

A CONSIDERATION OF
RESTITUTION OF UNJUST ENRICHMENT,
WITH PARTICULAR REFERENCE TO ITS APPLICATION TO
PROPRIETARY REMEDIES AND THE LAW OF TRUSTS

The text in this essay is a version of chapter 35 of AS Hudson's Equity & Trusts, 3rd ed., London: Cavendish Publishing, 2003. In the preparation of the 4th edition (Cavendish Publishing, 2005) of that work it was necessary to create space for an extended discussion of the obligations of trustees and consequently chapter 35 was sacrificed – it's publication on this web-site is intended to continue to make these comments available to the viewing public.

*The revisions which have been made to the essay which constituted Chapter 35 of that third edition leave this essay in the following form: first, an outline of the theory of restitution of unjust enrichment before the appeal in *Westdeutsche Landesbank v Islington* in 1996; secondly, a critique of those fundamental principles; and, thirdly, an outline of the development of the law of unjust enrichment after 1996.¹*

1. AN OUTLINE OF THE THEORY OF RESTITUTION OF UNJUST ENRICHMENT BEFORE
1996.

Introduction

In chapter 2 of Hudson's *Equity & Trusts* I consider the proposition that the law of trusts is drawn from general principles of equity and that equity itself is derived from a combination of philosophical principles of achieving just results in individual cases and as an expression of the history of the Chancery's jurisdiction in England and Wales. A key concept in that discussion was that of 'justice': an idea which we identified as being a complex one in the works of Aristotle² and susceptible of various definitions in the context of social justice as applied to rights in the home.³ In this essay we turn to consider the putative law of restitution of unjust enrichment which itself contains this term 'just' but without any of the detailed discussion of the meaning of that concept, and no concept equivalent to the concept of "conscience" in the equitable context.⁴

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All footnoted references are to materials found in the [Bibliography](#) file on this web-site.

² Bostock, 2000.

³ Para 16.4.

⁴ Birks, 2000, 6: considered below.

The purpose of this essay is to analyse critically, in a particularly short compass given the size of their current literatures, two related and hotly contested developments in the jurisprudence of English private law, namely the principle of restitution of unjust enrichment and the principle of restitution for wrongdoing. The place which these principles ought to occupy in the English legal canon is by no means certain. Either they are such fundamental concepts that they have always underlain the laws of England,⁵ or they an aberration imported from Roman law and civil code jurisdictions.⁶

It is this writer's opinion that the issues discussed by the self-styled restitution school are supple, subtle and very important. It is also this writer's opinion, however, that restitution does not and ought not to form a distinct part of English law. Rather, English law already contains the structures to cope with these issues far better than restitution could permit in the future. To accept a general principle of restitution into English law would, it is suggested, do much violence to many principles outwith its purview which depend upon the long-standing equitable structures currently deployed. The crisis of restitution, it is suggested, lies precisely in the indecision identifiable in its adherents as to whether they are simply seeking to re-explain existing dogma or whether they intend really to tear the entire edifice of English private law down and begin construction anew.⁷

35.1.2 What is 'restitution'?

The law of "restitution of unjust enrichment" (to give it its full title⁸) was given its first modelling by Lord Goff and Professor Jones in 1996⁹ and based broadly on the US *Restatement of Restitution* of 1939. As is apparent from many of the speeches of Lord Goff in the House of Lords, his lordship was concerned to promote 'justice' in his judicial work over-and-above formalism in rules, for example, as to the award of compound interest¹⁰ and to permit equitable responses only where the applicant had acted ethically.¹¹ The law of restitution has had a more troubled genesis than that one book written in 1966 would indicate. The *Law of Restitution* as written by Goff and Jones collected a hotchpotch of claims and remedies which appeared to operate so as to achieve restitution either of property or of some value lost by the claimant.¹² As Professor Birks has explained restitution it has the effect of identifying 'a dozen fragments, each with a wayward life of its own, [which] are reassembled'.¹³ And therein lies the core tension at the heart of the restitution project: either the core principles of restitution have always been a part of English law subsumed within its doctrines¹⁴ or it has been recently invented by the restitution school.¹⁵

5 An idea at odds with Maitland, 1939, 5, considered below.

6 Birks, 1997, 1; Hackney, 1997, 123.

7 Beatson, 1991, 245 - in an essay entitled 'Unfinished business - integrating equity'; Jaffey, 2000, 421.

8 Birks, 1998, 29.

9 With the publication of the first edition of Goff and Jones, 1998.

10 In particular his dissenting speech in *Westdeutsche Landesbank v Islington LBC* [1996] AC 669.

11 *Tinsley v Milligan* [1994] 1 AC 340.

