ch. 816).
- [921.](#) *Kettlewell v Refuge Assurance Co* [1908] 1 K.B. 545; [1909] A.C. 243; but cf. *Salata v Continental Insurance Co* [1948] 2 D.L.R. 663, where the agent was only authorised to solicit custom.
- [922.](#) *Holt v Ely* (1853) 1 E. & B. 795.
- [923.](#) *Rumsey v N.E. Ry* (1863) 14 C.B.(N.S.) 641; *Hill v Perrott* (1810) 3 Taunt. 274; *Abbotts v Barry* (1820) 2 Brod. & B. 369; *Collins v Brebner* [2000] Lloyd's Rep. P.N. 587, noted Elliott (2002) 65 M.L.R. 588.
- [924.](#) *Thornett v Haines* (1846) 15 M. & W. 367; *Green v Baverstock* (1863) 14 C.B.(N.S.) 204; *Parfitt v Jepson* (1877) 46 L.J.C.P. 529; and see Sale of Land by Auction Act 1867 ss.4–7. cf. solicitor suing, without authority, in the name of a nominal or imaginary claimant: *Dupen v Keeling* (1829) 4 C. & P. 102; see further, Vol.II, para.31-100.
- [925.](#) *Whittaker v Campbell* [1984] Q.B. 318, 327.
- [926.](#) Above, paras 7-123 et seq. But cf. *Logicrose Ltd v Southend United F.C. Ltd* [1988] 1 W.L.R. 1256. See also *Vadasz v Pioneer Concrete (SA) Pty Ltd* [1995] 185 C.L.R. 102; *Walker v W.A. Personnel Ltd* [2002] B.P.R. 621.
- [927.](#) *Clarke v Dickson* (1858) E.B. & E. 148.
- [928.](#) Above, para.7-132.
- [929.](#) *Halifax B.S. v Thomas* [1996] Ch. 217.
- [930.](#) *Campbell v Fleming* (1834) 1 A. & E. 40. See also *Law v Law* [1905] 1 Ch. 140, CA.
- [931.](#) *Miles v Dell* (1821) 3 Stark. 23, 26.
- [932.](#) *Lowry v Bourdieu* (1780) 2 Dougl. 468, 472; *Clarke v Shee* (1774) 1 Cowp. 197, 200; see also *Astley v Reynolds* (1732) 2 Stra. 915; *Re Judgment Summons* (No.25 of 1952) [1953] Ch. 1; *Re*

Majory [1955] Ch. 600 (the threat of the final sanction of bankruptcy, when costs are wrongly demanded, may be extortion). For extortion *colore officii*, see above, para.29-100, for money obtained by wrongful demand, see above, paras 29-094 et seq., for unconscionable bargains, see above, para.29-144, and, for ultra vires receipts by tax and other public bodies, see above, para.29-090.

933. On the tort of intimidation, see *Rookes v Barnard* [1964] A.C. 1129. But sed quaere whether “two party” intimidation is a tort: *J.T. Stratford & Son Ltd v Lindley* [1965] A.C. 269, 325; Harrison [1964] C.L.J. 159, 168; Hoffmann (1965) 81 L.Q.R. 116, 127–128. But see Beatson at pp.221 and 118–119. If it is not, these cases provide support for the view (above, para.29–146) that the claims in tort and unjust enrichment are entirely independent of each other. See also *Universe Tankships of Monrovia v International Transport Workers Federation* [1983] A.C. 366; *Dimskal S.S. Co SA v International Transport Workers Federation* [1992] 2 A.C. 152.

934. *Hills v Street* (1828) 5 Bing. 37.

935. *Green v Portsmouth Stadium* [1953] 2 Q.B. 190 (a charge contravening the Betting and Lotteries Act 1934 s.13, is not recoverable). On excessive charges paid to public authorities, see above, para.29-100.

Chitty on Contracts 32nd Ed.

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Volume I - General Principles

Part 9 - Restitution

Chapter 29 - Restitution ¹

Section 3. - Restitution for Wrongs ⁸⁴³

(c) - Breach of Contract ⁹³⁶

Restitution for breach of contract

29-158

A defendant may make a gain from a breach of contract either by making a larger profit from a third party than he would have made from the other party had he performed ⁹³⁷ or by saving expense from its breach. ⁹³⁸ In general, the gain to a defendant from a breach of contract is irrelevant to the quantification of damages. ⁹³⁹ A claimant who suffers a smaller loss than the defendant's gain or who suffers injury of a non-pecuniary kind from the breach of contract will, however, find a gain-based award attractive. The defendant's gain is relevant in sales of land, ⁹⁴⁰ where there has been a breach of a contractual duty of confidence ⁹⁴¹ or a fiduciary duty ⁹⁴² or where the breach of contract involves the use or interference with the claimant's property. ⁹⁴³ These are all cases of specifically enforceable contracts and it is arguable that the defendant's gains should be relevant in all such cases.

Account of profits

29-159

It was held in *Att-Gen v Blake* ⁹⁴⁴ that, in an exceptional case, where compensatory damages, specific enforcement and injunctions are inadequate remedies for a breach of contract or are not available, the court can require the defendant to account to the claimant for benefits received from a breach of contract, even where the breach does not involve the use of or interference with the claimant's property:

"The law recognises that a party to a contract may have an interest in performance which is not readily measurable in terms of money. On breach the innocent party suffers a loss. He fails to obtain the benefit promised by the other party to the contract. To him the loss may be as important as financially measurable loss, or more so. An award of damages, assessed by reference to financial loss, will not recompense him properly. For him a financially assessed measure of damages is inadequate." ⁹⁴⁵

In determining whether to order an account of profits, the court will have regard to all the circumstances, including the subject matter of the contract, the purpose of the contractual provision which has been breached, the circumstances in which the breach occurred, the consequences of the breach and the circumstances in which relief is being sought. Lord Nicholls of Birkenhead (with whom Lord Goff and Lord Browne-Wilkinson agreed) stated that:

"... a useful general guide, although not exhaustive, is whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activities and, hence, in

depriving him of his profit.”⁹⁴⁶

The Crown was held to have such an interest in preventing a former member of the intelligence services who had undertaken not to divulge any official information gained as a result of his employment from profiting from breaches of the undertaking in an autobiography. He was therefore not entitled to receive the royalties which had been held by his publishers.

Attorney-General v Blake

29-160

In *Att-Gen v Blake*⁹⁴⁷ their Lordships declined to give more specific guidance as to when an account of profits might be awarded for breach of contract. But they indicated that it would not in itself suffice that: (a) the breach was cynical and deliberate; (b) the breach enabled the defendant to enter into a more profitable contract elsewhere; and (c) by entering into a new and more profitable contract the defendant put it out of his power to perform the contract with the claimant.⁹⁴⁸ Their Lordships did not, moreover, consider the two categories suggested by the Court of Appeal for “restitutionary damages”⁹⁴⁹ were satisfactory. The first, the case of “skimped” performance, where defendants fail to provide the full extent of the contracted services, was said not to fall within the scope of an account of profits as ordinarily understood. Nor was an account of profits needed in this context. Suppliers of inferior goods have to refund the difference in price as damages for breach of contract, and a similar approach should apply in cases where the defendant provided inferior and cheaper services than those contracted for.⁹⁵⁰ The second category suggested by the Court of Appeal, where defendants profited by doing the very thing that they contracted not to do, was considered to be too widely defined because it embraced all express negative obligations.⁹⁵¹

Subsequent developments

29-161

Although immediately after the decision of the House of Lords in *Blake* it appeared that the courts would adopt a liberal interpretation of when an account of profits will be available for breach of contract,⁹⁵² since then the jurisdiction to award an account of profits for breach of contract has been interpreted very restrictively. In a very significant judgment in *Vercoe v Rutland Fund Management Ltd*⁹⁵³ Sales J. identified a number of key principles to determine when the remedy of account of profits should be available for breach of contract. The general principle concerns the identification of the just response to the particular wrong, which is determined by assessing whether the claimant’s objective interest in performance of the relevant obligation makes it just and equitable that the defendant should retain no benefit from the breach of the obligation, so that the remedy awarded is not disproportionate to the wrong done to the claimant. Where the claimant has a particularly strong interest in full performance, he should be entitled to a choice between damages (either to compensate for loss actually suffered or by reference to a hypothetical bargain to release a contractual obligation) and account of profits. The claimant might have a particularly strong interest in full performance of the contract where, for example, the breach of contract involves infringement of property rights, including intellectual property rights, or where it would not be reasonable to expect the contractual right to be released for a reasonable fee, such as the right to have state secrets maintained as in *Att-Gen v Blake* itself, or rights arising under fiduciary relationships.⁹⁵⁴ If the claimant does not have a strong interest in performance, as will be the case in a more commercial context, account of profits should not be available and the claimant should be confined to what the parties would have reasonably agreed that the defendant would have paid to the claimant to release the contractual right. In such circumstances the claimant will not be able to elect for an account of profits. In *Experience Hendrix LLC v PPX Enterprises Inc*⁹⁵⁵ a gain-based remedy was awarded where the defendant repeatedly breached a settlement agreement relating to the use of licensed material. However, the Court did not order the defendant to account for all the profits which derived from the breach, since the case was not considered to be exceptional. This was because, even though the case involved a deliberate breach of contract whereby the defendants did that which they had promised not to do and damages were an inadequate remedy because it was not possible to

quantify the loss suffered by the breach,⁹⁵⁶ the case was not concerned with a sensitive subject such as national security, the defendants were not fiduciaries and the breaches occurred in a commercial context.⁹⁵⁷ The remedy which was awarded was a reasonable sum assessed with reference to what the claimant would reasonably have demanded for the defendant's use of the material in breach of the agreement. In *One Step (Support) Ltd v Morris-Garner*⁹⁵⁸ account of profits was not awarded for breach of a non-competition and non-solicitation covenant, even though the breach was deliberate in that the defendants had planned to compete even before the covenant was made, because the breaches were characterised as being relatively straightforward and unremarkable, and so did not satisfy the *Blake* test of being exceptional.

Hypothetical bargain measure⁹⁵⁹

29-162

In *WWF—World Wide Fund for Nature v World Wrestling Federation Entertainment Inc*⁹⁶⁰ the claimant sought the award of a remedy to reflect its failure to make a bargain with the defendant to vary a compromise agreement, known as an award of damages on the *Wrotham Park* basis.⁹⁶¹ In previous proceedings⁹⁶² the claimant had unsuccessfully sought to amend its pleadings to claim an account of profits for breach of the settlement. The Court of Appeal held that it was an abuse of process now to seek *Wrotham Park* damages in separate proceedings, but it also recognised that both remedies were compensatory and so were juridically highly similar. Chadwick L.J. recognised⁹⁶³ that the:

“... two remedies should, I think, each be seen as a flexible response to the need to compensate the claimant for the wrong which has been done to him.”

Whilst the characterisation of the *Wrotham Park* remedy is controversial, and may indeed be a remedy to compensate the claimant for loss suffered,⁹⁶⁴ the assertion that an account of profits is a compensatory remedy deprives the expression “compensatory damages” of any sensible meaning, since the remedy is assessed with reference to the defendant's gain arising from the breach of contract and not with the identification of the claimant's loss. In *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd*⁹⁶⁵ the Privy Council recognised that, when determining the reasonable sum to be paid by reference to a hypothetical bargain between the parties, it is to be assumed that both parties would have acted reasonably in the negotiations and the focus should be on how those negotiations would have progressed in the light of the information known to the parties at the time and the commercial context. In *Vercoe v Rutland Fund Management Ltd*⁹⁶⁶ Sales J. also emphasised that the award of damages on the *Wrotham Park* basis requires the court to assess a fair price for the release or relaxation of a negative covenant, having regard to the likely parameters arising from ordinary commercial considerations, any additional factors which affect the just balance to be struck between the competing interests of the parties and the need to ensure that the relief awarded is not disproportionate to the claimant's interest in proper performance of the contract. In assessing the award it may be relevant to take expert evidence into account, especially where the hypothetical agreement is closely analogous to normal commercial bargains in an established market.⁹⁶⁷ Sales J. also suggested that the hypothetical bargain measure might be a more appropriate remedy than account of profits where the breach of contract involves interference with property rights in respect of property which is regularly bought and sold in a market.⁹⁶⁸ In *Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd*⁹⁶⁹ Arnold J. identified the following principles for the assessment of the hypothetical bargain measure:

(i)

The overriding principle is that these damages are compensatory.⁹⁷⁰

(ii)

They are to be assessed by considering what sum would have been arrived at in negotiations by

the parties, had they been making reasonable use of their respective bargaining positions, having regard to the information available to them and the commercial context when the notional negotiation would have taken place.

(iii)

It is irrelevant that one or both of the parties would not have agreed to the deal.

(iv)

As a general rule the assessment is to be made at the date of breach of the contract.

(v)

If there has not been any negotiation between the parties it is reasonable for the court to look at the eventual outcome and to consider whether this is a useful guide to what the parties would have thought at the time of their hypothetical bargain.

(vi)

The court can take into account other factors, including delay on the part of the claimant in asserting his rights.

Whilst it is clear that these circumstances do not require proof of interference with property rights, it appears that the most significant factor is that the defendant is in a relationship with the claimant which can be considered to be very close to a fiduciary relationship, which suggests that the award of an account of profits will be especially rare in respect of the breach of a commercial contract.⁹⁷¹ Where the case is not exceptional,⁹⁷² but orthodox compensatory damages are unavailable, the hypothetical bargain measure can be awarded.

1. For a full treatment of the subject matter of this chapter, see: Burrows, *The Law of Restitution*, 3rd edn (2011); Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016); Virgo, *The Principles of the Law of Restitution*, 3rd edn (2015). See also Beatson, *The Use and Abuse of Unjust Enrichment* (1991); Birks, *An Introduction to the Law of Restitution* (1985); Birks, *Unjust Enrichment*, 2nd edn (2005); Maddaugh and McCamus, *The Law of Restitution*, 2nd edn (2004); McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014); Mason, Carter and Tolhurst, *Restitution Law in Australia*, 2nd edn (2008); Palmer, *The Law of Restitution* (1978) (four Vols); The American Law Institute's Restatement of the Law Third, Restitution and Unjust Enrichment (2011).

843. Burrows at Pt IV; Virgo at Pt III; Winfield, *Province of the Law of Tort* (1931), pp.168–176 (also *The Law of Quasi-Contracts* (1952), pp.91–102); Wright (1941) 57 L.Q.R. 184; Fridman (1955) 18 M.L.R. 1; Friedmann (1980) 80 Col.L.Rev. 504; Hedley (1984) 100 L.Q.R. 653. Note also the power of a criminal court, under s.148 of Powers of Criminal Courts (Sentencing) Act 2000, to order restitution upon conviction: *R. v Ferguson* [1970] 1 W.L.R. 1246; *R. v Church* (1970) 55 Cr. App. R. 65; *R. v Parker* [1970] 2 All E.R. 458. cf. *Malone v Metropolitan Police Commissioner* [1980] Q.B. 49. The courts are also empowered by s.130 of the Powers of Criminal Courts (Sentencing) Act 2000 to make a compensation order against a convicted offender: *R. v Inwood* (1975) 60 Cr. App. R. 70; *R. v Kneeshaw* [1975] Q.B. 57; *R. v Daly* [1974] 1 W.L.R. 133; *R. v Vivian* [1979] 1 All E.R. 48. Magistrates' courts may also make orders for the delivery of property in the possession of the police to the person appearing to be the owner: Police (Property) Act 1897; *Raymond Lyons & Co v Metropolitan Police Commissioner* [1975] Q.B. 321. The Proceeds of Crime Act 2002 creates a statutory framework for the confiscation of

- assets of defendants convicted of a crime. See *Waya* [2012] UKSC 51, [2013] 1 A.C. 294; *Virgo* [2009] R.L.R. 29. Under Pt V of the Act state officials can apply to the High Court to recover the proceeds of crime: see *Serious Organised Crime Agency v Perry* [2012] UKSC 35, [2013] 1 A.C. 182. The victim of a crime can apply to the court for a declaration that property which might otherwise be recovered by the state as the proceeds of crime, was property or represents property of which the victim was deprived by unlawful conduct: *Proceeds of Crime Act 2002* s.281; *The National Crime Agency v Robb* [2014] EWHC 4384 (Ch), [2015] 3 W.L.R. 23.
- ^{936.} See generally, above, paras 26-046 et seq.; Burrows at Ch.25; Virgo at Ch.18. See also Friedmann (1980) 80 Col.L.Rev. 504, 513–529; Jones (1983) 99 L.Q.R. 442; Burrows, *Remedies for Torts and Breach of Contract*, 3rd edn (2004), pp.395–407; Birks [1987] L.M.C.L.Q. 421; Aggravated, Exemplary and Restitutionary Damages (Law Com. No.247, 1998), Pt III; Smith [1999] 115 L.Q.R. 245; Barnett, *Accounting for Profit for Breach of Contract* (2012).
- ^{937.} *Teacher v Calder* (1899) 1 F. 39 HL.
- ^{938.} *Tito v Waddell (No.2)* [1977] Ch. 106, above, para.26–036.
- ^{939.} *The Siboen* [1976] 1 Lloyd's Rep. 293, 337 (profits from alternative charter irrelevant); *Tito v Waddell (No.2)* [1977] Ch. 106, 332 (Megarry V.C.); *Surrey CC v Bredero Homes Ltd* [1993] 1 W.L.R. 1361. But see Goodhart [1995] Rest. L. Rev. 3; *Jaggard v Sawyer* [1995] 1 W.L.R. 269; *Nottingham University v Fishel* [2000] I.C.R. 1462. See, generally, above, para.26-035.
- ^{940.} *Lake v Bayliss* [1974] 1 W.L.R. 1073; *Tito v Waddell (No.2)* [1977] Ch. 106, 332 (Megarry V.C.).
- ^{941.} *Peter Pan Manufacturing Corp v Corsets Silhouette Ltd* [1964] 1 W.L.R. 96. See also above, para.29-152.
- ^{942.} See *Reading v Att-Gen* [1951] A.C. 507. See also *Hospital Products Ltd v US Surgical Corp* (1984) 156 C.L.R. 41 (Australia).
- ^{943.} *Penarth Dock Engineering Co Ltd v Pound* [1963] 1 Lloyd's Rep. 359; *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 W.L.R. 798, 812–816 (damages in lieu of injunction for breach of restrictive covenant assessed at 5 per cent of the profit made by the defendant builder on the basis that this was the sum that might reasonably have been demanded by the plaintiffs as a quid pro quo for relaxing the covenant); *Jaggard v Sawyer* [1995] 1 W.L.R. 269. See also Goodhart [1995] RLR 3; *Amec Developments v Jury's Hotel Management* [2001] E.G.L.R. 81. See also *O'Brien Homes Ltd v Lane* [2004] EWHC 303 (QB) where damages for breach of a collateral contract not to build more than three houses were assessed by reference to what the defendant would have been prepared to pay the claimant to be released from the contractual obligation. cf. *Surrey CC v Bredero Homes Ltd* [1993] 1 W.L.R. 1361 CA. See generally *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2009] UKPC 45, [2011] 1 W.L.R. 2370 at [46]–[54]; *Veroe v Rutland Fund Management Ltd* [2010] EWHC 424 (Ch) at [340] (Sales J.).
- ^{944.} [2001] 1 A.C. 268.
- ^{945.} *Att-Gen v Blake* [2001] 1 A.C. 268, 282 (Lord Nicholls). See also above, para.26-055. Lord Hobhouse dissented on the ground (at 298) that an account of profits, a remedy based on property rights, should not be given where the necessary property rights are absent. cf. *Hospitality Group Pty Ltd v Australian Rugby Football Union Ltd* [2001] FCA 1040 (in Australia loss recoverable for breach of contract is limited to compensation); Campbell and Harris (2002) 22 L.S. 308; Campbell (2002) 65 M.L.R. 256.
- ^{946.} [2001] 1 A.C. 268, 285. See also Lord Steyn at 292 (defendant's position closely analogous to that of a fiduciary). cf. *R. v Att-Gen for England and Wales* [2003] UKPC 22.
- ^{947.} [2001] 1 A.C. 268.
- ^{948.} [2001] 1 A.C. 268, 286 (Lord Nicholls), 291 (Lord Steyn). See [1998] Ch. 439, 457, 458 CA.

