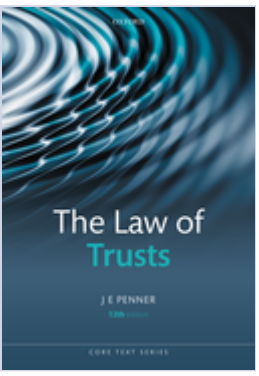

The Law of Trusts (12th edn)
J E Penner

p. 409

16. Restitution, unjust enrichment, and the law of trusts

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Abstract

Titles in the Core Text series take the reader straight to the heart of the subject, providing focused, concise, and reliable guides for students at all levels. This chapter discusses the various ways in which the law of trusts can be seen to provide remedies that can be described as 'restitutionary', and whether any aspects of the law of trusts should be treated as part of the law of unjust enrichment. The areas of trust law where these issues have been most often raised: the law of resulting trusts, the law of tracing, and the law governing breach of trust, are discussed in detail.

Keywords: resulting trusts, tracing, breach of trust, recipient liability, restitution, proprietary restitution, unjust enrichment, unjust factors

Summary

16.1 This chapter concerns the possible overlap between the law of trusts and the law of restitution, or the law of 'unjust enrichment'. The notion of overlap here is somewhat ambiguous. As we shall see, some commentators would say that certain areas of traditional trust law doctrine are 'really' part of a different area of law, the law of restitution/unjust enrichment. Less ambitiously, others might say that the law of trusts is informed or shaped by restitutionary/unjust enrichment principles of analysis. The purpose of this chapter is to examine whether some traditional trust law principles and doctrines are best coherently framed within a restitutionary/unjust enrichment analysis.

16.2 So what is the law of restitution, or the law of unjust enrichment, and what is a legal analysis which draws upon these areas of legal doctrine? As you can tell from the cagey way in which we have just spoken of the law of restitution/law of unjust enrichment, it is not entirely clear what this area of law should be called. The leading English practitioner text, 'Goff & Jones', was called *The Law of Restitution* up to its 7th edition, and then changed its name to *The Law of Unjust Enrichment*. The difference is basically the difference between a remedy, and a cause of action. 'Restitution' describes a remedy: X has to give a money payment to Y, returning the same amount that Y previously transferred to X. A standard example is a payment by Y made by mistake. Y
p. 410 pays the gas company £50 for her August bill, forgetting that she had paid it earlier. Y now has a restitutionary remedy, for return of the money, against the gas company.

16.3 But just saying this does not explain Y's 'cause of action'. A cause of action consists of the facts that Y must prove which, under the relevant law, entitle her to a remedy against X. In this example, the explanation of the cause of action was historically obscured by the form in which the action proceeded, as a claim for 'money had and received'. That label isn't very helpful. 'Unjust enrichment' provides a way in which we can make sense of the facts Y must prove to entitle her to a remedy. She has to prove (1) the payment and (2) that it was made by mistake. Because of the mistake, the law holds that X is unjustly enriched by the payment—he shouldn't be enriched in this way, and so he has to pay Y back.

16.4 But consider a different case. X buys goods from Y on credit. X now owes Y £50 as the price of the goods. X fails to pay. Y clearly has claim against X for the price of the goods, for that contractually incurred debt. But even though one could say, morally speaking, the reason why X has to pay is that if he didn't, he would be unjustly enriched by having the goods without paying for them, Y's claim is not a claim in unjust enrichment. It is a claim under the law of contract that X do what he agreed to do, ie pay for the goods.

16.5 Now consider a trickier case, which is on the borderline. Y contracts with X, a builder, to re-model Y's kitchen. Y pays £5,000 to X up front, with a further payment of £5,000 due when the work is finished. Before starting work, X dies. This contract is frustrated, and thereby terminated, by X's death. Y has a clear claim against X's estate for the repayment of £5,000. Is Y's claim a claim under the law of contract, or under the law of unjust enrichment? In the opinion of your author, it is a claim under the law of contract. It seems obvious that an implied term of a contract of this kind is that if a contract is frustrated, any payments going from one party to the other must be reversed (cf Stevens (2018), 584–586). So this is a restitutionary claim in the remedial sense, but not an unjust enrichment claim in the 'cause of action' sense. Yet (owing largely to the fact that these claims were brought as 'money had and received' claims), most unjust enrichment scholars claim that this is an example of an unjust enrichment claim. X, or rather X's estate, would be unjustly enriched if it were able to keep the £5,000 when there is no performance of the contract by X.

16.6 This last example is pertinent to our purposes because, as we shall see, in certain areas of trusts law, unjust enrichment scholars have claimed that certain parts of trusts law doctrine, such as the doctrine of presumed resulting trusts, or the law of tracing, are only explained, or better explained, on the basis of unjust enrichment reasoning.

16.7 The fact that it has become necessary to include a chapter on unjust enrichment and restitution in a trusts text should be telling of the direction of modern developments. Graham Virgo (2020, v) describes equity as 'another country', and 'an ancient country with rich resources'. Virgo goes on to say:

> *The territory of Equity is itself under threat. Some people wish to invade it and impose their will on its*
> p. 411 *running, despite its many years of peaceful, benevolent existence. One* ↵ *group appear to have particular designs on Equity. This is a strange evangelical sect known as the 'unjust enrichmentarians'. The members of this sect are mostly benign, but they have their own strange dialect and wish to reform what they consider to be the unsophisticated attitudes of the ancient Equity people, not realizing that the new structures they wish to impose typically replicate what Equity already has and in a much less sophisticated way.*

When you are done with this chapter you should be equipped to assess if equity truly is (or should be) losing parts of its bailiwick to unjust enrichment.

A brief history of unjust enrichment and restitution

16.8 Unjust enrichment was only recognised relatively recently as a distinct branch of law. The decision of *Lipkin Gorman v Karpnale Ltd* (1991) is seen as a moment where the subject came into its own. In that case, Lord Templeman quoted an earlier statement of Lord Wright from *Fibrosa v Fairbairn* (1943) (at 61):

> *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.*

16.9 It is not to our purposes whether *Lipkin Gorman* was adequately reasoned. It has been subjected to severe criticism (Smith (2009), 338–341; Stevens (2018), 591–592). It does, however stand for the proposition that there is a principle of unjust enrichment in English law which founds a cause of action leading to a restitutionary remedy.

