

Unjust Enrichment (LAWS 6217) (updated on 12.19.2024)

[Be prudent, may have mistakes]

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1. Introduction, history, principles	
Restitution for an Unjust Enrichment	
Law of obligations: the <i>giving back of a benefit</i> by a D that was <i>unjustly enriched</i> at the expense of the P Lord Reed: “the purpose of restitution is to <u>reverse a defective transfer</u> and <u>not to compensate</u> for the loss suffered.” (<i>Commissioners for HMRC v The Investment Trust Companies</i>)	
Tort: Right and duties <u>imposed by law</u> & Seeks to undo harm caused – compensatory	
Contract: Rights and duties <u>arises by consent</u> & Seeks to enforce promises – compensatory	
Unjust enrichment: Rights and duties <u>imposed by law</u> & Seeks to return a benefit conferred – restitutionary	
<i>Moses v Macferlan</i>	Facts: P owed a debt to D. P indorsed [promissory notes made to him by Jacobs] to D. D can <u>choose to sue either P or Jacobs</u> , but <u>agreed not to sue P</u> . But D nevertheless sued P and obtained judgment. P brought action for “money had and received” against D. Held: “ <i>the defendant... is obliged by the ties of natural justice and equity, to refund the money.</i> ”
Earlier Cases’: “implied contract”, “quasi-contract	<i>Fibrosa Spolka Akcyjna v Fairbairn Lawson</i> [1943] AC 32 (Lord Wright) “... unjust enrichment ... to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep... third category... called quasi-contract or restitution. ” <i>Westdeutsche Landesbank Girozentrale v Islington LBC</i> [1996] AC 669 “... not on implied contract but on unjust enrichment ... reject the concept that the claim for moneys had and received is based on an implied contract.”
*<i>Lipkin Gorman v Karpnale</i> * (1991) No contract (illegality) & No tort	Fact: Cass (C), partner of solicitor firm (P) stole money from client’s account to fund his gambling habits at Playboy Club (D’s casino) Held: D had not given valuable consideration for the stolen money D liable to repay winnings from C: “ <u>unjustly enriched at the expense of [P]</u> ” ❖ Unjust enrichment is not founded on any wrong – a matter of right
<u>Analytical Framework</u>	(1) Was the defendant <u>enriched</u> ? (2) Was the enrichment <u>at the plaintiff’s expense</u> ? (3) Was the enrichment <u>unjust</u> ? (4) Are any of the <u>defences</u> applicable? <i>Shanghai Tongji Science & Technology Industrial Co Ltd v Casil Clearing Ltd</i> (2004)
Unjust Factors vs Absence of Basis	
The “Unjust Factors” Approach: (most) common law systems	❖ P is entitled to restitution if the circumstances are such that <i>the law regards this enrichment as unjust</i> ❖ P must demonstrate some <i>positive reasons</i> D ought to give up the benefit conferred (e.g. by mistake / on a basis that fails)
The “Absence of Basis” Approach: Civil & mixed law systems (unjustified enrichment)	❖ P is entitled to restitution if there was <i>no legal ground</i> for D’s enrichment ❖ D could escape liability for unjustified enrichment by <i>showing that there was a legal ground</i> for his enrichment (e.g. P was required to benefit D by statute or contract)
Unjust Factors	❖ Deficient/failed intention: Mistake, duress, undue influence, personal disadvantage, transactional disadvantage ❖ Qualified intention: Failure of consideration, frustration, failed contracts ❖ No intention: Ignorance, want of authority

	❖ Policies requiring restitution: Secondary liability, necessity, undue and <i>ultra vires</i> payments by public bodies, illegality, reversed judgments
England	<i>Westdeutsche Landesbank Girozentrale v Islington London Borough Council</i> [1994] Facts: P bank entered into a ten-year interest rate swap agreement with D local authority and paid £2.5m. Later, the transaction was held void <i>ab initio</i> . Held: ... <i>ultra vires</i> transactions... where there is not and never has been any contract, I prefer to use the phrase ' <u>absence of consideration</u> '. Birks: an endorsement of the absence of basis approach. (rejected)
Hong Kong	<i>Big Island Construction (HK) Ltd v Wu Yi Development Co Ltd</i> Unjust factors approach.
Canada	<i>Garland v Consumers' Gas Co</i> [2004] 1 SCR 629 Reoriented towards the absence of basis approach
France	❖ Undue payment (<i>paiement de l'indu</i>) - narrower action ❖ Unjustified enrichment (<i>enrichissement injustifié</i>) – wider action
Germany	"He who obtains something through <u>somebody else's performance</u> or <u>in another way at his expense</u> without a legal cause , is obliged to make restitution to the other." (§812(1))
China	(1) obtainment of benefits, (2) the lack of a legal basis supporting the obtainment of benefits, (3) another person's loss, (4) no available defences
Justifying Grounds: defence or cause of action?	
1. Contracts	Benefits were transferred pursuant to a contract, and the contract subsists (remains valid), the contract governs the relationship between the parties ❖ Must first be void, avoided (avoids a voidable contract), terminated, or frustrated (this is governed by the Law of Contract) ❖ If contract no longer subsists, <u>Law of Unjust Enrichment</u> governs Void: Contract invalid from the beginning (Mistake, incapacity, illegality) Voidable: Contract remain valid until innocent party <u>chooses to rescind</u> (Misrepresentation, duress, undue influence, unconscionable bargain)
2. Discharge of a Debt	P pays money to D which effectively discharges a debt, this constitutes the provision of a legally effective basis which bar the unjust enrichment claim Even though P paid D under a mistake as to the legal basis
3. Statutes	Require P to benefit D, expressly or impliedly extinguish P's rights in unjust enrichment(giving him a set of statutory rights instead) (<i>Deutsche Morgan Grenfell Plc v IRC</i>) Stultification of statutory policy (<i>R Leslie Ltd v Sheill</i> [1914])
4. Court Judgments / Res Judicata	When money has been paid as the result of a court judgment / order, it cannot be recovered <u>unless</u> the judgment is set aside (i.e. through appeal) The court judgment (even if wrong) creates a legally effective basis <i>Res Judicata</i> = judged matter – no re-litigation after a final judgment
5. Natural Obligations legally unenforceable obligation that was binding on P's conscience	...payable in point of honour and honesty, ... payment of a debt barred by the Statute of Limitations, or contracted during his infancy... usurious contract, or, for money fairly lost at play... <u>[D] may retain it with a safe conscience</u> , though by positive law he was barred from recovering." <i>Moses v Macferlan</i> [1760]
Main Theorists	
Burrows / Birks (old) / other pupils of Birks: Unjust factors approach	
Birks (new): Absence of basis approach	

Virgo: Restitution is a result of (i) wrongs, (ii) unjust enrichment, (iii) vindication of property rights

Other sceptics:

- ❖ There is no / no need for a law of unjust enrichment (Stevens, Smith)
- ❖ This area is much smaller than what the proponents claim it to be (Burrows)
- ❖ Equity does all the work with “conscience”, no need for unjust enrichment (Gummow J)

2. Element 1: Enrichment

2.1 Different senses of “enrichment” (something of value, e.g. money and service)

Benefits	Positive: money, services, title to goods or land, contractual rights Negative: discharge by another of one’s legal obligations, saved expenses
Use value of Money	<i>Sempra Metals Ltd v Inland Revenue Commissioners</i> [2008] overruled!!! P paid D tax earlier under UK statute which was contrary to EC treaty. Held: D got 2 benefits, (1) the tax due to IRC and (2) the opportunity for IRC to <u>use</u> the money for this period (use value, quantified by <u>compound interest</u>). <i>Prudential Assurance Company v Commissioners for HMRC</i> [2018] Held: no compound interest allowed. Overruled Sempra↑↑↑ . (1) <i>Sempra</i> caused <u>disruption to public finances</u> (policy reason) (2) “at the expense of” only satisfied by a <u>direct transfer</u> (principled reason) <u>Causal connection</u> only (if not direct) not enough to establish a transfer of value
Use Value of chattels/goods	<i>Dimond v Lovell</i> [2002]: P had been <u>enriched by 8 days use</u> of the car. Restitution was not awarded since inconsistent with the goal of statute. (policy)
“at the Expense of”	“sufficiently close connection between the P’s loss and the D’s gain” (week 3)

2.1.1 Money as “Enrichment”

“universal medium of exchange” (*BP Exploration Co (Libya) Ltd v Hunt*)

Bank notes, coins, money in account (contractual right to payment of a debt)

Possible no restitution	<i>Falcke v Scottish Imperial Insurance</i> (lack of ‘at the expense of’) E paid premiums £1212 on the F’s policy and claimed a lien on the policy for the premiums paid. Will F get remaining sums £1723 in full or balance £511? Held: F was entitled to the sum in full , no claim though F was enriched. F was <u>not aware</u> that E had paid the premiums; nor did he <u>request</u> E to do so.
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2.1.2 Service as “Enrichment”

Assessment	<i>Cobbe v Yeoman’s Row</i> Issue: Assessed by (1) work & labour or (2) enhancement in market value? Held: enrichment is the value of <u>service itself</u> rather than the end product. Takes account of the experience of the service provider.
Subjective or Objective?	e.g. C cleans D’s car mistakenly thinking that D is his client. (Or: \$0???) Objective value (market value): \$10 Subjective value to D: \$4 (he has a cleaner friend and discount) Lord Clarke (majority): enrichment: 4; unjust: mistake; result: 4 Lord Reed (minority): enrichment: 10; no unjust (no choice); result: 0

2.2 Valuation (*Benedetti v Sawiris*, majority decision delivered by Lord Clarke) of Service/Goods

Fact: C served as a broker/adviser for D	D paid a fee of €67 million for C’s services. D <u>offered to settle</u> for a further €75.1 million. The market value of the services in total was €36.3 million. Held: since €67 was in excess of the market value, no further payment.
When	Valued at the time when it was <u>received</u> by D.

Services v End product	The question is what is the <u>value of the services themselves</u> , not of any end-product or subsequent profit made by D.
Step 1: Objective Test	
Starting Point	<p><u>Objective market value/price</u> of the service performed by C. Price which a reasonable person in [D]'s position would have had to pay. Ignore: D's 'generous or parsimonious personality'. Consider: 'conditions increasing or decreasing the objective value of the benefit to any reasonable person in the same (unusual) position' as D. (D's personal characteristics such as age, gender, occupation or state of health. e.g. A film star may not have to pay the ordinary price for dress as fashion house may allow her a discount to enhance brand image, "<u>being a film star</u>" is an objective aspect)</p>
Conditions	<p>D's buying power in a market. In context of borrowing: credit rating, public/private sector. Personal characteristics: age, gender, occupation, state of health. No personal references (not affect the services' value to a reasonable recipient)</p>
Step 2: Subjective Revaluation	
Rejected	<p>Not necessary in order to protect a [D]'s freedom of choice. Save perhaps in exceptional circumstances (basically never).</p>
Step 3: Subjective Devaluation: Protect D's autonomy, consider D's personal value system	
Meaning	<p><u>Reduce</u> the objective market value to reflect the subjective value of the services to D. D is entitled to prove that he valued the relevant <u>services (or) goods</u> provided by P at less than the market value. Based on the fundamental need to protect D's autonomy.</p>
Burden of proof	<p>On [D] to prove that he <u>did not subjectively value the benefit at all</u>, or that he valued it at <u>less than the market price</u>. Objective evidence required.</p>
Car Case	<p>There is no "free acceptance" (D does not have the opportunity to reject). D accepts that he has received some benefit (\$4), but not to the extent of the full market value (\$10).</p>
Rebut by P	<p>(i) [D] received an incontrovertible benefit 不容置疑的 (e.g. services saved [D] necessary expense, discharge of debt, realised benefit) Not sufficient in <i>Falcke</i>. (ii) [D] requested or freely accepted the benefit Free acceptance: <u>Recipient knows that a benefit is being offered to him</u> non-gratuitously and...<u>having the opportunity to reject, elects to accept</u> (Birks)</p>
Alternative By Lord Reed (minority)	<p>"Enrichment" should <u>always</u> be valued <u>objectively</u>. "<u>Autonomy</u>" as a factor which negates the unjust factor (e.g. mistake). "Whether the imposition of such a liability would be compatible with respect for [D]'s <u>autonomy or freedom of choice</u>" Car case: D lacks freedom of choice (no unjust factor), it's \$0 after devaluation.</p>
Ratio	<p>1. <u>No "subjective revaluation"</u>, save in (very) exceptional circumstances 2. Tentative support for "subjective devaluation", by the majority (Lord Clarke)</p>
Other theoretical issues: overcome subjective devaluation	
(a) incontrovertible benefit	<p>"A benefit which is <u>demonstrably apparent</u> and not subject to debate or conjecture" <i>Peel (Regional Municipality) v Canada</i> [1992] 1) Receipt of money / crediting of one's bank account Recognised in <i>Sempra Metals v IRC</i> (2007), overruled in <i>Prudential Assurance</i></p>

	<p><i>Co Ltd v HMRC</i> (2018).</p> <p>2) Saving of a necessary expense Necessary? Service value is higher? Could be further abated? No need?</p> <p>3) Non-money benefit turned into money <i>Greenwood v Bennett</i> [1973] Held D should pay P for repairs. P spent £226 on repairs, D <u>sold the car for £400</u> pending appeal.</p>
(b) D requested the benefit	<p>There are contractual relations: no unjust enrichment.</p> <p>No contract: unjust enrichment. (terminated for breach, frustrated, legally unenforceable, terms uncertain, performance without contract)</p>
(c) defendant freely accepted it	<p>D, having had the opportunity to reject the benefit, <u>freely accepted it</u> knowing or believing that the plaintiff expected payment for it.</p> <p>Controversial.</p>
(d) defendant chose to keep it	<p>After a request for its return, D chose to retain it when it was readily returnable.</p> <p><i>Cressman v Coys of Kensington Ltd</i> [2004] A car mistakenly sold to D.</p> <p>Held: D's refusal to return means D implied to accept.</p>