12 Goff and Jones, 1998 is the latest edition.

13 Birks, 1998, 1.

14 Ibbetson, 1999, 263 *et seq.*

15 On this tendency to develop new structures cloaked in an assertion of history, see perhaps Morrison, 1997.

For the restitution school, centred mainly on the University of Oxford, the project is one which seeks both to integrate civilian concepts of unjust enrichment derived from Roman law to the law of England and Wales and to take a revisionist approach to ancient case law. The aim of the revisionist aspect of the project is to reinterpret old cases so as to demonstrate that their principles could be explained equally well by reference to a hidden notion of making restitution to the claimant.¹⁶ The Romanesque approach in much of this thinking takes Justinian's institutes as a model so as to assert a new division between the categories of English private law on grounds of consent, wrongs and unjust enrichment:¹⁷ a division which would replace existing divisions between contract, tort, equity, trusts and so forth. Under this new division any matter performed consensually – such as the creation of a contract, express trust or other institution based on common intention – would fall within the rules based on consent. Any matter consisting of a wrong – such as breach of contract, breach of trust, any tort – would fall within the rules based on wrongs. Finally, any matter resulting in the enrichment of the defendant as a result of some unjust factor – such as failure of consideration, mistake, or undue influence – would be governed by the rules on restitution of unjust enrichment.

The principal difficulty with the law of restitution is that its core concepts remain forever layered beneath reams of academic commentary many of which point the way forward in subtly different directions. For example, the Roman law division of concepts set out by Justinian was between 'persons, things or actions'¹⁸ and not simply consent, wrongs and unjust enrichment. Restitution itself applies not only in situations of unjust enrichment but arguably also in situations where there has been wrongdoing more generally: the former concerned to subtract the enrichment, whereas the latter seeks some disgorgement or damages to make restitution to the claimant¹⁹ perhaps to punish the defendant.²⁰ There are a number of terms which can or cannot (depending on your view) be deployed in relation to restitutionary actions: compensation (which might be aimed at achieving something other than restitution²¹, damages (which may not be restitutionary at all on the basis that cash damages are not returning to the claimant any specific property which the claimant has lost²²) and possibly even the word 'restitution' itself (because it does capture the range of events which may give rise to a claim based on unjust enrichment, wrongs, or claims arising out of consenting acts).²³ For some commentators restitution is 'a third division of the law of obligations' alongside contract and tort,²⁴ whereas for other restitution is concerned also with property law²⁵ and the vindication of property rights.²⁶

16 Eg Mitchell, 1994, 4; Smith, 1997, esp 168; Chambers, 1997, 1.

17 Birks, 1998, 29; Hackney, 1997, 123 *et seq.*

18 Birks, 1997, 5.

19 Virgo, 1999, 445 *et seq.*; Jaffey, 2000, 363 *et seq.*

20 Jaffey, 2000, 374.

21 Birks, 1998, 10.

22 Jaffey, 1995; McGregor, 1996.

23 Birks, 1998, 1 *et seq.*

24 Burrows, 1998, 47.

25 Smith, 1997, 24.

26 Virgo, 1999, 656, *et seq.*

As it was, restitution had had to struggle out from under the shadow of the law of 'quasi-contract' which had always treated actions which are now dubbed 'restitutionary' as being based on an implied contract which had been impliedly breached.²⁷ Similarly, Lord Diplock famously proclaimed that 'there is no doctrine of unjust enrichment in English law': another shadow from which restitution has had to struggle to extricate itself.²⁸ Nevertheless, in a number of House of Lords decisions it has been accepted that the principle of restitution of unjust enrichment does exist at English law although there was no detailed guidance given in either case as to what the content of such a principle would be.²⁹ At the time of writing there appear to be three theatres of war as the stormtroopers of restitution continue their march:³⁰ in the academic journals (where activity was never more intense), in judicial pronouncements on the law of obligations (where restitution has had a long-established toe-hold³¹) and in judicial pronouncements on equity and trusts (where restitution suffered its first real casualties). It is on the interaction between restitution and the law of trusts and equity that this essay will focus.

The remainder of this chapter will set out the approaches of the restitution school to resulting trusts, tracing and subrogation, as considered elsewhere in this book already. It is hoped that by drawing these arguments together that the shape of the restitutionary project will become more apparent.

35.2 THE MAIN PRINCIPLES OF RESTITUTION

The restitution school have considered a few equitable claims in depth: resulting trusts, tracing, subrogation, undue influence and equitable compensation. This section will consider, briefly, how each fits within the restitutionary schemata. In Canada, the concept of unjust enrichment, as practised by the US law of restitution, has been adapted to provide rights in the family home for people who would otherwise have received no rights under classical trusts law approaches. This model of unjust enrichment was considered in detail in chapter 14³² and differs significantly from the Oxford model in the ways set out below.