16.10 What facts need to be shown to make out the cause of action in unjust enrichment? Can the phrase 'unjustly enriched at the expense of the claimant' be broken down into component parts, and articulated in the form of a test? Peter Birks' provision of a four-question test is regarded as a major contribution to this area of the law. In Burrows (2011), 27, these questions are expressed as follows:

> (i) *Has the defendant been benefited (ie, enriched)?*
>
> (ii) *Was the enrichment at the claimant's expense?*
>
> (iii) *Was the enrichment unjust?*
>
> (iv) *Are there any defences?*

If the first three questions are answered affirmatively, and the last is answered negatively, the claimant will be entitled to restitution.

16.11 The four questions that make up the 'unjust enrichment' cause of action are simply phrased, and this
p. 412 four-question test is regularly invoked by judges addressing claims purporting to be founded on the defendant's unjust enrichment. Although questions (i), (ii), and (iv) have given rise to many controversial issues, (iii) is obviously the heart of the matter. What makes an enrichment unjust? Orthodox English law takes what is called an 'unjust factors' approach; the claimant must claim and prove that his enrichment of the defendant, say by a payment of money, was unjust because it was made by mistake, or under duress, or under undue influence. The alternative approach is the 'absence of basis' approach, which derives from certain readings of the law in civil law jurisdictions. Here the claimant need only to show that there was no legal basis, or legal reason, for the payment of the money.

16.12 Given the now prevalent use of the four-question approach, one could be forgiven for thinking that the law of unjust enrichment has always been this way. This is not true. For a long time, the law of unjust enrichment lurked in the shadows of other areas of private law.

16.13 Historically, restitutionary obligations were seen to arise from implied contracts. Blackstone supported this view in his *Commentaries on the Laws of England*, saying that restitutionary obligations in the common law depend on implied contracts, or quasi-contracts ('*quasi ex contractu*').

16.14 *Moses v Macferlan* (1760) was one such case that employed this kind of reasoning. Lord Mansfield, the judge in the case, identified several classic 'restitutionary' situations including money paid by mistake, and said (at 1009) that the law gives relief 'as it were upon a contract ("*quasi ex contractu*," as the Roman law expresses it)'.

16.15 It is likely that this early identification of restitution with contract was for reasons of pleading and procedure, as opposed to reasons of substance. When early restitutionary claims emerged, they were brought under the form of action known as *indebitatus assumpsit*. This form of action was for an implied promise or contract to repay money, and was pleaded, as we have seen under a particular 'count' within *indebitus assumpsit*, the action 'for money had and received to the plaintiff's use'. (See Smith (2009) for a discussion of the variety of claims that could be brought under this action, including 'equitable debt' claims against a trustee who held assets on bare trust for a beneficiary.) Therefore, where a claim for money paid by mistake was brought under the *indebitatus assumpsit* action, the promise to repay was fictitious.

16.16 The quasi-contract theory and terminology persisted for most of the subject's history, culminating perhaps in the decision of the HL in *Sinclair v Brougham* (1914), but the quasi-contract theory was decisively rejected in *Westdeutsche Landesbank Girozentrale v Islington LBC* (1996). It is safe to say, as the CA noted ([121]) in *Cleveland Bridge UK Ltd v Multiplex Constructions (UK) Ltd* (2010), that the implied contract theory is now a 'ghost of the past'. Therefore, in more modern times, as opposed to seeing the rules of unjust enrichment (and restitution) as part of the law of quasi-contract (whatever that really is), the tendency has been to see the law of unjust enrichment as 'one of the main sources of rights and obligations in English private law' (Goff & Jones (2016), 3).

p. 413 **16.17** Much of the credit for the emergence of the law of unjust enrichment and restitution as an area in its own right is owed to Robert Goff and Gareth Jones with their publication of *The Law of Restitution* (Goff & Jones (1966)) in 1966, and later on, Peter Birks's *An Introduction to the Law of Restitution* (Birks (1985)). As Lord Rodger put it:

> *Goff and Jones are the Romulus and Remus of the English law of restitution … out of a few weak and scattered settlements they founded a powerful city whose hegemony now extends far and wide['] (Goff & Jones (2016), vii). One speaks of the English law of restitution because powerful developments were occurring in the United States with the American Law Institute's publication of its Restatement of Restitution in 1937, predating and influencing the English revival.*

16.18 However, the publication of *The Law of Restitution* in 1966 was by no means the end of the story. In fact, the four stage test we saw earlier was only endorsed conclusively by the House of Lords in *Banque Financiere de la Cite v Parc (Battersea) Ltd* (1998). As late as 1977, Lord Diplock was still saying that 'no general doctrine of unjust enrichment [is] recognized in English law' (*Orakpo v Manson Investments Ltd* (1978), 104).

16.19 Recent scholarship has cast doubt on the proposition that unjust enrichment ought to be thought of as a coherent area of law at all (Watts (2016); Stevens (2018); Smith (2018)). Stevens (2018) argues that unjust enrichment as a legal subject has no single reason (what he refers to as a 'consideration of justice') unifying it. Take for example contract law. According to Stevens, 'contract takes its unity from the consideration of justice that agreements, subject to various conditions, create legal rights that ought to be enforced'. If unjust enrichment were a single subject, Stevens argues, then it would have a reason of this kind unifying it. The development of the omnibus four-question test for liability assumes that the subject is unified to some extent

—it assumes that the elements of the test are capable of being articulated in a way that captures all situations of liability. This would mean that what constitutes an 'enrichment', for example, would be the same in all cases. Stevens argues that this is not true (Stevens (2018), 576):