3. Elements 2: At the Expense of – sufficiently close connection between P's loss and D's gain	
But for (rejected)	D gets gain <u>but for</u> subtraction from/loss to P + plus & minus (Birks)
Problem (and "stamp" case)	<p><i>TFL Management Services v Lloyds TSB Bank</i> (2014)</p> <p>Facts: P brought a claim to recover a debt, CA held the debt was owed by the 3rd party to Lloyds TSB bank. Then bank (D) recovered the debt from the third party. P then brought a claim against the bank for legal costs.</p> <p>Held: though incidental benefit, there is a "but for" connection.</p>
Taxonomy: "Conferral" and "Taking"	
Conferral	<p>Principal/Direct category: P has intentionally conferred the benefit to D</p> <ul style="list-style-type: none"> • Payment from P to D • Performance of service by P for D. <p>Residual/Incidental: P has conferred the benefit to D incidentally (i.e. as a secondary consequence) to what P is doing – exceptional cases</p> <ul style="list-style-type: none"> • P's discharge of D's obligation • P's mistaken improvement of D's property.
Taking/Infringement (P can be ignorant)	<p>❖ D has taken a right from P</p> <p>❖ D has infringed P's right</p> <p><i>Foskett v McKeown</i> [2001] Trustee misappropriates the property to pay policy.</p>
3.1 General Rule: applies to "direct conferral" claims	
ITC case	<p><i>ITC v HMRC</i>: (P paid value added tax to managers – then managers to D)</p> <p>Facts: P & managers need not to pay. Managers recovered limited payments from D, and P sued for the balance of VAT from D.</p> <p>Held: D's enrichment is at the expense of the <u>managers</u> rather than the P.</p> <ul style="list-style-type: none"> ❖ No direct payment from P to D (i.e. "but for" insufficient) ❖ Managers must pay to D even if P never made payments to managers.
<u>Transfer of Value</u>	<p>(1) D has received a benefit from P and</p> <p>(2) P has suffered a loss <u>through his provision</u> of the benefit (reject "but for"!!!)</p> <p>P must have suffered a loss because P wanted to provide a benefit to D.</p> <ul style="list-style-type: none"> ❖ Incidental benefits: not sufficient for transfer of value. ❖ Must be direct transfer.
General rule	Must be a <u>direct transfer</u> of value from P to D (& intention to benefit).

3.2 Exceptions (of “direct transfer of value”)	
(1) Agency	Agent of one of the parties is <u>interposed</u> between them...legally equivalent to a transaction <u>directly</u> between [P] and [D].
(2) Sham	Sham “ <i>created precisely in order to conceal the connection between [P] and [D], it is disregarded...</i> ”(Treat it as if it’s a <u>direct transfer</u>) <i>Relfo v Varsani</i> [2014] D procures a transfer of sums from P’s account to D’s account via a complex series of unidentified intermediary transactions.
(3). Co-Ordinated Transactions 协同交易 Not apply to ITC	(1) co-ordinated transactions has been treated as forming a single scheme or (2) consider each individual transaction separately would be unrealistic Not “Taking” : “transaction” between two parties requires some participation on the part of both parties. In a “taking” case, <u>P’s role is entirely passive</u> . Conclusion : <u>P’s discharge of D’s obligation</u> ! e.g. P pays X to discharge D’s debt owed to X. <i>Banque Financière and Menelaou</i> <i>Bank of Cyprus v Menelaou</i> [2016]P applied to declare bank’s charge invalid for forged signature. Held P unjustly enriched at expense of bank. Reject P. Bank’s remedy was subrogated to the unpaid vendor’s lien.
(4) Tracing	<u>[D] receives property from a third party into which [P] can trace an interest.</u> <i>Since the property is, in law, the equivalent of [P]’s property, [D] is therefore treated as if he had received [P]’s property.</i> Unjust factor : ignorance. <i>Lipkin Gorman</i>
(5) Discharge of D’s Obligation	“Although it is the third party creditor who receives the payment from [P], [D] is <u>directly enriched</u> , since the payment discharges his debt.” Enrichment : valued not by what the payment 3 rd party receives; but what discharge D receives.
Summary	General Rule : A direct transfer of value from P to D. Exceptions : (1) agency & (2) sham: general rule still applies. (3) Co-ordinated transactions: “discharge of D’s obligation” (4) Tracing: general rule does not apply (5) Discharge of D’s obligation: general rule does not apply.
Use Value	<i>Prudential Assurance v HMRC</i> Issue : when money is paid by mistake, does the law of UE grant P a claim for the <u>use value</u> of the money that D enjoyed prior to making restitution? Held : No (compound) interest (复利) is recoverable on the principal sum under the law of unjust enrichment (only simple interest (单利) is recoverable); there was <u>no direct transfer</u> of the use value of money from P to D. Rationale : the use value of money is represented by compound, not simple interest, if interest is recoverable, it would be awarded on a compound basis. Any benefit obtained by D as a consequence of his possession...is derived from his <u>failure to pay that debt</u> .
Burrows v Stevens	Lack of universal “at the expense of” Burrows : policy vs Stevens : direct conferral / performance cases are different.

4. Mistake (Unjust Factor, Element 3)	
4.1 Mistake: false belief or assumption as to some past or present matter of fact or law	
Mistake in UE	The D’s enrichment is unjust if it is caused by a mistake of fact or law made by the P (focus on P’s mistake while ignoring the D’s). (past or present state) Definition : a false belief or assumption. P has to be under a positive belief or

	<p>assumption which is mistaken at the time of payment. <i>Pitt v Holt</i></p> <p>Issue: (1) Ignorance insufficient; (2) negligence irrelevant (have means but fails to verify, still has a claim); (3) not risk taking (misprediction to future, reckless failure to establish truth).</p>
Misprediction	<p><i>Dextra Bank v Bank of Jamaica</i> [2002] P paid US\$2.99M to D pursuant to a cheque delivered to D via intermediaries. Fraud by 3rd party, P believe it was loan to D while D believes it was exchange for equivalent sum. Rejected – future.</p>
Reckless failure to establish truth	<p>P believed that it was more probable than not that the facts or law were otherwise (mistaken belief) than they in fact were (true state of affairs).</p> <p><i>Marine Trade SA v Pioneer Freight Futures Co Ltd BVI</i> [2009]</p>
Two Categories	<p>Mistaken payments: mistake about the obligation to pay.</p> <p>Mistaken gifts: not about obligation but something else. (Objectively gratuitous transfer and subjectively intention to the gratuitous nature of transfer. <i>Hacker</i>)</p>
4.2 Mistaken Payments	
4.2.1 Mistake of Fact	
Can Recover ("but for" mistake)	<p><i>Kelly v Solari</i> [1841] P (insurance company) seeks to recover insurance money which paid based on a lapsed policy.</p> <p>General Rule: can recover money paid under a mistake of fact, though P <u>had the means</u> of knowledge of the fact.</p> <p>Exception: can't claim if P <u>deliberately</u> chose not to investigate the facts.</p>
4.2.2 Mistake of Law	
Can Recover	<p><i>Kleinwort Benson v Lincoln CC</i> [1999] P entered into interest rate swap contracts with D, the contract was held void by UK Supreme Court later.</p> <p>Issue: whether P can rely on the <u>s.32(1)(c)</u> of Limitation Act 1980</p> <p>Held: no mistake of law bar (recoverable) & can rely on it.</p> <p>Background: the UK Supreme Court's decision is retrospective. 回溯效果 (Note: Birks argued that P's decision was not impaired – different interpretation)</p>
Mistake of Law	<p>Overlooking a legislative provision - Y</p> <p>Judicial development overruling an earlier decision: Depends on how changed.</p> <p>A later decision declares the law to be contrary to a "settled understanding" – Y?</p> <p>A later decision declares the law, where it was previously in doubt - Y</p> <p>Prospective judicial development of the law - N</p>
Two Important Issues DMG v IRC	<p>(1) Is there an unjust enrichment claim for a mistaken payment where the payment was still owed by P to D under a <u>valid legal obligation</u>?</p> <p>(2) When is a mistake of law "reasonably discoverable" under <u>s.32(1)(c)</u>?</p> <p>Held: (1) UE claim not barred by the fact that tax <u>remained to be paid</u>.</p> <p>(2) Mistake reasonably recoverable only when CJEU delivered judgement.</p> <p><i>Deutsche Morgan Grenfell v IRC</i> [2006] DMG claimed the <u>use value</u> of payments of ACT (DMG paid earlier than when DMG should pay).</p> <p>Conclusion: <i>Kleinwort</i> applies; P may have UE claim for a tax paid though still under obligation to pay; mistake discoverable when final judgement delivered.</p>
Reasonable Discoverability (changed DMG)	<p>Time ran from: (1) P <u>discovered</u>; or (2) could <u>with reasonable diligence have discovered</u>, his mistake of recognising that a worthwhile claim had arisen.</p> <p><i>Test Claimants in the FII Group Litigation v HMRC</i> [2022] P taxpayers brought claims against HMRC for tax paid under mistake of law.</p>
4.2.3 Conclusion for Mistaken Payments	
Conclusions	<p>❖ P has UE claim for a payment made under a <u>causative</u> (but for) mistake.</p>

	<ul style="list-style-type: none"> ❖ Tax Payments: UE claims is also available with <i>Woolwich</i> claim and any other statutory claims. ❖ Reasonable discoverability: when P became <u>aware a worthwhile claim for recovery had arisen</u>.
4.3 Mistaken Gifts	
Two-stages	(1) Rescission of the gift (c.f. rescission of a contract) (2) Restitution of the gift
Conclusion	<p>General Rule: a mistake as to consequence (as opposed to effect) is not normally sufficient. – the mistake needs to be a “<u>causative mistake of sufficient gravity</u>”.</p> <p>Satisfied <u>only</u> when there is a mistake either as to the <u>legal character or nature of a transaction</u>, or as to some matter of fact or law which is <u>basic to the transaction</u>.</p> <p><i>Pitt v Holt</i> [2013] P sought to have the deed and assignment void.</p> <p>(Note: Sir Terence Etherton suggests that this case is only about the equitable remedy for rescission (proprietary) but not personal claims)</p>

5. Duress & Undue Influence (Unjust Factors, Element 3)	
5.1 Duress	
Duress	<p><u>Illegitimate threat or pressure</u> over the P which had a <u>causal effect</u> on the P’s decision to transfer the benefit.</p> <p><i>Barton v Armstrong</i> [1976] Threats to kill P. (Fraud, abuse of relation of confidence, undue influence, duress, coercion)</p> <p>(1) Illegitimate threat or pressure & (2) Causation Threats can be both explicit and implicit. <i>The Alev</i> [1989]</p>
Causation	If D’s threats were “a” reason for P’s (conduct)
Unlawful (Act) Duress	<p>Generally, can only be established when threat is unlawful. Crimes, torts (& blackmail?)</p>
Lawful Duress Unlawful ≠ Illegitimate	<p>Exceptional circumstances: lawful but unreasonable.</p> <p>Did not constitute lawful duress but the existence recognised. <i>R v Attorney-General for England and Wales</i> [2003] Agreement that stops members of the British Special Air Service from writing about their service in the army. Leave if fail to sign.</p> <p>Using forgery and false evidence in support of that opposition. <i>Borrelli v Ting</i> [2010] Liquidators <u>forced to make a settlement</u> agreement containing no investigation and litigation to D. Held Agreement set aside for duress.</p>
5.1.1 Types of Duress	
(1) Duress to the Person	<p>Threatens to interfere with the person of either P or someone else. E.g. threats to kill, injure, interfere with liberty.</p> <p><i>Duke de Cadaval v Collins</i> [1836] P unlawfully arrested by D and paid money for release. Allow claim for money had and received</p>
(2) Duress to the Property	<p>Threats to seize property, retain property.</p> <p><i>Astley v Reynolds</i> D demanded additional interest before pawned plate could be recovered. Held Additional payment recoverable due to duress</p>
(3) Economic Duress	<p>Rationale: Consent induced by pressure which is not legitimate, the consent is treated in law as revocable.</p>

	<p>Definition: one party to a commercial transaction is in a stronger bargaining position than the other party. (severe economic pressure)</p> <p>Elements: (1) pressure & (2) illegitimacy of the pressure exerted (& (3) <u>absence of choice?</u>)</p> <p><i>The Universe Sentinel</i> [1983] D refused to issue a certificate to P's ship, P acceded to D's demand of a monetary contribution to their welfare fund. Held economic duress was unlawful and payment void.</p> <p><i>CTN Cash and Carry Ltd v Gallagher Ltd</i> [1994] Economic duress not established since the threat to withdraw or to cease commercial dealings was lawful – D did so in good faith.</p> <p><i>Progress Bulk Carriers Ltd v Tube City IMS LCC</i> [2012] D shipowner refused to substitute a ship unless charterer waive the damages claim for the repudiatory breach. P agreed under protest. <u>Illegitimate pressure found as the lawful threat was coupled with the prior repudiatory breach of contract.</u></p>
<p>illegitimate pressure Relevant Factors</p>	<p>(1) there has been an <u>actual or threatened breach of contract</u>;</p> <p>(2) the person allegedly <u>exerting the pressure</u> has acted in good or <u>bad faith</u>;</p> <p>(3) the victim had any realistic practical alternative but to <u>submit to the pressure</u>;</p> <p>(4) the victim <u>protested</u> at the time;</p> <p>(5) he <u>affirmed and sought to rely on</u> the contract.</p> <p><i>DSND Subsea Ltd v PGS Offshore Technology AS</i> [2000]</p> <p>Virgo: problematic since consider the consequence rather than whether illegitimate at the operative time.</p>
<p>No reasonable alternatives</p>	<p>Objectively determined. <i>Pao On v Lau Yiu Long</i> [1980]</p> <p>Alternatives: involve seeking <u>legal redress</u>.</p> <p><i>Hennessy v Craigmyle and Co Ltd</i> [1986] P signed an agreement not to bring proceedings before an industrial tribunal in return for termination by <i>redundancy</i> instead of summary dismissal. Held alternative of complaining to the industrial tribunal existed.</p> <p><i>The Alev</i> [1989] Cargo was retained by ship-owners who demanded money. Held alternative of seeking an injunction <u>unreasonable</u> and duress found.</p> <p>Virgo: should be a requirement rather than merely a relevant factor in determining causation.</p> <p>McKendrick: should be considered as defence rather than an element.</p>
<p>Lawful Act Economic Duress</p>	<p>(i) the making of an <u>illegitimate (albeit lawful)</u> threat by one party,</p> <p>(ii) sufficient <u>causation</u> between the threat and the threatened party entering into the contract or making the non-contractual payment; and</p> <p>(iii) the <u>lack of any reasonable alternative</u> to the threatened party giving in to the threat.</p> <p><i>Times Travel (UK) Ltd v Pakistan International Airline Corp</i> [2023] D's agents brought claims against it to recover commission. D put pressure on P not to join the claims. Held D has no bad faith – no illegitimate threat.</p> <p>Two Narrow Categories: (<i>Borelli v Ting</i>).</p> <p>(1) Exploitation of knowledge of criminal activity; D uses his knowledge of <u>criminal activity</u> by P or a member of P's close family to <u>obtain personal benefit</u> from P by express or implicit <u>threat to report</u> the crime or initiate the prosecution</p> <p>(2) Manoeuvring P to waive his claim.</p>