- [949.](#) Lord Nicholls preferred ([2001] 1 A.C. 268, 284) to avoid this term.
- [950.](#) [2001] 1 A.C. 268, 285 (Lord Nicholls), 291 (Lord Steyn).
- [951.](#) [2001] 1 A.C. 268, 286 (Lord Nicholls), 291 (Lord Steyn).
- [952.](#) See *Esso Petroleum Co Ltd v Niad* [2001] All E.R. (D) 324 (Morritt V.C.): an account of profits was awarded in a commercial context where damages were an inadequate remedy, but cf. *Beatson* (2002) 118 L.Q.R. 377 contrasting this with a less liberal approach taken by commercial arbitrators (see *AB Corp v CD Co*, *The Sine Nomine* [2002] 1 Lloyd's Rep. 805) and *WWW World Wide Fund for Nature v World Wrestling Federation Entertainment Inc* [2002] F.S.R. 32; affirmed on different grounds [2002] F.S.R. 33 CA. See also *Luxe Holding Ltd v Midland Resources Holding Ltd* [2010] EWHC 1908 (Ch).
- [953.](#) [2010] EWHC 424 (Ch) at [339]–[343].
- [954.](#) See *Jones v Ricoh Ltd* [2010] EWHC 1743 (Ch), [89] (Roth J.); *Luxe Holding Ltd v Midland Resources Holding Ltd* [2010] EWHC 1908 (Ch), [55] (Roth J.).
- [955.](#) [2003] EWCA Civ 323, [2003] 1 All E.R. (Comm) 830. See above, paras 26-051 et seq.
- [956.](#) [2003] 1 All E.R. (Comm) 830, 843 (Mance L.J.).
- [957.](#) 933 [2003] 1 All E.R. (Comm) 830. See also at 848 (Peter Gibson L.J.). cf. *Esso Petroleum Co Ltd v Niad* [2001] All E.R. (D) 324.
- [958.](#) [2014] EWHC 2213 (QB), [2015] I.R.L.R. 215.
- [959.](#) In *Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd* [2012] EWHC 616 (Ch), [2012] R.P.C. 29 Arnold J., at [383], preferred to describe this remedy as “negotiating damages”. See also *Primary Group (UK) Ltd v Royal Bank of Scotland Plc* [2014] EWHC 1082 (Ch), [2014] 2 All E.R. (Comm.) 1121.
- [960.](#) [2007] EWCA Civ 286, [2008] 1 W.L.R. 445. See above, para.26-057. *Lunn Poly Ltd v Liverpool and Lancashire Properties Ltd* [2006] EWCA Civ 430, [2007] L. & T.R. 6.
- [961.](#) See above, para.29-158.
- [962.](#) [2002] F.S.R. 32.
- [963.](#) [2007] EWCA Civ 286, [2008] 1 W.L.R. 445 at [59].
- [964.](#) See *Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd* [2012] EWHC 616 (Ch), [2012] R.P.C. 29 at [381] (Arnold J.); *One Step (Support) Ltd v Morris-Garner* [2014] EWHC 2213 (QB), [2015] I.R.L.R. 215 at [104] (Phillips J.).
- [965.](#) [2009] UKPC 45, [2011] 1 W.L.R. 2370 at [49].
- [966.](#) [2010] EWHC 424 (Ch) at [292].
- [967.](#) [2010] EWHC 424 (Ch) at [298].
- [968.](#) [2010] EWHC 424 (Ch) at [340].
- [969.](#) [2012] EWHC 616 (Ch) at [386].
- [970.](#) cf. *Giedo van der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373 (QB) at [528] (Stadlen J.).
- [971.](#) *Jones v Ricoh Ltd* [2010] EWHC 1743 (Ch) at [89] (Roth J.).

[972.](#) *One Step (Support) Ltd v Morris-Garner* [2014] EWHC 2213 (QB), [2015] I.R.L.R. 215 at [104] (Phillips J.).

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 9 - Restitution

Chapter 29 - Restitution ¹

Section 3. - Restitution for Wrongs ⁸⁴³

(d) - Equitable Wrongdoing ⁹⁷³

Types of equitable wrongdoing

29-163

⚠ Restitutionary remedies are available for a number of equitable wrongs, including actions for breach of fiduciary duty ⁹⁷⁴ and breach of confidence. ⁹⁷⁵ A fiduciary who has profited from his breach of duty will be liable to account for all the profits made, even if they would have been made had the defendant not breached his fiduciary duty. ⁹⁷⁶ ⚠

Receipt of a bribe, secret profit or commission

29-164

Where a fiduciary receives from a third party a bribe, secret profit or commission in connection with his principal's affairs, his principal may elect either to recover the value of the bribe ⁹⁷⁷ or damages for fraud (in respect of any loss he has sustained through the contract) from the agent. ⁹⁷⁸ A bribe is the payment of a secret commission: proof of corruptness or corrupt motive is not necessary in a civil action. ⁹⁷⁹ The same principle holds in regard to the relationship of employer and employee. ⁹⁸⁰ Thus the Crown can recover secret bribes received by a police officer, ⁹⁸¹ or secret payments received by a soldier for using his uniform illicitly to smuggle goods past civilian police ⁹⁸²; the employer's right of recovery is not affected by the fact that the money was earned through a criminal act of the employee, nor by the fact that the employer has suffered no loss. ⁹⁸³ In *FHR European Ventures LLP v Cedar Capital Partners LLC* ⁹⁸⁴ it was held that, where a fiduciary is liable to account for profits made as a result of a breach of fiduciary duty to the principal, those profits will be held on constructive trust for the principal. It follows that a fiduciary, such as an agent, who receives a bribe or a secret commission will hold the property received on trust for the principal, who can elect to sue for either a personal or a proprietary remedy. The person who paid the bribe may also be liable for dishonestly assisting a breach of fiduciary duty, ⁹⁸⁵ but double recovery is not permitted and the principal can only recover the amount of the bribe and any additional loss he can prove, however he chooses to frame his action, and even if he sues both the agent and the briber. ⁹⁸⁶ Where, however, the principal rescinds the transaction tainted by a bribe, he does not have to give credit for the amount of the bribe as part of his duty to make restitution of benefits received under the contract, even where he has already recovered the bribe from the fiduciary. ⁹⁸⁷

Equitable allowance

29-165

Where a fiduciary is liable to account for a profit or commission resulting from his fiduciary position or arising out of his use of his principal's property or the trust property, ⁹⁸⁸ he may, if he has acted openly

and honestly (albeit mistakenly), be entitled to some remuneration for his work and skill.⁹⁸⁹ The factors which will incline a court to make such an allowance include whether the work would in any event have had to be done by the claimant and the fact that the work has been of substantial benefit to the claimant.⁹⁹⁰


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1. For a full treatment of the subject matter of this chapter, see: Burrows, *The Law of Restitution*, 3rd edn (2011); Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016); Virgo, *The Principles of the Law of Restitution*, 3rd edn (2015). See also Beatson, *The Use and Abuse of Unjust Enrichment* (1991); Birks, *An Introduction to the Law of Restitution* (1985); Birks, *Unjust Enrichment*, 2nd edn (2005); Maddaugh and McCamus, *The Law of Restitution*, 2nd edn (2004); McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014); Mason, Carter and Tolhurst, *Restitution Law in Australia*, 2nd edn (2008); Palmer, *The Law of Restitution* (1978) (four Vols); The American Law Institute's Restatement of the Law Third, Restitution and Unjust Enrichment (2011).

 843. Burrows at Pt IV; Virgo at Pt III; Winfield, *Province of the Law of Tort* (1931), pp.168–176 (also *The Law of Quasi-Contracts* (1952), pp.91–102); Wright (1941) 57 L.Q.R. 184; Fridman (1955) 18 M.L.R. 1; Friedmann (1980) 80 Col.L.Rev. 504; Hedley (1984) 100 L.Q.R. 653. Note also the power of a criminal court, under s.148 of Powers of Criminal Courts (Sentencing) Act 2000, to order restitution upon conviction: *R. v Ferguson* [1970] 1 W.L.R. 1246; *R. v Church* (1970) 55 Cr. App. R. 65; *R. v Parker* [1970] 2 All E.R. 458. cf. *Malone v Metropolitan Police Commissioner* [1980] Q.B. 49. The courts are also empowered by s.130 of the Powers of Criminal Courts (Sentencing) Act 2000 to make a compensation order against a convicted offender: *R. v Inwood* (1975) 60 Cr. App. R. 70; *R. v Kneeshaw* [1975] Q.B. 57; *R. v Daly* [1974] 1 W.L.R. 133; *R. v Vivian* [1979] 1 All E.R. 48. Magistrates' courts may also make orders for the delivery of property in the possession of the police to the person appearing to be the owner: Police (Property) Act 1897; *Raymond Lyons & Co v Metropolitan Police Commissioner* [1975] Q.B. 321. The Proceeds of Crime Act 2002 creates a statutory framework for the confiscation of assets of defendants convicted of a crime. See *Waya* [2012] UKSC 51, [2013] 1 A.C. 294; Virgo [2009] R.L.R. 29. Under Pt V of the Act state officials can apply to the High Court to recover the proceeds of crime: see *Serious Organised Crime Agency v Perry* [2012] UKSC 35, [2013] 1 A.C. 182. The victim of a crime can apply to the court for a declaration that property which might otherwise be recovered by the state as the proceeds of crime, was property or represents property of which the victim was deprived by unlawful conduct: *Proceeds of Crime Act 2002* s.281; *The National Crime Agency v Robb* [2014] EWHC 4384 (Ch), [2015] 3 W.L.R. 23.

 973. Burrows at Ch.26; Virgo at Ch.19.

 974. *Regal (Hastings) Ltd v Gulliver* [1967] 2 A.C. 134n; *Boardman v Phipps* [1967] 2 A.C. 46; *Crown Dilmun, Dilmun Investments Ltd v Nicholas Sutton, Fulham River* [2004] EWHC 52 (Ch), [2004] 1 B.C.L.C. 468; *Re Quarter Master UK Ltd Unreported July 15, 2004* (Paul Morgan Q.C.); *Murad v Al-Saraj* [2005] EWCA Civ 1235, [2005] W.T.L.R. 1573. See generally Conaglen, *Fiduciary Loyalty* (2010).

 975. *Peter Pan Manufacturing Corp v Corsets Silhouette Ltd* [1964] 1 W.L.R. 96; *Att-Gen v Guardian Newspapers Ltd (No.2)* [1990] 1 A.C. 109. See also Jones (1970) 86 L.Q.R. 463. In *LAC Minerals Ltd v International Cornoa Resources Ltd* (1989) 61 D.L.R. (4th) 14 profits were held on constructive trust. As to whether the remedy of account of profits or reasonable damages for release of an obligation of confidence should be awarded, see *Vercoe v Rutland Fund Management Ltd* [2010] EWHC 424 (Ch) at [340]–[343] (Sales J.); *Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd* [2012] EWHC 616 (Ch); *Walsh v Shanahan* [2013] EWCA Civ 411 at [63] (Rimer L.J.) (a matter of judicial discretion).

 976.  *Murad v Al-Saraj* [2005] EWCA Civ 1235, [2005] W.T.L.R. 1573. See also *Novoship (UK) Ltd v Nikitin* [2014] EWCA Civ 908, [2015] 2 W.L.R. 526 at [96] (Longmore L.J.). The fiduciary will be liable to account for a profit made from his position is not dependent on whether the principal had been damaged or benefited from the breach of duty: *Akita Holdings Ltd v Honourable Attorney-General of the Turks and Caicos Islands* [2017] UKPC 7, [2017] 2 W.L.R. 1153.

- [977.](#) *Regal (Hastings) Ltd v Gulliver* [1942] 1 All E.R. 378; [1967] 2 A.C. 134n; *Phipps v Boardman* [1967] 2 A.C. 46 (the agent or employee may, however, be entitled to some remuneration for his work and skill if he has acted openly: see below, para.29-165); *Industrial Development Consultants Ltd v Cooley* [1972] 1 W.L.R. 443; *Guinness Plc v Saunders* [1990] 2 A.C. 663. In *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, [2015] A.C. 250 this was described as equitable compensation. That is confusing language since the remedy does not compensate the claimant for loss suffered but instead operates to require the defendant to disgorge the value of the bribe or the secret commission.
- [978.](#) *Reading v Att-Gen* [1948] 1 K.B. 268, 276; [1949] 2 K.B. 232; [1951] A.C. 507; *Mahesan v Malaysia Government Officers' Co-operative Housing Society Ltd* [1979] A.C. 374, applying *United Australia Ltd v Barclays Bank Ltd* [1941] A.C. 1. See also *Imageview Management Ltd v Jack* [2009] EWCA Civ 63, [2009] 2 All E.R. 666 (noted Watts (2009) 125 L.Q.R. 369) (football agent liable to account for fee paid by football club for obtaining work permit for footballer, because of a conflict of interest; breach of fiduciary duty could have been avoided by disclosure to the footballer. The agent was also liable to make restitution of remuneration already paid).
- [979.](#) *Industries and General Mortgage Co Ltd v Lewis* [1949] 2 All E.R. 573; Vol.II, para.31-073.
- [980.](#) *Boston Deep Sea Fishing & Ice Co Ltd v Ansell* (1888) 39 Ch. D. 339; *Lister v Stubbs* (1890) 45 Ch. D. 1. See Vol.II, paras 31-073 et seq. cf. *Meadow Schama & Co v C. Mitchel & Co* (1973) 228 E.G. 1511 (arrangement between estate agents after commission earned held not to amount to a secret commission); *Kelly v Cooper* [1993] A.C. 205.
- [981.](#) *Att-Gen v Goddard* (1929) 98 L.J.K.B. 743.
- [982.](#) *Reading v Att-Gen* [1951] A.C. 507.
- [983.](#) *Reading v Att-Gen* [1951] A.C. 507.
- [984.](#) [2014] UKSC 45, [2015] A.C. 250.
- [985.](#) *Novoship (UK) Ltd v Nikitin* [2014] EWCA Civ 908, [2015] 2 W.L.R. 526 the dishonest assister may be liable to account for their profit made as a result of assisting the breach of duty.
- [986.](#) *Mahesan v Malaysia Government Officers' Co-operative Housing Society Ltd* [1979] A.C. 374, 382–383; *Arab Monetary Fund v Hashim (No.9)* [1993] 1 Lloyd's Rep. 543; *Petrotrade Inc v Smith* [2000] 1 Lloyd's Rep. 486; *Fyffes Group Ltd v Templeman* [2000] 2 Lloyd's Rep. 643. But see Tettenborn (1979) 95 L.Q.R. 68 and cf. Needham (1979) 95 L.Q.R. 536 (1979). See further Vol.II, para.31-073.
- [987.](#) *Logicrose Ltd v Southend United F.C. Ltd* [1988] 1 W.L.R. 1256.
- [988.](#) Above, para.29-164; Vol.II, paras 31-129-31-130.
- [989.](#) *Phipps v Boardman* [1967] 2 A.C. 46, 104, 112; *O'Sullivan v Management Agency & Music Ltd* [1985] Q.B. 428; *Re Berkeley Applegate Ltd* [1989] Ch. 32; *Nottingham University v Fishel* [2000] I.C.R. 1462; *James v Williams* [2000] Ch. 1 (constructive trustee of property who expends money on repairs and maintenance can deduct this from the amount payable to the beneficiary); *Murad v Al-Saraj* [2005] EWCA Civ 1235, [2005] W.T.L.R. 1573; cf. *Guinness Plc v Saunders* [1990] 2 A.C. 663.
- [990.](#) *Re Berkeley Applegate Ltd* [1989] Ch. 32. The award of an equitable allowance was declined in *Re Quarter Master UK Ltd Unreported July 15, 2004* on the ground that directors should not profit from their breach of fiduciary duty and that the directors concerned had not demonstrated special skills or taken unusual risks.

Chitty on Contracts 32nd Ed.
Consolidated Mainwork Incorporating Second Supplement
Volume I - General Principles
Part 9 - Restitution
Chapter 29 - Restitution ¹
Section 4. - Proprietary Restitutionary Claims ⁹⁹¹
(a) - Establishing Proprietary Rights

Advantages of proprietary restitutionary claims

29-166

The advantages of proprietary restitutionary claims include, first, that they may lie against an innocent recipient of the property, even where no personal claim, whether in tort, unjust enrichment, or Equity, would lie against him ⁹⁹²; secondly, if the recipient of the property is insolvent, the true owner may, subject to statutory requirements in certain cases, ⁹⁹³ claim specific property ⁹⁹⁴ in priority to the claims of general creditors ⁹⁹⁵; thirdly, if the true owner traces the value of his property into property held by the defendant which has increased in value, the true owner will gain the benefit of that increased value. ⁹⁹⁶ Further, it is possible for a personal restitutionary remedy to be obtained by reliance on the vindication of the claimant's property rights. ⁹⁹⁷ This has the advantage that the claimant can obtain the restitution of value from an indirect recipient of the property, regardless of the fact that the recipient has not retained the property or its substitute.

Identifying a proprietary interest





29-167

⚠ Before a claimant can bring a proprietary restitutionary claim it is necessary to establish a proprietary interest, either at Law or in Equity. Where the claimant has transferred property, a legal proprietary interest may be retained where the claimant's intention to transfer the property can be considered to have been vitiated. For example, where the property was transferred as the result of a fundamental mistake, relating to the identity of the recipient ⁹⁹⁸ or the identity of the property, ⁹⁹⁹ then title will not pass. Similarly, where property has been stolen, title will not pass. ¹⁰⁰⁰ ⚠ A possessory title can be sufficient to found a proprietary restitutionary claim. ¹⁰⁰¹ An equitable proprietary interest will be created either by an express trust or through the recognition of a resulting ¹⁰⁰² or constructive trust.

Constructive trusts ¹⁰⁰³

29-168

⚠ Equity has employed the mechanism of a trust in order to compel the "trustee" to convey property to the "beneficiary" where, quite apart from the intention of the parties, the rules of Equity decide that property is in the wrong hands. The constructive trust arises by operation of law in a number of circumstances, including where the defendant has misappropriated property in breach of trust or breach of fiduciary duty, ¹⁰⁰⁴ ⚠ where property has been obtained by fraud, ¹⁰⁰⁵ ⚠ or has been

stolen,¹⁰⁰⁶  or where the defendant has received property unconscionably, such as where the defendant is aware that money had been paid by mistake,¹⁰⁰⁷ or possibly where the payee was aware that there had already been a total failure of basis.¹⁰⁰⁸  In *The National Crime Agency v Robb*¹⁰⁰⁹ Etherton C. recognised that, when a transaction induced by fraudulent misrepresentation is rescinded, the property which was transferred pursuant to the transaction will be held on constructive trust for the transferor, assuming that it is possible to identify the transferred property or its traceable proceeds in the hands of the defendant.¹⁰¹⁰  Before rescission is ordered the claimant only has a mere equity to rescind the contract, which is not sufficient to establish a proprietary restitutionary claim.¹⁰¹¹ The constructive trust has been extensively developed in the United States of America,¹⁰¹² where such a trust is regarded as “purely a remedial institution”¹⁰¹³ and, although support has been expressed for the development of the remedial constructive trust in English law,¹⁰¹⁴ this notion of the trust has been rejected by the Supreme Court.¹⁰¹⁵  The constructive trust is significant in other areas. For instance, when a bailee, who has insured the goods bailed to him for their full value, receives payment from the insurers, he may retain so much as would cover his own interest in the goods, and is a trustee for the owner of the goods in respect of the balance.¹⁰¹⁶ Similarly, where the owner of real property agrees to sell it to a purchaser, he becomes a “qualified trustee” for the purchaser, with the result that, if the owner later wrongfully sells the property to a second purchaser and receives the price from him, he is accountable to the first purchaser for the price as trust property to be transferred to the first purchaser upon his completing his obligations under the first contract.¹⁰¹⁷ The concept of a constructive trust has been used where there is a presumed common intention of cohabitants that they should have an interest in their home.¹⁰¹⁸

Defendant’s acquiescence in improvements to his land

29-169

There are other equitable rules which may create equitable proprietary interests. For instance, where a person in occupation of the land of another expends money on the land (e.g. by building) in the expectation, induced or encouraged by the owner of the land, that he will be allowed to remain in occupation, an equity is created under which the court will protect his occupation of the land.¹⁰¹⁹ The nature of the relief will depend on the circumstances.¹⁰²⁰

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1. For a full treatment of the subject matter of this chapter, see: Burrows, *The Law of Restitution*, 3rd edn (2011); Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016); Virgo, *The Principles of the Law of Restitution*, 3rd edn (2015). See also Beatson, *The Use and Abuse of Unjust Enrichment* (1991); Birks, *An Introduction to the Law of Restitution* (1985); Birks, *Unjust Enrichment*, 2nd edn (2005); Maddaugh and McCamus, *The Law of Restitution*, 2nd edn (2004); McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014); Mason, Carter and Tolhurst, *Restitution Law in Australia*, 2nd edn (2008); Palmer, *The Law of Restitution* (1978) (four Vols); The American Law Institute’s Restatement of the Law Third, Restitution and Unjust Enrichment (2011).
 - ^{991.} Burrows at Ch.8; Goff and Jones at Chs 7, 8 and 37–40; Virgo at Pt IV.
 - ^{992.} *Sinclair v Brougham* [1914] A.C. 398; *International Sales & Agencies Ltd v Marcus* (1982) 34 C.M.L.R. 46. But cf. *Thavorn v Bank of Credit & Commerce International SA* [1985] 1 Lloyd’s Rep. 259.
 - ^{993.} e.g. the registration requirements of Companies Act 2006 ss.860–894; *Re Bond Worth Ltd* [1980] Ch. 228; *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch. 25; *Re Peachdart Ltd* [1984] Ch. 131. But cf. *Clough Mill Ltd v Martin* [1985] 1 W.L.R. 111; *John Snow & Co Ltd v D.B.G. Woodcroft Ltd* [1985] B.C.L.C. 54.
 - ^{994.} At Common Law it will not be possible, however, to ensure the return of the property in specie; below, para.29-177. See the discretion to order that a chattel be restored by the Torts

(Interference with Goods) Act 1977 s.3.