35.2.1 Restitution of unjust enrichment

The basis of restitution of an unjust enrichment

The principle is beguiling simple in outline. It is said that restitution is concerned to reverse an enrichment of the defendant where that enrichment has been made as a result of some unjust factor. Reversal is achieved by subtraction of the enrichment from the defendant. In short the claimant is entitled to say: 'You have made an enrichment at my expense, so give me that enrichment.' The form of the enrichment may therefore either be the acquisition of a specific piece of property, or it may be the acquisition of some cash value. The problem for restitution lawyers is therefore whether the remedy ought to be personal or proprietary.

In Chambers' view '[m]oney is the very measure of enrichment ... by contrast benefits in kind are less equivocally enriching ...'.³³ The basis for this focus on money is the potential for the property to be devalued. His view is extended to say that the existence of a market in that thing (in which it could be said to have value) is not an issue: the question is the subtraction of value from the claimant.³⁴ For instance, where the claimant is seeking a remedy in connection with specific property which has passed to the defendant, what Smith would identify as a following claim,³⁵ it is a simple matter of evidence to establish the title of the claimant. No question of valuation arises in that sense because the remedy is for recovery of property, regardless of its inherent value.³⁶ An argument based on lack of value will not obtain, it is said.

27 Birks, 1989, 29.

28 *Orakpo v Manson Investments Ltd* [1978] AC 95, 104.

29 *Lipkin Gorman v Karpnale* [1991] 2 AC 548; *Woolwich Equitable Building Society v IRC (No 2)* [1993] AC 573.

30 Intellectual shock troops of the Roman tradition with their own law journal – the *Restitution Law Review* – and a growing list of publications: Birks and Chambers, 1997.

31 Burrows, 1998, 47.

32 Para 14.7.

33 Chambers, 1997, 93.

34 Birks, 1989, 19.

35 Smith, 1997, 67–104.

36 Burrows, 1993, 7.

One logical gap in this structure would arise in the following situation. Suppose that Arthur was the owner of all of the shares in a company called Big Ltd. If Arthur entered into a contract with Charlotte which provided that she would sell goods to Big Ltd, but where Charlotte was operating on the mistaken belief that she was contracting with the more reputable Bigger Ltd, then Charlotte may be able to rescind the contract if Arthur knew of her mistake.³⁷ The weakness with the unjust enrichment logic is that no claim would lie against Arthur because Arthur had taken no enrichment from the transaction personally. If Arthur failed to pay and Big Ltd went into insolvency, there would be no claim against Arthur solely on the basis of restitution of unjust enrichment. The claim would have to be based on restitution for wrongdoing or on the basis of some species of fraud but not on the basis of an enrichment. This question is considered below.

Proprietary claims over value

In relation to that question of claims against value, there is a division in restitution between two different measures in which the claimant may recover. The first measure is 'value received'; the second measure is 'value surviving'.³⁸ As Chambers delineates the subject:³⁹

First measure claims to the value received are necessarily personal, whereas second-measure claims to the value surviving are usually, but not necessarily, proprietary ... The resulting trust itself always effects restitution in the second measure (of the value surviving), because it can arise 'only in respect of something identified as existing in the defendant's hands'.⁴⁰ Like all trusts, it cannot exist unless it is 'possible to identify clearly the property which is subject to the trust'.⁴¹

Thus the proprietary claim based on the restitutionary resulting trust is necessarily bound by the established rules of equity as to the identity of property. The issue of founding equitable proprietary claims therefore remains central, in the light of a need for a proprietary base.

The use of the resulting trust

The furthestmost claim for restitution was made by Birks⁴² and by Chambers⁴³ to the effect that restitution could be achieved by extending the doctrine of resulting trust so that it would restore title in any property transferred away on the basis of some unjust factor.⁴⁴ If it were correct to say that English law would reverse an unjust enrichment by means of restoring rights to their original owner, then the resulting trust was said to constitute the most logical means of achieving this objective when the property 'jumps back' (to adopt Birks's terminology) to the claimant.

The elements of this definition are said to fit the resulting trust most closely. Chambers and Birks both acknowledge that these principles will potentially fit a number of different responses, and that closer examination of the resulting trust is therefore necessary. Therefore, Birks requires that two further considerations must be borne in mind. First, the preservation of obligations or property rights which have been created by consent and, second, the preservation of the owner's pre-existing title. In a somewhat syllogistic approach, Chambers supports Birks' view that:

The proof that resulting trusts are restitutionary makes it unnecessary to ask whether they respond to unjust enrichment. If they reverse unjust enrichments, those enrichments are unjust.⁴⁵

Thus, it is said that a resulting trust will reverse unjust enrichment because anything which a resulting trust reverses is unjust. Clearly that is not always the case. In *Vandervell v IRC* for example the resulting trust was not imposed on the basis of justice but rather on an institutional basis arising out of the original equitable owner's right to dispose of the whole of the equitable interest, instead leaving an amount of that interest (represented in that case by an option to repurchase the property) to come back to him on resulting trust.