	D, having exposed himself to a civil claim by P, deliberately manoeuvres P into position of vulnerability using illegitimate means, forcing P to waive his claim. (<i>Borelli v Ting</i>).
5.1.2 Consequences of Duress	
Contract Voidable/Void	Party can elect to void the contract & restitution for benefits transferred pursuant to the void contract. Duress to person: void. <i>Barton v Armstrong</i>
5.1.3 Bars to Duress	
Affirmation	<i>The Atlantic Baron</i> [1979] P's subsequent claim of duress failed due to <u>affirmation</u> .
"Restitutio in integrum" impossible	E.g. undoing work P did for D.
5.2 Undue Influence	
Definition	(1) There exists a <u>relationship of trust and confidence</u> between P and D (2) D <i>abuses</i> the relationship to induce P to transfer a benefit (or enter into a transaction with a third party)
Proving Undue Influence	Actual: Undue influence must be proven by P Presumed: Undue influence presumed, D must rebut the presumption.
(1) Actual Undue Influence	(1) D must have the ability to influence P. (2) D must have exercised this influence. (3) The influence must have been exercised unduly. (e.g. Victimization of P, non-disclosure of information) <i>Bank of Credit and Commerce International SA v Aboody</i> [1990] Husband induced wife to execute charges on home. Held UI found though the transaction was not set aside due to the lack of <u>manifest and unfair disadvantage</u> to the wife. (4) Must have caused P to enter into the relevant transaction. <u>Operative cause</u> (not but-for)
Examples	(1) Threats of ending marriage; (2) Threats of legal action; (3) Misrepresentation as to the transaction's nature; (4) "Neither coercion, nor pressure, nor deliberate concealment is a necessary element". <i>Dunbar Bank Plc v Nadeem</i> [1998]; (5) Need not show that an ordinary person would have been influenced, test is <u>subjective</u> not objective. <i>Re Craig (Deceased)</i> [1971] Held "absence of direct evidence of a gift being obtained by undue influence ... is far from indicating that it did not occur." Several indirect evidence found and AUI established.
Manifest and unfair disadvantage to the wife	<u>Required</u> in <i>Bank of Credit and Commerce International SA v Aboody</i> [1990] <u>Rejected</u> in <i>CIBC Mortgages plc v Pitt</i> [1994] C.f. <i>National Commercial Bank (Jamaica) Ltd v Hew</i> [2003] Held no UI since the relationship had not been <u>exploited to extract any special advantage</u> which could not have been obtained in ordinary commercial lending. ❖ Focuses on the transferring party's intention rather than the content of the transaction itself. ❖ In line with the strict liability nature of restitution claims
Causation: operative cause	"But for" causation. No UI where P would have entered into the transaction in any event. <i>Bank of Credit and Commerce International SA v Aboody</i> [1990]

	<p>“But for” causation <u>rejected</u>. UI only had to be an operative cause of the P entering into the transaction. (fraudulent nature) <i>UCB Corporate Services Ltd v Williams</i> [2002]</p>
(2) Presumed Undue Influence	<p>(1) P must have placed trust and confidence in D (2) The transaction must be one which <u>calls for explanation</u>.</p>
(a) Recognized relationships of influence	<p>Irrebuttable presumption: (1) Parent over the minor child; (2) Guardian over ward; (3) Doctor over the patient; (4) Solicitor over client; (5) Trustee over beneficiary NOT Husband and Wife: Benefit both husband and wife <i>Royal Bank of Scotland plc v Etridge</i> (No 2) [2002] Factual relationship of influence: Proved by the P. Fact-specific.</p>
(b) Transaction Requires Explanation	<p>(1) An ordinary person would not have entered into the transaction <u>unless they were unduly influenced</u> do to so. <i>Turkey v Awadh</i> [2005] (2) Judged <u>at the time the transaction was entered into</u> without reference to subsequent events. <i>BCCI v Aboudy</i> [1990] (3) Benefit to P relevant. Fortunes of husband and wife ordinarily <u>bound together and scheme for their mutual benefit</u>. Something <u>additional</u> is therefore required for the transaction to be disadvantageous. <i>Royal Bank of Scotland v Etridge (No 2)</i> [2002] e.g. (1) Transaction at an undervalue; (2) Gifts more likely to require explanation than contracts. <i>Crédit Lyonnais Bank Nederland NV v Burch</i> [1997] Employee agreed to give a charge over her flat and an unlimited guarantee for all of her employer’s debts. No mutual interest.</p>
Relevant factors	<p>(1) Relationship between the parties; (2) Size of transaction; (3) Amount of value transferred relative to assets of parties; (4) Amount of risk assumed relative to assets of parties; (5) Benefits received as part of transaction Vitiation of the will should only be presumed if disadvantageous.</p>
Rebut UI	<p>“Court <u>throws upon the donee the burden</u> of proving that he has not abused his position”...“necessary to show that the <u>donor had independent advice</u>, and was removed from the influence of the donee” <i>Allcard v Skinner</i> [1887] P was required by virtue of her membership of a religious organisation to give up all her property to D, a higher-ranking member of the organisation. Held no direct undue influence by D on P but sufficient to UI. P sought legal advice: (1) Adviser must be independent, fully informed and competent; (2) Not in itself sufficient – fact specific determination; (3) if P had an opportunity to but failed to obtain legal advice the presumption would not be rebutted.</p>
5.2.1 Undue Influence and Third Parties	
Transaction set aside	<p>Entire transaction must be set aside <u>absolutely</u>. <i>Barclays Bank plc v O’Brien</i> [1994] Wife induced to consent to second mortgage over family home by husband.</p>
5.2.2 Reflections on Undue Influence	
Focus on...?	<p>P’s intent. <i>Allcard v Skinner</i> D’s unconscionable conduct. <i>National Commercial Bank (Jamaica) v Hew</i> Both, can’t understood in isolation. Chen-Wishart and Virgo</p>

No need for D's fault	<i>Hammond v Osborn</i> [2022] D's conduct unimpeachable and nothing sinister but held gift set aside.
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6. Failure of Consideration I (in enforceable contract) (Unjust Factors, Element 3)	
"Consideration" ("condition")	<p><u>Actual performance</u> of the promise. (not the "promise")</p> <p>Failure of consideration: recovery of enrichments transferred <u>conditionally</u> in circumstances where the <u>condition fails</u>. (no actual performance)</p> <p><i>Fibrosa v Fairbairn</i> [1943] P made advance payment of £1000 towards purchase of £4800 machinery from D, contract frustrated (terminated automatically) due to war. Held recovery allowed for no machines delivered.</p>
Non-contractual contingent condition	<p>"(purpose...failed where) <u>condition has not been fulfilled</u>, or a <u>contemplated state of affairs has disappeared</u>." – from common intention of parties</p> <p><i>Roxborough v Rothmans of Pall Mall</i> [2001] D sold products to P at price comprised the price of products and <u>license fee</u>, license fee unconstitutional and P sued to recover license fee. Held P can recover, failure of a distinct and severable part of the consideration for the purchase price. (part of price was conditional on D's liability to pay license fee, "state of affairs altered")</p> <p>Note: contract is subsisting in this case; <u>severance</u> of purchase price.</p>
Severance	Failure of a <u>severable</u> part of the consideration. <i>Roxborough</i>
6.1 "Total" Failure of Consideration	
Total	Failure of consideration must be total. (no...perform) "any part of the contractual duties". <i>Stocznia Gdanska v Latvian Shipping Co</i> [1998]
Wilmot-Smith's interpretation	<p>(1) P transfers an enrichment to D subject to a condition, P can't recover from D if <u>any aspect</u> of the condition is satisfied. No</p> <p>Provision of an incidental benefit doesn't bar restitution. <i>Rowland v Divall</i></p> <p>P bought car from D and used it for months; D had no good title and P compelled to surrender car to true owner. P sued D for purchase price. Held <u>use of car</u> was merely <u>incidental benefit</u> which didn't bar restitution.</p> <p>(2) P transfers an enrichment to D subject to a condition and the condition fails, P must make counter-restitution of any benefits received from D prior to the failure of condition. No</p> <p><i>Stocznia</i>. P contracts with Ds to <u>design, build, and deliver a ship</u>. Ps terminated for Ds' failing to pay the <u>second instalment</u> due under the contract. D argued not payable for recoverable (by TFC). Held Ds bound to pay because no <u>total failure of consideration</u> and not recoverable.</p> <p>(3) P transfers an enrichment to D subject to a condition, P cannot recover from D if <u>any essential aspect</u> of the condition is satisfied. better not best</p> <p>WS: if any <u>substantial part</u> of the condition is <u>not satisfied</u>. (negative view)</p> <p>Possible that essential part satisfied but substantial part unsatisfied.</p> <p><i>Sumpter v Hedges</i> (Essential to lay house <u>foundations</u>) with no substantial part.</p>
Rationale	<p>"Total" failure rule ensures that restitution is <u>awarded only when contractual damages are not adequate</u>. (e.g. want sound horse rather than damages)</p> <p>When damages adequate, should be governed by contract.</p>
Interpretations	When P transfers an enrichment to D subject to a condition, P can only recover from D <u>if a substantial part</u> of the condition is unsatisfied. WS

	<p>(can restitution with no “<u>T</u>”FC, e.g. received incidental & no substantial) vs.</p> <p>Whether the promisor has <i>performed any part of the contractual duties</i> in respect of which the payment is due. <i>Stocznia</i> by Lord Goff</p>
Summary	<p>(1) Court may construe the benefit as not within the one bargained for (i.e. incidental benefit – <i>Rowland v Divall</i>)</p> <p>(2) Where P could exercise legal rights to <u>reject benefits</u> (i.e. buyer rejecting non-conforming goods even after delivery) (buy iPhone but get Samsung)</p> <p>(3) Court may construe obligations as severable (i.e. <i>Roxborough v Rothsmann</i>)</p> <p>Consideration: (1) condition; (2) single payment can be divisible with each subject to different conditions (\$100 for cigarettes, \$80 for delivery, \$20 for tax); (3) need not to be contractual – state of affairs.</p> <p>Total: Failure of consideration <u>isn’t sufficient</u> if the failure <u>isn’t total</u>.</p>
6.2 Claims for Failure of Consideration: following a breach of contract	
(1) Innocent Party	<p>If D in breach of contract, P would like to recover:</p> <p>(1) Any <u>payments</u> made under the contract and/or</p> <p>(2) <u>Damages</u> for loss of bargain etc.</p> <p>Contractual damages: (1) & (2).</p> <p>Restitution: only (1), but sometimes better.</p>
Restitution sometimes better	<p>(1) May allow P to escape from a bad bargain. (market value much lower)</p> <p>(2) Claim for restitution is (sometimes) a claim for a <u>liquidated sum</u> (not require the court to assess, easier to recover).</p> <p><i>Bush v Canfield</i> [1818] D agreed to sell 2000 barrels of flour to P at \$7 per barrel, P paid \$5000. The market price of flour fell to \$5.5 per barrel. D failed to deliver. P sued for \$5000 but D argued \$2000. Held P get \$5000, contract did not provide a “cap”.</p> <p><i>Mann v Paterson</i> [2019] P to build houses at fixed price, to be paid in stages. P terminated contract upon D’s breach. At least one stage not completed. P sued D for damages or higher sum for non-contractual <i>quantum meruit</i>.</p> <p>Held (1) completed stages, P confined to an <u>agreed sum</u>; (2) uncompleted stages, P can elect for damages for breach / restitution for FoC; (3) <u>exceptional cases</u>, restitution limited with rates prescribed by the contract (rejected by minority, no FoC where debt has accrued, uncompleted stages confined to claim for breach of contract).</p>
<i>Mann v Paterson</i> in detail	<p>Infinitely divisible Obligation: If a party is entitled to payment upon completion of any part of the work. Termination will not cause total failure of consideration. The remedy is restricted to a claim for what has <u>accrued due</u> or damages for <u>breach of contract</u>.</p> <p>Entire Obligations: nothing is due until all of the work has been completed by the contractor. Upon termination, there will be a total failure of consideration. Restitution will lie as upon a <i>quantum meruit</i> in respect of work and labor done up to the point of termination.</p> <p>Divisible (into several entire stages) Obligations: if the obligation to perform work is divisible into several entire stages, upon the termination of the contract:</p> <p>(i) the contractor will have accrued rights <u>under the contract</u> for those stages</p>