995. cf. claims for freezing orders which do not have this effect: *Cretanor Maritime Co Ltd v Irish Marine Management Ltd* [1978] 1 W.L.R. 966.
996. *Re Diplock* [1948] Ch. 465, 517, 557; *Re Tilley's W.T.* [1967] Ch. 1179, 1193; *Foskett v McKeown* [2001] 1 A.C. 102.
997. See below, paras 29-177 and 29-181.
998. *Citibank NA v Brown Shipley and Co Ltd* [1991] 2 All E.R. 690, 699 (Waller J.).
999. *Ashwell* (1885) 16 Q.B.D. 190.
1000. **!** This is the preferable explanation of *Lipkin Gorman (A Firm) v Karpnale Ltd* [1991] 2 A.C. 546, although the House of Lords based its decision on unjust enrichment applied in *Re Hampton Capital Ltd* [2015] EWHC 1905 (Ch), [2016] 1 B.C.L.C. 374.. Now see *Foskett v McKeown* [2001] 2 A.C. 102. See also *OEM Plc v Schneider* [2005] EWHC 1072 (Ch) at [40] (Peter Clarke J.); *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), [2013] Ch. 156. Title will pass under an ultra vires transaction: *Ayers v South Australian Banking Corp* (1871) LR 3 PC 548; *Challinor v Bellis* [2015] EWCA Civ 59 at [108] (Briggs LJ).
1001. *Costello v Chief Constable of Derbyshire Constabulary* [2001] 3 All E.R. 150.
1002. See *Air Jamaica v Charlton* [1999] 1 W.L.R. 1399, 1412 (Lord Millett); *Twinsectra Ltd v Yardley* [2002] 2 A.C. 164, 189 (Lord Millett); Chambers, Resulting Trusts (1997). This includes a so-called *Quistclose* trust, where property is transferred for a purpose which fails, the property will be held on resulting trust for the transferor: *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] A.C. 567; *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 A.C. 164 at [100] (Lord Millett). See also at [7] (Lord Steyn), [13] (Lord Hoffmann) and [25] (Lord Hutton); *Latimer v IRC* [2004] UKPC 14, [2004] 1 W.L.R. 1466, 1478 (Lord Millett); *Challinor v Bellis* [2015] EWCA Civ 59.
1003. Underhill and Hayton, *Law of Trusts and Trustees*, 18th edn (2010), Ch.9; Snell's Equity, 33rd edn (2014), 21–221, Chs 24 and 26; Virgo, *Principles of Equity and Trusts* (2012), Ch.9; Elias, *Explaining Constructive Trusts* (1990); Oakley, *Constructive Trusts*, 3rd edn (1997); Waters, *The Constructive Trust* (1964).
1004. **!** See para.29-163, above. For leading cases, see e.g. *Keech v Sandford* (1726) Cas. t. King 61; *Re Knowles' Will Trusts* [1948] 1 All E.R. 866; *Bannister v Bannister* [1948] 2 All E.R. 133; *Reading v Att-Gen* [1951] A.C. 507, 516, 517; *Re Green* [1951] Ch. 148; *Hepburn v A. Tomlinson (Hauliers) Ltd* [1966] A.C. 451; *Phipps v Boardman* [1967] 2 A.C. 46 (above, para.29-164); *Guinness Plc v Saunders* [1990] 2 A.C. 663; *Industrial Development Consultants Ltd v Cooley* [1972] 1 W.L.R. 443; *Queensland Mines v Hudson* (1978) 18 A.L.J. 1; *New Zealand Netherland Society "Oranje" Inc v Kuys* [1973] 1 W.L.R. 1126 (PC: a special arrangement may displace what would otherwise be a potential fiduciary obligation); *Papamichael v National Westminster Bank* [2003] 1 Lloyd's Rep. 341, 371; *Clark v Cutland* [2003] EWCA Civ 810; *Sinclair Investment Holdings SA v Versailles Trade Finance Ltd* [2011] EWCA Civ 347, [2012] Ch. 453, at [88] (Lord Neuberger MR); *Keown v Nahoor* [2015] EWHC 3418 (Ch) at [41] (D Halpern QC). As to whether a constructive trust should be recognised where a defendant has breached confidence, see *Tang* (2003) L.S. 135, cf. *Att-Gen v Guardian Newspapers (No.2)* [1990] 1 A.C. 109, 288 (Lord Goff).
1005. **!** *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669, 716 (Lord Browne-Wilkinson), at least where the transaction was void and not voidable: *Papamichael v National Westminster Bank* [2003] 1 Lloyd's Rep. 341, 374; *Halley v The Law Society* [2003] EWCA Civ 97 (contract was the instrument of fraud, rather than only induced by the fraud, and so was void); *Commerzbank AG v IMB Morgan Plc* [2004] EWHC 2771 (Ch), [2005] 1 Lloyd's Rep. 298 at [36] (Lawrence Collins J.); *Sinclair Investment Holdings SA v Versailles Trade*

Finance Ltd [2005] EWCA Civ 722, [2006] 1 B.C.L.C. 66; *Angove's Pty Ltd v Bailey* [2016] UKSC 47, [2016] 1 W.L.R. 3179 at [30] (Lord Sumption). cf. *Lonrho v Fayed (No.2)* [1992] 1 W.L.R. 1; *El Ajou v Dollar Land Holdings Plc* [1993] 3 All E.R. 717.

1006.

! *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), [2013] Ch. 156, at [276] (Stephen Morris Q.C.). See also *Angove's Pty Ltd v Bailey* [2016] UKSC 47, [2016] 1 W.L.R. 3179 at [30] (Lord Sumption) and *Fistar v Riverwood Legion and Community Club Ltd* [2016] NSWCA 81.

1007.

Westdeutsche Landesbank Girozentrale v Islington LBC [1996] A.C. 669, 715 (Lord Browne-Wilkinson). See also *Papamichael v National Westminster Bank* [2003] 1 Lloyd's Rep. 341, 372 (actual knowledge is required: at 373). In *Fitzalan-Howard (Norfolk) v Hibbert* [2009] EWHC 2855 (QB) at [49], Tomlinson J. suggested that the conscience of the recipient of a mistaken payment might be affected when he could reasonably be required to have acted by repaying the money, suggesting that an objective test of unconscionability should be adopted. See further the analysis of unconscionability adopted by Stephen Morris Q.C. in *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), [2013] Ch. 156, at [132]. See below, para.29-181.

1008.

! *Re Farepak Food and Gifts Ltd* [2006] EWHC 3272, [2006] All E.R. (D) 265. See also *Nesté Oy v Lloyd's Bank Plc* [1983] 2 Lloyd's Rep. 658 and *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), [2013] Ch. 156 at [129] (Stephen Morris Q.C.). In *Angove's Pty Ltd v Bailey* [2016] UKSC 47, [2016] 1 W.L.R. 3179 the Supreme Court did not accept that a constructive trust would be recognised where the recipient of money knew that imminent insolvency would prevent him from performing the corresponding obligation. In doing so the reasoning in *Nesté Oy v Lloyd's Bank Plc*, namely that a constructive trust was triggered because a reasonable and honest person would have repaid the money which had been received after the directors had concluded that the company was insolvent, was rejected. The justification for this appears to turn on what good conscience requires and that, just because a reasonable person would have returned a payment, it does not follow that it should have been returned. But this misses the point about the basis for recognising the constructive trust on the ground of unconscionable retention. The prior question is whether the defendant is liable to make restitution to the claimant by virtue of unjust enrichment. If there is such a liability and the defendant is aware of the circumstances which establish the claim then the money will be held on constructive trust. That is why money paid by mistake may be held on constructive trust, as was acknowledged by Lord Sumption, although he described this as a fundamental mistake, thus confusing mistakes which prevent legal title from passing with mistakes which may trigger a constructive trust. But if the defendant is liable to make restitution by virtue of a total failure of consideration and is aware of the circumstances amounting to this, that should be sufficient to justify the recognition of the constructive trust. The key question should then be whether a total failure of consideration can be identified. Despite this, the Supreme Court asserted that neither an actual nor a potential total failure of consideration will give rise to a proprietary restitutionary right, but is simply a matter of contractual readjustment. See further Watts (2017) 133 L.Q.R. 11.

1009.

[2014] EWHC 4384 (Ch), [2015] 3 W.L.R. 23 [49]. See also *Lonrho Plc v Fayed (No 2)* [1992] 1 W.L.R. 1, 12 (Millet J.); *Daly v Sydney Stock Exchange* (1986) 65 ALR 193, 204 (Brennan J).

1010.

! *The National Crime Agency v Robb* [2014] EWHC 4384 (Ch), [2015] 3 W.L.R. 23 at [51] (Etherton C.). See also *Bainbridge v Bainbridge* [2016] EWHC 898 (Ch), [2016] W.T.L.R. 943.

1011.


Phillips v Phillips (1862) 4 De G.F. and J. 208; *Shalson v Russo* [2003] EWHC 1637 (Ch), [2015] 3 W.L.R. 23, [2005] Ch. 281 at [111] (Rimer J.); *The National Crime Agency v Robb* [2014] EWHC 4384 (Ch), [2015] 3 W.L.R. 23 at [80] (Etherton C.).

1012.

Scott (1955) 71 L.Q.R. 39.

1013.

Pound (1920) 33 Harv. L.R. 420, 421.

- [1014.](#) *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669, 716 (Lord Browne-Wilkinson); cf. *London Allied Holdings v Lee* [2007] EWHC 2061 (Ch) at [274] (Etherton J.). In *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 Lord Scott (at [20]) endorsed the recognition of the remedial constructive trust, which he considered should be adopted instead of proprietary estoppel where there has been a representation as to a future rather than an immediate benefit, such as inheritance of property. None of the other Law Lords considered the remedial constructive trust.
- [1015.](#)  *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, [2015] A.C. 250 at [44] (Lord Neuberger). See also *Re Polly Peck International (No.2)* [1998] 3 All E.R. 812, 823 (Mummery L.J.), 830 (Nourse L.J.); *Metall und Rohstoff AG v Donaldson, Lufkin and Jenrette Inc* [1990] 1 Q.B. 391, 474–480; *Halifax Building Society v Thomas* [1996] Ch. 217, 229 (Peter Gibson L.J.); *Cobbold v Bakewell Management Ltd* [2003] EWHC 2289 (Ch) at [17] (Rimer J.); *Sinclair Investment Holdings SA v Versailles Trade Finance Ltd* [2007] EWHC 915 (Ch), [2007] 2 All E.R. (Comm) 993 at [105] (Rimer J.); *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347, [2012] Ch. 453 at [37] (Lord Neuberger M.R.); *Angove's Pty Ltd v Bailey* [2016] UKSC 47, [2016] 1 W.L.R. 3179 at [27] (Lord Sumption).
- [1016.](#) *Hepburn v A. Tomlinson (Hauliers) Ltd* [1966] A.C. 451 (Vol.II, paras 33-025, 42-011, 42-012). See also *The Albazero* [1977] A.C. 774.
- [1017.](#) *Lake v Bayliss* [1974] 1 W.L.R. 1073. See also *English v Dedham Vale Properties Ltd* [1978] 1 W.L.R. 93 and *Olins v Walters* [2008] EWCA Civ 782, [2009] Ch. 212 (mutual wills).
- [1018.](#) *Stack v Dowden* [2007] UKHL 17, [2007] 2 A.C. 432; Swadling (2007) L.Q.R. 511; Etherton (2008) C.L.J. 265; *Jones v Kernott* [2011] UKSC 53, [2012] 1 A.C. 776. This has been extended to commercial arrangements: *Yaxley v Gotts* [2000] Ch. 162; *Banner Homes Group Plc v Luff Developments Ltd* [2000] Ch. 372; *Yeoman's Row Management Ltd v Cobbe* [2008] UKHL 55, [2008] 1 W.L.R. 175; *Crossco No.4 Unlimited v Jolan Ltd* [2011] EWCA Civ 1619.
- [1019.](#) *Inwards v Baker* [1965] 2 Q.B. 29; *Chalmers v Pardoe* [1963] 1 W.L.R. 677; *Ward v Kirkland* [1966] 1 W.L.R. 601, 626–632; *Lee-Parker v Izzet* [1972] 1 W.L.R. 775, 780–781. cf. *E.R. Ives Investment Ltd v High* [1967] 2 Q.B. 379; *Siew Soon Wah v Yong Tong Hong* [1973] A.C. 836; *Dodsworth v Dodsworth* [1973] E.G. 233; *Crabb v Arun DC* [1976] Ch. 179 (one landowner encouraged the adjoining owner to act to his prejudice in the belief he would be given a right of way); *Jones v Jones* [1977] 1 W.L.R. 438; *Pascoe v Turner* [1979] 1 W.L.R. 431; *Grant v Edwards* [1986] Ch. 638; *Gillett v Holt* [2001] Ch. 210 *Yeoman's Row Management Ltd v Cobbe* [2008] UKHL 55, [2008] 1 W.L.R. 1752; *Thorner v Majors* [2009] UKHL 18, [2009] 1 W.L.R. 776. For earlier authorities, see *Dillwyn v Llewelyn* (1862) 4 De G.F. & J. 517; *Ramsden v Dyson* (1866) L.R. 1 H.L. 129; *Willmot v Barber* (1880) 15 Ch. D. 96; *Plimmer v Mayor of Wellington* (1884) 9 App. Cas. 699. See also *Allan* (1963) 79 L.Q.R. 238; *Van den Berg v Giles* [1979] 2 N.Z.L.R. 111. cf. above, paras 4-141 et seq.
- [1020.](#) *Inwards v Baker* [1965] 2 Q.B. 29.

Chitty on Contracts 32nd Ed.
Consolidated Mainwork Incorporating Second Supplement
Volume I - General Principles
Part 9 - Restitution
Chapter 29 - Restitution ¹
Section 4. - Proprietary Restitutionary Claims ⁹⁹¹
(b) - Following and Tracing

Following and tracing ¹⁰²¹

29-170

Where the claimant has a legal or equitable proprietary interest he will need to identify that interest in property which can be identified in the hands of the defendant. To do this the claimant as true owner of the property may “follow” the original property or “trace” the product or substitute of his property and then claim its recovery. ¹⁰²² This process is recognised both at Common Law ¹⁰²³ and in Equity, ¹⁰²⁴ each with its own limitations, ¹⁰²⁵ but tracing in Equity is likely to prove more useful in practice because of the more extensive proprietary remedies available. Despite calls for the assimilation of the tracing rules at Law and in Equity, they remain distinct, ¹⁰²⁶ although the reason for the distinction appears to have arisen from a misinterpretation of earlier authorities. ¹⁰²⁷

Tracing at Common Law

29-171

At Common Law a claimant is permitted to trace and claim property in which he has a legal proprietary interest if it has not been mixed with other property but can be identified in a “physical” ¹⁰²⁸ sense, e.g. sovereigns in a bag ¹⁰²⁹ or an entire chose in action, such as a bank balance ¹⁰³⁰ or a promissory note. ¹⁰³¹ If another asset has been “purchased exclusively” ¹⁰³² with the claimant’s money, it is still identifiable at Common Law, because Common Law permits the owner of the original property to assert his title to the product in place of the original property ¹⁰³³ and to profits made from the exchanged property. ¹⁰³⁴ But in the case of money, identification has been held not to be possible if there was “admixture of other money”. ¹⁰³⁵

Tracing in Equity

29-172

! Tracing in Equity is only possible where the claimant can establish that the defendant or a third party is in a fiduciary relationship with him which has been broken ¹⁰³⁶ and that he has an equitable proprietary interest in the relevant property. ¹⁰³⁷ Once this is established the beneficiary can trace the property into the hands of anyone, until either a bona fide purchaser for value without notice acquires the legal title to the property, ¹⁰³⁸ or the property ceases to be identifiable even in Equity. ¹⁰³⁹ Thus, the claimant may recover his property from a person who purchases it for value, but with notice of the equitable interest, or from an innocent volunteer who takes the property without notice of the equitable interest but who does not give value for it, ¹⁰⁴⁰ **!** for in these cases there is no bona fide purchaser for value. ¹⁰⁴¹ If the trustee or fiduciary pays trust money into his private bank account which is overdrawn, and the bank, without notice that it is trust money, uses it to pay off the overdraft,

the right to trace is lost. ¹⁰⁴² In *Relfo Ltd v Varsani* ¹⁰⁴³ Arden L.J. recognised that in order to trace money into substitute property it is not necessary that the payments should occur in any particular order. So, for example, where a third party pays money to the defendant in the expectation that the third party would be reimbursed from money transferred from the trust of which the claimant is a beneficiary, the claimant can trace the value of his money to the defendant. This is a potentially significant expansion of the tracing rules, which does not limit tracing to direct substitutional transfers.

Fiduciary relationship

29-173

The authorities requiring that there be a fiduciary relationship have been criticised ¹⁰⁴⁴ and courts have, on occasion, been willing to circumvent or manipulate the requirement. ¹⁰⁴⁵ Moreover, in some cases the finding that a fiduciary relationship exists has appeared to rest solely on the fact that it would be unconscionable for the recipient or his trustee in bankruptcy to retain the amount by which his assets had been increased. ¹⁰⁴⁶ However, the category of fiduciary relationships is broad ¹⁰⁴⁷ and the relationship need not originate in a consensual transaction. ¹⁰⁴⁸ Nor, apparently, need the property have been the subject of fiduciary obligations before it got into the wrong hands. Although the requirement of a fiduciary relationship has been reaffirmed by the House of Lords, ¹⁰⁴⁹ it was also stated ¹⁰⁵⁰ that stolen moneys are traceable in Equity and that an equitable proprietary interest under a resulting or constructive trust will suffice. It therefore appears that the courts will continue to manipulate this requirement where they think it is appropriate. The preferable view is that a fiduciary relationship is not a precondition for tracing in Equity, but instead is a function of the claimant having an equitable proprietary interest in the property. ¹⁰⁵¹

Identifying property in Equity

29-174

Equity may trace property beyond “the verge of actual identification”, ¹⁰⁵² into any specific asset purchased with it, ¹⁰⁵³ or into a bank account even when it is mixed with other moneys ¹⁰⁵⁴; “equity regarded the amalgam as capable, in proper circumstances, of being resolved into its component parts”. ¹⁰⁵⁵ Accordingly, if the trustee mixes his own money with the trust money, the beneficiary can trace into the mixed fund or into any asset purchased with the mixed fund. ¹⁰⁵⁶ But even Equity cannot trace property if its identity is finally lost, e.g. by being spent on living expenses such as a dinner, ¹⁰⁵⁷ being used to pay off a loan, ¹⁰⁵⁸ or by mixing heterogeneous goods in a manufacturing process wherein a wholly new product emerges. ¹⁰⁵⁹ Nor will Equity permit tracing if it would operate in a harsh or unconscionable manner upon the volunteer, e.g. if a volunteer who innocently acquires trust property uses it to alter or improve his own land or buildings, the right to trace in Equity is lost, since it would be inequitable to force the sale of his land. ¹⁰⁶⁰ The right to trace will also be lost if the recipient is a bona fide purchaser for value, ¹⁰⁶¹ but it appears that the defence of change of position will not defeat a proprietary restitutionary claim. ¹⁰⁶²

Withdrawals from a mixed fund in a bank account

29-175

In *Clayton's Case* ¹⁰⁶³ it was held that the principle that moneys in a current bank account are presumed to have been paid out in the order in which they were paid in applies in Equity where two trust funds, or trust money and a volunteer's own money, have been mixed in the same bank account. ¹⁰⁶⁴ Where, however, the application of the rule in *Clayton's Case* would be impracticable, is inconsistent with the presumed intentions of the parties (such as where the fund is intended to be a common investment fund), is inconsistent with the actual allocation of funds, or will result in injustice, it will not apply if there is a preferable alternative allocation. ¹⁰⁶⁵ In such cases the rule in *Clayton's Case* will be easily displaced ¹⁰⁶⁶ and the court will incline to rateable division. ¹⁰⁶⁷ Moreover, where a trustee mixes his own money with trust money in a bank account, the rule in *Clayton's Case* does not apply, and the trustee is taken to have drawn out first his own money, until his own money in the

account is exhausted. ¹⁰⁶⁸ If the trustee draws out all the trust money, but later pays in money of his own, the beneficiary cannot trace into this money in the account unless he can prove that the trustee intended to replace the trust money. ¹⁰⁶⁹ If the trustee or volunteer “unmixes” the trust money by earmarking a particular withdrawal as the trust money, the beneficiary may trace it into another asset purchased with the proceeds of the withdrawal. ¹⁰⁷⁰

Reservation of title clauses: original goods and new products

29-176

The question of entitlement to trace has arisen in a commercial context where sellers of goods have sought to protect themselves from the consequences of their buyers’ insolvency by including reservation of title clauses in the contract of sale. ¹⁰⁷¹ It has been held that, where the purchaser holds the goods as a bailee, an appropriately drafted clause will entitle the unpaid seller to claim the goods and to trace into the identifiable proceeds of any further sale of the goods by the buyer. ¹⁰⁷² The reservation of title clause must, however, ensure that the seller retains the beneficial ownership of the property. Although, for instance, allowing the buyer to sell the goods or to use them in a manufacturing process may be held to be inconsistent with this, ¹⁰⁷³ the seller may be held to have retained beneficial ownership and the entitlement to trace until the goods are sold or so used. ¹⁰⁷⁴ Where a reservation of title clause applies to the product of a manufacturing process it will normally be construed as creating a charge on the product by the buyer in favour of the seller rather than a reservation of beneficial ownership ¹⁰⁷⁵ and, as such, is subject to the registration requirements of the Companies Act 2006. ¹⁰⁷⁶ It has, however, been stated that in principle parties to a contract could provide that title in new goods created by a manufacturing process could directly vest in the sellers. ¹⁰⁷⁷ Where it is wished to trace into the proceeds of sale (even where no manufacturing process had occurred), it is necessary to show that the parties were in a fiduciary relationship. ¹⁰⁷⁸ The following factors have been said to assist in establishing such a relationship:


- (a) an obligation to store the goods in a manner manifesting the seller’s ownership;
- (b) postponement of the passage of property until payment is made for the total indebtedness;
- (c) provision that the seller obtains the benefit of any claims against a subpurchaser;
- (d) provision that the buyer act as agent for or on account of the seller; and
- (e) an obligation on the buyer to keep the proceeds of sale separate from his own moneys and not to use them. ¹⁰⁷⁹

1. For a full treatment of the subject matter of this chapter, see: Burrows, *The Law of Restitution*, 3rd edn (2011); Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016); Virgo, *The*

Principles of the Law of Restitution, 3rd edn (2015). See also Beatson, *The Use and Abuse of Unjust Enrichment* (1991); Birks, *An Introduction to the Law of Restitution* (1985); Birks, *Unjust Enrichment*, 2nd edn (2005); Maddaugh and McCamus, *The Law of Restitution*, 2nd edn (2004); McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014); Mason, Carter and Tolhurst, *Restitution Law in Australia*, 2nd edn (2008); Palmer, *The Law of Restitution* (1978) (four Vols); The American Law Institute's Restatement of the Law Third, Restitution and Unjust Enrichment (2011).