37 Para 32.2.

38 Birks, 1989, 6.

39 Chambers, 1997, 105.

40 Birks, 1989, 85.

41 See also Waters, 1984, 117; *Cowcher v Cowcher* [1972] 1 WLR 425, 430.

42 Birks, 1992.

43 Chambers, 1997, esp the opening chapter.

44 Cf comments of Millett J in *El Ajou v Dollar Land Holdings* [1993] 3 All ER 717.

45 Birks, 1989, 19.

It is this pattern of exclusion from the ambit of the resulting trust any other factual circumstance, including the rights of an insolvent's creditors, which caused Lord Browne-Wilkinson to reject the restitutionary conception of the resulting trust in *Westdeutsche Landesbank v Islington*.⁴⁶

The opposing view, presented primarily by Swadling,⁴⁷ is predicated on the basis that the resulting trust has arisen from a presumed but vitiated intention to create an express trust. This is opposed to the views of Chambers and Birks, as set out below, that the resulting trust fulfils some restitutionary function not based on prior intention.

The stage was set in *Westdeutsche Landesbank v Islington*⁴⁸ for disagreement between the progenitor of the modern law of restitution, Lord Goff, and the new equity lawyer's broom of Lord Browne-Wilkinson. The bank had transferred property to the authority acting on a mistaken belief that their contract was valid.⁴⁹ The contract was subsequently declared to have been void ab initio and therefore the bank sought to recover the property transferred. These two had taken different approaches to the appropriate use of equity and of trusts implied by law in decisions such as *Tinsley v Milligan*.⁵⁰ The work carried out by Professor Birks in relation to restitution was considered in close detail by the House of Lords in determining which ideological route is to be favoured in deciding the issues arising from the local authority swaps cases. The approach of Lord Browne-Wilkinson was to deny the extended role suggested for the resulting trust by holding that the resulting trust would arise only in two limited circumstances: when a contribution had been made to the purchase price of property and when a trust had been declared without disposing of the whole of the equitable interest.⁵¹

35.2.2 Restitution for wrongdoing

It is a centrepiece of the law of restitution as applied to obligations that it effects disgorgement of any benefit taken by a defendant as a result of the commission of a wrong.⁵² This wrongdoing may apply to equitable wrongdoing,⁵³ including undue influence,⁵⁴ constructive trusts imposed on fiduciaries in relation to secret profits,⁵⁵ constructive trusteeship imposed on strangers to a trust,⁵⁶ and so forth.

Where a contract is entered into by means of undue influence, the contract is rescinded. The rescission of the contract requires the restoration of any property to the claimant which had been transferred under the terms of that rescinded contract.⁵⁷ On this basis, the remedy is said to be restitutionary. The discretionary aspect to the remedy – similar to the equitable remedy of account – arises when the claimant has taken some benefit from the rescinded contract: it is this discretionary aspect which underlines the equitable heritage of the constructive fraud canon.⁵⁸

46 [1996] AC 669.

47 Swadling, 1996, 110.

48 [1996] AC 669.

49 Admittedly, it is not clear whether the basis of restitution here was mistake or failure of consideration: both are canvassed by Hobhouse J at first instance: [1994] 4 All ER 890.

50 [1994] 1 AC 340.

51 Done by applying the reasoning set out in Swadling, 1996, 110.

52 Jaffey, 2000, 363.

53 Virgo, 1999, 518 *et seq.*

54 Considered in chapter 20.

55 Para 12.5.

56 Para 12.5.

57 O'Sullivan, 1998, 42; Virgo, 1998, 70.

58 McGhee, 2000, 610 *et seq.*

In the field of constructive trusts, the law of restitution has an equivocal attitude. Birks considers that constructive trusts tell us only that a trust has been imposed but does not, as a mere badge or label, help us to know on what basis that trust has been imposed.⁵⁹ For Elias, the constructive trust has a number of aims only one of which is to achieve restitution of some property for the claimant.⁶⁰ As considered in chapter 12, constructive trusts divide between proprietary and personal claims – with the roots of that form of trust construed by the court as being based vaguely on a notion of knowledge of some unconscionable act on the part of the defendant. In relation to the generation of secret profits by the trustee in a case like *Boardman v Phipps*⁶¹ or in relation to the receipt of bribes in a case like *Attorney-General for Hong Kong v Reid*⁶² there cannot be an argument that the constructive trusts which are imposed make restitution to the beneficiaries of any property previously held on trust precisely because in those two cases neither Boardman’s profits nor Reid’s bribes had previously belonged to the beneficiaries.⁶³ Jaffey suggests that the aim of the constructive trust is to disgorge those profits.⁶⁴ However, this does not explain *why* the fiduciary is required to account to the beneficiaries for those profits. The answer is that equity imposes a particular set of duties on the trustee and the fiduciary which forbids any unauthorised profit being taken from the fiduciary relationship.