	<p>that have been completed;</p> <p>(ii) there will be a <u>total failure of consideration</u> in respect of the stages that have not been completed;</p> <p>(iii) restitution will lie as upon a <i>quantum meruit</i> in respect of the work and labor done towards completion of the uncompleted stages as an alternative to damages for breach of contract.</p>
Judgement	<p>(1) For completed stages: no failure of consideration where the debt has accrued, the performance is conditional upon an <u>enforceable contractual right</u> to the agreed price.</p> <p>(2) For uncompleted stages: (a) majority: where because of D's repudiatory breach, P is unable to earn the agreed sum for the work, P has the right to <u>elect</u> between <u>contractual damages</u> and <i>quantum meruit</i>; (b) minority: P has the right to sue for contractual damages therefore no right to sue for a <i>quantum meruit</i>.</p> <p>(3) (if P can elect in (2)) save in exceptional circumstances (unconscionable), the amount of restitution is <u>capped</u> by the contract price.</p>
(2) Party in Breach	<p>Party in breach is not barred from claiming restitution, depends on the interpretation of agreement.</p> <p><i>Dies v British International Mining</i> [1939] D sell rifles and ammunitions to P for £270,000, P paid £100,000. P in breach, <u>refused to take delivery</u>, and sue to recover the £100,000 for FoC. Held (1) £100,000 not deposit; (2) P entitled to recover £100,000 <u>subject to D's claim to damages for breach</u>.</p> <p><i>Sumpter v Hedges</i> [1898] P build for D for a <u>lump sum</u>. P did part of work and abandoned, D completed the work then. P sued for <i>quantum meruit</i> for work had done. Held P can't recover <i>quantum meruit</i>.</p>
"Entire Obligation" rule	<p>Where it is <u>agreed</u> that full performance of an obligation is <u>necessary</u> before the right to payment or other counter-performance is to be earned, then that <u>obligation is "entire"</u>. (subject to <i>de minimis</i> exception) <i>Sumpter v Hedges</i></p> <p>If not substantially or entirely performed, no claim for <i>quantum meruit</i>.</p> <p>Entire: in a contract for work for a <u>lump sum</u>, the agreed sum is payable when the work is <u>substantially</u> performed. <i>Hoening v Isaacs</i> [1952]</p> <p>No TFoC in "substantial/entire" obligation case: P's performance is conditional upon D's payment & D's payment is <u>conditional upon P's entire / substantial performance</u>. (P takes risk)</p>

7. Failure of Consideration II (frustration, void, no contract) (Unjust Factors, Element 3)

7.1 Frustration – from Common Law – the Exercise is Governed by Statute now

Definition	<p>One of the methods to terminate a contract.</p> <p><u>Legal requirements</u> governed by common law & <u>consequence</u> by statute</p>
Legal Requirements	<p><u>An event</u> occurred after the contract has been made which makes performance: (a) physical or legally <u>impossible</u>; or (b) would otherwise be rendered <u>radically different</u> from that which was promised</p> <p>(1) Mere fact that performance has been made more onerous or expensive does not constitute frustration;</p> <p>(2) Event neither provided for nor foreseen by the parties;</p> <p>(3) Event was not the result of "fault" by either party.</p>

Impossibility	<p>(1) Physical Impossibility. <i>Taylor v Caldwell</i> [1863] Contract for use of a music hall, hall destroyed by fire. P sued for breach. Held hall essential to contract, destruction neither contemplated nor fault of party.</p> <p>(2) Legal Impossibility. <i>Metropolitan Water Board v Dick Kerr and Co Ltd</i> [1918] D agreed to build a reservoir, but ordered to stop by the government for war. A term providing for extension of time for delay. Held interruption & delay fundamentally changes the conditions of the contract.</p>
Cancellation of event	<p>Depends on the foundation of the contract.</p> <p><i>Krell v Henry</i> [1903] D hire a flat from P to watch coronation processions, processions cancelled due to King's illness. D sue for recover the deposit. Held D could recover, coronation is foundation of contract.</p> <p><i>Herne Bay Steam Boat Co v Hutton</i> [1903] D hired P's ship for viewing the Royal Naval Review & cruise, review cancelled due to King's illness. Held contract not frustrated for cruise was still possible, one purpose could still be fulfilled.</p>
More difficult More expensive	<p>Not "impossible".</p> <p><i>Davis Contractors Ltd v Fareham UDC</i> [1956] P build house for D but P incurred much more money. P claimed frustration & higher claim in <i>quantum meruit</i>. Held not frustrated, more expensive / difficult did not amount to frustration – supervening event not go to very root of the contract.</p>
No "self-induced" frustration	<p><i>Maritime National Fish Ltd v Ocean Trawlers Ltd</i> [1956] P chartered a boat which needs license, P didn't get enough license and claimed frustration. Held no frustration, P's deliberate acts which deprived D's boat of a licence means P in breach of contract.</p>
Effects under common law "the loss lies where it falls"	<p>(1) Contract terminated (not void <i>ab initio</i>).</p> <p>(2) Future obligations terminates.</p> <p>(3) Past (but unperformed) obligations are not discharged.</p> <p>❖ Payment obligation accrued prior to frustration still to be paid, <u>unless</u> one could claim a total failure of consideration (<i>Fibrosa</i>)</p>
Defects of common law	<p>(1) Restitution possible only: "total" failure of consideration. (abolished)</p> <p>❖ <i>Whincup v Hughes</i> [1871] Restitution denied, watchmaker had completed 1/6 of the contract.</p> <p>❖ <i>Fibrosa v Fairbairn</i> "total" for none of the machines were delivered.</p> <p>(2) <i>Quantum meruit</i> for work before frustration generally denied. (relaxed) "Entire obligation" rule. <i>Cutter v Powell</i> [1795] Sailor to be paid on arrival in Liverpool, but died before arrival. Held could not recover a <i>quantum meruit</i> for the work that he had done before his death.</p> <p>(3) Until <i>Lipkin Gorman</i>, no defence of change of position.</p> <p><i>Fibrosa v Fairbairn</i> Ds incurred significant expense in manufacturing the machines, if machines not realisable, Ds can't recover expense from Ps. A change of position allow Ds retain payment equivalent to expenses incurred.</p>
LARCO (Cap.23)	<p>s.16(1) applies to contract governed by Hong Kong law.</p> <p>s.16(2) restitution of money.</p> <p>s.16(3) restitution of benefits in kind.</p>
Section 16(2)	<p>Main part: "<u>All sums paid or payable to any party in pursuance of the</u></p>

Payment of Money	<p><i>contract before the time when the parties were so discharged... shall, in the case of sums so paid, be recoverable...</i></p> <p>No requirement of total failure of consideration.</p> <p>The proviso: “<i>Provided that, if the party to whom the sums were so paid or payable incurred expenses before the time of discharge in, or for the purpose of, the performance of the contract, the court <u>may</u>, if it considers it <u>just</u> to do so having regard to all the circumstances of the case, <u>allow him to retain</u> or, as the case may be, <u>recover the whole or any part of the sums so paid or payable, not being an amount in excess of the expenses so incurred</u>”</i></p> <p>“a statutory recognition of the defence of change of position”</p> <p>Goff J in <i>BP Exploration v Hunt</i> (No.2) [1982]</p> <p>Strictly speaking, not change of position: (1) not equal division of loss & (2) general loss apportionment.</p>
Example of s.16(2)	<p>Gamerco SA v ICM/Fair Warning (Agency) [1995]</p> <p>P contracted with D for band to play in stadium, paid US\$412,500 upfront. Authorities banned the use of stadium for safety, concert cancelled.</p> <ul style="list-style-type: none"> ❖ P incurred \$450,000 (in addition to the upfront payment to D). ❖ D incurred \$50,000. <p>P sued to recover the US\$412,500 under s.16(2) & D sought to set off its expenses of \$50,000 by the <u>proviso</u>.</p> <p>Held P can recover the \$412,500 without any set-off against D’s expenses.</p>
Section 16(3) Get service etc.	<p>“... <i>purpose of... performance of the contract, <u>obtained a valuable benefit</u> (other than a payment of money to which subsection (2) applies) before the time of discharge, there <u>shall be recoverable from him...not exceeding the value of the said benefit to the party obtaining it, as the court considers just, having regard to all the circumstances of the case and, in particular...</u></i>”</p> <p>s.16(3)(a): “<i>the amount of <u>any expenses incurred</u> before the time of discharge <u>by the benefited party</u> in, or for the purpose of, the performance of the contract, including any sums paid or payable by him to any other party in pursuance of the contract and retained or recoverable by that party under subsection (2); and</i>”</p> <p>s.16(3)(b): “<i>the <u>effect</u>, in relation to the said benefit, of the <u>circumstances giving rise to the frustration</u> of the contract.</i>”</p> <p>P can recover the monetary value of benefits in kind transferred to D to the extent that the court considers just.</p>
Three Stages to inquiry	<p>(1) Identification of D’s benefit – cap the award</p> <p>(2) Valuation of the benefit – cap the award</p> <p>(3) Assessment of the just sum – discretionary</p> <p>BP Exploration v Hunt (No.2) [1982]</p>
(1) Identification of D’s benefit: end product	<p>Normally, Service rather than end product. Cobbe v Yeoman’s Row</p> <p>Benefit is the <u>end product</u> of the services.</p> <p>(i) s.16(3) distinction between performance and valuable benefit.</p> <p>(ii) s.16(3)(b) relates to the identification of the end product.</p>
(2) Valuation of benefit	<p>(1) objective market value.</p> <p>(2) consider subjective revaluation (subjective value to D is higher).</p> <p>(3) An allowance of D’s expenses under s.16(3)(a).</p> <p>Date: assessed at the date of frustration.</p>

(3) Assessment of the just sum	By reference to the <u>service</u> themselves not the end product. (1) Objective market value. (2) contract cap. (like the subjective devaluation)
Example of s.16(3)	P contracts with D to build a house for a lump sum of \$1m on 12.12. 12.13, Contract frustrated, market value of uncompleted house is \$800k. (1) & (2): date – 12.13; <u>end product</u> : \$0. (3): value of P's <u>work</u> : \$800k; but can't exceed value of D's benefit: so, \$0.
7.2 Void Contracts	
Examples	<i>Guinness Mahon & Co v Kensington and Chelsea Royal LBC</i> [1999] P bank entered into interest rate swap contract with D local council. Contract void later while swap was fully performed. P sued for money paid. Held total failure of consideration. Bargain is legal obligation not payment. <i>Sharma v Simposh</i> [2011] D granted P option to purchase D's property for £53,400, agreement void for lack of formalities. P sought restitution. Held P's expectation fulfilled (benefit of option itself).
7.3 No Contract for Want of Certainty	
Definition	P may confer a benefit to D on the mistaken basis that there is or will be a contract between the parties. E.g. act for pre-contractual negotiations without contract.
Examples	<i>British Steel v Cleveland Bridge and Engineering</i> [1981] Ds sent Ps a letter of intent and proposed to contract (to produce nodes) on D's standard terms. The letter <u>requested Ps to begin work immediately</u> . P expected formal order and went ahead with work. No contract. Ps delivered the nodes and sued for a <i>quantum meruit</i> . Held Ds had to pay a quantum meruit for Ps' work done at the request of Ds. (1) D requested P to perform the work (2) Both parties expected that there will be a formal contract <i>Cobbe v Yeoman's Row</i> [2008] P orally agreed to purchase property from D at a discounted price, provided that P is able to obtain planning permission. Contract no legal effect for (1) lack of formalities and (2) uncertain. Ps sued for a <i>quantum meruit</i> for work had done in obtaining permission. Held a failure of consideration. (note the promise is the written contract)

8. Ignorance/Lack of consent, Want of Authority and Tracing (Unjust Factors, Element 3)	
8.1 Ignorance / Lack of Consent: D obtains an enrichment from P without P's consent	
Concurrent liability	(1) Proprietary claim to asset. (2) Personal claim for knowing receipt (e.g. breach of trust claim against third parties) / tort of conversion. (3) Personal claim for <u>unjust enrichment</u> .
Definition	D obtains an enrichment from P without P's consent. (P is ignorant of / did not consent to the transfer to D) Two party : e.g. D steals from P. Three party : e.g. X steals from P and gives stolen asset to D.
"Lack of consent" is better than ignorance (title in the property doesn't	<i>Armstrong DLW GmbH v Winnington Networks Ltd</i> [2013] A <u>fraudulent transfer</u> of European carbon emission allowances ("EUAs") from <u>P's account</u> with the German national registry to <u>D's account</u> in the UK

pass if P is ignorant, P can resort to <u>vindication of right</u>)	<p>national registry. D (not part of the fraud) purchased the allowances and sold them on to a third party.</p> <p>Held <u>restitution</u> claim denied, <u>vindication</u> of P's property rights instead. If legal title had been transferred, D liable for knowing receipt. If legal title had been retained, D liable for vindication of rights. – No UE.</p> <p>Goff & Jones: P can also claim use value; case don't involve title; ought to have multiple remedies.</p>
<p>Trust</p> <p>Separation of legal and equitable titles</p>	<p>Express Trust</p> <p>Implied Trust (arise by operation of law)</p> <p>(1) Presumed resulting trust: property transferred to someone who pays nothing for it.</p> <p>(2) Automatic resulting trust: creation of a trust in favor of a transferor when the creation of the trust fails.</p> <p>(3) Constructive trust:</p> <ul style="list-style-type: none"> ❖ Institutional: trust imposed by the courts to give proprietary effect to a transaction that has occurred between the parties. ❖ Remedial: trust imposed by the courts as a remedy.
Tangible Assests	<p><i>Criterion Properties Plc v Stratford UK Properties LLC</i> [2004]</p> <p>Directors of P, <u>without authority</u>, entered into agreement with D, giving D the right to have its interest bought out on favorable terms if, the chairman / MD ceased to be involved in its management.</p> <p>MD dismissed; D served notice to exercise option to be bought out.</p> <p>Held P could (i) <u>set aside</u> the agreement based on <u>agent's lack of authority</u>, make a proprietary claim to recover the transferred assets, but also (ii) have a <u>personal claim</u> for unjust enrichment against the assets</p>
Intangible Assets	<p><i>Cressman v Coys of Kensington (Sales) Ltd</i> [2004] Auctioneers failed to retain the personalised registration mark of car, registration sold with the car.</p> <p>Held purchaser liable in UE for value of the mark.</p>
8.2 Want of Authority (Exceeding that authority improperly, directors, trustees etc.)	
Breaches of fiduciary obligations	<p>Loyalty: dealing in <u>conflict of interest</u> between the fiduciary's duty and his personal interest</p> <p>Self-dealing rule: fiduciaries cannot <u>sell trust property to themselves</u>.</p>
Legal Ownership cases	<p><i>Lipkin Gorman v Karpnale Ltd</i> [1991] Cass (firm partner) took cash from the firm's client account and gambled it away at D casino.</p> <p>Held casino was liable for the value of the cash in unjust enrichment</p> <p><i>Great Investment Ltd v Warner</i> [2016] Director abused power of attorney to procure bonds owned by the company to his personal creditors. Obiter Strict personal restitutionary liability for the value of the bonds recognised.</p> <p><i>Relfo Ltd (In Liquidation) v Varsani</i> [2012] Director of P caused the misdirection of £500,000 from P's bank account to D's account via complex series of intermediate transactions. Held: ignore all the middle transaction procedures and see as if from P's account to G's account. D liable for know receipt. (Obiter D liable in UE)</p> <p>Strict liability: doesn't depend on knowledge / conscience of recipient.</p> <p><i>Re Hampton Capital</i> [2015] Director transferred company funds to the two D at the request of a fraudulent 3rd party. Held that Ds owed a strict restitutionary liability to the company</p>