991. Burrows at Ch.8; Goff and Jones at Chs 7, 8 and 37–40; Virgo at Pt IV.
1021. Snell's Equity, 33rd edn (2014), 30–051—30–063; Virgo, *Principles of Equity and Trusts*, Ch.19; Goff and Jones, Ch.7; Birks at pp.358–375; Lawson, *Remedies of English Law*, 2nd edn (1980), Ch.6; Smith, *The Law of Tracing* (1997); Wright (1936) 6 Camb. L.J. 305; Lord Denning (1949) 65 L.Q.R. 37; Maudsley (1959) 75 L.Q.R. 234; Babafemi (1971) 34 M.L.R. 12; Goode (1976) 92 L.Q.R. 360, 528; (1987) 103 L.Q.R. 433; Pearce (1976) 40 Conv.(N.S.) 277; Evans (1999) 115 L.Q.R. 469; Walker [2000] Rest. L. Rev. 573.
1022. *Foskett v McKeown* [2001] 1 A.C. 102, 128 and 139 (Lord Millett).
1023. *Re Diplock* [1948] Ch. 465, 518 et seq.; *Lipkin Gorman v Karpnale Ltd* [1991] 2 A.C. 548; *Trustee of the Property of F. C. Jones & Sons v Jones* [1997] Ch. 159. See also *Scott v Surman* (1742) Willes 400; *Taylor v Plumer* (1815) 3 M. & S. 562.
1024. *Sinclair v Brougham* [1914] A.C. 398; *Re Diplock* [1948] Ch. 465, 520 et seq.
1025. See below, paras 29-171, 29-172, 29-179, 29-180.
1026. *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch. 281, [103]–[104] (Rimer J). In *Nelson v Larholt* [1948] 1 K.B. 339 at 343, Denning J. considered that Common Law and Equity should be fused into one set of principles. See also *Bristol and West Building Society v Mothew* [1996] 4 All E.R. 698, 716 (Millett L.J.); *Foskett v McKeown* [2001] 1 A.C. 102, 113 (Lord Steyn), 128 (Lord Millett); Ulph [2007] R.L.R. 76.
1027. See Virgo, *Landmark Cases in Equity* (2012), p.387.
1028. *Sinclair v Brougham* [1914] A.C. 398, 418 (Viscount Haldane L.C.). But cf. Matthews (1981) 34 C.L.P. 156; *Indian Oil Corp v Greenstone Shipping Co SA* [1988] Q.B. 345. In *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, [2015] A.C. 250 at [44] the Supreme Court asserted that Common Law tracing is possible without a proprietary interest. No authority was provided for this obiter dictum, which is inconsistent with fundamental principles underpinning the law of tracing.
1029. *Sinclair v Brougham* [1914] A.C. 398, 418 (Viscount Haldane L.C.).
1030. *Banque Belge pour l'Etranger v Hambrouck* [1921] 1 K.B. 321; *Agip (Africa) Ltd v Jackson* [1991] 1 Ch. 547; *Lipkin Gorman v Karpnale Ltd* [1991] 2 A.C. 548. In *BMP Global Distribution Inc v Bank of Nova Scotia* 2009 S.C.C. 15 the Supreme Court of Canada recognised that the transfer of money through the clearing system does not constitute a systematic break in the chain of possession of the funds; Fox [2010] C.L.J. 28.
1031. *Scott v Surman* (1742) Willes 400.
1032. *Re Diplock* [1948] Ch. 465, 519; *Re J. Leslie Engineers Co Ltd* [1976] 1 W.L.R. 292, 297 (Lord Parker). See also *Whitecomb v Jacob* (1710) Salk 160.
1033. *Lipkin Gorman v Karpnale Ltd* [1991] 2 A.C. 548, 573 (Lord Goff). This process has been described as “ratification”: *Re Diplock* [1948] Ch. 465, 518; *Sinclair v Brougham* [1914] A.C. 398, 441 (Lord Parker). This agency fiction is criticised by Lord Denning (1949) 65 L.Q.R. 37, 41–42; it was not accepted in *Taylor v Plumer* (1815) 3 M. & S. 562, nor in *Lipkin Gorman v Karpnale Ltd* 574 (Lord Goff). But cf. Goode (1976) 92 L.Q.R. 360, 367, n.27; Khurshid and

Matthews (1979) 95 L.Q.R. 78 for criticism of this “exchange product” theory and the view that the claimant will acquire no title to the new asset unless it has been transferred to the recipient as agent for him or the recipient appropriates the property to him.

- [1034.](#) *Trustee of the Property of F. C. Jones & Sons v Jones* [1997] Ch. 157.
- [1035.](#) *Re Diplock* [1948] Ch. 465, 518.
- [1036.](#) *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd* [1986] 1 W.L.R. 1072. But see para.29-173, below.
- [1037.](#) *Re Diplock* [1948] Ch. 465, 520–521, 529–530; *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669, 714, 716 (Lord Browne-Wilkinson). See also *Aluminium Industrie Vassen BV v Romalpa Aluminium Ltd* [1976] 1 W.L.R. 676; *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch. 25; *Chase Manhattan Bank N.A. v Israel-British Bank (London) Ltd* [1981] Ch. 105; *Agip (Africa) Ltd v Jackson* [1991] Ch. 547; *Re Goldcorp Exchange Ltd* [1995] 1 A.C. 74; *Boscawen v Bajwa* [1996] 1 W.L.R. 328; *Moriarty v Various Customers of BA Peters Plc* [2008] EWCA Civ 1604, [2010] 1 B.C.L.C. 142.
- [1038.](#) *Re Diplock* [1948] Ch. 465, 539, 544; *Cowan de Groot Properties Ltd v Eagle Trust Plc* [1994] 4 All E.R. 700, 767. The same limitation applies at Common Law: *Clarke v Shee* (1774) 1 Cowp. 197.
- [1039.](#) *Re Diplock* [1948] Ch. 465, 521, 546–550; *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch. 25, 41–42; *R. v Preddy* [1996] A.C. 815, 834.
- [1040.](#)  *Re Diplock* [1948] Ch. 465, 539. See also *Thorndike v Hunt* (1859) 3 De G. & J. 563; *Taylor v Blakelock* (1886) 32 Ch. D. 560; *Sinclair v Brougham* [1914] A.C. 398, 443–447 (Lord Parker); *Clegg v Pache (deceased)* [2017] EWCA Civ 256 at [87] (Briggs L.J.). But cf. below, para.29-174 for the refusal to permit an equitable remedy which would operate unconscionably upon the volunteer.
- [1041.](#) See Snell’s Equity 33rd edn, 4–017–4–039; Babafemi (1971) 34 M.L.R. 12, 22–28.
- [1042.](#) *Thomson v Clydeside Bank* [1893] A.C. 282; *Coleman v Bucks & Oxon Union Bank* [1897] 2 Ch. 243; *Bishopsgate Investment Management Ltd v Homan* [1995] Ch. 211, 220; *Style Financial Services Ltd v Bank of Scotland* [1995] B.C.C. 785; *Serious Fraud Office v Lexi Holdings Plc* [2008] EWCA Crim 1443, [2009] Q.B. 376 at [50].
- [1043.](#) [2014] EWCA Civ 360, [2015] 1 B.C.L.C. 14 at [63]. Note also the so-called doctrine of “backwards tracing”. See below, para.29-174.
- [1044.](#) Maudsley (1959) 75 L.Q.R. 234, 241–245; (1971) 19 Vanderbilt L.R. 1123, 1136; Babafemi (1971) 34 M.L.R. 12; Oakley (1975) 28 Current Legal Problems 64; Birks (1997) 11 Trust Law Internat. 2; Millett (1998) 114 L.Q.R. 399, 409.
- [1045.](#) *El Ajou v Dollar Land Holdings Plc (No.1)* [1993] 3 All E.R. 717, 734 (Millett J.); *Bristol and West B.S. v Mothew* [1998] Ch. 1, 23 (Millett L.J.).
- [1046.](#) *Sinclair v Brougham* [1914] A.C. 398, 441–444 (Lord Parker); *Chase Manhattan Bank N.A. v Israel-British Bank (London) Ltd* [1981] Ch. 105, above, para.29-168; *Clough Mill Ltd v Martin* [1985] 1 W.L.R. 111; *Re Goldcorp Exchange Ltd* [1995] 1 A.C. 74. See also *English v Dedham Vale Properties Ltd* [1978] 1 W.L.R. 93 (although the plaintiff there sought an account of profits rather than a proprietary remedy). But cf. *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch. 25 for a more restrictive approach.
- [1047.](#) Sealy [1962] C.L.J. 69. For this purpose the relationship between, inter alia, solicitor and client, bailor and bailee, principal and agent will be regarded as fiduciary. An important factor in determining whether an agent is a fiduciary is whether he is under a duty to keep his own money separate from his principal’s money. See also below, para.29-176.

- [1048.](#) *Chase Manhattan Bank N.A. v Israel-British Bank (London) Ltd* [1981] Ch. 105, 119 (Goulding J.), discussed, Vol.II, para.34-136; *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669, 716 (Lord Browne-Wilkinson). See also *Sinclair v Brougham* [1914] A.C. 398; *English v Dedham Vale Properties Ltd* [1978] 1 W.L.R. 93, 111; *Ex p. James* (1874) L.R. 9 Ch. App. 609, discussed, above, paras 20-022, 29-044; see further *Agip (Africa) Ltd v Jackson* [1991] Ch. 547 but cf. *Re Byfield* [1982] Ch. 267.
- [1049.](#) *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669.
- [1050.](#) [1996] A.C. 669, 716.
- [1051.](#) *Re Diplock's Estate* [1948] Ch. 465, 530; *Campden Hill Ltd v Chakrani* [2005] EWHC 911 (Ch) at [74] (Hart J.). See Virgo, *Landmark Cases in Equity*, p.382.
- [1052.](#) *Sinclair v Brougham* [1914] A.C. 398, 459 (Lord Sumner). See also *Foskett v McKeown* [2001] 1 A.C. 102.
- [1053.](#) *Lane v Dighton* (1762) Amb. 409; *Hopper v Conyers* (1866) L.R. 2 Eq. 549.
- [1054.](#) *Re Diplock* [1948] Ch. 465, 520.
- [1055.](#) [1948] Ch. 465, 520.
- [1056.](#) [1948] Ch. 465, 539; *Re Hallett's Estate* (1880) 13 Ch. D. 696; *Re Pumfrey* (1882) 22 Ch. D. 255; *Re Oatway* [1903] 2 Ch. 356. The beneficiary can elect to claim either the value in the mixed fund or the asset purchased with value from that fund, because the evidential difficulty in identifying the location of the value which derived from the claimant's contribution will be resolved against the interests of the fiduciary, save where the fiduciary can show otherwise on the balance of probabilities: *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347, [2012] Ch. 453, at [141] (Lord Neuberger M.R.).
- [1057.](#) *Re Diplock* [1948] Ch. 465, 521.
- [1058.](#) [1948] Ch. 465, 548–550. In *Brazil v Durant International Corp* [2015] UKPC 35 the Privy Council recognised the possibility of so-called “backwards tracing”, such that it will be possible, for example, to trace through an overdrawn account, but only where the claimant can establish coordination between the depletion of a fund and the acquisition of an asset into which value is sought to be traced.
- [1059.](#) *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch. 25, 41 but cf. *Clough Mills Ltd v Martin* [1985] 1 W.L.R. 111, below, para.29-176.
- [1060.](#) *Re Diplock* [1948] Ch. 465, 546–548. (The alteration to the land or buildings may have been to suit the personal needs of the volunteer, so that there was no increase in the market value of the asset.)
- [1061.](#) *Foskett v McKeown* [2001] 1 A.C. 102, 129 (Lord Millett).
- [1062.](#) [2001] 1 A.C. 102, 129 (Lord Millett); *Armstrong DLW GmbH v Winington Networks Ltd* [2012] EWHC 10 (Ch), [2013] Ch. 156, at [103] (Stephen Morris Q.C.). See Edelman and Degeling, *Equity in Commercial Law* (2005), pp.315 and 325.
- [1063.](#) (1816) 1 Mer. 572. See McConville (1963) 79 L.Q.R. 388.
- [1064.](#) *Hancock v Smith* (1889) 41 Ch. D. 456, 461; *Re Stenning* [1895] 2 Ch. 433; *Re Hallett's Estate* (1880) 13 Ch. D. 696; *Re Diplock* [1948] Ch. 465, 552–554.
- [1065.](#) *Barlow Clowes (International) Ltd v Vaughan* [1992] 4 All E.R. 22; *Russell-Cooke Trust Co v Prentis* [2002] EWHC 2227 (Ch), [2003] 2 All E.R. 478; *The National Crime Agency v Robb* [2014] EWHC 4384 (Ch), [2015] 3 W.L.R. 23.

- [1066.](#) In *Russell-Cooke Trust Co v Prentis* [2002] EWHC 2227 (Ch), [2003] 2 All E.R. 478, 495 the so-called “Rule” was described as the exception; *Commerzbank AG v IMB Morgan Plc* [2004] EWHC 2771 (Ch), [2005] 1 Lloyd’s Rep. 298 at [50] (Lawrence Collins J.).
- [1067.](#) *Barlow Clowes (International) Ltd v Vaughan* [1992] 4 All E.R. 22, 42, 44.
- [1068.](#) *Re Hallett’s Estate* (1880) 13 Ch. D. 696 CA; *James Roscoe (Bolton) Ltd v Winder* [1915] 1 Ch. 62. But cf. *Re Oatway* [1903] 2 Ch. 356 (money first drawn out and invested held to be traceable where remaining balance later dissipated).
- [1069.](#) *James Roscoe (Bolton) Ltd v Winder* [1915] 1 Ch. 62; *Bishopsgate Investment Management Ltd v Homan* [1995] Ch. 211; *Goldcorp Exchange Ltd (In Receivership)* [1995] 1 A.C. 74, 107; *Campden Hill Ltd v Chakrani* [2005] EWHC 911 (Ch); *Brazil v Durant International Corp* [2015] UKPC 35, [41].
- [1070.](#) *Re Diplock* [1948] Ch. 465, 551–552.
- [1071.](#) See Goodhart and Jones (1980) 43 M.L.R. 489, 501–510; Goode (1976) 92 L.Q.R. 528, 547–552, 554–560 (discussion of the effect of such clauses in the context of the assignment of book debts and other receivables). See on reservation of title generally, below, Vol.II, paras 44-174 et seq.
- [1072.](#) *Aluminium Industrie Vaasen BV v Romalpa Aluminium Ltd* [1976] 1 W.L.R. 676. For the limited nature of this right to trace, see *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch. 25, 38–41. See also Davies [1984] L.M.C.L.Q. 49.
- [1073.](#) *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch. 25. See also *Re Bond Worth Ltd* [1980] Ch. 228.
- [1074.](#) *Clough Mill Ltd v Martin* [1985] 1 W.L.R. 111; *John Snow & Co v D.B.G. Woodcroft Ltd* [1985] B.C.L.C. 54; *Re Peachdart Ltd* [1984] Ch. 131, 141; *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd* [1984] 1 W.L.R. 485, 492. See also *Four Point Garage Ltd v Carter* [1985] 3 All E.R. 12 (retention of title clause did not preclude implication of term authorising resale and passage of title to sub-buyer).
- [1075.](#) *Clough Mill Ltd v Martin* [1985] 1 W.L.R. 111; *Re Peachdart Ltd* [1984] Ch. 131; *E. Pfeiffer Weinkellerei-Weineinkauf GmbH & Co v Arbuthnot Factors Ltd* [1988] 1 W.L.R. 150; *Re Weldtech Equipment Ltd* [1991] B.C.L.C. 393.
- [1076.](#) ss.860–894. See above, paras 10-046.
- [1077.](#) *Clough Mill Ltd v Martin* [1985] 1 W.L.R. 111, 119–120, 123–124.
- [1078.](#) *Hendy Lennox (Industrial Engines) Ltd v Grahame Puttick Ltd* [1984] 1 W.L.R. 485; *Re Andrabell* [1984] 3 All E.R. 407.
- [1079.](#) [1984] 1 W.L.R. 485. A fixed credit period has been held to be incompatible with (e).

Chitty on Contracts 32nd Ed.
Consolidated Mainwork Incorporating Second Supplement
Volume I - General Principles
Part 9 - Restitution
Chapter 29 - Restitution ¹
Section 4. - Proprietary Restitutionary Claims ⁹⁹¹
(c) - Proprietary Restitutionary Claims

Claiming at Common Law ¹⁰⁸⁰

29-177

Where the claimant has traced a legal proprietary interest into property in the hands of the defendant, the claim at Common Law to vindicate this proprietary interest may take the form of a claim for wrongful interference with goods, ¹⁰⁸¹ or a restitutionary claim for money had and received. ¹⁰⁸² The scope of the remedy in tort in particular has been considerably widened in order to protect proprietary rights; for instance, an action for conversion is given to the person on whose bank account a cheque belonging to him is drawn without his authority, ¹⁰⁸³ the Common Law thus treating him as “owner” of the cheque rather than “owner” of the intangible bank balance. These Common Law actions are, however, personal, in the sense that only a personal remedy is available, although the claim remains proprietary. ¹⁰⁸⁴ Common Law tracing into a substitute “cannot be relied on so as to render an innocent recipient a wrongdoer”. ¹⁰⁸⁵

Limitations of Common Law proprietary claims

29-178

The limitations of the Common Law proprietary claims ¹⁰⁸⁶ are said to be as follows:

(1)

the Common Law does not recognise equitable interests in property, ¹⁰⁸⁷ so that a beneficial interest under a trust cannot be claimed at Law;

(2)

at Common Law it is normally not possible to compel the return of the property *in specie* because the “device of a declaration of charge” is unknown to the Common Law ¹⁰⁸⁸;

(3)

the Common Law cannot identify the claimant’s money in a mixed fund. However, this does not mean that the remedy will be ineffective where the recipient of the property is insolvent since, if it comes into the hands of the trustee in bankruptcy, he will be personally liable even where he no longer has it. ¹⁰⁸⁹

Claiming in Equity

29-179

Equity recognises a variety of proprietary remedies to vindicate equitable proprietary rights, including a claim to a proportionate share of the property in the defendant's hands, recognition of an equitable charge over the property and subrogation. Where the claimant owns in Equity a proportionate share of the property in the defendant's hands, that share will be held on trust for the claimant. In *Foskett v McKeown* ¹⁰⁹⁰ it was held that, where money subject to an express trust was fraudulently used to pay insurance premiums, the defrauded beneficiaries were entitled to trace the money wrongfully paid into the policy and its proceeds. Moreover, their remedy was not merely a lien to secure return of the misapplied money, but a share of the proceeds of the policy (a much larger sum) which was held on the original express trust for the beneficiaries. Where the property purchased by a "mixed" fund has increased in value, the claim will be for a proportionate part of the increased value, as well as for the amount of the trust money. ¹⁰⁹¹ If the trustee mixes the trust funds of two separate trusts, there is an equal equity in each beneficiary, so that the separate beneficiaries can trace and share *pari passu*, or enjoy *pari passu* any equitable lien or charge on an asset purchased with the mixed fund. ¹⁰⁹² Any equitable charge may be enforced ultimately by sale of the assets. ¹⁰⁹³ If the trust money is received by a volunteer who then mixes it with his own money, the beneficiary may again trace his property, claiming a declaration of charge if necessary, but he must share the fund (or any asset purchased therewith) *pari passu* with the volunteer. ¹⁰⁹⁴ The assertion by Arden L.J. in *Relfo Ltd v Varsani* ¹⁰⁹⁵ that money or its substitute can be recovered from a third party where the money was stolen by the fiduciary, if the money or its substitute was knowingly received by the third party, confuses proprietary and personal claims. ¹⁰⁹⁶ The third party's liability to restore the property or its substitute is strict. Personal liability for the value received requires proof of fault, for purposes of the action of unconscionable receipt. ¹⁰⁹⁷

Subrogation

29-180


⚠ By virtue of "subrogation" a person may, in certain situations, "step into the shoes" of another so as to enjoy the latter's legal position or his rights against a third person. Subrogation may arise from the express or implied agreement of the parties or by operation of law. In the latter situation subrogation may be triggered by the defendant's unjust enrichment. ¹⁰⁹⁸ ⚠ It follows that it will be necessary to establish that the defendant was enriched at the expense of the claimant and that a ground of

restitution can be identified. ¹⁰⁹⁹ ⚠ In *Bank of Cyprus UK Ltd v Menelaou* ¹¹⁰⁰ ⚠ a bank was subrogated to a vendor's unpaid lien where the bank had released charges on one property which enabled funds to become available to purchase another property, with the bank incorrectly assuming that it would have a valid charge over the second property. The majority in the Supreme Court justified the award of subrogation on the basis that the owner of the second property was unjustly enriched at the Bank's expense. Lord Neuberger considered that it would be hard to find a more

appropriate remedy to award in this case, ¹¹⁰¹ ⚠ since it would give to the bank what it should have had if the charge over the second property had been valid. The Supreme Court's recognition of the award of subrogation to reverse the defendant's unjust enrichment involves the award of a proprietary remedy as a response to unjust enrichment, since the effect of subrogation is to give the claimant the benefit of a security interest to gain priority over the defendant's unsecured creditors, even though, as