That form of constructive trusteeship which is imposed on strangers to the trust is more difficult to classify. There is no trust properly so-called precisely because there is no property held on trust: rather the dishonest assistant to a breach of trust or the knowing recipient of property misapplied in breach of trust are both held *personally* liable to account to the beneficiaries for their loss as though they have been expressly appointed as trustees to the trust. The restitution lawyer would contend that all three categories of defendant (malfeasant trustee, dishonest assistant, and knowing recipient) are liable to the claimant beneficiaries to make restitution for their wrongdoing.⁶⁵ Again, the liability arises from equity’s determination to protect beneficiaries from the ramifications of any unauthorised reduction in the size of the trust fund.

35.2.3 Vindication of property rights

One of the more progressive concepts advanced as part of the emerging law of unjust enrichment is that of ‘vindication of property rights’ in the writings of Graham Virgo.⁶⁶ The aim of this mooted head of restitution would be to provide a remedy which recognised that the claimant had rights in property before the unjust or wrongful act of the defendant which led to the defendant taking possession of that property. The expression ‘vindication of property rights’ draws on the Roman remedy of *vindicatio* which would similarly give rise to a declaration of ownership rather than requiring any re-transfer of property.

The concept of vindication could stretch to cover a range of circumstances. At one level it could equate to the following claim identified by Smith⁶⁷ by which a person is able to recover property taken from them involuntarily. For example, a victim of crime whose property is taken by a thief (therefore without the victim’s consent) could be returned to the victim of crime by means of a vindication of those rights. This argument is in effect the same as the argument that the proceeds of theft ought properly to be considered to remain the property of their original owner unless there has been any voluntary transfer of title in them. In this sense it should be argued that there is no ‘restitution’, in the sense of a restoration, of title in the original owner because that owner is merely recognised as continuing to own that property.

59 Birks, 1989, 89.

60 Elias, 1990, 1.

61 [1967] 2 AC 46.

62 [1994] 1 AC 324.

63 Para 12.8.

64 Jaffey, 2000, 401.

65 *Soulos v Korkontzilas* [1997] 2 SCR 217. Cf *Fortex v Mackintosh* [1998] 3 NZLR 171.

66 Virgo, 1999, 656.

67 Smith, 1999, 6.

Alternatively, it might accord with the approach of the Court of Appeal in *Jones, FC (A Firm) v Jones*⁶⁸ in which it was held that common law tracing operated to recognise title which the Official Receiver had in partnership money which had been paid to Mrs Jones and which she had invested successfully in potato futures. In that case, Millett LJ held that the original fund of £11,700 taken from the partnership which had been successfully invested and had grown to £49,860, should be transferred to the Official Receiver under a common law tracing claim. At one level, the novel common law remedy⁶⁹ advanced here by Millett LJ accords with the notion of vindicating the property rights of the 'rightful' owner of property such that that owner takes title in not only the original property (here, £11,700) but also any profits attaching to that property (here, £49,860).

The concept of vindication of property rights has been accepted by the House of Lords in *Foskett v McKeown*⁷⁰ in which a trustee had taken trust property in breach of trust and used it to pay the premiums on life assurance policies taken out in favour of his spouse and children. It was held that when the life assurance policy paid out to the trustee's dependants after his death, that property should be held for the beneficiaries of the trust in proportion to their contribution to the total amount of the life assurance premiums. The basis of the beneficiaries' claim was that the lump sum paid out on the life assurance policy constituted the traceable proceeds of those trust moneys transferred away in breach of trust. As such, the tracing claim was said to vindicate the property rights of the beneficiaries and thus achieve restitution for the original breach of trust.

The etymology of the word 'vindicate' is in itself interesting. While it has a happy coincidence with the Roman action of *vindicatio*, the word 'vindication' culled from that Latin also has a sense of 'avenging' as well as 'restoring'. In common with what has already been said about restitution for wrongdoing in the preceding section the notion of vindicating property rights would tally with a sense of punishment in the treatment of those who have wrongfully taken possession of another's property.⁷¹

2. A CRITIQUE OF THE THEORY OF RESTITUTION OF UNJUST ENRICHMENT.

35.1.3 The argument of this essay

The principle contention of this essay is that 'restitution' is simply a description of a group of actions which permit the claim to acquire restitution of some traceable property or restitution of a loss by means of money. It is not true to say that 'restitution' is an area of law in itself; rather it is one adjective which could be applied to a range of actions which entitle the claimant to recovery of some property or of some value lost to her. The alternative explanation of those claims which fall within the concerns of the restitution specialists is that they are already well-established between the existing English categories of contract, tort, trusts and so forth and that all that has been done is to transplant into the restitution textbooks from their natural soil those claims which respond to the adjective "restitutionary". The suggestion is then that equity has no further utility because it can be better explained by concepts of restitution.

