mistakes of law, particularly those identified by retrospective application of judicial decision, was too great. They gave the example (at [291]) of the invitation to the Supreme Court in *Rock Advertising Ltd. v MWB Business Exchange Centres Ltd.* [2018] UKSC 24, [2019] A.C. 119 to overrule *Foakes v Beer* (1884) 9 App. Cas. 605, which could have unsettled over a century's worth of payments. By changing the law to bring in a claim for payments by mistake of general law – as opposed to mistake as to private rights in *Cooper v Phibbs* (1867) L.R. 2 H.L. 149 – the minority argued a new state of affairs that was not within the intention and purpose of Parliament was created (at [274]). The minority went so far as to say at [287] that on a purposive construction of the Limitation Act 1980 the provision could not have been intended to cover mistakes of general law as the language is not apt to do so. It seems, however, incorrect to say that section 32(1)(c) cannot apply to mistakes of law; the natural construction of the language, as we have seen, does not allow for that interpretation and it re-introduces the mistake of law/fact distinction that caused so many problems prior to the abolition of the mistake of law bar. That said, there will be a complex exercise of examining evidence to decide when time starts to run on the majority's view. If that proves too complex, a solution might be one I proposed in 2000 that the mistake was reasonably discoverable when made because it was possible to construct the argument that the original decision was wrong then. If this finds no favour, legislation may be needed.

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BUILDING UNEXPECTEDLY ACCEDES TO LAND

IN *School Facility Management Ltd. v Christ the King College* [2021] EWCA Civ 1053, Christ the King College was desperate to open a sixth form. The only problem was that the college could not afford a building to teach sixth-formers in. So instead of paying the full cost of a building up front, the college entered a "Hire Contract" with some builders. The builders built a modular building for the college. In return, the college agreed to pay an annual payment for 15 years and then dismantle and return the building. The building opened in 2013 and the college made its first four annual payments. Then in 2017 the college stopped paying. The builders sued.

At first instance, Foxton J. gave two careful judgments which repay close reading ([2020] EWHC 1118 (Comm), [2020] P.T.S.R. 1913; [2020] EWHC 1477 (Comm), [2020] 1 W.L.R. 4825; noted [2021] L.M.C.L.Q.

63). He held that the contract was ultra vires for the college and so void. This left both parties unjustly enriched.

The college was enriched by the use of the building. This was unjust because the builders provided the building on condition that the college pay for it, and that condition had failed in respect of the period after 2017. The builders were therefore entitled to restitution in respect of the value of the college's use of the building between 2017 and date of judgment, valued at £0.7 million.

Meanwhile, the builders were enriched by the college's payments, totalling £3.2 million. This was unjust because the college paid under a mistake that the contract was legally binding, or because the college paid on condition that the contract was legally binding, or because the payments were ultra vires. However, the college could not claim restitution because the builders had a change of position defence. In anticipation of receiving the college's payments, the builders changed their position by spending £5.8 million on constructing the building.

The interaction of the cross-claims raised tricky issues. The parties accepted that there exists a "principle of counter-restitution": "in certain circumstances a party seeking a restitutionary remedy for unjust enrichment must give credit for benefits received from the other party" (at [25]). The question for the Court of Appeal was whether this counter-restitution principle applied before or after the builders' change of position defence.

The builders argued that the change of position defence applied first and the counter-restitution principle second. They had a change of position defence to the college's claim, whereas the college had no defence to the builders' claim, leaving the college to pay £0.7 million to the builders.

By contrast, the college argued that the counter-restitution principle applied first and the change of position defence second. On this approach, the builders' enrichment of £3.2 million less the college's enrichment of £0.7 million produced a net enrichment for the builders. The builders could then raise their change of position defence, so there were no claims for restitution.

The Court of Appeal held that it was unnecessary to decide whether the counter-restitution principle applied before or after a change of position defence. Instead, it held that the counter-restitution principle did not apply on the facts. It is "too simplistic to say that all benefits provided in each direction under a void contract must generally be taken into account" (at [80]). Instead, "the benefits for which the claimant must give credit are those which are sufficiently closely connected with the benefits provided to the defendant that justice requires him to do so" (at [83]).

Here, each of the college's annual payments was referable only to that year's use of the building. The counter-restitution principle therefore operated on a year-by-year basis. In the builders' claim for restitution of the value of the college's use after 2017, there were no payments for the

builders to give counter-restitution of. The builders were therefore entitled to £0.7 million, representing the college's use of the building from 2017 to date of judgment.