Lord Clarke said, "a claim in unjust enrichment does not need to show a property right". ¹¹⁰² ⚠ But, where it is possible to establish that the claimant's value has been used to discharge a secured debt, it is preferable to analyse the award of the remedy of subrogation without necessary recourse to the unjust enrichment principle but with reference to the vindication of equitable property rights, such that the identification of a recognised ground of restitution need not be considered. ¹¹⁰³ ⚠ Indeed, this

was how Lord Carnwath in *Menelaou* justified the award of the subrogation remedy, ¹¹⁰⁴ ⚠ with the bank being able to establish the necessary proprietary interest in the money which had been used to

discharge the unpaid vendor's lien by virtue of a *Quistclose* resulting trust.¹¹⁰⁵  Crucially, subrogation will only be available where the defendant can be considered to have been enriched as the result of a defective transaction. It was for this reason that subrogation was not available in *Lowick Rose LLP v Swynson Ltd.*¹¹⁰⁶ In that case the claimant intentionally discharged a debt owed by one company to another company, which was controlled by the claimant, in order to reduce the latter company's tax liability. Since there was no defect in the transaction involving the discharge of the debt the claimant could not be subrogated to the company's claim against a third party firm of accountants in professional negligence, it having been argued that the accountants had been enriched by the discharge of the debt since the company had no longer suffered any loss as a result of the negligence such that the accountants were relieved of a substantial liability. In fact, unjust enrichment could not have been established anyway because the benefit to the third party was

incidental.¹¹⁰⁷  It was also indirect.¹¹⁰⁸ 

The right of an insurer who pays a claim under an indemnity policy in respect of a particular loss to be subrogated to and to enforce the rights of the insured person arising out of that loss against any third person¹¹⁰⁹ is founded upon contractual intention.¹¹¹⁰ So also, in general, is the entitlement of a guarantor who pays the debt of the principal debtor to require the creditor to give him the benefit of any security given by the principal debtor to the creditor,¹¹¹¹ and of an indorser of a bill of exchange who pays the bill to claim analogous rights.¹¹¹² Where a loan to a minor has been expended on necessities, the minor will be liable to pay the lender the amount so expended.¹¹¹³ But in other cases the foundation of a right to be subrogated can be characterised as restitutionary.¹¹¹⁴ In such cases the rights are akin to other restitutionary rights, but subject to statute.¹¹¹⁵ The contractual and restitutionary forms of subrogation have been said to be "radically different",¹¹¹⁶ although the influence of contractual subrogation and of the implied contract theory of restitution has meant that the distinction has not always been maintained. Moreover, some types of transaction¹¹¹⁷ may provide examples of both contractual and restitutionary subrogation. Examples of restitutionary subrogation include ultra vires or unauthorised borrowing used to discharge a debt.¹¹¹⁸ Subrogation has also been sought by lenders where, for a variety of reasons, the loan is irrecoverable. Thus, where a loan on mortgage to a minor was void but the money lent was used to buy property, the lender was held to be entitled to a lien over the property by being "subrogated" to the position of the vendor who received the money.¹¹¹⁹ Again, where an ultra vires loan is made to a company it has been held that the lender may be subrogated to the position of a creditor whose valid debt is discharged with the proceeds of the loan.¹¹²⁰ Subrogation has also been awarded in cases where the payer of money expected to obtain a charge and this expectation was defeated, regardless of whether this expectation was shared by the payee.¹¹²¹ However, subrogation will not be permitted where it would frustrate the policy of the rule that invalidates the loan. Thus, a moneylender who financed a series of property transactions by loans that were unenforceable for noncompliance with statutory requirements was held not to be able to be subrogated to the security represented by the previously existing charges and unpaid vendors' liens that had been discharged by the loans.¹¹²² To give relief by subrogation in such a case:

"... would be to enable the court to express a policy of its own in regard to moneylending transactions which would be in direct conflict with the policy of the [statute]¹¹²³ itself."¹¹²⁴

Where it is allowed, however, this form of subrogation may appear to differ from subrogation in the sense used in the insurance and guarantee cases in so far as the person entitled to be subrogated has, in some cases, only been allowed to succeed to the creditor's personal claim but not to take the benefit of any priority enjoyed by the creditor.¹¹²⁵ Subrogation rights may also be waived.¹¹²⁶ Principles relating to the award of the equitable remedy of subrogation were usefully summarised by the Court of Appeal in *Cheltenham and Gloucester Plc v Appleyard*.¹¹²⁷ These include that a lender cannot claim subrogation if he obtains all of the security for which he bargained¹¹²⁸ or where the lender bargained on the basis that no security would be received.¹¹²⁹ Subrogation will be available even where the chargee's original charge was void for illegality, at least where the chargee was not party to the illegality.¹¹³⁰ The remedy of subrogation will not be available where a contract between the parties continues to subsist.¹¹³¹

Personal restitutionary remedies

29-181

❗ Where the defendant has received property in which the claimant had an equitable proprietary interest, but the defendant no longer has that property or its traceable substitute, the claimant may sue the defendant in the action for unconscionable receipt. ¹¹³² ❗ The remedy which is awarded, namely the value of the property received, will be restitutionary. Alternatively, the defendant may be liable for dishonestly assisting a breach of trust or fiduciary duty, ¹¹³³ but the remedy will typically be compensatory since it is usually assessed with reference to the claimant's loss rather than the defendant's gain. ¹¹³⁴ It has, however, been recognised that sometimes it will be possible to award an account of profits where the defendant who assisted or encouraged a breach of trust or fiduciary duty profited from the assistance or encouragement. ¹¹³⁵ It has also been recognised that a defendant will be liable to account for the value of property transferred in breach of fiduciary duty even though the defendant did not obtain the profits personally, at least where the property was transferred to a third party at the direction of the defendant who retained control of the property once received by the third party. ¹¹³⁶ Similarly, where the defendant has received property in which the claimant has a legal proprietary interest, but the defendant has not retained that property or its traceable substitute, the claimant can recover the value of the property ¹¹³⁷ or, as regards a personal claim to vindicate legal proprietary rights in a chose in action or other intangible property, in an action for the value of the property. ¹¹³⁸

Bona fide purchase defence ¹¹³⁹

29-182

❗ Where a claimant brings a restitutionary claim to vindicate equitable property rights, the claim may be defeated by a defence of bona fide purchase for value, but not by a defence of change of position. ¹¹⁴⁰ This is because the bona fide purchase defence defeats the claimant's equitable proprietary interest. ¹¹⁴¹ The defence of bona fide purchase is not available where the claim is a personal one for unjust enrichment. ¹¹⁴² The bona fide purchase defence will not be available where the defendant has actual or constructive notice of the claimant's proprietary right at the time the property was received. ¹¹⁴³

1. For a full treatment of the subject matter of this chapter, see: Burrows, *The Law of Restitution*, 3rd edn (2011); Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016); Virgo, *The Principles of the Law of Restitution*, 3rd edn (2015). See also Beatson, *The Use and Abuse of Unjust Enrichment* (1991); Birks, *An Introduction to the Law of Restitution* (1985); Birks, *Unjust Enrichment*, 2nd edn (2005); Maddaugh and McCamus, *The Law of Restitution*, 2nd edn (2004); McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014); Mason, Carter and Tolhurst, *Restitution Law in Australia*, 2nd edn (2008); Palmer, *The Law of Restitution* (1978) (four Vols); The American Law Institute's Restatement of the Law Third, Restitution and Unjust Enrichment (2011).

⁹⁹¹. Burrows at Ch.8; Goff and Jones at Chs 7, 8 and 37–40; Virgo at Pt IV.

¹⁰⁸⁰. See *OBG Ltd v Allan* [2007] UKHL 21, [2008] A.C. 1 at [308] (Baroness Hale).

¹⁰⁸¹. e.g. *Miller v Race* (1758) 1 Burr. 452, 457–458; *Wookey v Pole* (1820) 4 B. & Ald. 1, 6. See also *Indian Oil Corp v Greenstone Shipping Co SA* [1988] Q.B. 345 (damages for short delivery of wrongfully mixed cargo).

¹⁰⁸². e.g. *Clark v Shee* (1774) 1 Cowp. 197; *Reid v Rigby* [1894] 2 Q.B. 40; *Lipkin Gorman v Karpnale Ltd* [1991] 2 A.C. 548; *Trustee of the Property of F.C. Jones & Sons v Jones* [1997] Ch. 159. See Smith (2009) 125 L.Q.R. 338 who argues that the Common Law claim for money

had and received can be used to vindicate equitable interests arising under a trust.

- [1083.](#) *Morison v London County and Westminster Bank Ltd* [1914] 3 K.B. 356; *Lloyds Bank Ltd v Chartered Bank of India, Australia and China* [1929] 1 K.B. 40; *Midland Bank Ltd v Reckitt* [1933] A.C. 1; *Lloyds Bank Ltd v E.B. Savory & Co* [1933] A.C. 201. See now *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 A.C. 1 where some members of the House of Lords accepted that it was possible to convert intangible property such as debts and contractual rights (Lord Nicholls at [220]–[241]) and Baroness Hale (at [302]–[318])). Lords Hoffmann (at [94]–[107]) and Walker (at [271]) left the matter open for consideration by the Law Commission. Lord Brown, at [321]–[322] did not consider that it was possible to convert intangible property. See *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), [2013] Ch. 156, at [88] (Stephen Morris Q.C.).
- [1084.](#) *Trustee of the Property of F. C. Jones & Sons v Jones* [1997] Ch. 159, 168. See also Pearce (1976) 40 Conv.(N.S.) 277, 284.
- [1085.](#) *Lipkin Gorman v Karpnale Ltd* [1991] 2 A.C. 548, 573, 583–588 (in respect of claims founded on conversion).
- [1086.](#) *Re Diplock* [1948] Ch. 465, 519–520.
- [1087.](#) *Re Diplock* [1948] Ch. 465.
- [1088.](#) *Re Diplock* [1948] Ch. 465, 519. But see the discretion to order the return of a chattel under the Torts (Interference with Goods) Act 1977 s.3. See further *Howard E. Perry & Co Ltd v British Rys Board* [1980] 1 W.L.R. 1375.
- [1089.](#) *Giles v Perkins* (1807) East 12; *Scott v Surman* (1742) Willes 400; *Trustee of the Property of F.C. Jones & Sons v Jones* [1997] Ch. 159. See Pearce (1976) 40 Conv.(N.S.) 277, 284.
- [1090.](#) [2001] 1 A.C. 102. See also *Director of the Serious Fraud Office v Lexi Holdings Plc* [2008] EWCA Crim 1443, [2009] Q.B. 376.
- [1091.](#) *Scott v Scott* (1963) 109 C.L.R. 649. cf. *Re Tilley's Will Trusts* [1967] Ch. 1179, 1193; *Foskett v McKeown* [2011] A.C. 102, 131 (Lord Millett).
- [1092.](#) *Re Diplock* [1948] Ch. 465, 533–534, 539; *Sinclair v Brougham* [1914] A.C. 398, 442 (Lord Parker) (above, para.10-025); *Barlow Clowes (International) Ltd v Vaughan* [1992] 4 All E.R. 22.
- [1093.](#) *Re Diplock* [1948] Ch. 465, 546–547.
- [1094.](#) *Re Diplock* [1948] Ch. 465, 534, 539; *Sinclair v Brougham* [1914] A.C. 398, 442–443 (Lord Parker).
- [1095.](#) [2014] EWCA Civ 360, [2015] 1 B.C.L.C. 14 at [1].
- [1096.](#) See also *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, [2015] A.C. 250 at [44].
- [1097.](#) See below, para.29-181.
- [1098.](#)  *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66, [2016] A.C. 176; *Lowick Rose LLP v Swynson Ltd* [2017] UKSC 32, [2017] 2 W.L.R. 1161. See also *Banque Financière de la Cité SA v Parc (Battersea) Ltd* [1999] 1 A.C. 221, where the claimant sought a personal remedy against a third party by means of subrogation; *Cheltenham & Gloucester Plc v Appleyard* [2004] EWCA Civ 291; *Anfield (UK) Ltd v Bank of Scotland* [2010] EWHC 2374 (Ch), [2011] 1 W.L.R. 2414 at [10] (Proudman J.); *Sandher v Pearson* [2013] EWCA Civ 1822; *Re Beppler & Jacobson Ltd* [2016] EWHC 20 (Ch) at [122] (Hildyard J.). In *Niru Battery Manufacturing Co v Milestone Trading Ltd (No.2)* [2004] EWCA Civ 487, [2004] 2 All E.R. (Comm) 289, the remedy

of subrogation was ordered to prevent the defendant's unjust enrichment arising from the discharge of a liability owed by the defendant. It is unclear, however, why this remedy was sought or obtained since the claimant had a direct restitutionary claim to recover the value of the benefit obtained by the defendant and did not need to step into the shoes of any other party to bring such a claim. The High Court of Australia rejected unjust enrichment as the doctrinal foundation of subrogation in Australia: *Bofinger v Kingsway Group Ltd* [2009] HCA 44; Ridge (2010) 126 L.Q.R. 188.

1099.

! See *Adams v Moore Unreported*, May 12, 2016 QBD where subrogation was awarded as a remedy to reverse the defendant's unjust enrichment where the claimants had paid money to discharge the defendant's mortgage in circumstances where the claimants understood that they had lent the money to the defendant. Subrogation was justified on the ground that it would be unjust for the claimants not to recover their money, although it is not obvious what the ground of restitution would be. cf. *Re Beppler & Jacobson Ltd* [2016] EWHC 20 (Ch) where it was recognised that subrogation to reverse unjust enrichment will not lie if there is a subsisting contract between the parties. In *Lowick Rose LLP v Swynson Ltd* [2017] UKSC 32, [2017] 2 W.L.R. 1161 at [29], Lord Sumption did warn against trying to fit subrogation into "any broader category of unjust enrichment" and characterised it as *sui generis*. He identified various differences between unjust enrichment generally and unjust enrichment triggering subrogation, including that subrogation is not a restitutionary remedy as such, since it does not restore the parties to their pre-transfer position, but specifically enforces a defeated expectation, and the ground of failure of basis can be established even if the basis is not shared by the parties.

1100.

! [2015] UKSC 66, [2016] A.C. 176. See further *Menelaou v Bank of Cyprus UK Ltd* [2016] EWHC 2656 (Ch), where judicial discretion was exercised to sell the property.

1101.

! [2015] UKSC 66 at [79].

1102.

! [2015] UKSC 66 at [38].

1103.

! See also *Lehman Commercial Mortgage Conduit Ltd v Gatedale Ltd* [2012] EWHC 848 (Ch).

1104.

! [2015] UKSC 66, [2016] A.C. 176 at [107]. Lord Neuberger acknowledged that this route to subrogation was also available, and he considered this would have been simpler and less controversial: [100].

1105.

! *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] A.C. 567.

1106.

[2017] UKSC 32, [2017] 2 W.L.R. 1161.

1107.

! [2017] UKSC 32 at [88] (Lord Mance) and [113] (Lord Neuberger). See above, para.29-029.

1108.

! [2017] UKSC 32, [2017] 2 W.L.R. 1161 at [86] (Lord Mance) and [115] (Lord Neuberger). See above, para.29-028.

1109.

See Vol.II, para.42-114.

1110.

This has been described as subsisting rights subrogation: Mitchell and Waterson, *Subrogation: Law and Practice* (2007), 1.07. See *Alliance Bank JSC v Aquanta Corp* [2011] EWHC 3281 (Comm) at [22] (Burton J.); *Ibrahim v Barclays Bank Plc* [2011] EWHC 1897 (Ch), [2012] 1 B.C.L.C. 33 at [7] (Vos J.).

1111.

See Vol.II, para.45-131, but see above, para.29-116 for the position of the officious guarantor.

1112.

See Vol.II, para.34-129.

- [1113.](#) See above, para.9-023; cf. above, paras 9-095—9-096.
- [1114.](#) *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 A.C. 221, where subrogation was awarded as a remedy to reverse the defendant's unjust enrichment; *Niru Battery Manufacturing Co v Milestone Trading Ltd (No.2)* [2004] EWCA Civ 487, [2004] 2 All E.R. (Comm) 289. See also Mitchell and Watterson, *Subrogation: Law and Practice* (2007), who describe this as "extinguished rights subrogation"; Burrows at Ch.7; Goff and Jones at Ch.39; Birks (1971) 34 M.L.R. 207; *Lord Napier and Ettrick v R. F. Kershaw Ltd* [1993] A.C. 713. Thus, a "volunteer" will not be subrogated: *Esso Petroleum Co Ltd v Hall Russell & Co Ltd* [1989] A.C. 643. See further *Boodle Hatfield & Co v British Films Ltd* [1986] P.C.C. 176; *Boscawen v Bajwa* [1996] 1 W.L.R. 328 (subrogation discussed under a restitutionary analysis); Mitchell [1995] L.M.C.L.Q. 451. See also *Kleinwort Benson Ltd v Vaughan* [1996] C.L.C. 620 CA. But cf. *Orakpo v Manson Developments Ltd* [1978] A.C. 95, 104, criticised (1978) 41 M.L.R. 330; *Re Byfield* [1982] Ch. 267.
- [1115.](#) *Re T.H. Knitwear (Wholesale) Ltd* [1988] Ch. 275.
- [1116.](#) *Banque Financierè de la Cité v Parc (Battersea) Ltd* [1999] 1 A.C. 221, 231 (Lord Hoffmann). See also *Cheltenham and Gloucester Plc v Appleyard* [2004] EWCA Civ 291 at [32] (Neuberger L.J.).
- [1117.](#) e.g. guarantee, see above, para.29-116 (officious guarantor).
- [1118.](#) Above, para.10-025 (ultra vires); *Bannatyne v D. & C. MacIver* [1906] 1 K.B. 103 (unauthorised borrowing by agent); but cf. the unauthorised payment of a debt by a "stranger": *Re Cleadon Trust Ltd* [1939] Ch. 286 (above, para.29-118).
- [1119.](#) *Nottingham Permanent Benefit Building Society v Thurston* [1903] A.C. 6, above, para.9-073. See also *Filby v Mortgage Express (No.2)* [2004] EWCA Civ 759, where a mortgage was a nullity by virtue of a forged signature; and *Cheltenham and Gloucester Plc v Appleyard* [2004] EWCA Civ 291, where a mortgage had not been registered.
- [1120.](#) *Re Cork and Youghal Ry* (1869) L.R. 4 Ch. App. 748; *Blackburn Benefit Building Society v Cunliffe, Brookes & Co* (1882) 22 Ch. D. 61; *Baroness Wenlock v River Dee Co* (1887) 19 Q.B.D. 155 (relief given where borrowed money used to pay debts accruing after dates of its receipt). But see *Re Cleadon Trust Ltd* [1939] Ch. 286, 322–344 for the requirement that the debtor must have adopted the benefit of the invalid loan.
- [1121.](#) *Chetwyn v Allen* [1899] 1 Ch. 353; *Butler v Rice* [1910] 2 Ch. 277; *Ghana Commercial Bank v Chadiram* [1960] A.C. 732; *Cheltenham and Gloucester Plc v Appleyard* [2004] EWCA Civ 291.
- [1122.](#) *Orakpo v Manson Investments Ltd* [1978] A.C. 95. See also *Burston Finance Ltd v Speirway Ltd* [1974] 1 W.L.R. 1648. Compare *Cheltenham and Gloucester Plc v Appleyard* [2004] EWCA Civ 291, where the claimant's mortgage had not been registered as required by statute but it was subrogated to another mortgage because, inter alia, the claimant had not obtained the legal charge for which it had bargained, but only an equitable charge, and the failure to register was not the result of the claimant's negligence.
- [1123.](#) Moneylenders Act 1927 s.6 (repealed by the Consumer Credit Act 1974).
- [1124.](#) *Orakpo v Manson Investments Ltd* [1978] A.C. 95, 115. See also Megarry (1956) 72 L.Q.R. 480. This depends on whether a claim to this type of subrogation must be based on the presumed mutual intentions of the borrower and lender, for the statute only made a "security given by the borrower" unenforceable. For criticism of the decision in *Orakpo*, see (1978) 41 M.L.R. 330. See also *Re Byfield* [1982] Ch. 267.
- [1125.](#) *Re Wrexham, Mold and Connah's Quay Ry* [1899] 1 Ch. 440; *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 A.C. 221; *Cheltenham and Gloucester Plc v Appleyard* [2004] EWCA Civ 291 at [36] (Neuberger L.J.). See also *Bannatyne v D. & C. MacIver* [1906] 1 K.B. 108, 109. cf. *Paul v Speirway Ltd* [1976] 1 Ch. 220 which, by analogy, suggests that if the

lender's money is to be used to discharge a secured loan the presumption is that he intended his loan to be secured. See also *Orakpo v Manson Investments Ltd* [1978] A.C. 95, 105; *McColl's Wholesale Pty Ltd v State Bank of N.S.W.* [1984] 3 N.S.W.L.R. 365, 369. In *Lowick Rose LLP v Swynson Ltd* [2017] UKSC 32, [2017] 2 W.L.R. 1161 it was held that unjust enrichment did not enable the claimant, who had made a payment to discharge a liability, to be subrogated to a personal claim in damages against a negligent adviser.

[1126.](#) *The Surf City* [1995] 2 Lloyd's Rep. 242.


[1127.](#) [2004] EWCA Civ 291 at [32]–[44] (Neuberger L.J.).

[1128.](#) *Capital Finance Co Ltd v Stokes* [1969] 1 Ch. 261.

[1129.](#) *Paul v Speirway Ltd (In Liquidation)* [1976] 1 W.L.R. 220.

[1130.](#) *Lehman Commercial Mortgage Conduit Ltd v Gatedale Ltd* [2012] EWHC 848 (Ch).

[1131.](#) *Sandher v Pearson* [2013] EWCA Civ 1822.