The reader may think at this point that I am becoming hysterical. That there is no 'threat' to equity by this development of restitution. 'Surely,' you might say, 'it is only an attempt to explain the common heritage between varying forms of torts, contractual claims and equitable claims. Surely, restitution is not attempting to *replace* equity.' Well that is not so. Professor Birks⁷² has approved Professor Beatson's project of displacing equity with a law of restitution.⁷³ Similarly, side-projects like the development of a unitary law of tracing are intended to remove the need to trace specifically in equity thus permitting an ability to trace generally.⁷⁴

68 [1996] 3 WLR 703.

69 Virgo, 1999, 657; cf *Greenwood v Bennett* [1973] QB 195.

70 [2000] 3 All ER 97.

71 See perhaps Jaffey, 2000, 374.

72 Birks, 2000:3, 261.

73 Beatson, 1991, 244 *et seq.*

74 Eg Birks, 1995.

The argument pursued below is that it is simply not possible for a vague concept like 'restitution of unjust enrichment' to displace the whole of equity for two reasons: first equity is built on a philosophical ground which requires that it be more broadly based than simply a concern with restitution of property or value, and secondly that restitution cannot hope to explain injunctions, specific performance, express trusts and that host of equitable remedies which do not correspond to the adjective "restitutionary".⁷⁵ Restitution has focused for some time on picking off the wounded animals which crouch at the edges of the conceptual herd of equity, like lions near the water-hole: resulting trusts, equitable tracing and so forth. They are wrong philosophically and they are wrong categorically to say that restitution of unjust enrichment can replace all that is currently done in the name of 'equity'. If we cannot find a comprehensive means of displacing all of equity (let alone a philosophically convincing reason for doing so) then we should not seek to displace any of it by hacking out those lumps which have an ostensible match to other concepts. As the final essay in this book will argue, there remains much work for equity to do in terms of social justice which would not benefit from any intercession from restitution at its edges.

35.1.4 Some objections to the principle of unjust enrichment

A jumble of odds and ends

The first weakness of restitution as a coherent category is that many of the actions grouped together under the heading of 'restitution' do not fit together. It is said that restitution is a new way of thinking of a hotchpotch of common law and equitable claims, so that old disparities between contract, tort and equity can now be overlooked. That is not the objection being raised here. Rather restitutionary actions are a groups of claims which share some loose connection with the idea of giving something to X because Y has benefited from some breach of duty owed to X, or some wrong done to X, or some similar 'unjust factor' exerted over X. What is clear is that there is no necessary link between this rag-bag of claims in contract, tort, and equity other than that they appear to fit into a variety of categories slung from the belt of this term 'restitution'. That restitution requires so many sub-divisions exposes its inadequacy as a principle which will underpin all of our existing claims and actions. That restitution would seek to take some but not all of the existing claims and remedies means that we would be left with an inexplicable rump of actions if restitution were given its way. Inexplicable actions in that they would be robbed of their rationales if restitution were able to snatch them away from their historical moorings and from their conceptual underpinnings.

The second weakness of restitution is that it cannot reconcile with its core concerns a range of other actions which do not fit neatly into this bracket of 'restitution' but which are closely linked to claims and remedies which advocates of restitution claim as their own, such as equitable compensation, express trust and so forth. The reason why I have been so careful to include the express trust as part of equity is to explain that there are many trusts which play no part of anything to do with restitution but which are necessarily part of the law of trusts.

What is meant by 'unjust' enrichment?

The main objection raised against this broad category of restitution is that it deliberately avoids providing any content for its actions being based on 'unjust enrichment'. It is not sufficient to say that the injustice at which it aims is merely a 'technical' matter as Birks does: the question of 'just' and 'unjust' is one which occupies a far more important philosophical ground than that. As Birks has put it: "'Unjust' here is technical. An enrichment is unjust if the circumstances are such that the law requires its recipient to make restitution."⁷⁶ This is a circular statement. The term 'unjust' necessarily involves a value judgment about what constitutes justice in any particular case. What restitution lawyers prefer is rationality. As Birks states that matter: 'We are not all as brave as Cranmer but like him we know it is better to burn than to live in a world which has abandoned rationality.'⁷⁷ The purpose of my discussion is to demonstrate that seeking to cling to rationality too firmly will not always permit justice to be achieved.

⁷⁵ In the interests of fairness, I should point out that no restitution specialists have suggested that they could be replaced by unjust enrichment.

⁷⁶ Birks, 2000:1, 6.

⁷⁷ Birks, 2000:1, 8.