	<i>Torbay Holdings Ltd v Napier</i> [2015] Director misdirected corporate funds into trust. Held Ds owed a strict personal liability in unjust enrichment for the misdirected monies.
Equitable Ownership cases	<p><i>Re Diplock</i> [1951] Executors distributed residue of deceased estate to charities pursuant to an invalid will. Held: the next of kin has a <u>direct claim in equity</u> against the charities. (Suggested to be UE but (1) no change of position defence; (2) could not bear interest; (3) first exhaust remedies to D)</p> <p>Note: hard for remedy in UE. (1) harsh strict liability, equitable ownership hidden from view; (2) giving beneficiaries claim may collapse trust.</p>
C.f. Knowing Receipt	<p>(1) Recipient <u>received</u> the misapplied assets or their traceable proceeds beneficiary;</p> <p>(2) Recipient <u>knows</u> that the assets were transferred in breach of trust.</p> <p>Knowledge: a state of mind, makes it unconscionable for recipient to retain the benefit. <i>BCCI v Akindele</i> [2001]</p> <p>Remedy: recipient liable as a constructive trustee, have custodial duties to restore, preserve or invest the misapplied assets. Beneficiary can seek restoration of assets or compensation from the knowing recipient.</p> <p><i>Re Rothko</i> [1977] Improper transfer of paintings to 3rd parties.</p> <p>Knowing Receipt: 3rd party liable for <u>current market value</u> of paintings.</p> <p>UE: 3rd party liable for <u>value at the time of transfer</u>.</p>
Claims by Fiduciary in breach? (trustee, director)	<p>Trustees' duty: recover, secure, duly apply the trust fund. <i>Re Brogden</i> [1888]</p> <p>(1) Trustees have standing to sue in knowing receipt though they are responsible. (2) Knowing recipients who further misapply trust assets by transferring to 3rd parties can sue 3rd parties for assets.</p> <p>vs. (there are concurrent causes of action both by beneficiary and trustee)</p> <p>Beneficiaries should bring proceedings to challenge the exercise of a dispositive power by trustee, <u>not the trustee</u>. <i>Pitt v Holt</i></p>
8.3 Tracing	
Overview	<p>Rules that <u>deem</u> one asset to be the <u>substitute of another</u>.</p> <p>Enables claims to be made in respect of the <u>substitute asset</u>.</p> <p>Elect (1) <u>follow the original asset</u> into the hands of the new owner or (2) <u>trace its value into the new asset</u> of the same owner. <i>Foskett v McKeown</i>.</p> <p>Tracing: looks at the <u>substitute asset</u> in the hands of the party.</p> <p>Following: follows the <u>original asset</u> into the hands of a third party.</p>
Policy-based Choice	<p>“<u>identify an asset which represents P's property</u>...asset which is <u>not</u> in reality the P's <u>original property</u> but one which the law is prepared to <u>treat as a 'substitute'</u> for the original.” “accordingly making a policy choice as whether the law is prepared to recognise”</p> <p><i>Federal Republic of Brazil v Durant International Corp</i> [2016]</p>
(1) Straight Substitutions	<p><u>Straightforward tracing of substitute assets.</u></p> <p>“Trace their property at common law in that <u>chose in action</u>, or...into its <u>product</u>.” “follow their property...when it was paid to them at the club”</p> <p><i>Lipkin Gorman v Karpnale Ltd</i> [1991] Cash from bank account spent gambling at D's casino.</p> <p><i>Trustee of the Property of FC Jones (A Firm) v Jones</i> [1997] D received</p>

	cheque from partnership's bankrupt account, money used to invest in potato shares, proceeds paid into bank account. Held tracing allowed, potato shares represented substitute for the money from partnership's account.
(2) Mixed Substitution	<p>(1) D knowingly mixes P's money with his own money. e.g. D mixes \$100 of P's money ("traceable proceeds") into his own bank account with an existing \$100. (a) D takes \$100 out to spend, assumed that D kept the <u>traceable proceeds</u> intact and spent his own \$100 first. <i>Re Hallet's Estate</i> (b) D takes \$100 out to buy a painting, then spends the remaining \$100, assumed that D used the <u>traceable proceeds</u> to buy the painting and spent his own \$100. <i>Re Oatway</i> (c) D takes \$100 out to buy a painting, then keeps the remaining \$100, but the painting triples in value, it is assumed that D used the <u>traceable proceeds</u> to buy the painting. <i>Shalson v Russo</i></p> <p>(2) D mixes monies of two innocent P. (a) <u>First in, first out rule</u>. <i>Clayton's case</i> - rejected in many jurisdictions. UK affirmed but would deny if it would be <u>impracticable</u> or result in <u>injustice</u>. (b) <u>Rolling charge</u> solution preferable to the <u>pro rata</u> division. <i>Barlow Clowes International Ltd v Vaughan</i> [1992]</p>
Limitations Presumptions can't displace actual evidence	<p>(1) Lowest intermediate balance rule. D mixed P's 100 and own 100, loses 160. P can't claim more than 40 no matter D's addition in account.</p> <p>(2) No "Backwards tracing". Tracing from asset to asset must follow chronological order – cannot trace into pre-acquired asset.</p>
Backwards Tracing	<i>Federal Republic of Brazil v Durant International Corp</i> [2016] M received US\$10.5M bribes and paid into D's account. D argued claim limited to US\$7.7M. Held bribe payments could be traced to the prior withdrawal since they were part of a "co-ordinated scheme" – combat money laundering.
Tracing and UE	<p><i>Foskett v McKeown</i> [2001] Trustee wrongfully used trust monies to pay for a life insurance policy, trustee died and policy was paid out. Held that beneficiaries could claim a proportionate beneficial interest in the proceeds of the policy. Held not a UE case, but property rights attached to a specific thing and UE should involve.</p> <p><i>Relfo Ltd (In Liquidation) v Varsani</i> [2012] Held that D owed a strict restitutionary liability even if the P's monies could not be strictly traced into the D's account. Suggests that UE claims ought not be title based. Sufficient connection existed if the director's objective was to bring about the payment to D's account in reality equivalent to a direct payment.</p>

9. Secondary Liability (Unjust Factors, Element 3)

9.1 Recoupment

Rationale	<p>P has <u>paid money</u> which [D] was <u>ultimately liable to pay</u>, so that the latter obtains the benefit of the payment by the <u>discharge of his liability</u>... [D] is held <u>indebted</u> to [P] in the amount... D gets the benefit of the payment. <i>Brook's Wharf & Bull Wharf v Goodman Bros</i> [1937]</p>
Requirements	<p>(1) P and D are both liable to X (2) Between P and D, D is <u>primarily</u> liable to X (3) P does <u>not</u> act <u>voluntarily</u></p>

	(4) P pays X, and D's liability to X is discharged
(1) & (2)	<p>Brook's Wharf [1937] Importers have to pay tax but deferred liability by storing goods in a bonded warehouse. Goods were stolen and warehouse paid the tax. Warehouse sued the importer – both <u>importer</u> and <u>warehouse owner</u> are liable to pay tax and importer bears <u>primary liability</u>.</p> <p>Gebhardt v Saunders [1892] Blocked drain caused nuisance, tenant abate the nuisance and sued the landlord. Nuisance caused by structural defect. (landlord's responsibility)</p> <p>Exall v Partridge [1799] P's carriage left on D's premises for repair. D's rent in arrears, landlord detained the carriage, P paid the rent to get the carriage back and claimed the rent from D.</p>
(3)	<p>Old common law cases: <u>implied promise to return</u> if payment involuntary.</p> <p>Owen v Tate [1976] D obtained a loan from Bank secured over property of Ms. L, P personally guarantee D's loan and remove the pre-existing security on Ms. L's property (P only wanted to benefit Ms. L). D didn't know & want. D in default and bank sued P. P sought recoupment from D. Held recoupment <u>not</u> allowed as liability cannot be <u>voluntarily</u> assumed, unless the assumption of liability was <u>reasonably necessary</u>.</p>
9.2 Contribution	
Rationale	Several persons or properties all <u>equally liable</u> at law to the <u>same demand</u> , it would be <u>equitable</u> that the burden should fall...if that burden is placed <u>inequitably</u> ...should be afterwards <u>readjusted</u> . Witham v Bullock [1939]
Difference with recoupment / reimbursement	<p>Recoupment: one party has <u>primary liability</u> (note: one primarily liable and one secondarily liable), so party with the <u>secondary liability</u> that discharges the burden can seek <u>full recoupment</u> of the discharge from the primarily liable.</p> <p>Contribution: parties are <u>equally liable</u>, thus the contribution is <u>apportioned properly</u>.</p> <p>Mitchell: P is entitled to <u>shift the burden</u>, there is no substantial difference.</p>
Points	<p>(1) One of the parties pay more than their share of the common burden</p> <p>(2) The amount recoverable requires equal division</p> <p>(3) Solvency of specific sureties seems to be ignored</p>
Statute	<p>Contribution under the Civil Liability (Contribution) Act 1978, or Civil Liability (Contribution) Ordinance (Cap 377)</p> <p>s. 3(1) "Subject to the following provisions of this section, any person <u>liable in respect of any damage</u> (note: exclude debts) suffered by another person may recover contribution from <u>any other person liable</u> in respect of the <u>same damage</u> (whether jointly with him or otherwise)."</p> <p>s. 2(3) (Interpretation)</p> <p>"A person is liable in respect of any damage for the purposes of this Ordinance if the person who suffered it (or anyone representing his estate or dependants) is <u>entitled to recover compensation</u> from him in respect of that damage (whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise)."</p>
Restitutionary liability?	<p>"liability in respect of any damage" – meaning?</p> <p>P sued developers in mistake / failure of consideration.</p> <p>P sued surveyors in tort / breach of contract.</p>

	<p>Surveyors sued developers for contribution under CLCA 1978.</p> <p><i>Friends' Provident v Hiller Parker May & Rowden</i> [1997]</p> <p>Held may be a claim for compensation for damage under sections 1(1) and 6(1) of the Act of 1978.</p> <p>A claim for restitution cannot be said to be a claim to recover compensation within the meaning of section 1(1). <i>Goff & Jones, The Law of Restitution</i> Agreement with [Goff and Jones']. <i>Royal Brompton Hospital NHS Trust v Hammond</i> [2002]</p> <p><i>City Index Ltd v Gawler</i> [2007] P is victim of D2's knowing receipt, D1 were negligent auditors and directors, D2 paid compensation and sought contribution from D1. Held restitutionary claim is for no more than the amount of loss suffered by [P].</p>
Same damage to the same person	<p>D liable to one person, P liable to another: no contribution.</p> <p><i>Birse v Haiste</i> [1996]</p> <p><i>Nationwide BS v Dunlop Haywards (DHL) Ltd, Cobbetts</i> [2009]</p>
Amount Recoverable	<p>...just and equitable having regard to the extent of that person's responsibility for the damage in question. s.4 - Statutory discretion</p> <p>Considerations: (1) relevant fault; (2) causative potency; (3) benefit from the wrongdoing. <i>Madden v Quirk</i> [1989]</p>
Part of UE?	<p>Unjust factor of <u>compulsion</u>.</p> <p><i>Brook's Wharf & Bull Wharf v Goodman Bros</i> [1937]</p> <p><i>Re D&D Wines International Ltd (in liq)</i> [2016]</p> <p><u>Restitutionary remedies</u> for unjust enrichment.</p> <p><i>Dubai Aluminium Co Ltd v Salaam</i> [2002]</p> <p>Hilliard: Principle of fair distribution of liabilities instead of UE.</p> <p>Smith: Not putting things back the way <u>they were</u>, but putting things the way they <u>should be</u>. "not designed to reverse a transfer".</p>
9.3 Subrogation	
Types Two / Three parties	<p>Two parties: technically not subrogation.</p> <p>P may be entitled to be subrogated to X's rights against D's liability.</p> <p>c.f. Extinguished Rights: X's right extinguished.</p> <p>P (guarantee), D (debtor), X (creditor)</p> <p>P (victim), D (thief), X (D's creditor)</p> <p>P creditor, D borrower, X (D's former paid-off creditor)</p>
Subsisting Rights Rights still surviving Examples	<p>(1) X has an indemnity insurance contract with P insurer, D causes X loss covered by the policy. P pays X insured indemnity for loss, P insurer be <u>subrogated</u> to X's rights to sue D in tort.</p> <p>(2) X has a liability insurance contract with D insurer. X causes loss to P covered by the policy. X becomes insolvent. P entitled to be <u>subrogated</u> to X's rights against D liability insurer.</p> <p>(3) X trustee incurs debts to P creditor in the course of acting as trustee, X trustee has a right to an indemnity from D trust fund. X becomes insolvent. P entitled to be <u>subrogated</u> to X trustee's right of indemnity against D trust fund.</p>
Extinguished Rights X's right extinguished	<p>(1) P guarantees a debt which D owes to X. D does not pay the debt and P is called upon pay X pursuant to the guarantee. If P pays X, then P will</p>