> *in some cases we are reversing a performance rendered, sometimes the value of a right received, in others a right retained, in some what it would have cost to discharge an obligation, and in still others the expense compelled to incur on another's behalf. The subject lacks even the weak formal unity of being concerned with the same kinds of 'enrichment'. There is no genus to which these species belong.*

16.20 To give a brief flavour of his thinking, consider an example Stevens ((2018), 579) raises:

> *C and D each own one of only two examples of a rare collectible stamp worth thousands of pounds. C, by mistake, destroys his stamp, which causes D's stamp to more than double in value. D sells his stamp. C seeks restitution from D of the enrichment D has made at C's expense.*

16.21 The elements of the four stage test for liability seem to be satisfied here. If the correct result is that
p. 414 there should be no liability, then the omnibus test has led us into error. Stevens explains that the problem is that the relevant 'enrichment' is wrongly identified. What needs to be reversed, he argues, is the performance from C to D, and not the consequences of the performance. To Stevens, 'a defendant who receives a performance from a claimant does so either on the basis that it is made for some justified reason, or that it is not.' If the recipient knows that there is no justifying reason for the performance, then restitution must be made. In this case, when C destroys his stamp by mistake, there has been no performance rendered by C to D at all, and therefore there is nothing to reverse.

16.22 For his part, Watts (2016) argues that the four-question test obscures the analysis of restitutionary claims, and has induced in judges a 'well-meaning sloppiness of thought' that has led to unjust claims being upheld, and just restitutionary claims to be denied. Smith (2018) similarly claims the four-question test 'overgeneralises', and argues for a 'smaller unjust enrichment' framed in terms of discrete, specific, causes of action akin to the different causes of action found in the law of torts.

16.23 It is beyond our purposes here to examine these criticisms in detail, but it should be recognised that there is no consensus about some of the very fundamental basics of the 'unjust enrichment' analysis (see also Penner (2018b)). If Stevens, Watts, and Smith are right that there really are irreconcilably different justificatory reasons for restitution, then we do not have a big 'unified' law of unjust enrichment after all.

Personal and proprietary restitution

16.24 Just saying that someone has a claim to restitution leaves a lot unsaid. In our mistaken payment example, if Y mistakenly pays her gas bill of £50 twice, and the gas company becomes insolvent, then it would matter very much to Y whether her claim to restitution is 'personal' or 'proprietary'. If Y only has a personal remedy, it means that the gas company simply has to pay her £50 from its funds, so Y's claim will be on the same footing with all the gas company's other unsecured creditors, and she may end up getting very little or

nothing at all. If Y has a proprietary remedy, she asserts a claim over the very £50 that she paid (assuming of course, it can be followed or traceable substitutes of the money can be identified), and that £50 or its traceable proceeds will not be available to satisfy the claims of the other competing creditors.

16.25 A personal restitutionary remedy is given for claims made for money had and received. Proprietary restitutionary remedies are the norm in equity. The classic example is the claim available against a non-bona fide purchaser who receives property transferred in breach of trust. Such a person will be liable to an order to transfer the very property, or its traceable proceeds, to a trustee to hold the property on trust as before. The important thing to note here is that we are focussing only on the restitutionary remedy, not the cause of
p. 415 action for which it is a remedy. In the latter case, of property transferred in breach of trust, the restitutionary remedy is not traditionally regarded as responding to the recipient's unjust enrichment—it responds to the fact that the beneficiary has a continuing equitable interest in the assets transferred.

Unjust enrichment and resulting trusts

Presumed resulting trusts

16.26 Although Chambers (1997) was the originator of the 'absence of intention to benefit' reading of the presumption of resulting trust (**10.30** et seq), he now (Chambers (2010a)) denies that resulting trusts respond to any presumption at all; cases where the so-called 'presumption' applies are really just cases where there is no legal reason or basis for the transfer. Chambers thus embraces the 'no legal basis' (**16.11**) reading of what makes a transfer unjust. B, having received the property either directly from A (as in the case of an ART or a voluntary transfer PRT) or indirectly from A (in the case of a purchase contribution PRT), would be unjustly enriched, because inexplicably enriched, at A's expense, if he were allowed to keep the property for his own benefit.

16.27 On this view, the current categories of PRTs and ARTs do not exhaust the cases in which resulting trusts (should) arise. They are just the most well-recognised historical situations in which they do. This formulation encompasses a much wider range of cases than is captured by PRTs and ARTs.

16.28 Take our familiar example: I mistakenly pay my gas bill a second time, simply forgetting that I have done so already. Assume, for simplicity, that I pay in cash. The gas company acquires legal title to the cash when I pass it to one of its employees, even though I do so under a mistake, because I voluntarily hand it over intending title to pass. At common law I am entitled to a restitutionary personal claim against the gas company for the amount I mistakenly paid. On Chambers' thesis, however, equity steps in to give me more: although I intended to pay the money to meet a contractual debt to the gas company, because I owed the company no money there was no legal basis for the transfer; therefore the gas company should hold the money it received on an 'unjust enrichment trust' for me. Obviously, I will be very happy about acquiring this equitable proprietary right if, following my mistaken payment, the gas company becomes insolvent. If this is right, many common law personal restitutionary claims may be elevated to equitable proprietary rights via this restitutionary resulting trust, because it makes any B who receives A's property when A had no valid legal obligation for transferring it, and A intended no gift, a trustee of that property.

16.29 This result occurred in *Chase Manhattan Bank v Israel-British Bank* (1981). Goulding J held that the plaintiff bank, which mistakenly paid the defendant bank $2m, not only had the normal common law
p. 416 restitutionary personal claim against the recipient of a mistaken payment; in addition, immediately upon receiving the money the recipient bank incurred a fiduciary obligation to return that very money; therefore the recipient bank held it on trust for the paying bank. Accordingly, the paying bank could claim any traceable proceeds acquired with the money as its in equity, thus withdrawing the proceeds from the pool of assets on the recipient's insolvency. The case is poorly reasoned, as Chambers admits (2010a), and the HL in *Westdeutsche Landesbank v Islington London Borough Council* (1996) disapproved of the reasoning.