One of the primary complaints about the law of restitution is the tension between its avowedly logical approach to establishing rights either to proprietary claims or some other restitutionary claim, and the concomitant overlooking of the normative content in terms like 'unjust' and 'wrongdoing'. The restitution lawyers appear to want it both ways – they want to rely on the logic of their positions without unearthing the ideologically loaded language of justice and injustice, rightful behaviour and wrongful behaviour. Again, to quote Birks: 'All rights arise from events in the world.'⁷⁸ Yet restitution fails to acknowledge distinctions between categories of case and suggests that the single, technical standard of 'justice' contained in unjust enrichment will fit all cases. As will be suggested below, the only context in which it can hope to work effectively, without filling in the concept of "justice", is in relation to the termination of commercial contracts, as considered below.

No application to non-pecuniary, non-proprietary claims

Restitution has only limited itself to recent cases involving payments of money and recovery of private property. It is a necessarily parochial focus of attention. That is not to say that it could not be extended to cover other areas – but it does mean that the absence of any theory of 'just' and 'unjust' makes it currently unsuitable for wider application. With the development of human rights law it is important that we adjust to thinking of right and wrong in relation to rights in property, to a family life, to a fair trial and so forth: it is important that both equity enthusiasts and restitution enthusiasts think more dynamically about words like 'justice' and 'conscience'. Whether one is entitled to recover title in property transferred under a mistake is a much easier question than whether one has a right to a state pension to which one has contributed for one's working life or whether one has a right to receive remuneration from an employer for whom one has performed overtime prior to their insolvency. These latter questions are questions of justice and questions of rights in property. What is needed is a more dynamic way of conceiving of them in the future. It is only an equity based on philosophically clear principles of providing individual rights and responsibilities which can hope to answer such conundrums satisfactorily.

Compared to this, the philosophical principle of equity outlined in chapter 17⁹ demonstrates a potential breadth of application which cannot be matched by unjust enrichment. First, the institutional express trust operates both as a form of contractual agreement in many situations between settlor and trustee but which also operates on an *unconscious* level to allocate title between parties who did not know that they were creating a trust.⁸⁰ This form of unconscious express trust is considered in chapter 36 below and applies in cases like *Paul v Constance* where title was allocated between the parties on the basis of good conscience and nothing else.⁸¹ Without a notion of equity based on good conscience there would not be a right for that property to be held on express trust, rather the claimant would be entitled only to a restitutionary claim to subtract any property held by the defendant subject to a defence of change of position. The express trust has always formed part of the general jurisdiction of equity and has not been based on a principle of unjust enrichment.

Second, equity contains a range of remedies which are not predicated on dealings with property such they achieve any restitution of any property. So remedies of injunction, account, specific performance, rectification and so forth are not predicated on anything other than achieving equitable results in individual cases, in accordance with their own specific principles, where the common law would not permit such fairness. The call to replace equity with restitution forgets how much is bound up in equity – both at the philosophical level and in terms of the history of the Chancery jurisdiction. The group of concepts dealt with in this book under the rubric of 'equity' have cogent intellectual ties one to another which the hotchpotch of purported restitutionary claims and remedies do not. The term 'restitutionary' is an adjective which fits some remedies, in the same way that 'tall' fits some people. Just as the word 'tall' will not fit all people, the word 'restitutionary' will not adequately describe all of the claims and remedies which are recognised by equity: only the word 'equitable' as defined in chapters 1–37 of this book will both describe and fulfil the underlying purposes of those actions.

78 Birks, 2000, 7.

79 Para 1.1.

80 As considered in detail in para 36.2.2 below.

81 [1977] 1 WLR 527.

Two cheers for conscience

The term “conscience” itself has been criticised as being incapable of explaining a system of legal rules. It has been considered throughout this book consciously and unconsciously, that is on the basis that all trusts are predicated on a notion of conscience and that courts of equity are courts of conscience. The feasibility of the notion of conscience as founding a system of rules is considered in greater detail in chapter 37:⁸² briefly put, it is suggested there that our idea of conscience must be concerned both with considering the morality of the defendant’s behaviour and also with an understanding that the morality making up an individual’s conscience is objectively formulated such that it is susceptible of external sanction through law. A less temperate attitude to “conscience” is taken by Professor Birks. First, Birks is suspicious of conscience thinking in any event because, it is said, equitable concepts such as constructive trusts do not make it clear on what basis the remedy is being awarded. The counter-argument is simply that concepts such as constructive trusts are imposed in any situation in which the defendant has acted unconscionably. Consequently, its premise is clear but the content of the term “conscience” requires careful construction just as the “justice” comprised in unjust enrichment requires explanation. What Birks says further about “conscience” is the following, surprising thing. Secondly, in three essays⁸³ Birks has drawn attention to the fact that the leading Nazi, Reinhard Heydrich (chief of the Gestapo and architect of the vile “final solution” of the concentration camps) accounted for his actions on the basis that he was acting in line with his own conscience: ‘For the fulfilment of my task I do fundamentally that for which I can answer to my conscience ... I am completely indifferent whether others gabble about breaking the law’.⁸⁴ Therefore, it is said by Birks, anyone who propounds this notion of conscience is adopting thinking characteristic of Nazis. Of course, that is the very last thing that the proponents of conscience are arguing for. What they are arguing for, briefly put, is an acceptance of the proposition that law must be made up of a combination of positivism and natural law: that is, there must be law created through legitimate means and also law which responds to some form of morality. By definition that is the antithesis of the Nazi code which Professor Fuller and others have argued does not qualify even as “law” because it lacked the necessary moral worth.⁸⁵ All we ask is that the law retain a set of principles (equity, in effect) as a means of distinguishing between right and wrong. As Hedley has pointed out, just because a Nazi once used the word “conscience” in sense *x*, that does not mean that anyone else who uses that word also means *x*.⁸⁶ Birks’s argument must mean that anyone who doubts restitution on the basis of an idea of conscience is a fascist: that is not an idea I intend to dignify with any further consideration. Instead I refer to the reader to the various discussions of conscience already in this book and in chapter 37.