Examples	<p>have a <u>recoupment</u> claim against D, the principal debtor. On the same facts, P may also be <u>subrogated</u> to the rights of X, the paid-off creditor, against D (including any security held by the creditor for D's debt).</p> <p>(2) P's money is stolen by D, and used to pay X who is D's creditor. P may be '<u>subrogated</u>' to the rights of X, the paid-off creditor, against D (including any security held by the creditor for D's debt).</p> <p>(3) P loans money to D borrower which D uses as envisaged to repay an earlier loan made by X lender. P does not obtain the security for its loan which it bargained for. P may be <u>subrogated</u> to the rights of X, the paid-off creditor, against D borrower (including X's security for D's debt)</p> <p>(1)(2)(3) Rights <u>extinguished</u> since X is already paid.</p>
Current understanding	<p><u>Prevention / Reversal</u> of unjust enrichment.</p> <p><i>Banque Financière de la Cité v Parc (Battersea) Ltd</i> [1999] Held it is a means by which the court regulates the legal relationships between a [P] and [D] in order to prevent enrichment.</p> <p><i>Menelaou v Bank of Cyprus UK Ltd</i> [2015] Forged daughter's name and bank's charge defective. Held remedy of subrogation is reversing what would otherwise be her unjust enrichment.</p> <p>(1) Majority: Unjust Enrichment (2) Lord Neuberger: Vindication of Property Rights (3) Lord Carnwath: Tracing</p>
Unjust Factor	<p>(1) Mistake: mistakenly thought that the requisite security would be provided.</p> <p>(2) Total Failure of Consideration: requisite security was the basis of the transaction.</p>
9.4 Secondary Liability Map: (1)(2), P pays to the creditor; (3) P pays under a contract.	
1. D's enrichment is unjust if P enriched D by discharging a <u>liability</u> of D to another person X under legal compulsion by X.	
P & D are under a common or concurrent liability, but:	<p>P's liability is <u>secondary</u> to D → <u>recoupment</u> (common law) D should bear part of that liability</p> <ul style="list-style-type: none"> ❖ If liability is for debt → <u>contribution</u> (common law) ❖ If liability is for compensation → contribution (<u>Civil Liability (Contribution) Ordinance (Cap 377)</u>)
2. If the <u>liability</u> in (1) is a secured liability, P gains a right to be <u>subrogated</u> to the discharged security [in P's own name] (i.e. subrogation to an extinguished right) where:- <ul style="list-style-type: none"> ❖ D's enrichment is the discharge of liability of D to X (i.e. typical surety case) ❖ Liability of D1 (higher ranking chargee) to X has been discharged at P's expense, D2 (lower ranking charge) has been enriched (i.e. BFC) 	
3. P indemnified D against a loss caused by X under a contract of indemnity, P may take over D's rights against X [in D's name]. X's liability to D has not been discharged (i.e. subrogation to subsisting rights) such that:- <ul style="list-style-type: none"> ❖ Unjust enrichment (over-indemnification) is prevented ❖ Liability falls on the right person, since X is primarily liable, P is secondarily liable. P recoup its loss. (i.e. typical insurance case – victim (X)'s insurer (P) subrogated to victim's right to sue wrongdoer (D)) 	
Notes: You will see that (2) is basically a supplement claim of claim (1). It enhances the remedy obtainable in these circumstances.	

A (2) claim can also supplement a claim other than for legal compulsion, i.e. mistake, failure of consideration (i.e. *Menalou*).

A (3) claim falls outside legal compulsion. It is its own specific unjust factor, but the precise formulation of the unjust factor is unclear.

10. Illegality & Incapacity (Unjust Factors, Element 3 & Defences (Element 4))

10.1 Illegality (Unjust Factor)

Policy-based	<p>(1) P <u>protected</u> by the policy that makes the parties' <u>contract illegal</u> [Protected Class], or</p> <p>(2) Restitution <u>encourages withdrawal</u> from illegal agreements and thereby furthers the policy which makes the agreements <u>illegal</u> [Withdrawal].</p>
Protected Class	<p>“<u>calculated for the protection of the subject against oppression, extortion, deceit, etc. If such laws are violated, and [D] takes advantage of [P]’s condition or situation, there [P] shall recover.</u>”</p> <p><i>Smith v Bromley</i> [1760] P’s brother committed an act of bankruptcy, D and P’s creditor refused to sign certificate of discharge unless he paid money, P paid and sued D. Held restitution allowed.</p> <p><i>Kiriri Cotton Co Ltd v Dewani</i> [1960] D demanded premium from P which was illegal. Held the Ugandan Law was passed with the object of protecting the tenant, P was entitled to recover the premium.</p> <p>Exception: when such claims for recovery run contrary to the statute.</p> <p><i>Green v Portsmouth Stadium Ltd</i> [1953] P overpaid and sought to recover charges paid <u>beyond the amount allowed by statute</u>. Held Rejected due to inconsistency with the statute (only criminal liability no civil claims).</p>
Difficult to invoke, but	<p>Need express language in the statute, but the statute also provides consequences for the breach. Still <u>adopted</u> in recent cases:</p> <p>Company can’t help outsiders to buy the shares. Company sue in UE to recover the unlawful financial assistance.</p> <p><i>Murray Vernon Holdings Ltd v Hassall</i> [2010]</p> <p><i>Hounga v Allen</i> [2014] P entered UK on false identity documents procured by employers. P was abused & dismissed by employers. Sue for unpaid wages. Held that barring her claim would run counter to the <u>public policy</u> against human trafficking, victims of trafficking should be protected. Suggested could have been a restitutionary claim in <i>Patel v Mirza</i>.</p> <p><u>illegality itself</u> vs <u>consequences of illegality</u> (void / unenforceable contract)</p>
Withdrawal from illegal transactions	<p>Law <u>encourages [P] to abandon an illegal purpose</u> by giving a right to restitution by <u>withdrawal</u> during the <i>locus poenitentiae</i>.</p> <p>Illegal agreement must <u>not</u> have been <u>substantially carried into effect</u>.</p> <p>(1) P is able to do so, seeking to withdraw <u>before the illegal purpose has been achieved</u> and without withdrawal, still likely creditors will be defrauded.</p> <p><i>Taylor v Bowers</i> [1876] P transfer goods to X to defraud P’s creditors. X sold goods to D (knows the scheme). P seeks to withdraw from contract.</p> <p><i>Kearley v Thomson</i> [1890] P claimed the return of bribe. Held contract was illegal, as tending to pervert the course of justice. Money paid can be</p>

	<p>recovered back.</p> <p>(2) Transaction itself was <u>irrelevant</u> and the <u>purpose</u> was what mattered. <i>Q v Q</i> [2008] Transferred ownership to avoid tax.</p> <p>Point of return: court's determination of the <u>illegal purpose</u>.</p> <p>Require genuine repentance: <i>Bigos v Boustead</i> [1951] Illegal currency exchange arrangement.</p> <p>Not Require: <i>Tribe v Tribe</i> [1996] Supported in <i>Patel v Mirza</i>. Transferred shares to escape creditors. No creditors actually defrauded.</p>
10.2 Illegality (Defence)	
Illegal Agreement	<p>(1) It constitutes a crime or civil wrong, or</p> <p>(2) It is contrary to public policy (e.g. sexual immorality...)</p>
Reliance Principle (previous position)	<p>If party relied on the <u>illegal act</u> the illegality defence could apply. <i>Bowmakers Ltd v Barnett Instruments Ltd</i> [1945] <i>Tinsley v Milligan</i> [1994]</p>
Rejection of Reliance Principle <i>Patel v Mirza</i> [2016]	<p>Fact: P paid D a sum to bet on the price of shares based on insider information (illegal contract). The insider information never materialized and bet never made. P sought to recover and D relied on illegality defence.</p> <p>General rule: "... a person who satisfies the ordinary requirements of a claim in unjust enrichment <u>will not prima facie be debarred from recovering money paid</u> or property transferred by reason of the fact that the consideration which has failed was an <u>unlawful</u> consideration."</p> <p>Range of factors (majority): determine whether public interest harmed, consider</p> <p>(a) <u>underlying purpose of the prohibition</u> which has been <u>transgressed</u> and whether that purpose will be enhanced by denial of the claim,</p> <p>(b) any other <u>relevant public policy</u> on which <u>the denial of the claim may have an impact</u>; and</p> <p>(c) whether denial of the claim would be a <u>proportionate</u> response to the illegality, bearing in mind that punishment is a matter for the criminal courts.</p> <p>Overarching consideration: stultification. Consider whether allowing the claim would be <u>inconsistent</u> with the purpose of infringed rule.</p> <p>Minority: reliance approach only for claims to enforce or otherwise profit from an illegal contract. Even P relies on illegal conduct to unwind and not enforce the illegal transaction, UE should be granted.</p>
Consequence	<p>Lord Toulson: "rare" case (do the illegality defence apply to UE) <i>Boiseevain v Weil</i> [1950] Contract contrary to regulation, held not allowed to recover via UE.</p>
Reception of <i>Patel v Mirza</i>	<p>Rejected new approach in Patel due to unprincipled distinction between statutory and common law illegality. <i>Ochroid Trading Ltd v Chua Siok Lui</i> [2018] CFI decided to follow Tinsley instead of Patel. <i>Tse Chun Wai v Leung Kwok Kin Joseph</i> [2017] It would only be logical that Patel is followed in the absence of any local circumstances that render it inappropriate. <i>Monat Investment Ltd v All Person(s) in Occupation of Part of Np 16 Ma</i></p>

	Po Tsuen [2023]
Structure	<p>(1) What is the <u>underlying purpose</u> of the prohibition in this case?</p> <p>(2) Would any other <u>relevant public policy</u> be impacted by a denial?</p> <p>(3) Is the denial of the claim proportionate? (Enforcement or unwinding?)</p>
10.3 Incapacity (Unjust Factor)	
Definition	<p>Claims of UE by legally incapable Ps.</p> <p>Legal incapacity vitiates the transaction and allows for restitution.</p> <p>e.g. Public bodies have the ability to bring restitution claims for transfers made outside of their powers. Auckland Harbour Board v R [1924]</p> <p>Defined in s.2 Mental Health Ordinance (Cap 136)</p>
<p>(1) Contracts entered into by mentally incapable Ps can be set aside.</p> <p>UK: if the other party knew he was insane.</p> <p>Imperial Loan Co v Stone [1892]</p> <p>Canadian / New Zealand: Knowledge by the other party not required. Hardman v Falk [1955]; O'Connor v Hart [1984]</p> <p>(2) Transaction voidable so long as P was so <u>intoxicated</u> that he or she <u>did not understand the nature and effect</u> of the transaction and D knew that P was intoxicated at the time. Gore v Gibson [1845]</p> <p>(3) Under 18 years old.</p> <p>Minors who have not reached the “<u>age of understanding</u>” have limited contractual capacity</p> <ul style="list-style-type: none"> (a) contract for necessities. (b) contracts which are voidable. <p>Generally not entitled to recover money paid under a contract unless there had been a total failure of basis/consideration. Steinberg v Scala (Leeds) Ltd [1923]</p> <ul style="list-style-type: none"> (c) contracts other than necessities or voidable (unenforceable contracts) Not binding on minor unless and until he ratifies them upon attaining majority. <p>(4) Restitution of property by minors. “the court <u>may</u>, if it is just and equitable to do so, and on such terms as it may think fit, require the respondent to <u>transfer to the applicant any property acquired</u>”.</p> <p>(5) Companies entering into contract beyond powers under Articles of Association. Restitution allowed for such claims (e.g. HKN Investoy v Incotrade Pvt Ltd [1993] IR 152)</p> <p>(6) Companies unlawfully returning capital to company shareholders</p> <p>Illegal buying back of shares or making illegal dividend payments</p> <p>Analogy with liability in UE for the receipt of misdirected funds</p> <p>Payne / Goff & Jones: Should be an unjust enrichment claim</p> <p>(7) Payments contrary to Statutory Insolvency Regimes</p> <p>Dispositions after the commencement of winding up for companies. Rose v AIB Group (UK) Plc [2004]</p> <p>Transactions at an undervalue. Phillips v Brewin Dolphin Bell Lawrie [2001]</p>	

11. Defences (Element 4)	
Denial vs. Defence	<p>Denial: denies the existence of a <u>cause of action</u> (P proves).</p> <p>Defence: negates liability <u>after</u> a cause of action is prima facie proven (D).</p> <p>(1) change of position; (2) estoppel; (3) limitation; (4) ministerial receipt; (5) passing on; (6) <i>bona fide</i> purchaser without notice; (7) justifying grounds; (8) illegality / incapacity.</p>
11.1 Change of Position	
General Principle	<p>Lipkin Gorman v Karpnale [1992] Solicitor stole money and went to casino, the firm sued casino. Held recognized the change of position defence.</p> <p>Definition: that the defence is available to a person whose <u>position has so</u></p>