16.30 The 'unjust enrichment trust' thesis has not been accepted by the courts. In *Westdeutsche Landesbank* the HL unanimously adopted Swadling's view (Swadling (1996b)) that proof of any intention inconsistent with A's intention that B hold the received property on trust defeated the PRT. Since that time Lord Millett has accepted the alternative 'no intention to benefit' formulation both in his extrajudicial writing (Millett (1998a, 2000, 2005)) and in *Air Jamaica* (1999) and *Twinsectra v Yardley* (2002), but has also stated extrajudicially (Millett (1998a)) that *Chase Manhattan* was wrongly decided. His difference from Chambers lies in what it means to have 'no intention to benefit'. In the mistaken payment case, for example, there is no doubt on the facts that the payor did intend to confer on the recipient a beneficial interest in the property. When I pay money to you to discharge a debt, I transfer the money to you to use as your own. In other words, I intend that you should take the money beneficially, to bank in your current account, to spend it as you please—if that wasn't my intention, if I intended that the money should remain mine beneficially, then I wouldn't be discharging the debt; for me to discharge a debt I must make the money beneficially yours. In such a case then, the evidence clearly shows that the transferor (to employ a necessary but clumsy double negative) genuinely did not have 'no intention to benefit the recipient'.

16.31 As Virgo has pointed out, (Virgo (2006), 598):

> *... [I]f the absence of intention analysis [of resulting trusts] is to be recognized, it is vital to define the notion of the vitiation of the claimant's intent restrictively ... [J]ust because the claimant's intention to benefit the defendant has been vitiated for the purposes of identifying a ground of restitution for unjust enrichment, it does not necessarily mean that the claimant's intention to benefit the defendant has been vitiated for the purposes of identifying a resulting trust. A more restrictive interpretation of when the claimant's intention will be vitiated needs to be adopted before a resulting trust can be recognized.*

16.32 Therefore, just because the claimant's intention has been vitiated for one purpose (ie for identifying a ground of restitution for unjust enrichment), does not mean that the claimant's intention to benefit the defendant is vitiated for the purposes of finding a resulting trust. (For other criticisms of Chambers' thesis see Mee (2014, 2017).)

16.33 A final criticism of the unjust enrichment trust theory is that it doesn't really seem to effect restitution of the unjust enrichment. This is most clearly seen in the case of a purchase money PRT. A pays C £1m to transfer C's title in a house to B. If A has no intention to benefit B, then the transaction ought to be reversed;
p. 417 A's claim is that he should get an equivalent sum of money back from B. That would be true restitution, because it would put the parties in the position in which they started. If A is entitled to a trust interest in the

house under the PRT, then this gives A a right which, according to the unjust enrichment thesis, he never intended to have, and which is a new and different right to the one he gave up. Whatever this is, it is not restitution in any conventional sense.

Automatic resulting trusts

16.34 We have seen (**10.61** et seq) that the automatic resulting trust (ART) is fully explicable on basic trust law principles. Chambers (2009) argues for an alternative explanation: ARTs arise to reverse the unjust enrichment of B, the trustee. But according to this view, in order to reverse the unjust enrichment created by the receipt of an asset, the claimant is entitled to the very asset back from the recipient. This places the unjust enrichment view on the horns of a dilemma. If the ART gives A, the settlor, an interest which is regarded as different than the one he had before—he started with legal title, and the ART gives him an equitable interest under the ART—then the ART does not effect restitution, for A is not getting the same interest he gave up. But if the interest he acquires is the same interest he had at the outset—ie the beneficial interest he started with—then that is as much as to say that he retained the same interest he had at the outset, ie that which he did not effectively give away, he kept, which is just the traditional view.

16.35 Another way in which the alternative, unjust enrichment, analysis can be criticised is as follows: if the rules governing the creation of an express trust are that where a person receives title to property he takes a beneficial interest in that property unless and only to the extent that the transferor effectively imposes a trust obligation upon him, then under the rule he is entitled to whatever beneficial interest that rule gives him; what the transferor does not 'take away from him' by imposing a valid trust, he keeps. But if that is the rule, then he is not unjustly enriched. That is just what the rule gives him. It would seem to go without saying that this is not the way that a trustee's undertaking to hold property on trust is understood. As we have already seen (**2.14**, **10.72**), on this view the trustee is a residual claimant to the trust assets, which is just false.

Tracing and restitution

16.36 At first glance, there appears to be a very strong argument for saying that only by relying upon an unjust enrichment analysis can one explain the process of tracing and claiming. The unjust enrichment theorist asks, why does the property that is the proceeds of a transaction with trust property become in turn the property of the trust? In the case of the trustee, one could argue that the trustee, by undertaking the trust, agrees to hold substitute property as trust property. But this only works if the terms of the trusts allow
p. 418 substitutions (say the investment of the trust assets); the trustee cannot consent, at least as part of his undertaking of the trust, to hold unauthorised substitutions on trust. But the law doesn't care whether the traceable proceeds are the result of an unauthorised substitution or not. Therefore, reasons the unjust enrichment lawyer, whenever a new interest in property arises, ie the interest in the substitute asset, the law must have a reason in justice for awarding it, and the most obvious reason is that otherwise the trustee would be unjustly enriched, because he would acquire an unencumbered legal title to property purchased with trust

money. So the law imposes a trust over the proceeds. The same reasoning goes *a fortiori* in the case of tracing through substitutions made by a third-party recipient of the trust funds, who never undertook to act as a trustee at all.