[1132.](#)  *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch. 437; *Papamichael v National Westminster Bank* [2003] 1 Lloyd's Rep. 341, 375: requiring proof of actual knowledge of the circumstances of the misapplication, rather than dishonesty. cf. *Farah Construction Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; Ridge and Dietrich (2008) 124 L.Q.R. 26. See also *Criterion Properties Plc v Stratford UK Properties LLC* [2003] 1 W.L.R. 2108 (need to have regard to the defendant's actions and knowledge in the context of the commercial relationship as a whole to determine whether the test of unconscionability was satisfied; the House of Lords concluded that the case was not concerned with the question of unconscionability but whether directors had authority to sign an agreement: [2004] UKHL 28, [2004] 1 W.L.R. 1846). On the interpretation of the test of unconscionability see also *Crown Dilmun, Dilmun Investments Ltd v Nicholas Sutton, Fulham River* [2004] EWHC 52 (Ch), [2004] 1 B.C.L.C. 468 at [200] (Peter Smith J.); *It's a Wrap (UK) Ltd v Gula* [2006] EWCA Civ 544, [2006] B.C.C. 626; *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), [2013] Ch. 156, at [132] (same test as for bad faith for change of position: see below, para.29-191). A person who receives property in their capacity as an agent will not be liable for unconscionable receipt: *Uzinterimpex JSC v Standard Bank Plc* [2008] EWCA Civ 819. The remedy is not proprietary because it involves only a personal liability to account or to compensate and so has nothing to do with the constructive trust: *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] A.C. 1189. In *Fistar v Riverwood Legion and Community Club Ltd* [2016] NSWCA 81 the New South Wales Court of Appeal recognised that a strict liability claim in unjust enrichment for money had and received relating to stolen money lay even though the claimant alternatively had a claim in unconscionable receipt which required proof of fault.

[1133.](#) *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 A.C. 378 (objective test of dishonesty: at 389 (Lord Nicholls)); *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 A.C. 164 (knowledge of circumstances of dishonesty required: at [20] (Lord Hoffmann) and at [35] (Lord Hutton)). Now see *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 W.L.R. 1476 (objective test of dishonesty). See also *Abou-Rahmah v Abacha* [2006] EWCA Civ 1492, [2007] 1 Lloyd's Rep. 115 and *Virgo* [2007] C.L.J. 22; *Starglade Properties Ltd v Nash* [2010] EWCA Civ 1314 at [32]; *Fiona Trust & Holding Corp v Privalov* [2010] EWHC 3199 (Comm) at [1437] (Andrew Smith J.).

[1134.](#) *Sinclair Investment Holdings SA v Versailles Trade Finance Ltd* [2007] EWHC 915 (Ch), [2007] 2 All E.R. (Comm) 993 at [101] (Rimer J.).

[1135.](#) *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) at [1600] (Lewison J.); *Fiona Trust & Holding Corp v Privalov* [2010] EWHC 3199 (Comm) at [66] (Andrew Smith J.); *Novoship (UK) Ltd v Nikitin* [2014] EWCA Civ 908, [2015] 2 W.L.R. 526.

[1136.](#) *Fiona Trust & Holding Corp v Privalov* [2010] EWHC 3199 (Comm) [2010] EWHC 3199 (Comm)

- at [1540] (Andrew Smith J.). cf. *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) at [1600] (Lewison J.).
- [1137.](#) *Lipkin Gorman (A Firm) v Karpnale Ltd* [1991] 2 A.C. 548. Although the House of Lords analysed this claim with reference to the unjust enrichment principle, following the decision of the same court in *Foskett v McKeown* [2001] A.C. 102, it is better analysed with reference to the vindication of property rights principle. See Virgo in Getzler, *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (2003), p.104; *OEM Plc v Schneider* [2005] EWHC 1072 (Ch). This analysis was approved by Stephen Morris Q.C. in *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), [2013] Ch. 156, at [75].
- [1138.](#) *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), [2013] Ch. 156, at [88] (Stephen Morris Q.C.). A claim in conversion is not available in respect of intangible property. cf. *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 A.C. 1, n.1056, above.
- [1139.](#) Burrows at pp.573–580; Goff and Jones, paras 29-03–29-16; Virgo at Ch.23.
- [1140.](#) *Foskett v McKeown* [2001] 1 A.C. 102, 129 (Lord Millett); *Papamichael v National Westminster Bank* [2003] 1 Lloyd's Rep. 341, 376; *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), [2013] Ch. 156, [99]–[103] (Stephen Morris Q.C.); *Test Claimants in the FII Group Litigation v HMRC (No.2)* [2014] EWHC 4302 (Ch), [2015] S.T.I. 49, [348] (Henderson J.). See above, para.29-174. See Degeling and Edelman, *Equity in Commercial Law* (eds Degeling and Edelman) (2005), pp.315 and 325. On the relationship between bona fide purchase and change of position, see *Lipkin Gorman v Karpnale Ltd* [1991] 2 A.C. 548; Birks [1991] L.M.C.L.Q. 473; Millett (1991) 107 L.Q.R. 71, 82. The bona fide purchase defence is not available to a claim founded on unjust enrichment: *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), [2013] Ch. 156 at [105] (Stephen Morris Q.C.).
- [1141.](#) *Re Diplock* [1948] Ch. 465, 537. The proprietary interest will not be defeated if the property is reacquired from the bona fide purchaser by the trustee (*Wilkes v Spooner* [1911] 2 K.B. 473) or where the transaction involving the transfer to the bona fide purchaser is rescinded (*Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195, [2013] Ch. 91; Häcker (2012) L.Q.R. 493).
- [1142.](#) *Papamichael v National Westminster Bank* [2003] 1 Lloyd's Rep. 341, 374.
- [1143.](#) *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347, [2012] Ch. 453 at [100] and [109] (Lord Neuberger M.R.); *Crédit Agricole Corporation and Investment Bank v Papadimitriou* [2015] UKPC 13 at [20] (Lord Clarke). In *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), [2013] Ch. 156, at [122] Stephen Morris Q.C. equated notice for the bona fide purchase defence with the notion of bad faith in the defence of change of position, so the defendant will only have constructive notice if, on the facts known to the defendant, the reasonable person would have been aware of the impropriety of the transaction or would have made inquiries. See also *Crédit Agricole Corporation and Investment Bank v Papadimitriou* [2015] UKPC 13 at [33] (Lord Sumption). See below para.29-191.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 9 - Restitution

Chapter 29 - Restitution ¹

Section 5. - Defences ¹¹⁴⁴

(a) - Estoppel ¹¹⁴⁵

Nature of estoppel

29-183

In certain circumstances a person making a payment may be precluded from recovering it by an estoppel. He may, for instance, be estopped from subsequently alleging that he acted under a mistake. ¹¹⁴⁶ To raise an estoppel the payee must satisfy three conditions. ¹¹⁴⁷ First, he must show that either the payer was under a duty to give him accurate information and failed to do so, ¹¹⁴⁸ or that there was an unequivocal ¹¹⁴⁹ misrepresentation made to him for which the payer was responsible. ¹¹⁵⁰ Secondly, he must show that this inaccurate information led him to believe that he was entitled to treat the money as his own. ¹¹⁵¹ Thirdly, he must show that because of his mistaken belief he changed his position in a way which would make it inequitable to require him to repay the money. ¹¹⁵²

Fact of payment in itself is insufficient

29-184

The mere fact of payment by itself cannot give rise to an estoppel. ¹¹⁵³ However, where there is inequality between the parties, as where the payer is uniquely well placed to know or ascertain the true state of accounts, it may be relatively easy to spell out a representation from the one-sidedness of the means of knowledge. Thus, where a computer had been fed with the wrong information by an employer who then overpaid one of his employees, it was conceded that, in the circumstances, there was a sufficient representation to found an estoppel. ¹¹⁵⁴ Such situations, exemplified by the "paymaster" cases, are sometimes treated as instances of breach of a duty to inform the payee of the true state of the account rather than as representation cases. ¹¹⁵⁵ In fact neither *Holt v Markham* ¹¹⁵⁶ nor the old case of *Skyring v Greenwood* ¹¹⁵⁷ turn on breach of duty. In *Holt v Markham* the claimant by letter claimed repayment of an excessive gratuity that he had mistakenly paid to the defendant. The defendant replied that the claim was unfounded and heard nothing further from the claimant for over two months. The Court of Appeal held that the claimant was:

"... entitled to assume that his reply was regarded as satisfactory, and that he was at liberty to deal with the money as he pleased." ¹¹⁵⁸

Scrutton L.J. went further in not relying on the defendant's letter. He stated that:

"The claimants represented to the defendant that he was entitled to a certain sum of money and paid it, and, after a lapse of time sufficient to enable mistakes to be detected and rectified, the defendant acted on the representation and spent the money." ¹¹⁵⁹

The representation in such cases has never been formulated with precision, but, in view of the need for a lapse of time before it may be acted upon, it is arguably a representation that reasonable care has been used in making and checking the payment. ¹¹⁶⁰

Inequitable to require restitution

29-185

The third requirement of an estoppel, that the payee has changed his position so as to make it inequitable ¹¹⁶¹ to require him to repay the money, is clearly satisfied where he can establish that a particular expenditure has been incurred as a result of the receipt of the money and he is no longer able to recover the money. Examples include investing the money in a company that has since failed, ¹¹⁶² and irretrievably paying it over to a third party to whom the payee thought he was obliged to pay it. ¹¹⁶³ However, in certain circumstances, a sufficient change of position to found an estoppel may occur without any obvious change in the payee's style of living. In one case an employee who had been overpaid for a period of some eighteen months, and who had spent the money as part of his normal living expenses, successfully raised an estoppel. ¹¹⁶⁴ The test is whether, but for the payment, the expenditure would have occurred. Thus, there may be circumstances in which, even after all the money has been spent, it would not be inequitable to require repayment. ¹¹⁶⁵ Conversely, in *Avon CC v Howlett* ¹¹⁶⁶ it was stated that, while a plea of estoppel should not enable a profit to be made, a payee who has relied on a representation should not be subjected to the difficult task of having "subsequently to recall and identify retrospectively in complete detail" alterations to his general mode of living, commitments undertaken and other transactions entered into. The operation of estoppel might, therefore, result in the payee returning less than the difference between the amount paid and the precise amount he proved he had irretrievably spent. This was stated to follow from the fact that estoppel by representation is a rule of evidence and does not operate pro tanto. ¹¹⁶⁷ However, the finding that the whole of the overpayment had in fact been spent and the recognition by the court that injustice would result if the sum sought to be recovered were so large as to bear no relation to the payee's detriment and that recovery in such circumstances might be unconscionable, ¹¹⁶⁸ suggests that in an appropriate case estoppel may nevertheless operate pro tanto. ¹¹⁶⁹

1. For a full treatment of the subject matter of this chapter, see: Burrows, *The Law of Restitution*, 3rd edn (2011); Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016); Virgo, *The Principles of the Law of Restitution*, 3rd edn (2015). See also Beatson, *The Use and Abuse of Unjust Enrichment* (1991); Birks, *An Introduction to the Law of Restitution* (1985); Birks, *Unjust Enrichment*, 2nd edn (2005); Maddaugh and McCamus, *The Law of Restitution*, 2nd edn (2004); McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014); Mason, Carter and Tolhurst, *Restitution Law in Australia*, 2nd edn (2008); Palmer, *The Law of Restitution* (1978) (four Vols); The American Law Institute's Restatement of the Law Third, Restitution and Unjust Enrichment (2011).

¹¹⁴⁴. Burrows at Pt III; Goff and Jones at Pt 6; Virgo at Pt V; Grantham and Rickett [2008] C.L.J. 92. For the defence of limitation periods see above, Ch.28.

¹¹⁴⁵. Burrows at pp.550–558; Goff and Jones at Ch.30; Virgo at pp.666–674; Spencer-Bower and Turner, *The Law Relating to Estoppel by Representation*, 4th edn (2003); Jones (1957) 73 L.Q.R. 48, 49–53; Hudson [2014] R.L.R. 19

¹¹⁴⁶. See *Leslie v Farrar Construction Ltd* [2015] EWHC 58 (TCC), [255] (Judge Stephen Davies).

¹¹⁴⁷. *United Overseas Bank v Jiwani* [1976] 1 W.L.R. 964, 968 (McKenna J.).

¹¹⁴⁸. *Mercantile Bank of India Ltd v Central Bank of India Ltd* [1938] A.C. 287; *Moorgate Mercantile Co Ltd v Twitchings* [1977] A.C. 890, 903 (on facts, no duty found); *United Overseas Bank v Jiwani* [1976] 1 W.L.R. 964. On the question of whether estoppel by negligence is possible in the absence of a special relationship, see *R.E. Jones Ltd v Waring & Gillow Ltd* [1926] A.C. 670, 693; *Mercantile Credit Co Ltd v Hamblin* [1965] 2 Q.B. 242. cf. *Moorgate Mercantile Co Ltd*

v Twitchings; Tai Hing Cotton Mill Ltd v Lin Chong Hing Bank Ltd [1986] A.C. 80. See also Consumer Credit Act 1974 s.172 which provides that certain statements made by a creditor, owner or trader are to bind him although provision exists for relief from the operation of the section to the extent that it “appears just in an appropriate case”; s.172(3).

- [1149.](#) *Weld-Blundell v Synott [1940] 2 K.B. 107, 114; Moorgate Mercantile Co Ltd v Twitchings [1977] A.C. 890.*
- [1150.](#) *R.E. Jones Ltd v Waring & Gillow Ltd [1926] A.C. 670; Deutsche Bank v Beriro & Co (1895) 1 Com. Cas. 123, 255; United Overseas Bank v Jiwani [1976] 1 W.L.R. 964; Avon CC v Howlett [1983] 1 W.L.R. 605, 620.*
- [1151.](#) *Holt v Markham [1923] 1 K.B. 504, 512; Transvaal & Delagoa Bay Investment Co v Atkinson [1944] 1 All E.R. 579, 585; United Overseas Bank v Jiwani [1976] 1 W.L.R. 964; Avon CC v Howlett [1983] 1 W.L.R. 605, and see Sheldon J. [1981] I.R.L.R. 447.*
- [1152.](#) See below, para.29-185.
- [1153.](#) *R.E. Jones Ltd v Waring & Gillow Ltd [1926] A.C. 670.*
- [1154.](#) *Avon CC v Howlett [1983] 1 W.L.R. 605.*
- [1155.](#) *Weld-Blundell v Synott [1940] 2 K.B. 107, 115.*
- [1156.](#) *[1923] 1 K.B. 504.*
- [1157.](#) *(1825) 4 B. & C. 281.*
- [1158.](#) *Holt v Markham [1923] 1 K.B. 504, 512.*
- [1159.](#) *Holt v Markham [1923] 1 K.B. 504, 514.* See also the fuller report on this point in *(1923) 128 L.T. 719, 726.*
- [1160.](#) See above, para.29-039; Birks [1972] C.L.P. 179, 194 et seq.
- [1161.](#) *Kleinwort, Sons & Co v Dunlop Rubber Co (1907) 97 L.T. 263, 264; United Overseas Bank v Jiwani [1976] 1 W.L.R. 964.*
- [1162.](#) *Holt v Markham [1923] 1 K.B. 504.*
- [1163.](#) *Deutsche Bank v Beriro & Co (1895) 1 Com. Cas. 123, 255.*
- [1164.](#) *Avon CC v Howlett [1983] 1 W.L.R. 605.* See also *Skyring v Greenwood (1825) 4 B. & C. 281, 289* (Abbott C.J.).
- [1165.](#) *United Overseas Bank v Jiwani [1976] 1 W.L.R. 964, 968–969.*
- [1166.](#) *[1983] 1 W.L.R. 605.*
- [1167.](#) *Avon CC v Howlett [1983] 1 W.L.R. 605, 611, 621–624.* For criticism see Burrows at pp.554–556; Virgo at pp.671–672. See also *Lipkin Gorman v Karpnale Ltd [1991] 2 A.C. 548, 579* (Lord Goff). cf. Fung and Ho (2001) 117 L.Q.R. 14.
- [1168.](#) *Avon CC v Howlett [1983] 1 W.L.R. 605, 612, 624–625.*
- [1169.](#) As was recognised in *Scottish Equitable Plc v Derby [2001] EWCA Civ 369, [2001] 3 All E.R. 818* and *National Westminster Bank Plc v Somer [2001] EWCA Civ 970, [2002] 1 All E.R. 198.* See also *Philip Collins Ltd v Davis [2000] 3 All E.R. 808.*

Chitty on Contracts 32nd Ed.
Consolidated Mainwork Incorporating Second Supplement
Volume I - General Principles
Part 9 - Restitution
Chapter 29 - Restitution ¹
Section 5. - Defences ¹¹⁴⁴
(b) - Change of Position ¹¹⁷⁰

Change of position as a separate defence

29-186

In *Lipkin Gorman v Karpnale Ltd* ¹¹⁷¹ the House of Lords recognised a broad defence of change of position. This was said to be:

“... available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full.” ¹¹⁷²


The defence is said to be one of the general principles of the law of restitution ¹¹⁷³ and, even before the decision of the House of Lords, its supposed existence was used as a justification for widening the scope of recovery for mistake. ¹¹⁷⁴ Change of position is a wider defence than estoppel because it does not depend on breach of duty or misrepresentation by the payee. In one respect, however, it is narrower than estoppel in not recognising expenditure on everyday expenses. ¹¹⁷⁵ The broad formulation was explicitly chosen by the House of Lords to allow for the development of the defence on a case by case basis. ¹¹⁷⁶ In *Commerzbank AG v Gareth Price-Jones* ¹¹⁷⁷ Mummery L.J. recognised that “the decided cases steer a cautious course, aiming to avoid the dangers of a diffuse discretion and the restrictions of rigid rules”. Munby J. stated that the defence was “intended to be a broadly stated concept of practical justice” and that “technicality and black letter law are to be avoided”. ¹¹⁷⁸ Where the basis of a claim is the unjust enrichment of the defendant then in principle the defence should be based on the extent of the defendant’s enrichment and should apply to the extent that the enrichment has been erased. ¹¹⁷⁹ In the context of mistake, as the ground of recovery is wide and does not bar recovery by a negligent payer, ¹¹⁸⁰ it is particularly important to accept a broad defence. Moreover, although the evidential burden is on the defendant to establish the defence, it has been said that the court should beware of applying too strict a standard because it may be unrealistic to expect a defendant to produce conclusive evidence of a change of position, given that when he changed his position he can have had no expectation that he might thereafter have to prove that he did so and the reason why he did so. ¹¹⁸¹ It appears that the defence will not apply where the restitutionary claim is founded on the vindication of the claimant’s property rights rather than unjust enrichment, at least where the claimant seeks a proprietary remedy. ¹¹⁸²

Key requirements of change position

29-187

🚩 The operation of the defence is founded on two fundamental principles.

(1)

There must be a causative link between the receipt of the benefit by the defendant and his or her change of position, so that, but for the receipt of the benefit, ¹¹⁸³  the defendant's position would not have changed, either because the defendant no longer has the benefit received or because the defendant, in reliance on the receipt of the benefit, has changed his position in some other way.

(2)

The defendant's position must have changed in circumstances which make it inequitable for him or her to make restitution to the claimant. Specific principles can be identified to assist in the determination of what is equitable for these purposes.

Both these principles underlie the defence because it is only where the defendant's position has changed by virtue of the receipt of the enrichment, and where it is just for the defendant to rely on the defence, that it is possible to conclude that the defendant's interest in the security of his or her receipt should prevail over the interest of the claimant in obtaining restitution.

Illustrations of change of position

29-188

The mere fact of having spent money or delivered property does not suffice to establish the defence. ¹¹⁸⁴ The paradigm case of change of position is where the payee has detrimentally relied on a payment made to him which he has received in good faith. ¹¹⁸⁵ For instance, where the recipient of a mistaken payment, acting in good faith, pays the money or part of it to charity or makes a purchase which he would not have made but for the payment, it is unjust to require him to make restitution to the extent that he has so changed his position. ¹¹⁸⁶ Thus, on the facts of *Lipkin Gorman v Karpnale Ltd*, where a person who had stolen money used it to gamble, the gaming club was not required to repay the entire amount gambled but only their net winnings from the thief. ¹¹⁸⁷ In these cases the loss ought to lie where it falls, on the payer who has initiated the loss-causing event, at least where neither party is at fault. But if the payee has used the money to cover expenses which would have been incurred even if he had never received the payment in question, the defence will not be established. ¹¹⁸⁸ In *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* ¹¹⁸⁹ the High Court of Australia recognised that the defence was available where the defendant had relied on the receipt of money and suffered an irreversible detriment, which was established in that case where the defendant had decided not to pursue claims against the claimant following the receipt of a mistaken payment. Irreversible detriment by itself is not, however, sufficient to establish the defence, since it must also be shown, at least in England and Wales, that but for the receipt of the enrichment the detriment would not have occurred. ¹¹⁹⁰ With regard to situations where the recipient has altered his position in "anticipatory reliance" on a payment, the Privy Council ¹¹⁹¹ has held, obiter, that the defence of change of position is in principle available and confined cases of reliance on void contracts, where the defence failed, to their exceptional facts ¹¹⁹²; this was subsequently applied by the High Court. ¹¹⁹³ The defence is founded on a principle of justice designed to protect the defendant from a claim to restitution in respect of a benefit received by him in circumstances in which it would be inequitable to pursue that claim, or to pursue it in full. Since an unjust enrichment claim can only be established if the expected payment has in any event been received by the defendant, giving effect to "anticipatory reliance" in that context will indeed operate to protect the security of an actual receipt. ¹¹⁹⁴ The change of position must, on the evidence, be referable in some way to the payment of the money. ¹¹⁹⁵

Link between receipt and specific expenditure unnecessary

29-189

The broad defence as formulated by the House of Lords does not appear to require a link between specific expenditure and specific receipts.¹¹⁹⁶ This means that deserving cases in which it would be difficult to show a specific link are not necessarily excluded. For instance, where a sick employee is erroneously paid his full salary instead of the reduced sick pay to which he is entitled and, as a consequence, the employee simply fails to adjust his outgoings in the light of his new income, or where it is difficult to characterise the expenditure as unusual, such as buying “a better cut of meat, maybe, from time to time, or something extra from the grocer”,¹¹⁹⁷ or where a person with a complicated pattern of expenditure cannot attribute any particular items to the payment,¹¹⁹⁸ provided the payee can satisfy the court that expenditure has increased in line with income, it may be possible to establish the defence.¹¹⁹⁹ It was recognised by Henderson J. in *The Test Claimants in the Franked Investment Income (FII) Group Litigation v Commissioners for Her Majesty's Revenue and Customs (No 2)*¹²⁰⁰ that, where a claim is brought against the Revenue for mistakenly paid taxes, the essential test is whether the award of restitution would make the Revenue worse off than if the tax had not been paid in the first place. It has, however, been recognised that, in respect of Government expenditure, it is not necessary to show a precise link between particular receipt and particular items of expenditure.¹²⁰¹ Rather, it is possible:

“... to infer that planned expenditure would not have taken place at the level which it did but for the availability of the tax receipts which were taken into account in fixing departmental budgets. In such circumstances it would be inequitable to require restitution to be made for tax which was paid by mistake when the money has long ago been spent in the public interest and everybody assumed in good faith that it had been validly levied.”¹²⁰²

The broad test of change of position may also be able to deal with situations where the payee's loss is not due to his reliance on the payment but to some other factor, such as where the money mistakenly paid has been stolen from him or where its loss is the result of a natural event, such as a fire. While it is likely that hardship unrelated to the payment will be treated as irrelevant and will not establish the defence, in the case where the very notes are stolen or are consumed by fire, it is submitted that the defence should be available.¹²⁰³

Non-pecuniary change of position


29-190

In *Commerzbank AG v Gareth Price-Jones*¹²⁰⁴ the Court of Appeal recognised that a non-pecuniary change of position may be sufficient to establish the defence, although, on the facts of the case, the defendant's change of position, in staying in his job rather than seeking more lucrative employment elsewhere, was not sufficient for it to be inequitable to require him to make restitution, since there was no relevant connection between the anticipated receipt of money and the decision to stay in his job, and that decision did not have a significant, precise or substantial impact on the defendant.