	<p>changed that it would be <i>inequitable</i> in all the circumstances to require him to make restitution, or alternatively to make restitution <i>in full</i>. (<i>partial</i> defence)</p> <p>Test: whether restitution would be inequitable.</p>
Two Bars	<p>(1) Bad Faith (D paid away while <u>knowing the facts</u> entitling P to recover)</p> <p>(2) Wrongdoing</p>
Elements (D must prove)	<p>(1) there was a <i>causative link</i> between the <u>receipt</u> of the benefit and its change of position, so that <u>but for the receipt of the benefit, its position would not have changed</u>; and</p> <p>(2) its position has changed in circumstances which make it <i>inequitable</i> for it to <u>be required to make restitution to [P]</u>. But the defence is <u>not available</u> to someone who has changed his position in <u>bad faith</u>.”</p> <p><i>Zhang Kan v SPH (Hong Kong) International Trading Co Ltd</i> [2023]</p>
Rationales	<ul style="list-style-type: none"> ❖ Bant: Irreversibility. (Edelman: sounds like a consequence) ❖ Security of Receipt. But there are exceptions & non-pecuniary. ❖ Protection of autonomy (Edelman). But can without the autonomy of D. ❖ Just and equitable outcome (<i>Lipkin Gorman</i>). Too vague or unclear. ❖ Disenrichment (Birks). But there are exceptions & non-pecuniary.
Causation	<p>Narrow view: Where D has received value and no longer has value (<u>direct extinguishment</u> of received value)</p> <p>Wide view: D may have changed position even if he had <u>retained</u> the value received if they <u>relied on the receipt</u> of the value in another way. Endorsed in: <i>Scottish Equitable v Derby</i> [2001] D paid off his mortgages <u>immediately</u>.</p> <p>Test: but-for test.</p>
Independent changes of position	<p>(1) Caused by a <u>3rd party</u> rather than <u>D</u>, or</p> <p>(2) issue of “whether ‘[detrimental] reliance’ by D necessary”</p> <p>E.g. Mistaken transfer of funds to D were stolen by a 3rd party X.</p> <p>Recognised: HK and England but not Australia.</p> <p>“if D2 did not obtain the benefit from P in the first place, her position would not have changed for the worse...but for causation...appropriate” “if money...<u>stolen, fraudulently misappropriated, lost or destroyed</u>...full restitution inequitable” <i>Credit One Finance Ltd v Yeung Kwok Chi</i> [2020] D1 tricked P into granting him a loan, money transferred to D1&D2’s <u>joint account</u> without D2’s knowledge. D1 took money away and P sued D2. Held Although the withdrawals were not procured by the D2, CoP defence established.</p> <p><i>Hua Rong Finance Ltd v Mega Capital Enterprises Ltd</i> [2001]</p> <p>Australia: <u>Detrimental reliance</u> is required for the change of position defence. It must be instigated by <u>D</u> instead of a 3rd party. <i>Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd</i> [2014]</p>
Further Issues	<p>(1) Need not be <i>pecuniary</i>. <i>Commerzbank v Price-Jones</i>. [2003] D was paid additional bonus by P. D decided to <u>leave the bank</u> and obtain similar employment. Held D’s decision to quit job constituted CoP.</p> <p>(2) No CoP if the expenditure is <i>not extraordinary</i>. <i>Scottish Equitable plc v Derby</i> [2001] D’s payment of <u>mortgages</u> was not CoP since existing debt would have been paid anyways.</p> <p>Non-extraordinary: Eating at your regular café or restaurant, Buying a cheap</p>

	<p>pen you would have brought anyways; No <u>discernible change</u> in the <u>quality of living</u> of the person.</p> <p>Extraordinary: Throwing a <u>lavish</u> party; Dining at an expensive restaurant you would not have dined at otherwise.</p> <p>(3) No CoP if the <u>payment</u> or <u>assets exchanged for the payment</u> are</p> <p>(a) <u>still surviving</u> and (<i>Lipkin Gorman</i> D bought a car, car still surviving.)</p> <p>(b) of <u>identical</u> or <u>greater</u> value than at the <u>time of transfer</u></p> <p>If resale value is less than original price? Can have CoP, <u>partial defence</u>.</p> <p><i>Credit Suisse (Monaco) SA v Attar</i> [2005] D bought shares increased in value.</p> <p>(4) <u>Anticipatory</u> changes of position <u>valid</u>.</p> <p><i>Dextra Bank & Trust Co Ltd v Bank of Jamaica</i> [2001] P paid and thought it was making a loan & D thought it was buying foreign currency. D paid 3rd parties in <u>reliance</u> on P's cheque <u>before</u> cheque received.</p>
Bar (1): Bad Faith	<p>(1) <u>Knowledge</u> of the transfer being unjust. <i>Lipkin Gorman</i></p> <p>(2) <u>Awareness of a risk</u> that the recipient was <u>not entitled</u> to the enrichment. <i>South Tyneside MBC v Svenska International</i> [1995] D knew there was a risk of repaying the borrowed money (illegal).</p> <p>(3) <u>Failure</u> to act in a <u>commercially acceptable way</u>. "good faith may well dictate that an inquiry be made of the payer"</p> <p><i>Niru Battery Manufacturing Co v Milestone Trading Ltd</i> [2003]</p> <p>(4) <u>Test</u> for dishonesty: whether in light of the facts known by D, a <u>reasonable person</u> would consider their conduct to be dishonest. <i>Ivey v Genting Casinos (UK) Ltd</i> [2017] P gambler can remember slight imperfection of each card.</p>
Bad faith vis-à-vis (in relation to) P	<p>UK: P must be owed "<u>duties and responsibilities</u>" by D, which would give them a <u>basis</u> for complaining of D's commercially unacceptable conduct.</p> <p><i>Juliet Bellis v Challinor</i> [2015] (D must owe duty to P)</p> <p>HK: need not be vis-à-vis P. <i>Arrow ECS Norway AS v M Yang Trading Limited</i> [2018] D not complied with licensing and due diligence required. Held D <u>commercially unacceptable</u> & <u>bad faith</u>. No CoP though duty not vis-à-vis P.</p>
Relative Fault a Bar?	<p>New Zealand: if D is more at fault the CoP defence is barred.</p> <p>Rejected by the Privy Council in <i>Dextra Bank & Credit One</i></p> <p>(1) examining and comparing the degrees of fault displayed by the parties would be too uncertain;</p> <p>(2) P's carelessness does not prevent establishing a cause of action, thus it would be "very strange" if same could bar a defence.</p>
Bar (2): Wrongdoing	<p><i>Barros Mattos Junior v MacDaniels</i> [2005] D exchanged the money. The exchange of funds was <u>illegal under Nigerian law</u>. Held The existence of the <u>illegality</u> barred the CoP defence</p> <p>(Laddie J applied the "reliance principle" on illegality in <i>Tinsley v Milligan</i> which generally applied to bar cause of action)</p> <p><u>Any form of illegality</u> constitutes wrongdoing and bars the change of position defence unless <u>de minimis</u>, followed in Hong Kong. <i>Arrow ECS</i></p> <p><u>Expanded to Regulatory offences</u> in HK.</p> <p><i>DBS Bank (Hong Kong) Ltd v Pan Jing</i> [2020] P a victim of fraud and D received money as part of the sale of his shares. The purchase money for D's shares came from the defrauded sums through an <u>underground currency</u></p>

	<p>transaction in breach of PRC regulations. D <u>didn't know</u> funds transferred in breach of PRC regulations. Held bar Change of Position.</p> <p>UK different: regulatory offences <u>insufficient</u>.</p> <p><i>Jeremy D Stone Consultants Ltd v National Westminster Bank plc</i> [2013]</p>
Stultification	<p><i>Skandinaviska Enskilda Banken AB v Conway</i> [2019] CoP rejected for statutory restitution claims under anti-avoidance provisions in bankruptcy law. Defence would stultify the anti-avoidance provisions.</p> <p><i>Test Claimants in the FII Group Litigation v RCC</i> [2014]</p> <p>CoP rejected for restitution claims against public authorities for <i>ultra vires</i> payments. Defence inconsistent with constitutional principles.</p>
Proving the claim	<p>Burden is on D.</p> <p>Realistic approach adopted: <i>Phillip Collins v Davis</i> [2000] P told D they were overpaid 7 years later. D need <u>not</u> to prove conclusively.</p>
11.2 Estoppel	
Requirements	<p>(1) Representation (2) Causal Reliance (3) Detrimental change of circumstances</p> <p><i>United Overseas Bank v Jiwani</i> [1976]</p>
1. Representation	<p>(1) Express or implied (2) Clear and unequivocal (3) Representor (P) must have <u>intended</u> Representee (D) act on it.</p>
2. Causal Reliance	<p>But-for causation (if D knew or suspicious that not entitled, no estoppel)</p> <p><i>United Overseas Bank v Jiwani</i> [1976] D bought a hotel with improperly transferred sums. Held D would have buy the hotel <u>anyways</u>, so insufficient casual reliance for estoppel.</p>
3. Detrimental change of circumstances	<p><i>Avon CC v Howlett</i> [1983] Teacher <u>overpaid for years</u> having been <u>assured</u> that money was properly due. Held teacher gave up social security benefit and expended certain sums of the overpayment. Estoppel succeeded.</p>
Overlap with CoP	<p>Estoppel: all or nothing, rule of evidence, require <u>positive representation</u> by P, arguably not need extraordinary expenditure;</p> <p>CoP: partial defence, substantive defence, extraordinary expenditure. (Hudson)</p> <p>CoP: D used to be before the receipt and harm suffered relative to the point.</p> <p>Estoppel: D would be if assumption based on P's representation ture. (Bant)</p>
11.3 Limitation	
Time limitation	<p>6 years: <u>s.4 Limitation Ordinance (Cap 347)</u></p> <p><i>Kleinwort Benson Ltd v Lincoln CC</i> [1999]</p> <p>2 years for contribution claims: <u>s.6 Limitation Ordinance (Cap 347)</u></p> <p>From "the day on which the cause of action accrued"</p> <p>Fraud, concealment or mistake: <u>s.26 Limitation Ordinance (Cap 347)</u></p> <ul style="list-style-type: none"> Limitation period is postponed "until [P] has <u>discovered</u> the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it." (UE for mistake)
11.4 Ministerial Receipt	
Agency as a defence Ministerial receipt	<p>D <i>may</i> have a defence: obtaining the <u>benefit as an agent</u>.</p> <p>If D has obtained the benefit as an agent, D has a defence to the extent that D</p>

	<p>(a) has <u>transferred benefit</u> (by payment or otherwise) to the principal, & (b) has done so <u>without actual notice</u> of P's right to restitution. Strong version: only principal can be sued. <i>Agip (Africa) Ltd v Jackson</i> [1990] Weak version: only available to the agent if (a) it transferred the benefit to the principal and (b) without notice to P's right. <i>Transvaal an Delagoa Bay Investment Co Ltd v Atkinson</i> [1944].</p>
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11.5 Passing On

<p>Passing on of a loss by P to a 3rd party</p>	<p>(1) <u>not</u> a defence at common law to restitution for UE. <i>Kleinwort Benson Ltd v Birmingham CC</i> [1997] (2) in case of particular taxes, there are <u>statutory defences</u> of a similar nature. English tax statutes requirement: "It shall be a defence, in relation to a claim [for payment of tax not due] of an amount would unjustly enrich the claimant." Value Added Tax Act 1994 s.80 & Inland Revenue Ordinance (Cap 112) s.70A</p>
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12. Remedies

<p>Remedy</p>	<p>Relief that a person can seek from a court to vindicate his legal rights. (cf. self-help "remedies" <u>without</u> coming to court) Familiar Remedies: damages, injunctions, award of an agreed sum. Personal: order is binding only on D. Proprietary: attached on property (rights rather than object itself)</p>
<p>Proprietary Remedy</p>	<p>Give P rights in respect of specific property (e.g. constructive trust over a car). The Property not available for distribution among D's creditors on D's insolvency, can have other benefits for P (interest, increase in value).</p>

12.1 Remedy in Mistaken Payments

<p>Possible Remedy</p>	<p>Proprietary remedy: unclear. Personal remedy: available. (face risk of insolvency)</p>
<p>Proprietary Remedy?</p>	<p>The person who paid money to another under a mistake retained an <u>equitable property</u> in it. <i>Chase Manhattan Bank v Israel-British Bank</i> [1979] P mistakenly paid the same sum twice to D. D ordered to be <u>wound up</u> and P sought to trace and recover by asserting a constructive trust. Suggests that <u>constructive trust</u> is available to all mistaken payors. However: New York law recognises remedial constructive trust (discretion of the judge to give a remedy, arises from the moment of court's decision) while the UK only adopted institutional constructive trust (exists when certain circumstances arise, arises from the moment of the event). <i>Westdeutsche v Islington</i> [1996] P paid D money and the contract was void, D's account overdrawn (not traceable). P argued a resulting trust had arisen at the point of receipt (liable for <u>compound interest</u>). Held D did <u>not</u> hold the moneys on the resulting trust. Obiter it may be a constructive trust if (1) D had actual knowledge of the mistake; & (2) the moneys paid remained <u>traceable</u>. Birks: that a resulting trust <u>should arise</u> wherever money is paid under a <u>mistake</u> or when money is paid on a <u>condition</u> which is subsequently <u>not satisfied</u> (i.e. total failure of consideration).</p>
<p>Why no resulting trust?</p>	<p>Principle: resulting trust should give effect to the <u>common intentions</u> of the parties to create a trust; Justice: D should not be burdened with a resulting trust without knowledge of</p>