16.37 This characterisation of tracing was rejected by the HL in *Foskett v McKeown* (2001), most forcefully by Lord Millett who said (at 127E):

> *The transmission of a claimant's property rights from one asset to its traceable proceeds is part of our law of property, not of the law of unjust enrichment. There is no 'unjust factor' to justify restitution (unless 'want of title' be one, which makes the point). The claimant succeeds if at all by virtue of his own title, not to reverse unjust enrichment.*

16.38 Unfortunately, Lord Millett presented the picture in his decision in *Foskett* without sufficient elaboration. In order to counter the unjust enrichment theorist's argument, and defend the view that the right to claim traceable proceeds flows from the rules of the law of property, one must focus on the nature of the beneficiary's title. As Lord Millett (2005) has since explained extrajudicially, the rules of tracing only make sense on the understanding that the beneficiary's right to claim traceable proceeds flows from the fact that the beneficiary's interest is an interest in a fund (**2.48** et seq). Recent work by Smith (2009) and your humble author (Penner (2009b, 2014a)) elaborates on the reasons why equitable ownership interests are fund interests. The basic idea is that ownership not only comprises the right to use an asset, ie to realise its use-value, but also the power to exchange it for other property, to realise its exchange-value. If I own the legal title to property outright, and I decide to exchange it for other property for my own benefit, then I become the owner of the property I receive in exchange. It could hardly be otherwise given what ownership means. But now let us consider the case of property held on trust. It is axiomatic that the trustee, having legal title to the property, has the power as legal owner to exchange it for other property. But, in the eyes of equity, the beneficiary is the true beneficial owner of the property. But if this is so, and it is, then any realisation of the ownership of the property through the use of the power to exchange it must be a realisation for the benefit of the beneficiary. The trustee is not entitled to use his legal power to exchange the property otherwise than for the benefit of the beneficiary. Or rather, in any case where the trustee does use his legal power to exchange the trust property for some new asset, that asset is the proceeds of that power and thus belongs to the beneficiary. Equity's recognition of the beneficiary's right to the proceeds is ancient (*Bale v Marchall* (1457)).

16.39 Another way of putting the present point is to say that it would be inconceivable for equity to allow the trustee to defeat the beneficiary's interest by using the very powers that go with title to the trust assets to
p. 419 exchange those assets for others. And the situation is no different for a recipient of trust property transferred in breach of trust. The property this recipient receives is bound by the beneficiary's equitable beneficial interest unless the recipient is a bona fide purchaser. If so bound, just like the trustee the whole beneficial interest in the property is the beneficiary's. And so just as in the case of an express trustee, any use of the powers that go with his legal title to that property to exchange it for some other property, whether innocently or not, is just as much a realisation of the beneficiary's right to the exchange value of the property as is the case when the express trustee exchanges it. The upshot is that equitable ownership interests go hand in hand with understanding those interests as interests in a fund, as interests not only in the assets held in trust for the time being but in any proceeds of those assets, because of the way the trust splits the benefit of the

property, which belongs to the beneficiary, from the powers over the title to that property, which are in the hands of the trustee. There is, thus, no need to invoke any unjust enrichment reasoning to explain the rules of tracing.

The restitutionary analysis of recipient liability

16.40 From the unjust enrichment perspective, the non-bona fide recipient of trust property is liable simply because he has been unjustly enriched, ie is now wealthier than he should be, at the beneficiary's expense. Thus he should reverse this situation, by paying back the same amount to the beneficiary, thus restoring the status quo ante. This claim, then, is not for compensation for a wrong as in conversion, but restitutionary, ie the recipient must give up the gain he received. The analogy here is with common law restitutionary actions, such as the action 'for money had and received'. As with the standard of knowledge applicable to conversion, the recipient's knowledge about Y's mistake is irrelevant.

16.41 To review Y's mistaken payment of her gas bill under the four-question formula, we can see that the gas company was enriched by receiving £50, it came from Y, and the enrichment is unjust because of the 'unjust factor' of Y's paying the money by mistake. As we shall see (**16.61**), one of the problematic aspects of treating liability for the receipt of trust property under a restitutionary analysis is that of determining the unjust factor. Now to question (iv). The most wide-ranging defence available to a defendant otherwise liable to make restitution is the defence of 'change of position'.

The defence of change of position

16.42 This defence was firmly established as part of English law in the HL's decision in *Lipkin Gorman* (**16.8**). Lord Goff said (at 579E–580C):

> *Where an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution. If the plaintiff pays money to the defendant under a mistake of fact, and the defendant then,*
> p. 420 *acting in good faith, pays* ↵ *the money or part of it to charity, it is unjust to require the defendant to make restitution to the extent that he has so changed his position ... I am most anxious that, in recognising this defence to actions of restitution, nothing should be said at this stage to inhibit the development of the defence on a case by case basis, in the usual way.*

16.43 The law has indeed since developed on a case-by-case basis, but it is beyond our purposes to examine the law in detail—you should merely be aware of it in outline. The main points to be aware of are, first, that the defence arises on the basis that the defendant has made an extraordinary expenditure on the faith of his greater wealth due to the enrichment, or has suffered an extraordinary loss because of it. Lord Goff gives the example of a person who celebrates his new-found wealth by making a gift to charity he would not otherwise have made. Other stock examples are organising a more lavish wedding for one's child, or taking a world cruise. The defence applies because the recipient can argue that had he not received the money, he would not

have spent it on these things, and it would now be unjust to require the full amount back, because that would leave him in a worse position than if he had never received the money at all. The change of position defence does not arise when one merely spends in the normal way—paying one's rent is an expense one would have had to meet anyway, so there is no change of position that flows from the enrichment. Secondly, the defence is only available to innocent recipients. A person who realises that he has been unjustly enriched and will have to return his newly acquired wealth has no justification for making any extraordinary expenditures. Finally, as to the notion of extraordinary loss, consider this case: you receive a mistaken payment of cash of £1,000, and on the way to bank it you are robbed. The receipt of this much cash exposed you to an extraordinary risk of theft, and it may not be just to require you to pay it back if the risk materialises.