The court's reasoning is not without problems. Four years ago, "sufficient connection" was rejected as the test for whether an enrichment came at the claimant's expense. In *Investment Trust Companies v Revenue and Customs Commissioners* [2017] UKSC 29, [2018] A.C. 275, at [37], a unanimous Supreme Court held that this test is "too vague to provide clarity" and "leaves unanswered the critical question, namely, what connection … is sufficient?". The same applies here.

Fortunately, a workable test is implicit in the court's application to the facts. This implicit test asks whether the defendant transferred a benefit to the claimant on condition that the claimant transferred a benefit to the defendant. If the law then requires restitution, then the law causes this condition to fail, and so the law must also require counter-restitution. Here, each of the college's annual payments was only "referable to" (i.e. conditional on) that year's use of the building (at [86]). The college's payments were not conditional on use of the building after 2017. So the builders' claim for restitution after 2017 was not subject to counter-restitution. In short, the court's "sufficiently close connection" test is best understood to mean that a claimant must make counter-restitution where its benefit was conditional on the benefit for which it seeks restitution.

Ultimately, *Christ the King* becomes an easier case if one considers who owns the building. The contract was described as a hire contract and both parties proceeded on the basis that the builders owned the building. However, objects fixed to land become the property of the owner of the land. House of Lords authority establishes that this is determined by the law, not the parties' subjective intentions or their contracts: *Melluish v BMI (No 3) Ltd.* [1996] 1 A.C. 454; *Elitestone Ltd. v Morris* [1997] 1 W.L.R. 687.

These cases establish the following principles. The question of who owns a fixture is distinct from the question of whether another party has a (contractual) right to remove it. Whether an object is sufficiently fixed to the land to become a fixture depends on both the degree to, and objective purpose for, which it was fixed. Buildings have consistently been treated as owned by the landowner. However, in *Elitestone* there are dicta suggesting that a building which can be taken down and rebuilt elsewhere is a chattel and so does not become the property of the landowner.

One might think that the modular building in *Christ the King* falls into this exceptional category. But this was no portakabin. Foxton J. found that the building was custom-built, "was intended for permanent use on its original site and was designed in accordance with that intention" (at [247]). After years of litigation the building remains on the college's land (at [433]–[440]). Moving the building would require a 100 tonne

crane and cutting through bolts (at [241]) and would not be economically viable (at [243], [247], [248]). In place, the building was worth c.£6m (at [219(i)], [233(v)]) but if dismantled its re-sale value was "negligible" (at [493]).

On balance, the building is fixed to the college's land and so the property of the college. This provides an elegant solution to three issues.

First, the college was enriched not merely by use of the building for a length of time. Instead, it was enriched by title to the building forever. Consequently, there was no need to take a year-by-year approach to counter-restitution. Instead, the builders' claim for restitution in respect of the college's enrichment (the building, worth approximately £6 million) required the builders to give counter-restitution of the college's payments for the building (£3.2 million).

Second, the builders cannot raise a change of position defence to the college's claim for counter-restitution. They can be credited for either the value of the building or the cost of providing it. But giving the builders credit for both would amount to double recovery. The builders can either claim restitution or raise a change of position defence. Not both.

Finally, on the court's approach, the college has to pay only £0.7 million now, but the builders still own the building. As each day passes, the college comes under a new obligation to make restitution of the value of that day's use to the builders (arguably: see [433]–[440] of Foxton J.'s decision). By contrast, if the college owns the building, then it is entitled to continue using it and will not come under further obligations. The college has to pay more now (approximately £2.8 million) but then the parties get a clean break.

In summary, buildings accede to the land on which they are built. The college should have been ordered to make restitution of the value of the building (approximately £6 million), less the £3.2 million already paid.

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CIVIL CLAIMS FOR SECRET COMMISSIONS

THE civil law's objection to bribery and undisclosed commissions is usually said to be a concern about abuse of position by an agent for his or her personal advantage, typically to the disadvantage of his or her principal (*Industries and General Mortgage Co. Ltd. v Lewis* [1949] 2 All E.R. 573, 575 (Slade J.); *Fiona Trust & Holding Corp v Privalov* [2011] EWHC 715 (Comm), at [73]). In these circumstances, the agent is