	<p>P's mistake;</p> <p>Coherence: it is inexplicable why a resulting trust is available in cases of <u>mistake</u> and in certain cases of <u>total failure of consideration</u>, but not in cases of total failure of consideration caused by a <u>breach of contract</u>.</p>
Summary of <i>Westdeutsche</i>	<p>No resulting trust because there was no actual or inferred intention to create a trust in the event of mistake/ total failure of consideration</p> <p>No constructive trust because there was no longer any identifiable trust property at the time when D local authority knew of the mistake</p> <p>Possibility of constructive trust:</p> <p>(1) D had actual knowledge of the mistake; and</p> <p>(2) There was identifiable trust property at the time of D's knowledge of the mistake.</p> <p><i>Bailey v Angove's Pty Ltd</i> [2016] Constructive trust <u>may be available</u> when money was paid as a result of a <u>fundamental mistake</u> / money was paid under a contract which has been <u>rescinded</u>.</p>
Hong Kong	<p>CFI judgments: in the absence of [D], the existence of a <u>constructive trust</u> in respect of funds which payment was procured by a cyber fraud.</p> <p><i>Mesirow Financial Administrative Corporation</i> [2016]</p> <p><i>Guaranty Bank and Trust Company v Zzzik Inc Limited</i> [2016]</p> <p><i>Sultana Distribution Services Inc v Hongkong Fuheng Technology Co, Limited</i> [2018]</p> <p><i>Creative Impact (Hong Kong) Ltd v Luckon Travel Ltd and Anor</i> [2021]</p>
Summary of trust of mistaken payments	<p>Possible basis for a constructive trust:</p> <p>(1) Lord Browne-Wilkinson in <i>Westdeutsche</i>: Knowledge on the part of the payee of the payor's mistake. (adopted in numerous cases in Hong Kong)</p> <p>(2) Lord Sumption in <i>Bailey v Angove's</i>: payment under a <u>fundamental mistake</u></p>
12.2 Rescission	
Primary effect	<u>Wipe away</u> a contract or deed of gift <i>ab initio</i> (from the beginning).
Proprietary Effect	<i>Car and Universal Finance v Caldwell</i> D sold car to a rogue and got a £10 cash deposit & cheque for £965. Cheque found dishonored. Car sold by series of sub-sales and P bought the car in good faith. Held D had better title to the car, D rescinded the contract by reporting the incident to the police and the AA, and title reverted to D.
Note on property law & <i>nemo dat</i> rule	<p>Ownership is relative. One cannot give what one does not have (<i>nemo dat</i> rule).</p> <p>Stolen Property: Owner > Thief > 3rd party > someone who steals from 3rd party.</p> <p>Property Obtained by Fraud: T gains a <u>voidable title</u> from O = O has a <u>right/power</u> to rescission that is ineffective until it is exercised.</p> <p>Power to rescind: title transferred under the contract reverts to the innocent party O. (can be defeated by a <u>bona fide purchaser</u>)</p>
12.3 Tracing	
Personal or Proprietary Remedy	<p>Process of <u>identifying a new asset</u> as a <u>substitute</u> for the old.</p> <p>Remedy: rights generated pursuant to tracing. (strictly not a remedy itself)</p> <p>Proprietary remedy: beneficial interest in the substitute; lien</p> <p><i>Foskett v Mckeown</i> [2001] Trustee use trust money to pay insurance policy. Trustee died and insurer paid death benefit. Beneficiaries of trust (P) claimed a <u>proportionate share</u> of death benefit (over £400,000). Beneficiaries of policy (Ds) sought to limit P's claim to a lien of stolen premiums (£20,440). Held trust beneficiaries entitled to elect: (1) a <u>proportionate share</u> of the death benefit</p>

	or (2) enforce a lien to secure their personal claim for the stolen money.
12.4 Subrogation	
Personal or Proprietary Remedy	<p>P has discharged D's obligation to X.</p> <p>Allows P to <u>step into the shoes</u> of X whose debt is discharged so as to have the benefit of some or all of <u>X's former or present rights</u> against D.</p>
12.5 Lien	
Proprietary Remedy	<p>Entitles P to <u>retain assets in his possession</u> pending payment of a debt owed. (no automatic right to sell the assets to satisfy the debt)</p> <p>Spencer v S Frances [2009] P claim in conversion for return of embroideries. D counterclaimed for a <i>quantum meruit</i> for the work in inspecting and analyzing (which increased the value). Held D was entitled to a quantum meruit of £80,750. A <u>lien</u> can be awarded where labour has been bestowed upon an article, resulting in an <u>improvement</u> in its condition.</p>
12.6 Policy Arguments about Proprietary Remedy	
Swadling	<p>(1) P did not take insolvency risks? Many creditors who cannot be said to have taken insolvency risks. (tort victim)</p> <p>(2) P swell the assets of D? D's estate would not have contained these rights if D had paid his debts as they fell due.</p> <p>(3) In total failure of consideration, position of an unjust enrichment P is analogous to a secured creditor? A proprietary remedy puts P in a <u>better</u> position than a secured creditor.</p>
Evaluation	<p>Does unjust enrichment ever give rise to a proprietary response? Yes.</p> <p>Relatively uncontroversial: <u>rescission</u> and <u>lien</u></p> <p>More controversial: <u>subrogation</u> and <u>tracing</u> (UE case?)</p> <p>Mistaken payment claims: Probably yes (as a matter of HK law)</p>

Unjust Enrichment Analysis Reference [Be prudent, may have many mistakes]

Structure: (1) Was D enriched? (2) Was it at P's expense? (3) Is there an unjust factor? (4) Can D raise any defences? (5) What remedies can P get?

Answer: As requested, I will advise about the possible claims for restitution against the Ds. The analytical framework of unjust enrichment contains four steps (*Shanghai Tongji*):

- (1) Was the defendant enriched?
- (2) Was the enrichment at the plaintiff's expense?
- (3) Was the enrichment unjust?
- (4) Are any of the defences applicable?

Then I will advise about the claims against the Ds respectively.

A. P's claim against D

Issue 1: Was D enriched?

Rule: Enrichment is something of value.

[Money] is a universal medium of exchange (*BP Exploration*) and can be an enrichment (*Falcke v Scottish Imperial Insurance*).

[Use Value] The enrichment's causal connection must be the result of direct transfer, therefore the compound interest (use value) is not allowed while the simple interest (which is derived from failure to pay that debt) is allowed (*Prudential Assurance v HMRC*).

[Service] can be an enrichment and its value is assessed by the service itself rather than the end product (*Cobb v Yeoman's Row*).

There are three steps to assess the value of service (*Benedetti v Sawiris*):

- (1) Objective test: start from the objective market value/price of the service performed by P, and the price is what a reasonable person in D's position would like to pay (ignoring D's 'generous or parsimonious personality' while considering 'conditions increasing or decreasing the objective value of the benefit to any reasonable person in the same position as D, such as D's age, gender, occupation or state of health).
- (2) Subjective Revaluation: not necessary to protect D's freedom of choice, save perhaps in exceptional circumstances.
- (3) Subjective Devaluation: D is entitled to prove that he valued the relevant services (or) goods provided by P at less than the market value. The burden is on D to prove that he did not subjectively value the benefit at all or at less than the market price, and can be rebutted by P, such as (a) D received an incontrovertible benefit (*Peel v Canada*); (b) D requested the benefit; (c) D freely accepted it; (d) D chose to keep it (*Cressman v Coys of Kensington*).

Application:

[Money] D received \$100 and \$100 is money.

[Use Value] D received \$100 and kept it for three months, but as the compound interest (use value) is not the result of direct transfer, the P is only enriched by the simple interest of the \$100 for the failure to pay the debt.

[Service] D received the service provided by P; the valuation analysis is:

- (1) Objective Test: the objective market value/price of P's service is \$100. D's generous personality should be ignored. D's special position as a VIP / film star should be considered. D will always get a discount and the objective market price of the service should be \$80.
- (2) Subjective Revaluation: D intended to spend \$500 to get the service but this should be ignored.
- (3) Subjective Devaluation: D argues that he only thought the value of the service was \$60 but there is no evidence, so there is no subjective devaluation / but it's an incontrovertible benefit therefore there is no subjective devaluation / as there is no free acceptance, the benefit is \$60.

Conclusion:

[Money] D was enriched by \$100.

[Use Value] P can't recover the compound interest of the \$100, P can only recover the simple interest.

[Service] D was enriched by the service and the value is \$100 / \$80 / \$60.

Issue 2: Was it at P's expense?

Rule: There must be a direct transfer from P to D (*ITC v HMRC*):

- (1) D has received the benefit from P, and
- (2) P has suffered a loss through this provision and P wanted to provide this benefit.

Exceptions of direct transfer rule:

- (1) The [receipt by agency] is regarded as a direct transfer.
- (2) The [sham] will be treated as a direct transfer (*Relfo v Varsani*).
- (3) The [co-ordinated transactions] will be regarded as P's discharge of D's obligation (*Banque Financière and Menelaou, Bank of Cyprus v Menelaou*).
- (4) [Tracing]: If D receives property from a third party into which P can trace an interest, the property is the equivalent of P's property in law, and D is treated as if he had received P's property (*Lipkin Gorman*).
- (5) The [discharge of D's obligation] is regarded as [D] is directly enriched. The enrichment is not valued by what the payment the third party receives; but what the discharge D receives.

Application: D received from P and P did want to benefit D though it's mistaken.

Conclusion: It was at P's expense.

Issue 3: Is there an unjust factor?

Rule:

[Mistake] is an unjust factor which is the false belief or assumption (*Pitt v Holt*), a misprediction of future is not a mistake (*Dextra Bank v Bank of Jamaica*).

(1) As for mistaken payments:

- (a) P can recover money paid under a mistake of fact, though P had the means of knowledge of the fact; but can't claim if P deliberately chose not to investigate the facts (*Kelly v Solari*).
- (b) P can recover money paid under a mistake of law (*Kleinwort Benson v Lincoln CC*), it is not barred by the fact that the money remained to be paid (*Kleinwort*), and the mistake is reasonably recoverable from the time when (i) P discovered or (ii) P could with reasonable diligence have discovered his mistake of recognizing that a worthwhile claim had risen (*FII Group Litigation v HMRC*).

(2) As for mistaken gifts: The court can set aside a voluntary disposition on the ground of mistake where there is a "causative mistake of sufficient gravity". (*Pitt v Holt*).

[Duress] is an unjust factor which is the illegitimate threat or pressure over the P which had a causal effect on the P's decision to transfer the benefit (*Barton v Armstrong*). The threats can be both explicit and implicit (*The Alev*). It is sufficient to establish the causative link if D's threat was one reason for P's conduct.

Generally, the duress can only be established when the threat is unlawful. In exceptional circumstances, it can be lawful but unreasonable (*R v Attorney General for England and Wales*).

[Economic Duress] There must be no reasonable alternatives that involves seeking legal redress (*Hennessy v Craigmyle and Co*).

The lawful act economic duress includes (1) exploitation of knowledge of criminal activity and (2) manoeuvring P to waive his claim (*Borelli v Ting*).

[Undue Influence] is an unjust factor which requires (1) there exists a relationship of trust and confidence between P and D and (2) D abuses the relationship to induce P to transfer a benefit.

P must prove there is an actual undue influence / D can rebut the presumption of undue influence.

[Presumed Undue Influence]

There may be an irrebuttable presumption of undue influence if there is a special relationship between P and D (e.g. Parents and minor child; doctor and patient; solicitor and client...).

Where an ordinary person would not have entered into the transaction unless they were unduly influenced, there is a presumed undue influence (*Turkey v Awadh*).

D can rebut the presumed undue influence if D can prove that he has not abused his position, such as the doner had independent advice and was removed from the influence of the donee (*Allcard v Skinner*).

[Failure of Consideration] is an unjust factor which means P has enriched D based on a consideration that fails. The failed consideration may be a failed counter-performance / promise or an event or a situation that was not promised.

The failure must be total (*Stocznia Gdanska v Latvian Shipping Co*).

[Enforceable Contract & Breach] After the breach of the contract, both the innocent party and the party in breach can claim restitution.

The court may interpret the contract obligation in different ways, such as (1) obligations as entire; (2) obligations as infinitely divisible; and (3) obligations as severable in stages.

For a completed obligation, P was confined to a claim for an agreed sum; for the uncompleted obligation, P was entitled to elect for either damages for breach of contract or restitution for failure of consideration (*Mann v Paterson*).

[Frustration] Frustration is one method to terminate a contract. The restitution claim following the frustration is governed by the *LARCO*.

[Money] P can claim the restitution though there is no “total” failure of consideration; the court may allow D to retain the whole or any part of the sums that were paid by P before the time of frustration, provided that the amount does not exceed the expenses that D has incurred to perform the contract (*s.16(2), LARCO*).

[Service, etc.] P can recover the monetary value of benefits in kind transferred to D to the extent that the court considers just. (*s.16(3), LARCO*). The money P can claim is valued by three stages, (1) identification of D’s benefit, (2) valuation of the benefit, and (3) assessment of the just sum (*BP Exploration*).

[Lack of Consent] is an unjust factor.

[Want of Authority] is an unjust factor.

[Illegality] is an unjust factor.

[Incapacity] is an unjust factor.

Application & Conclusion

Issue 4: Can D raise any defences?

Rule:

[Change of Position] is a defence that is available to D whose position has so changed that it would be inequitable to require D to make restitution or make restitution in full. The D must prove (*Zhang Kan*):

- (1) there was a causative link between the receipt of the benefit and its change of position;
- (2) position has changed and makes it inequitable for it to be required to make restitution to P.

There can be independent changes of position caused by the third party rather than D. If the money is “stolen, fraudulently misappropriated, lost or destroyed”, the full restitution will be inequitable (*Credit One*).

There is no Change of Position if the expenditure is not extraordinary (*Scottish Equitable v Derby*).

The burden is on D to prove while a realistic approach is adopted (*Phillip Collins v Davis*).

The change of position can be barred by:

- (1) Bad faith, such as

- (a) D knew about the transfer being unjust (*Lipkin Gorman*).

- (b) D was aware of the risk that the recipient was not entitled to the enrichment (*South Tyneside MBC v*

Svenska International).

(c) D failed to act in a commercially acceptable way such as an inquiry of the payer (*Niru Battery Manufacturing*).

(d) Dishonesty. Considering the facts known by D, a reasonable person would consider their conduct to be dishonest (*Ivey v Genting Casinos*).

In the UK, P must owe “duties and responsibilities” to D as a basis for complaining of D’s commercially unacceptable conduct (*Juliet Bellis v Challinor*) while HK need not be vis-à-vis P (*Arrow ECS*).

(2) Wrongdoing. Any form of illegality constitutes wrongdoing and bars the change of position defence unless *de minimis* (*Arrow ECS*), and the regulatory offence is sufficient (*Pan Jing*).

[**Estoppel**] is a defence that requires (1) representation by P to D, (2) causal reliance (if D knew or was suspicious that D is not entitled to the benefit, no causal reliance), and (3) detrimental change of circumstances of D (*United Overseas Bank*).

Application & Conclusion: D has a partial defence of \$50.

Issue 5: What Remedies can P get?

Restitution: D must give restitution of \$50 to P.

Other remedies:

Rule: A constructive trust can be established if (1) D had actual knowledge of the mistake and (2) there was identifiable trust property at the time of D’s knowledge of the mistake (*Westdeutsche*).

Application & Conclusion: D holds \$25 as a constructive trust.