Judicial support for the restitutionary analysis

16.44 There have been a number of obiter and extrajudicial statements by judges that argue for treating liability for the receipt of trust property as liability for unjust enrichment leading to a claim for restitution. In *Royal Brunei Airlines* (1995), for instance, Lord Nicholls sharply distinguished accessory liability and recipient liability (at 386F):

> *Different considerations apply to the two heads of liability. Recipient liability is restitution-based, accessory liability is not.*

16.45 In *El Ajou v Dollar Land Holdings plc* (1993) Millett J said (at 736G):

> *[Knowing receipt] is the counterpart in equity of the common law action for money had and received. Both can be classified as receipt-based restitutionary claims.*

16.46 In *Lipkin Gorman* Lord Goff said the following (at 581A–B):

> *[T]he recognition of the [change of position] defence should be doubly beneficial. It will enable a more*
> p. 421 *generous approach to be taken to the recognition of the right to* ↵ *restitution, in the knowledge that the defence is, in appropriate cases, available; and, while recognising the different functions of property at law and in equity, there may also in due course develop a more consistent approach to tracing claims, in which common defences are recognised as available to such claims, whether advanced at law or in equity.*

16.47 In respect of the final sentiment, Millett LJ in *Boscawen v Bajwa* (1995), dealing with the claims of an owner in equity for recipient liability against a defendant into whose hands he has traced his rights, made it clear that the change of position defence should apply. Moreover, he said (at 334G):

> *The introduction of the defence not only provides the court with a means of doing justice in future but allows a re-examination of many decisions in which the absence of the defence may have led judges to distort basic principles in order to avoid injustice to the defendant.*

16.48 Writing extrajudicially Lord Nicholls (1998) takes *Lipkin Gorman* to be a catalyst in the development of the law, and has argued (at 238–239) vis-à-vis recipient liability:

> *In this respect equity should now follow the law. Restitutionary liability, applicable regardless of fault but subject to a defence of change of position, would be a better tailored response to the underlying mischief of misapplied property than personal liability which is exclusively fault-based. Personal liability would flow from having received the property of another, from having been unjustly enriched at the expense of another. It would be triggered by the mere fact of receipt, thus recognising the endurance of property rights. But fairness would be ensured by the need to identify a gain, and by making change of position available as a defence in suitable cases when, for instance, the recipient had changed his position in reliance on the receipt.*

16.49 Moreover, in obiter remarks in *Criterion Properties v Stratford UK Properties* (2004) Lord Nicholls reasserted the restitutionary analysis in cases of knowing receipt.

16.50 The move toward a restitutionary analysis has not been unanimous, of course. In *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* (1996) Lord Browne-Wilkinson quite clearly affirmed, obiter, the traditional formulation (at 707C–D):

> *Even if the third party [recipient of trust property], X, is not aware that what he has received is trust property B [the beneficiary] is entitled to assert his title in that property. If X has the necessary degree of knowledge, X may himself become a constructive trustee for B on the basis of knowing receipt. But unless he has the requisite degree of knowledge he is not personally liable to account as trustee.*

16.51 However, viewed in its context, the statement may be taken to be directed only to the question whether the third-party recipient should, without knowledge, be regarded as having a trustee's duties and liabilities such as the liability to account (the answer being 'no'), leaving entirely open whether the third-party recipient
p. 422 might have personal liabilities arising on a different basis, ie on the basis of his unjust enrichment or his interference with the beneficiary's proprietary rights.

16.52 Nourse LJ in *Akindele* (**15.43** et seq) strongly doubted whether knowing receipt should be reframed along restitutionary lines; although in *Grupo Torras v Al Sabah* (2001) the CA appeared to leave the question more open.

16.53 Originally it was argued by unjust enrichment theorists that liability under the 'knowing receipt' label was not truly fault-based, but was an unrealised form of liability for unjust enrichment, and this appears to have been the view of judges found in most of the preceding quotes. More recently the favoured view (see eg Birks (2002)) is that there is concurrent liability, both fault-based liability for knowing receipt, and strict restitutionary liability for unjust enrichment. This is the view advanced obiter by Lord Millett in *Dubai Aluminium v Salaam* (2003) ([87]):

> *Dishonest receipt gives rise to concurrent liability, since the claim can be based on the defendant's dishonesty, treating the receipt itself as incidental, being merely the particular form taken by the defendant's participation in the breach of fiduciary duty; but it can also be based simply on the receipt, treating it as a restitutionary claim independent of any wrong doing …*

16.54 In terms of authority, however, this more recent view seems no more plausible than the former view. As Smith (2000) puts it:

> *It has been said that the claim in knowing receipt belongs to the law of unjust enrichment, and since claims in unjust enrichment do not depend on fault, therefore it cannot be right that the knowing receipt claim should depend on fault. The startling consequence is that not some but all of the cases on the subject are wrong. More recently, another line has been taken, to the effect that even if the claim in knowing receipt is based on wrongdoing rather than unjust enrichment, nonetheless there is no reason that a plaintiff cannot put to one side the claim based on wrongdoing, and sue instead in unjust enrichment. The consequences of this view are only slightly less startling: the cases may be right, but all of the lawyers and judges involved failed to notice that there was another claim available to the plaintiff, and moreover one which renders otiose any inquiry into cognition. That of course is the inquiry with which the cases are most concerned. It is important to stress that no defendant appears ever to have been made strictly liable for the receipt of trust property.*

16.55 The High Court of Australia has weighed in, in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007), rejecting, pretty much root and branch, the restitutionary analysis of the recipient's personal liability. In a unanimous decision of the five-judge panel, the court echoed the just-quoted views of Smith ([154]):

> *[T]he restitution basis is unhistorical. There is no sign of it in clear terms in any but the most recent*
> p. 423 *authorities. It is inherent in the Court of Appeal's conclusion that for ↵ many decades the courts have misunderstood the tests for satisfying [personal recipient liability]: that is improbable. It is inherent in the conclusion advocated by Say-Dee that for many decades the courts have failed to notice the existence of a form of liability co-existing with [it]: that is equally improbable.*

16.56 Perhaps more importantly, the court also rejected the theoretical approach of the proponents of the restitutionary approach ([154]):

> *The restitution basis reflects a mentality in which considerations of ideal taxonomy prevail over a pragmatic approach to legal development. As Gummow J said [in* Roxborough v Rothmans of Pall Mall Australia Ltd *(2001) at 544 [72]]:*
>
> > *'To the lawyer whose mind has been moulded by civilian influences, the theory may come first, and the source of the theory may be the writings of jurists not the decisions of judges. However, that is not the way in which a system based on case law develops; over time, general principle is derived from judicial decisions upon particular instances, not the other way around.'*
>
> *The restitution basis was imposed as a supposedly inevitable offshoot of an all-embracing theory. To do that was to bring about an abrupt and violent collision with received principles without any assigned justification.*

16.57 One is unlikely to get a more brutal rejection of the theory than that. Unsurprisingly, restitutionary analysis proponents find the result deplorable (see eg Chambers (2007)).