Bad faith

29-191

⚠ In *Lipkin Gorman v Karpnale Ltd*¹²⁰⁵ Lord Goff recognised that the defence is not open to a defendant who has changed his position in bad faith, as where the defendant pays money away knowing of the facts which entitle the claimant to restitution. Beyond this situation it has been unclear what constitutes bad faith. The proper interpretation of bad faith for these purposes was considered by Moore-Bick J. in *Niru Battery Manufacturing Co v Milestone Trading Ltd*¹²⁰⁶ where it was held that it includes, but is not confined to, dishonesty.¹²⁰⁷ It also includes “a failure to act in a commercially acceptable way and sharp practice that falls short of outright dishonesty”.¹²⁰⁸ This will include a defendant who changes his position in circumstances where he has good reason to believe that there are facts which enable the claimant to claim restitution, such as that money was paid by mistake, and does not make inquiries of the payer.¹²⁰⁹ Moore-Bick J's interpretation was confirmed by the Court of

Appeal where Clarke L.J. emphasised that the essential question is whether it would be inequitable or unconscionable to deny restitution. ¹²¹⁰ Bad faith does not, however, include negligence, ¹²¹¹ so the defendant is not acting in bad faith if he failed to make inquiries which a reasonable person would have realised should be made, if the defendant did not suspect that there were reasons why the claimant might have a claim for restitution. ¹²¹² A more objective interpretation of bad faith was, however, applied in *Harrison v Madejski and Coys of Kensington*, ¹²¹³ where it was held that the defence was not available to a purchaser who was considered to have been blind to what should have been obvious to him. In *Re Hampton Capital Ltd* ¹²¹⁴  George Bompas Q.C. sitting as a Deputy High Court Judge acknowledged that the test of bad faith for change of position was the same as the test of knowledge for the claim in knowing receipt, namely whether what was known to the defendant was sufficient to make it unconscionable for the defendant to refuse to repay the money. In that case it was held that the defendant knew enough to have reasonable grounds to suspect that the money he had received had been stolen.

Wrongdoing

29-192

In *Lipkin Gorman v Karpnale Ltd* ¹²¹⁵ Lord Goff recognised that “it is commonly accepted that the defence should not be available to a wrongdoer”. It is not clear from this whether Lord Goff accepted this “common” view, especially when this dictum was followed by the statement that such matters can “be considered in depth in cases where they arise for consideration”. Perhaps, Lord Goff’s explicit reliance on the notion of bad faith enables distinctions to be drawn between different degrees of wrongdoer. Indeed, there is obiter dicta which indicates that the defence might be available to a claim grounded on the tort of conversion, which does not require proof of fault. ¹²¹⁶ Further, in *Jeremy D Stone Consultants Ltd v National Westminster Bank* ¹²¹⁷ Sales J. recognised that the commission of a strict liability regulatory failure was insufficiently grave to debar a defendant from relying on the defence. In *Cavenagh Investment Pte Ltd v Rajiv* ¹²¹⁸ Chan Seng Onn J. of the Singapore High Court recognised that the defence should only be unavailable where the rationale of the defence cannot outweigh the policy for remedying the wrong. It was held as a consequence that the defence should be available where the restitutionary claim related to trespass to land. The defence of change of position is not available where a defendant’s change of position is tainted by the commission of an illegal act, other than where the illegality can be characterised as *de minimis*. ¹²¹⁹

Risk-taking

29-193

In *Haugesund Kommune v Depfa ACS Bank* ¹²²⁰ the Court of Appeal recognised that the defence of change of position would not be available where the defendant had taken the risk of its position changing. So, in that case, where the borrower of money had suffered loss as a result of investing the money which had been borrowed from the claimant, change of position was not available because the borrower knew at the time of receipt that the loans would need to be repaid, and had taken the risk that it would not be able to do so.

Relative fault

29-194

A further question concerns the effect of the relative fault of the parties in failing to avoid the mistaken payment and the reasonableness of the payee’s conduct following the payment, for example where he suffers heavy losses as a result of making highly speculative investments, he incurs the expenses after becoming aware of the claimant’s claim, ¹²²¹ or where he pays far over the odds for an item he particularly wants. It is submitted that it is the payee’s *real* loss to which the law should look, since individuals’ perceptions of their own wealth are likely to influence the extent to which they are willing to take risks or are indifferent to price. ¹²²² It has been unclear whether the broad formulation in *Lipkin Gorman v Karpnale Ltd* would allow the payee’s “contributory negligence” to be taken into account in

determining the extent to which reliance can be placed on a change of position, as is the law in New Zealand,¹²²³ or whether fault is only relevant to exclude the defence where the payee was clearly more at fault than the payer, a “relative fault” approach. The New Zealand approach has been criticised by law reform agencies which have considered this matter on the ground that it goes far beyond what is required to give effect to a change of position defence.¹²²⁴ The “contributory negligence” approach gives the court a power to split the loss between the two parties rather than simply determining whether the payee was clearly more at fault than the payer and, if not, simply refusing recovery to the extent of the payee’s change of position. It has been argued that “a contributory negligence” approach involves too much uncertainty and complexity and is likely to hamper the settlement of disputes.¹²²⁵ The Privy Council in *Dextra Bank & Trust Co Ltd v Bank of Jamaica* accepted these criticisms and concluded that the New Zealand decisions show that when the defence is used to reflect relative fault it becomes unduly unstable.¹²²⁶ The Privy Council declined to recognise the propriety of introducing the concept of relative fault into this branch of the law. Good faith on the part of the recipient was considered to be a sufficient requirement. The court was influenced by the fact that, in actions for the recovery of money paid under a mistake (the usual context in which the defence of change of position is invoked) it is well settled that the claimant may recover, however careless he may have been in omitting to use due diligence.¹²²⁷ It would be strange if, in such circumstances, the defendant should find his conduct examined to ascertain whether he had been negligent, and still more so that the claimant’s conduct should be examined for the purposes of assessing the relative fault of the parties. However, in *Commerzbank AG v Gareth Price-Jones*¹²²⁸ Munby J., whilst acknowledging that relative fault was irrelevant, was clearly influenced by the fact that the defendant changed his position as a result of his own negligent mistake, which was not shared or induced by the claimant, in reaching his conclusion that it was not equitable to allow the defendant to rely on the defence.

Similar defences

29-195

❗ Prior to the recognition of the broad defence, in certain circumstances there were other defences which could be rationalised¹²²⁹ as change of position. Thus, if an agent acting on behalf of a disclosed principal receives money paid under a mistake and pays the money to his principal before the payer claims recovery, the agent is not liable, since “the person who made the mistake is not without redress, but has his remedy over against the principal”.¹²³⁰ ❗ This is now better treated as a rule for identifying the correct defendant.¹²³¹ Another instance occurs where money is paid under a forged bill of exchange.¹²³² Furthermore, the need to protect changes of position may well explain the denial of relief in some cases which appear to proceed on other grounds. *Boulton v Jones*,¹²³³ in which goods mistakenly supplied were consumed by the recipient, but where the recipient was held not to be liable to pay for them is one example. The “paymaster” cases¹²³⁴ may be another instance of the indirect operation of the defence in so far as it is difficult to accept them as true cases of estoppel.


Relationship between change of position and estoppel

29-196


The flexibility of change of position may mean that it will be rare in the future for a defendant who has changed his position to plead that the claimant is estopped.¹²³⁵ While this may well be the case, the fact that estoppel will generally not operate pro tanto¹²³⁶ means that defendants may prefer it.¹²³⁷ But there are indications that the recognition of change of position which operates pro tanto means that it should no longer be possible to use estoppel to recover a sum that bears no relation to the payee’s detriment.¹²³⁸ Another reason for a defendant preferring estoppel, at least until change of position is more fully developed, is that it may be easier to establish the defence where sums from a variety of sources have been spent but no particular item of expenditure can be ascribed to a particular payment, or where the payee, erroneously believing his income is higher than it is because of the payments, simply fails to adjust his outgoings to reflect his new income.¹²³⁹ The importance of estoppel will certainly diminish as the result of the introduction of a broad defence of change of position, but it is submitted that it is premature to regard it as redundant.

1. For a full treatment of the subject matter of this chapter, see: Burrows, *The Law of Restitution*, 3rd edn (2011); Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016); Virgo, *The Principles of the Law of Restitution*, 3rd edn (2015). See also Beatson, *The Use and Abuse of Unjust Enrichment* (1991); Birks, *An Introduction to the Law of Restitution* (1985); Birks, *Unjust Enrichment*, 2nd edn (2005); Maddaugh and McCamus, *The Law of Restitution*, 2nd edn (2004); McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014); Mason, Carter and Tolhurst, *Restitution Law in Australia*, 2nd edn (2008); Palmer, *The Law of Restitution* (1978) (four Vols); The American Law Institute's Restatement of the Law Third, Restitution and Unjust Enrichment (2011).
- [1144.](#) Burrows at Pt III; Goff and Jones at Pt 6; Virgo at Pt V; Grantham and Rickett [2008] C.L.J. 92. For the defence of limitation periods see above, Ch.28.
- [1170.](#) Burrows at pp.524–550 and 697–700; Goff and Jones at Ch.27; Virgo at pp.678–701; Bant, *The Change of Position Defence* (2009).
- [1171.](#) [1991] 2 A.C. 548.
- [1172.](#) *Lipkin Gorman v Karpnale Ltd* [1991] 2 A.C. 548, 580 (Lord Goff). See also at 558 and 568. This case departed from the previous position on which see e.g. *Durrant v Ecclesiastical Commissioners* (1880) 6 Q.B.D. 234; *Larner v L.C.C.* [1949] 2 K.B. 683, 688–689; *Baylis v Bishop of London* [1913] Ch. 127; *Re Diplock* [1948] Ch. 465, 476; affirmed sub nom. *Minister of Health v Simpson* [1951] A.C. 251, 276. See also New Zealand Judicature Amendment Act 1958 s.94B.
- [1173.](#) *R. v Tower Hamlets LBC Ex p. Chetnik Developments Ltd* [1988] A.C. 858.
- [1174.](#) *Barclays Bank Ltd v W. & J. Simms, Son and Cooke (Southern) Ltd* [1980] Q.B. 677, above, para.29-036; *Rover International Ltd v Cannon Film Sales Ltd* (No.3) [1989] 1 W.L.R. 912; *Midland Bank Plc v Brown Shipley & Co Ltd* [1991] 2 All E.R. 690, 701–702; *Rural Municipality of Storthoaks v Mobil Oil Canada Ltd* [1975] 55 D.L.R. (3d) 1; *David Securities Pty Ltd v Commonwealth of Australia* [1992] 66 A.L.J.R. 768. See also *Scottish Equitable Plc v Derby* [2001] 3 All E.R. 818. cf. Birks and Swadling [1999] All E.R. 319–320. See further McInnes (2002) 118 L.Q.R. 209.
- [1175.](#) *Lipkin Gorman v Karpnale* [1991] 2 A.C. 548, 559–560, 580 (Lord Goff); *National Westminster Bank Plc v Somer* [2002] 1 All E.R. 198, 213 (Potter L.J.); *Barros Mattos Jnr v McDaniels Ltd* [2004] EWHC 1188 (Ch), [2005] 1 W.L.R. 247 at [16] (Laddie J.).
- [1176.](#) See, e.g. *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All E.R. (Comm) 193 PC.
- [1177.](#) [2003] EWCA Civ 1663, [2004] 1 P. & C.R. DG15 at [32].
- [1178.](#) *Commerzbank AG v Gareth Prices-Jones* [2003] EWCA Civ 1663 at [48]. See also *Scottish Equitable Plc v Derby* [2001] EWCA Civ 369, [2001] 3 All E.R. 818 at [26], [34] (Robert Walker L.J.); *Niru Battery Manufacturing Co v Milestone Trading Ltd* [2002] EWHC (Comm) 1425, [2002] 2 All E.R. (Comm) 705, 743 (Moore-Bick J.).
- [1179.](#) So the defence is not available where money received is used to discharge a debt, since the defendant will remain enriched by the discharge of the debt: *Scottish Equitable Plc v Derby* [2001] EWCA Civ 369, [2001] 3 All E.R. 818 at [35] (Robert Walker L.J.); *National Bank of Egypt International Ltd v Oman Housing Bank SAOC* [2002] EWHC 1760 (Comm), [2003] 1 All E.R. (Comm) 246.
- [1180.](#) See above, para.29-039.
- [1181.](#) *Phillip Collins Ltd v Davis and Satterfield* [2000] 3 All E.R. 808. See also *Scottish Equitable Plc*

v Derby [2001] EWCA Civ 369, [2001] 3 All E.R. 818; *National Westminster Bank Plc v Somer* [2001] EWCA Civ 970, [2002] 1 All E.R. 198, 215 (Potter L.J.).

1182. *Foskett v McKeown* [2001] 1 A.C. 102, 129 (Lord Millett); *Papamichael v National Westminster Bank* [2003] 1 Lloyd's Rep. 341, 376 (Judge Chambers Q.C.); *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), [2013] Ch. 156, [99]–[103] (Stephen Morris Q.C.); *Test Claimants in the FII Group Litigation v HMRC (No.2)* [2014] EWHC 4302 (Ch), [2015] S.T.I. 49 at [348] (Henderson J.). See above, para.29-174.
1183.  *Test Claimants in the FII Group Litigation v HMRC (No 2)* [2014] EWHC 4302 (Ch), [2015] S.T.I. 49 at [343] (Henderson J.). See also *Dexia Crediop SpA v Comune di Prato* [2016] EWHC 2824 (Comm) at [75], where it followed from the recognition of the but for test of causation that the defence would not be applicable if the defendant would have incurred the expenditure in the ordinary course of events.
1184. *Rover International Ltd v Cannon Films Sales Ltd (No.3)* [1989] 1 W.L.R. 912. See also *United Overseas Bank v Jiwani* [1976] 1 W.L.R. 964, 968–969.
1185. This is the only interpretation of the test in Australia: *David Securities Commonwealth Bank of Australia* (1992) 175 C.L.R. 353, 385; *State Bank of New South Wales Ltd v Swiss Bank Corp* (1995) 39 N.S.W.L.R. 350, 356–7; *Citigroup v National* [2012] NSWCA 381, 82 NSWLR 391 at [5]–[6] (Bathurst C.J., Allsop P. and Meagher J.A.) at [64]–[65] (Barrett J.A.); *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* [2014] HCA 14, [25] (French C.J.), [81], [88] (Hayne, Crennan, Kiefel, Bell and Keane JJ.).
1186. *Lipkin Gorman v Karpnale* [1991] 2 A.C. 548, 559 (Lord Bridge), 579 (Lord Goff). Where the item purchased has a second-hand value there is unjust enrichment to the extent of the second-hand value of that item, but where, for example, the money is spent on a holiday which leaves no by-product, the enrichment is erased by the change of position.
1187. *Lipkin Gorman v Karpnale* [1991] 2 A.C. 548, 559, 579-580 (Lord Goff). For the reason why the provision of gaming services was not regarded as good consideration see above, para.29-080.
1188. *R.B.C. Dominion Securities Inc v Dawson* [1994] 111 D.L.R. (4th) 230.
1189. [2014] HCA 14.
1190. *Test Claimants in the FII Group Litigation v HMRC (No.2)* [2014] EWHC 4302 (Ch), [2015] S.T.I. 49 at [354] (Henderson J.).
1191. *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All E.R. (Comm) 193 at [39]. The Court of Appeal expressly recognised that an anticipatory change of position is a good defence in *Commerzbank AG v Gareth Price-Jones* [2003] EWCA Civ 1663, [2004] 1 P. & C.R. DG15 at [38] (Mummery L.J.) and [64] (Munby J.).
1192. *South Tyneside MBC v Svenska International Plc* [1995] 1 All E.R. 545; *Barber v N.W.S. Bank* [1996] 1 W.L.R. 641; *State Bank of N.S.W. Ltd v Swiss Bank Corp* [1997] 6 Bank. L.R. 34. Nolan, *Laundering and Tracing* (1995), Ch.6.
1193. *Charles Terence Estates Ltd v Cornwall County Council* [2011] EWHC 2542 (QB), [2012] 1 P. & C.R. 2, at [98] (Cranston J.). See also *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2011] SGCA 22, [2011] 3 S.L.R. 540.
1194. *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All E.R. (Comm) 193 at [39]. In *Jeremy D Stone Consultants Ltd v National Westminster Bank* [2013] EWHC 208 (Ch) Sales J. (at [251]) recognised that commission of a strict liability regulatory failure was insufficiently grave to debar a defendant from relying on the defence.
1195. *Phillip Collins Ltd v Davis and Satterfield* [2000] 3 All E.R. 808. See also *Scottish Equitable Plc v Derby* [2001] EWCA Civ 369, [2001] 3 All E.R. 818.