3. THE DEVELOPMENT OF THE THEORY OF UNJUST ENRICHMENT SINCE 1996.

4. CONCLUSION

To term this a ‘conclusion’ is perhaps a little ambitious. The volume of academic literature in this area continues to grow apace. There are even e-mail chat-rooms for the restitution community to plumb the depths of each new judicial or academic development. The journals are splitting at the seams with new thoughts, new cases, and new structures. So, perhaps this is an addition rather than a conclusion.

82 Para 37.

83 E.g. Birks, 1996, 10.

84 Quoted in AH Campbell ‘Fascism and legality’ (1946) 62 LQR 141, 147.

85 Fuller, *The Morality of Law*.

86 Hedley, 2003.

That restitution of unjust enrichment forms a part of English law at the time of writing is undeniable in the wake of the House of Lords decisions in *Lipkin Gorman* and *Woolwich*. What is unclear is the future of these principles: whether they will remain part of English law (or whether they even *ought* to be a part of English law). Lord Browne-Wilkinson has made reference to the notion of restitution as being a part of the long-understood process of restoring title in property to a person who has had identifiable property taken from them, as in the claim for money had and received. However, rather than being an acknowledgement that restitution forms a part of English law, his lordship was suggesting merely that the term forms part of the vocabulary of English law and that, in line with his own speech in *Westdeutsche Landesbank*, the much-vaunted principle of restitution of an unjust enrichment forms no meaningful part of that conversation.

Indeed, in looking back over the equitable principles considered in this book, the argument for restitution has only been attempted to be made out in relation to constructive trust, resulting trust and subrogation. The question of trusts of homes and restitution has been put through this wringer only in Canada. And that is perhaps the most useful illustration of the limits of the English principle of unjust enrichment. In Canada there is no *restitution* of any pre-existing property right to the claimant. It is not suggested that the claimant has lost some interest to the defendant and that it is *only that very interest* which is being restored to the claimant. On the contrary, the claimant is able to acquire rights to property in which the claimant had not previously had any title. What is being advanced is, in truth a principle of *justice and injustice*, using the moniker 'unjust enrichment'. That is exactly the same technique as relying on a term like 'unconscionability' – it is a fiction used to achieve a just result.

Acting on conscience to achieve a just result is precisely what Equity has always done, whether through the trust or through the equitable claims and remedies considered in this book. As such there is no need to replace Equity with another set of principles based on Roman law, but rather to ensure that the current form of equity is made to operate properly. The weakness of restitution is that it is limited in its scope. It refers, literally, to *restoring* property to its original owner. That is a very brittle principle: if there remains nothing to restore, or there never was any thing to restore, then restitution does not have any role to play. Therefore, that definition is only useful in relation to property. It is less useful in relation to personal obligations in relation to which there is no property at issue. In any event, 'restitution' cannot replace the entirety of equitable principles – it is not meant to. However, this limit on its applicability must make it of only limited utility.

Consequently, the expression 'reversal of unjust enrichment' is now used. The focus is on the identification of some unjust enrichment and then on reversing it. The weakness with that principle is that it requires removing the current notions of Equity in many circumstances to replace a notion of 'conscience' with a notion of 'injustice' in circumstances in which it is difficult to see what the practical distinction between the two would be.

Ultimately, the weakness of restitution is that it is seeking to impose order on a chaotic world. Equity is lyrical and vague because the contexts which it is asked to consider are similarly vague, albeit not always lyrical. Not everything is capable of being reduced to certainty. However, equity itself must be developed so that its ancient principles keep pace with social change, particularly the split between commercial and non-commercial litigation. That development resolves itself to a necessary questioning and re-questioning of the meaning of the term 'conscience' which lives at the heart of Equity. In the final analysis, you cannot impose order on a fundamentally chaotic universe.