The recipient's enrichment

16.58 As we have seen, in order for a claimant to establish the restitutionary liability of the defendant, he must first show that he has been enriched at the expense of the claimant, and then point to an unjust factor that makes the defendant's enrichment unjust. We will deal with each point in turn.

16.59 There is a long-running dispute amongst commentators on the law of restitution as to whether someone in the position of the recipient of trust funds is enriched. As we know, unless the recipient is a bona fide purchaser, the beneficiary retains his equitable interest in the property the recipient receives. In view of this it seems impossible to say that the recipient is enriched, because the beneficiary retains his beneficial, equitable, title and the recipient acquires no beneficial title at law or in equity. This contrasts sharply with the case of the typical mistaken payment. If you pay your gas bill a second time, the gas company acquires beneficial legal title to your money, since you transferred it with the intention that title should pass. The gas company is clearly enriched because it now has beneficial title to money that was once yours, and at your expense. But the very opposite is the case with the third-party recipient of trust property. The beneficiary
p. 424 seeks to specifically enforce the trust against that recipient. From a traditional perspective, there would seem to be no room for a restitutionary claim in these circumstances, and this distinction between equitable title claims and restitutionary claims appeared to be endorsed by Lord Millett in *Foskett*, and was explicitly endorsed in Millett (2005). (But see Chambers (2009) for a sophisticated reappraisal of the issue.)

The unjust factor

16.60 What is the unjust factor making the receipt by the third party of trust property unjust? The problem here is that the trustee, in transferring the property in breach of trust, does not make a mistake, nor does the recipient (at least in the vast majority of cases) acquire the property by acting unconscionably or by putting the trustee under duress (and, if he did, the trustee would simply have a common law claim for restitution against the third party, which he would be bound to pursue on behalf of the trust). Birks ((1985), 140) claimed

that the unjust factor is 'ignorance': the beneficiary's property is transferred away from the trust and he does not even know about it. This, argues Birks, is clearly a stronger case of injustice than that of the mistaken payor who pays his gas bill twice, because here the beneficiary could do nothing to prevent the transfer; his ignorance of the transfer makes the stranger's receipt of the trust property unjust.

16.61 There is, however, a glaring problem with saying that ignorance is the unjust factor, which is simply that the beneficiary is typically ignorant of all the dispositions of the trust property the trustee makes, whether unauthorised or authorised (except, of course, payments to that beneficiary himself under the terms of the trust). The argument therefore proves too much. If the beneficiary was entitled to reverse any disposition of the trust property of which he was ignorant, he could reverse any transaction a trustee undertook, whether it was authorised or not. The beneficiary's 'ignorance' of the trustee's dealing is simply part and parcel of the way trusts work, of the fact that it is the trustee who has all the legal powers to deal with the trust property and is expected to use them according to the terms of the trust, not according to the beneficiary's instructions (Chambers and Penner (2008); see also Swadling (1996b); Grantham and Rickett (1996); Bant (1998)).

16.62 One might reply that, in the case of authorised transactions, the 'ignorance' factor is displaced by the beneficiary's implicit 'consent' to authorised transactions, ie transactions within the terms of the trust—to the extent that the beneficiary claims any benefit under the trust at all, it is only to such a benefit as is within its terms, and therefore he must consent to any transaction within the terms. But this argument revises the unjust factor to 'unauthorised or wrongful transactions of which the beneficiary is ignorant', and this does not describe the cases. A breach is a breach of trust whether the beneficiary is ignorant of or knows about it (a beneficiary's mere knowledge does not amount to consent (**13.75** et seq)), so clearly the operative factor here is that the transaction is unauthorised; the beneficiary's knowledge or ignorance is irrelevant. Thus the only
p. 425 unjust factor that would appear to operate is the trustee's want of authority in carrying out the transaction. (For a much more thorough exploration of the problems of 'ignorance' as an unjust factor, see Chambers and Penner (2008).) But if want of authority is the 'unjust factor', then plausibly the appropriate analogy to the common law is liability for conversion, not liability for unjust enrichment, because dealing with the trust property without authority would appear to amount to committing a wrong commensurate to interfering with the beneficiary's property rights. Liability for conversion is strict, and so differs from knowing receipt, which depends upon fault. But in view of the battery of claims that a beneficiary can make in cases of breach (he always has a strict liability claim against the trustee, may have a claim for knowing assistance against a third party, etc), it may make sense that the 'conversion' claim in equity is more restrictive, fault-based rather than strict.

16.63 A similar point is put by Smith (2000), 432–433:

> *Writing on this subject, [Lord Nicholls (1998)] deploys the following example. A defendant innocently receives some money, trust property, as a gift from the trustee. He spends it on something which he would have bought anyway, and which leaves no traceable product. If fault is required, there is no claim; if fault is not, then there probably is, because the facts are intended to imply that the defendant cannot use the defence of change of position. Lord Nicholls takes the view that this defendant should repay; he has been made better off out of the claimant's trust fund, and if the defendant is required to repay, he will only be back to where he started. But of course the fact that someone is only back to where he started does not justify liability. Otherwise all gifts would be recoverable, subject only to a defence of change of position. Presumably Lord Nicholls would say, this is not a gift; the plaintiff never intended the defendant to be enriched. But in another sense, it was a gift; it was a gift from the trustee. Ignoring that amounts to ignoring that there is a trust. This defendant might reasonably ask why he should be required to account in court for what he has done over the preceding several years with money that was legally his own (subject only to the [plaintiff's] undiscoverable equitable interest), failing which he will have to dig into his pocket to repay. He might ask why the plaintiff should not instead look for relief to his trustee, the one to whom the money was entrusted in the first place. But the argument for strict liability consistently ignores the essential fact that there is a trust, and seeks to treat the trust beneficiary like a legal owner.*