- [1196.](#) *Phillip Collins Ltd v Davis and Satterfield* [2000] 3 All E.R. 808. See also *Scottish Equitable Plc v Derby* [2001] EWCA Civ 369. cf. *Rural Municipality of Storthoaks v Mobile Oil Canada Ltd* [1976] 2 S.C.R. 147 where the defence failed because it was not proved that specific items of expenditure resulted from specific receipts. But reliance on the validity of the receipt must be established: *Rose v AIB Group (UK) Plc* [2003] EWHC 1737 (Ch), [2003] 2 B.C.L.C. 374.
- [1197.](#) *Avon CC v Howlett* [1981] I.R.L.R. 447, 449-450 (Sheldon J.); [1983] 1 W.L.R. 605, 622. See above, para.29-185.
- [1198.](#) *Avon CC v Howlett* [1981] I.R.L.R. 447.
- [1199.](#) See *Home Office v Ayres* [1992] I.C.R. 175 (indications by EAT that spending money on normal living expenses, i.e. failing to adjust standard of living, would probably have qualified as a change of position); *Phillip Collins Ltd v Davis and Satterfield* [2000] 3 All E.R. 808. See also *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 66 A.L.J.R. 768, 780-781; *Westdeutsche Landesbank Girozentrale v Islington LBC* (1993) 91 L.G.R. 325, 390-397 (Hobhouse J.) (while no need for link between specific expenditure and specific receipts, losses independent of or prior to the receipt of the benefit cannot be taken into account).
- [1200.](#) [2014] EWHC 4302 (Ch), [2015] S.T.I. 49, [347].
- [1201.](#) *Bloomsbury International Ltd v Sea Fish Industry Authority* [2009] EWHC 1721 (QB), [2010] 1 C.M.L.R. 12, [137] (Hamblen J.); *Test Claimants in the FII Group Litigation v HMRC* [2014] EWHC 4302 (Ch), [2015] S.T.I. 49, [356] (Henderson J.).
- [1202.](#) *Test Claimants in the FII Group Litigation v HMRC* [2014] EWHC 4302 (Ch), [2015] S.T.I. 49, [356] (Henderson J.).
- [1203.](#) Mistakes of Law and Ultra Vires Public Authority Receipts and Payments (Cm.2731) (Law Com. No.227, 1994), para.2.21; Burrows at p.529; Virgo at pp.683-686. cf. Birks [1991] L.M.C.L.Q. 473; Birks, *Restitution—The Future* (1991), pp.141-143; Watts (1993) Contract Statutes Review 25 N.Z.L.C. 191.
- [1204.](#) [2003] EWCA Civ 1663, [2004] 1 P. & C.R. DG15 at [39], [40], [43] (Mummery L.J.) and [59] (Munby J.).
- [1205.](#) [1991] 2 A.C. 548, 580. See also 560 (Lord Templeman). See Palmer [2005] R.L.R. 53. For examples of bad faith defeating the defence of change of position see *Jones v Churcher* [2009] EWHC 722 (QB), [2009] 2 Lloyd's Rep. 94 (circumstances of payment were suspicious); *Barclays Bank Plc v Kalamohan* [2010] EWHC 1383 (Ch) at [75] (Proudman J.).
- [1206.](#) [2002] EWHC 1425 (Comm), [2002] 2 All E.R. (Comm) 705; approved [2003] EWCA Civ 1446.
- [1207.](#) See, in the context of the action for dishonest assistance in a breach of trust, *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 A.C. 378 and *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 W.L.R. 1476; *Starglade Properties Ltd v Nash* [2010] EWCA Civ 1314 at [32]; *Fiona Trust & Holding Corp v Privalov* [2010] EWHC 3199 (Comm) at [1437] (Andrew Smith J.) (objective test of dishonesty).
- [1208.](#) [2002] EWHC 1425 (Comm), [2002] 2 All E.R. (Comm) 705, 741, approved [2003] EWCA Civ 1446. See also *McDonald v Coys of Kensington* [2004] EWCA Civ 47, [2004] 1 W.L.R. 2775 at [41] (Mance L.J.). In *Challinor v Bellis* [2015] EWCA Civ 58 at [116] Briggs LJ considered that conduct can only be considered to be commercially unacceptable in relation to the claimant and does not include conduct about which the claimant cannot complain.
- [1209.](#) *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), [2013] Ch. 156 at [108] (Stephen Morris Q.C.). cf. *Jones v Churcher* [2009] EWHC 722 (QB), [2009] 2 Lloyd's Rep. 94 at [46] (Havelock Allan Q.C.).
- [1210.](#) [2003] EWCA Civ 1446 at [152]. See also at [183] and [192] (Sedley L.J.). See also

- Commerzbank AG v Gareth Price-Jones* [2003] EWCA Civ 1663, [2004] 1 P & C.R. DG15 at [53] where Munby J. stated that this was an exercise in judicial evaluation rather than judicial discretion. cf. *Birks* (2004) 120 L.Q.R. 373, *Burrows* [2004] C.L.J. 276. See also *Abou-Ramah v Abacha* [2006] EWCA Civ 1492, [2007] 1 Lloyd's Rep. 115, where it was held that bad faith had to be determined at the time of the defendant's change of position and is not concerned with the general nature of the defendant's conduct. See *Virgo* [2007] C.L.J. 22; *Lee* [2007] R.L.R. 135.
- [1211.](#) *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All E.R. (Comm) 193; *Niru Battery Manufacturing Co v Milestone Trading Ltd* [2002] 2 All E.R. (Comm) 705, 738; *Maersk Air Ltd v Expeditors International (UK) Ltd* [2003] 1 Lloyd's Rep. 491, 499; *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), [2013] Ch. 156, at [110] (Stephen Morris Q.C.).
- [1212.](#) *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), [2013] Ch. 156 at [110] (Stephen Morris Q.C.). In *Jeremy D Stone Consultants Ltd v National Westminster Bank* [2013] EWHC 208 (Ch) Sales J. (at [247]) recognised that incompetence did not constitute bad faith.
- [1213.](#) [2014] EWCA Civ 361 at [61] (Etherton C.). See also *Jones v Churcher* [2009] EWHC 722 (QB), [2009] 2 Lloyd's Rep 94 at [46] (Havelock Allan QC).
- [1214.](#)  [2015] EWHC 1905 (Ch), [2016] 1 B.C.L.C. 374.
- [1215.](#) [1991] 2 A.C. 548, 580.
- [1216.](#) *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 A.C. 883, 1093 (Lord Nicholls).
- [1217.](#) [2013] EWHC 208 (Ch) at [251].
- [1218.](#) [2013] SGHC 45, [2013] 2 S.L.R. 543.
- [1219.](#) *Barros Mattos Jnr v McDaniels Ltd* [2004] EWHC 1188 (Ch), [2004] 3 All E.R. 299. cf. *O'Neil v Gale* [2013] EWHC 644 (Ch) at [68] (David Donaldson QC).
- [1220.](#) [2010] EWCA Civ 579, [2012] Q.B. 549.
- [1221.](#) *Sullivan v Lee* (1995) 95 B.C.L.R. (2d) 195.
- [1222.](#) *Skyring v Greenwood* (1825) 4 B.C. 281, 289.
- [1223.](#) *Thomas v Houston Corbett and Co* [1969] N.Z.L.R. 151.
- [1224.](#) Law Commission Consultation Paper No.120, para.2.77; Law Reform Commission of British Columbia L.R.C. 51 (1981), p.79; Law Reform Committee of South Australia (84th Report, 1984), p.32. Law Reform Commission of New South Wales L.R.C. 53 (1987), para.5.35.
- [1225.](#) *Burrows* at pp.540-542.
- [1226.](#) *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All E.R. (Comm) 193 at [45], accepting the view of *Birks*, *Limits of Restitution: A Comparative Analysis*, p.41. See also *Niru Battery Manufacturing Co v Milestone Trading Ltd* [2002] EWHC (Comm) 1425, [2002] 2 All E.R. (Comm) 705, 738 (Moore-Bick J.).
- [1227.](#) *Kelly v Solari* (1841) 9 M. & W. 54, 59, above, para.29-039. Equally where the claimant might be considered to be negligent in failing to recover money from a third party: *Niru Battery Manufacturing Co v Milestone Trading Ltd* [2002] EWHC (Comm) 1425, [2002] 2 All E.R. (Comm) 705, 743 (Moore-Bick J.).
- [1228.](#) [2003] EWCA Civ 1663, [2004] 1 P & C.R. DG15. See also *Niru Battery Manufacturing Co v Milestone Trading Ltd (No.2)* [2004] EWCA Civ 487 at [33] (Clarke L.J.).

[1229.](#) *Lipkin Gorman v Karpnale Ltd* [1991] 2 A.C. 548, 579 (Lord Goff).

[1230.](#) **!** *Buller v Harrison* (1777) 2 Cowp. 565, 566; *Continental Caoutchoue v Kleinwort* (1904) 90 L.T. 474, 476; *Gowers v Lloyds and National Provincial Foreign Bank Ltd* [1938] 1 All E.R. 766; *Agip (Africa) Ltd v Jackson* [1990] Ch. 265, affirmed [1991] Ch. 547; *Australia and New Zealand Banking Group Ltd v Westpac Banking Corp* (1988) 78 A.L.R. 157, 168; *Bank Tejarat v Hong Kong & Shanghai Banking Corp (CI) Ltd* [1995] 1 Lloyd's Rep. 239; *National Bank of Egypt International Ltd v Oman Housing Bank SAOC* [2002] EWHC 1760 (Comm), [2003] 1 All E.R. (Comm) 246; Virgo at pp.674-678. See Vol.II, para.31-109. But see Burrows at pp.558-568; Goff and Jones, Ch.28; Bant [2007] L.M.C.L.Q. 225 for the view that this is a distinct defence applicable under agency law. In *Jeremy D Stone Consultants Ltd v National Westminster Bank* [2013] EWHC 208 (Ch) Sales J. (at [244]) recognised the defence of ministerial receipt as a defence. This was considered to be distinct from change of position and it applied where a bank was contractually obliged to pay a customer where money had been paid to the bank for the account of the customer. See also Millett (1991) 107 L.Q.R. 71, 76; Swadling, *Laundering and Tracing* (1995), Ch.9. Note that this principle does not apply where the recipient is in the position of a trustee: *Baylis v Bishop of London* [1913] 1 Ch. 127; or received the money as a result of his own wrongdoing, or with knowledge that it resulted from another's wrongdoing: *Oates v Hudson* (1851) 6 Ex. 346. The defence of ministerial receipt was considered by Teare J. in *Marsfield Automotive Inc v Siddiqi* [2017] EWHC 187 (Comm), where a distinction was tentatively drawn between a strong and a weak version of the defence. The former version applies the defence wherever an agent receives a benefit on behalf of the principal, because the agent should not be considered to be enriched; rather, it is the principal who is enriched and who should be sued. The weak version gives the agent a defence only where the agent has transferred the benefit received in accordance with the principal's instructions and before the agent has notice of the claimant's right to restitution. This distinction was also acknowledged by Henderson J. in *High Commissioner for Pakistan in the United Kingdom v Prince Mukkuram Jah* [2016] EWHC 1465 (Ch), [2016] W.T.L.R. 1763 at [150], who noted that both versions were supported by authority. In *Marsfield Automotive* Teare J. indicated, (at [34]), that the weak interpretation of the defence applied where the payment to the agent was made by mistake or as the result of a wrongful act, whereas the stronger version applied in all other cases. This is a sensible way of rationalising a confused body of cases.

[1231.](#) *Portman Building Society v Hamlyn Taylor Neck* [1998] 4 All E.R. 202, 207 (Millett L.J.); *Niru Battery Manufacturing Co v Milestone Trading Ltd* [2002] EWHC (Comm) 1425, [2002] 2 All E.R. (Comm) 705, 740 (Moore-Bick J.).

[1232.](#) *Price v Neal* (1762) 3 Burr. 1354; *Cocks v Masterman* (1829) 9 B. & C. 902; *London & River Plate Bank v Bank of Liverpool* [1896] 1 Q.B. 7; *Imperial Bank of Canada v Bank of Hamilton* [1903] A.C. 49; *National Westminster Bank Ltd v Barclays Bank International Ltd* [1975] Q.B. 654.

[1233.](#) (1857) 2 H. & N. 564. See also the requirement of *restitutio in integrum* for rescission for misrepresentation, above, paras 7-123 et seq. The requirement of total failure of basis, above, paras 29-057 et seq. was also justified because of the absence of a defence of change of position; *Whincup v Hughes* (1871) L.R. 6 C.P. 78, 82, 84. See also the "statutory recognition" of the defence in *B.P. Exploration Co (Libya) Ltd v Hunt (No.2)* [1979] 1 W.L.R. 783, 800.

[1234.](#) See above, para.29-184.

[1235.](#) Burrows at p.558; Fung and Ho (2001) 9 R.L.R. 52; Wilken (2002) 54 Comm. Law. 73. Cp. Hudson [2014] R.L.R. 19.

[1236.](#) Above, para.29-185.

[1237.](#) *Avon CC v Howlett* [1983] 1 W.L.R. 605, 612, 624–625. See above, para.29-185.

[1238.](#) *R.B.C. Dominion Securities Inc v Dawson* (1994) 111 D.L.R. (4th) 230; *Boscawen v Bajura* [1996] 1 W.L.R. 328; *Phillip Collins Ltd v Davis and Satterfield* [2000] 3 All E.R. 808; *Scottish Equitable Plc v Derby* [2001] EWCA Civ 369, [2001] 3 All E.R. 818. But cf. the more recent

decision of the CA in *National Westminster Bank Plc v Somer* [2001] EWCA Civ 970, [2002] 1 All E.R. 198 at [215] (Potter L.J.), [216] (Clarke L.J.), [219] (Peter Gibson L.J.).

[1239](#). But note the more flexible approach adopted in *Phillip Collins Ltd v Davis and Satterfield* [2000] 3 All E.R. 808. See also *Scottish Equitable Plc v Derby* [2001] EWCA Civ 369, [2001] 3 All E.R. 818.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 9 - Restitution

Chapter 29 - Restitution ¹

Section 5. - Defences ¹¹⁴⁴

(c) - Settlement of an Honest Claim

Settlement of an honest claim ¹²⁴⁰

29-197

A payment that is made in settlement of or submission to an honest claim, or as part of a compromise, cannot be recovered. Since greater doubts surround questions of law than questions of fact it is more likely that there will be a settlement or a compromise where the issue is one of law rather than one of fact. Although it has been stated that the precise limits of the settlement defence “have still to be clarified”, ¹²⁴¹ the current position can be stated in the following way. First, where the payer knows or believes the money is not due but pays in any event, the money will not be recoverable on the ground of mistake. ¹²⁴² If a claim has been made and disputed but payment eventually made, whether in order to avoid threatened litigation or for some other reason such as to preserve good commercial relations or to secure some advantage, it will either be a compromise or a contractual submission to the claim. If there has been no overt dispute, the reason for irrecoverability may be more difficult to characterise as submission and is better analysed as waiver. In any event in such cases there is no mistake.

Payer has doubts but nevertheless pays

29-198

Where the payer has doubts but pays nevertheless, he is unlikely to be able to recover the payment:

“... a state of doubt is different from that of mistake. A person who pays when in doubt takes the risk that he may be wrong.” ¹²⁴³

Three situations must, however, be distinguished. First, if the payee has made a claim accompanied by a threat to sue, recovery will be denied. ¹²⁴⁴ Secondly, where there has been no overt dispute, if the payer does not care which way that doubt is resolved but consciously makes a decision to pay, there will also be no recovery. In other cases recovery is unlikely, particularly where the payer's doubt concerns a crucial issue, ¹²⁴⁵ but will depend on the degree of the doubt: while some doubt will not prevent recovery, ¹²⁴⁶ the greater the doubt the less likely it is that recovery will be ordered. In the context of a question of law, a payer who adverted to the issue and nevertheless decided to make the payment is likely to be held to have been indifferent to what the law really was. Thirdly, if the payer would have paid in any event, any mistake would not have caused the payment and it would therefore not be recoverable on this ground. ¹²⁴⁷

Payer has no doubts as to liability

29-199

Where the payer pays by mistake but he has no doubts as to his liability he will prima facie recover.¹²⁴⁸ If, however, the payment is in response to a claim accompanied by a threat to sue, recovery will be denied even if the payer is mistaken.¹²⁴⁹ If, moreover, the payer has waived any claim to recover the money or has assumed the risk of any mistake, recovery will be denied. While in the context of mistake of fact it appears that a mistaken payer will only rarely be held to have so waived his right or assumed the risk, it is possible that courts may be more willing to hold that there has been a waiver in the context of mistake of law,¹²⁵⁰ perhaps because of the greater prevalence of doubtful questions of law, and particularly where the payer has adverted to the issue but decided to make the payment anyway.¹²⁵¹

Compromise

29-200

Recovery will also be denied if there has been a compromise of the claim. A compromise involves some degree of concession (or consideration) on each side, and this can include the forbearance to sue.¹²⁵² Again, it may be binding regardless of the validity of the claim. This, of course, assumes that in cases where the only pressure on the party who makes the payment is the probability of being sued, the claimant bona fide believes he has a fair chance of success.¹²⁵³ A compromise may be invalidated by a mistake, but not where the compromise was agreed on the basis of an erroneous assumption about the law.¹²⁵⁴

Payment following simple demand

29-201

A payment following a simple but mistaken demand can be recovered, as there is neither a compromise of nor a submission to an honest claim. For example, in *Baylis v Bishop of London*¹²⁵⁵ restitution was granted where the plaintiffs had paid a rentcharge under a mistake of fact to the sequestrator of a benefice, thinking that a lease was in force when in fact it had expired. Money cannot, however, be recovered for mistake if it was paid for reasons other than the mistake, as there is no causal link between mistake and payment.¹²⁵⁶

1. For a full treatment of the subject matter of this chapter, see: Burrows, *The Law of Restitution*, 3rd edn (2011); Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016); Virgo, *The Principles of the Law of Restitution*, 3rd edn (2015). See also Beatson, *The Use and Abuse of Unjust Enrichment* (1991); Birks, *An Introduction to the Law of Restitution* (1985); Birks, *Unjust Enrichment*, 2nd edn (2005); Maddaugh and McCamus, *The Law of Restitution*, 2nd edn (2004); McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014); Mason, Carter and Tolhurst, *Restitution Law in Australia*, 2nd edn (2008); Palmer, *The Law of Restitution* (1978) (four Vols); The American Law Institute's Restatement of the Law Third, Restitution and Unjust Enrichment (2011).

^{1144.} Burrows at Pt III; Goff and Jones at Pt 6; Virgo at Pt V; Grantham and Rickett [2008] C.L.J. 92. For the defence of limitation periods see above, Ch.28.

^{1240.} See generally Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments (Law Com. No.227, 1994), paras 2.25–2.38. See also Andrews [1989] L.M.C.L.Q. 431; Arrowsmith, *Essays on the Law of Restitution* (1991); Virgo at pp.143–144.

^{1241.} *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 A.C. 349, 413 (Lord Hope). See also at 373 (Lord Goff).

- [1242.](#) *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 66 A.L.J.R. 768, 775, 778. See also *Kelly v Solari* (1841) 9 M. & W. 54, 59; *Maskell v Horner* [1915] 3 K.B. 106, 118; *Mason v New South Wales* (1959) 102 C.L.R. 108, 143.
- [1243.](#) *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 A.C. 349, 410 (Lord Hope); *Cobbold v Bakewell Management Ltd* [2003] EWHC 2289 (Ch) at [19] (Rimer J.); *Brennan v Bolt Burdon* [2004] EWCA Civ 1017, [2005] Q.B. 303; *Deutsche Morgan Grenfell Plc v IRC* [2006] UKHL 49, [2007] 1 A.C. 558, above, para.29-038.
- [1244.](#) *Moore v Vestry of Fulham* [1895] 1 Q.B. 399; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 66 A.L.J.R. 768, 788 (Dawson J.).
- [1245.](#) *Wason v Wareing* (1852) 15 Beav. 151; *Cushen v City of Hamilton* (1902) 4 Ont. L.R. 265, 266, 270.
- [1246.](#) *Charfield v Paxton* (1799) 2 East 471. See also *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 A.C. 349, 401 (Lord Hoffmann), 412 (Lord Hope); *Westdeutsche Landesbank Girozentrale v Islington LBC* [1994] 4 All E.R. 890, 934 (Hobhouse J) (need for “an actual conscious appreciation” for recovery to be barred).
- [1247.](#) *Home and Colonial Insurance Co Ltd v London Guarantee and Accident Co Ltd* (1928) 45 T.L.R. 134 (regarding the fact that in practice underwriters did not refuse to pay out on unstamped marine insurance policies, although they were not valid). See also *Kelly v Solari* (1841) 9 M. & W. 54, 59; *Maskell v Horner* [1915] 3 K.B. 106, 118; *Mason v New South Wales* (1959) 102 C.L.R. 108, 143; *Deutsche Morgan Grenfell Plc v IRC* [2006] UKHL 49, [2007] 1 A.C. 558, above, para.29-038.
- [1248.](#) Above, para.29-036. See also *Woolwich Equitable Building Society v IRC* [1993] A.C. 70, 192 (Lord Jauncey).
- [1249.](#) *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 66 A.L.J.R. 768, 788 (Dawson J.); *Moore v Vestry of Fulham* [1895] 1 Q.B. 399; cf. *Re Roberts* [1905] 1 Ch. 704, 710–711.
- [1250.](#) See, e.g. *South Australia Cold Stores Ltd v Electricity Trust of South Australia* (1957) 98 C.L.R. 65, 73–75; *Bryan* (1993) 15 Syd L. Rev 461, 479–80, 481; *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 A.C. 349, 401 (Lord Hoffmann), 409 (Lord Hope), 412 (Lord Hope).
- [1251.](#) *Avon CC v Howlett* [1983] 1 W.L.R. 605, 620; *Akt Dampskibbs Steinstad v William Pearson & Co* (1927) 137 L.T. 533; *Westdeutsche Landesbank Girozentrale v Islington LBC* [1994] 4 All E.R. 890.
- [1252.](#) *Callisher v Bischoffsheim* (1870) L.R. 5 Q.B. 449; *Cook v Wright* (1861) 1 B. & S. 559; *Atlee v Backhouse* (1838) 3 M. & W. 633. See generally, above paras 4-052—4-055.
- [1253.](#) *Llewellyn v Llewellyn* (1854) 3 Dow. & L. 318; *Longridge v Dorville* (1821) 5 B. & Ald. 117; *Haigh v Brooks* (1839) 10 Ad. E. 309.
- [1254.](#) *Brennan v Bolt Burdon* [2004] EWCA Civ 1017, [2005] Q.B. 303. See further above, para.6-053.
- [1255.](#) [1913] 1 Ch. 127.
- [1256.](#) Above, paras 29-036, 29-038.

Chitty on Contracts 32nd Ed.
Consolidated Mainwork Incorporating Second Supplement
Volume I - General Principles
Part 9 - Restitution
Chapter 29 - Restitution ¹
Section 5. - Defences ¹¹⁴⁴
(d) - Public Policy

Public policy

29-202

A new defence to restitutionary claims was recognised in *Haugesund Kommune v Depfa ACS Bank*, ¹²⁵⁷ namely that the claim for restitution will be defeated where it is contrary to public policy, such as where restitution was contrary to the objective of a statute which had rendered a contract void. ¹²⁵⁸ In that case it was recognised that there is no general public policy rule which prevents or restricts the right to claim restitution of money lent under a void borrowing contract, save where restitution is inconsistent with a statute which renders the contract void.

^{1.} For a full treatment of the subject matter of this chapter, see: Burrows, *The Law of Restitution*, 3rd edn (2011); Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016); Virgo, *The Principles of the Law of Restitution*, 3rd edn (2015). See also Beatson, *The Use and Abuse of Unjust Enrichment* (1991); Birks, *An Introduction to the Law of Restitution* (1985); Birks, *Unjust Enrichment*, 2nd edn (2005); Maddaugh and McCamus, *The Law of Restitution*, 2nd edn (2004); McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (2014); Mason, Carter and Tolhurst, *Restitution Law in Australia*, 2nd edn (2008); Palmer, *The Law of Restitution* (1978) (four Vols); The American Law Institute's Restatement of the Law Third, Restitution and Unjust Enrichment (2011).

^{1144.} Burrows at Pt III; Goff and Jones at Pt 6; Virgo at Pt V; Grantham and Rickett [2008] C.L.J. 92. For the defence of limitation periods see above, Ch.28.

^{1257.} [2010] EWCA Civ 579, [2012] Q.B. 549.

^{1258.} See *Boissevain v Weil* [1950] A.C. 327; *Dimond v Lovell* [2002] 1 A.C. 384; *Wilson v First County Trust (No.2)* [2003] UKHL 40, [2004] 1 A.C. 816.