Untraceable expenditure of the trust property

16.64 The preceding considerations would seem to undercut the idea that a third-party recipient of trust property should be strictly personally liable to transfer a sum of money equivalent in value to that of the property she received on the basis that she was unjustly enriched at the beneficiary's expense. They would seem to suggest that the present law, whereby the beneficiary can enforce the trust against the recipient in respect of any trust property or traceable proceeds in his hands, is both sufficient and just. However, what if
p. 426 the recipient innocently dissipates the trust property or proceeds, ie spends it on something that does not generate any traceable proceeds in exchange, say blows it all on a holiday? Cannot the restitution theorist intervene at this stage? By spending the money in this way, the beneficiary's title is extinguished (the holiday agent is a bona fide purchaser) in a way that legally, not just factually, benefits the recipient, because he acquires the contractual right to the performance of the holiday agent, which he benefits from when he takes the holiday.

16.65 The problem again comes down to the unjust factor: there is no mistake, duress, unconscionability and, as we have seen, 'ignorance' does not work either. The transaction is not 'vitiated' in any way on any of these bases. What has happened here is simply that the recipient has bought his holiday with trust money—that is, he has defeated the beneficiary's equitable interest in that property. So if the recipient should be liable, he would be primarily liable for committing this wrong, not for being unjustly enriched at the beneficiary's expense. But coming to this conclusion depends upon saying that the innocent recipient of trust property does commit a wrong when he spends the trust property, ie commits a wrong in the eyes of equity. But this is precisely what the cases do not say. Smith (2000) again (see also Hayton (2007)):

> *The argument that suggests that personal claims based on receipt of trust property must line up with the strict liability in* Lipkin Gorman v Karpnale *seems to ignore a very basic truth: a beneficiary's interest under a trust is not legal ownership. Equitable proprietary rights are not protected in the same way as legal ones. In general, they are protected less well. They are always subject to destruction by bona fide purchase of a legal interest or overreaching, and wrongful interference with them is dependent on fault … The argument for strict liability would make the most sense as part of an agenda which sought the abolition of the trust, and the return to a regime in which only one person can claim to be the owner of a given asset. That would be an odd agenda to pursue, when civilian systems all over the world, aware of the flexibility which the trust device offers, are introducing it in various forms. Certainly as the law is now, the beneficiary's interest under a trust attracts different incidents from legal ownership. It is not clear that it would make sense to abolish some of the characteristics of equitable property rights while leaving others intact. If liability for receiving trust property is strict, why should equitable interests be subject to destruction by the defence of bona fide purchase of a legal interest?*
>
> *The trustee is (usually) the legal owner. If he makes, for example, a mistaken payment, or is defrauded … he will have at his disposal all of the strict liability claims which protect his legal title and protect him from defective transfers. On the other hand, he might not have a claim; he might have given the trust money away in breach of trust. But it does not follow from this that we must give the beneficiaries the same rights that the trustee would have had, had he acted properly. It is in the nature of the trust institution that beneficiaries are vulnerable to breaches of trust, in ways which they would not be if they were the legal owners of the trust property. To complain about this is to complain about the incidents of the institution of the trust.*

p. 427 **16.66** The contrast with the typical two-party case of restitution at common law (eg where you pay your gas bill twice) and the situation of breach of trust can be further sharpened by pointing out that, in the case of breach of trust, the beneficiary has, besides the recipient, a defendant who is always strictly liable for the entire loss to the trust, with no change of position defence, that is, the trustee. So while the beneficiary's remedial protection can look weaker from a restitutionary point of view, this is so only if one focuses only on the third-party recipient.

16.67 One final consideration: to make the recipient strictly liable to pay for any loss in the value of the beneficiaries' interest when he innocently dissipates the trust assets (albeit subject to a change of position defence, which he must claim and also prove) would be to make the recipient equivalent to an insurer of the beneficiaries' interest, insuring the beneficiaries against the consequence of breaches of trust by their trustee. That cannot be right. To adapt what Lord Nicholls said in *Royal Brunei Airlines v Tan* (**15.7** et seq) (at 387EF), when discussing imposing strict liability on someone who participates in a breach of trust:

> *the recipient's only sin is that he interfered with the due performance by the trustee of the fiduciary obligations undertaken by the trustee by innocently dissipating property transferred to him on a basis he did not know to be wrongful. Beneficiaries could not reasonably expect that third parties should deal with trustees at their peril, to the extent that they should become liable to the beneficiaries even they were unaware and had no reason to suppose that they were dealing with trust property.*

Further reading

Birks (2002)

Chambers (1997, 2009, 2010a)

Chambers and Penner (2008)

Mee (2014, 2017)

Millett (1998a, 2000, 2005)

Nicholls (1998)

Penner (2009b, 2014a, 2018b)

Smith (2000, 2009, 2018)

Stevens (2018)

Swadling (1996b)

Watts (2016)

Must-read cases: *Westdeutsche Landesbank Girozentrale v Islington LBC* (1996); *Foskett v McKeown* (2001); *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007)

p. 428

Self-test questions

1. Owing to a serious computer error, the London School of Econometrics mistakenly directs its bank to pay £1,500 into several hundred of its employees' bank accounts with the payment reference 'performance bonus'. Is there any basis in law for the School to claim that these employees hold these mistaken payments on trust for it?
2. What examples are there of personal restitutionary remedies and how are they different from proprietary restitutionary remedies?
3. X pays Y to convey Blackacre to Z. What kind of interest does X have now in Blackacre, and how is that interest best explained?
4. On what basis does an ART arise, and is this basis illuminated by an 'unjust enrichment trust' analysis?
5. What is the unjust enrichment analysis of tracing, and does it stand up to the traditional explanation?
6. What insights, if any, arise from the restitutionary analysis of a third party recipient of trust property or its traceable proceeds?

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