

INTERCEPTIVE SUBTRACTION, UNJUST ENRICHMENT AND WRONGS—A REPLY TO PROFESSOR BIRKS

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*An Introduction to the Law of Restitution*¹ was a landmark in private law. More clearly than any preceding work, it unpacked the ambiguity inherent in the notion of “the claimant’s expense” by delineating two forms of “unjust enrichment”. (1) The *autonomous action in unjust enrichment* involves a *subtractive expense*. The defendant acquires a benefit from the claimant in circumstances that the law regards as reversible. The response is always *restitution*. The defendant must give the enrichment, or its value, back to the claimant. (2) *Unjust enrichment by wrongdoing*, in contrast, is concerned with a normative or *wrongful expense*. The defendant acquires a benefit, usually from a third party, as a result of breaching an obligation owed to the claimant (e.g. trespass to land). Although the standard response to a civil wrong is compensation for the claimant’s loss, a court exceptionally may compel the defendant to give up, or *disgorge*, his ill-gotten gain.

The distinction between a subtractive expense and a wrongful expense is critically important. It determines the cause of action (autonomous unjust enrichment or some species of civil breach), the remedy (restitution or disgorgement), and, at a deeper level, the rationale for the court’s intervention (reversing an impugned transfer or stripping a wrongful gain). That distinction nevertheless has come under attack. And somewhat surprisingly, a chief antagonist is Professor Birks himself. In 1998,² he formally rejected the quadrature thesis, which holds that unjust enrichment invariably and exclusively triggers restitution. “Restitution”, he insists, can respond to various events, including wrongs. Upon close examination, however, that argument does not so much deny the ambiguity of “the claimant’s expense”, as obscure it. In substantive

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¹ P.B.H. Birks, *An Introduction to the Law of Restitution* (Oxford 1985).

² P. Birks, “Misnomer” in W. Cornish *et al.* (eds.), *Restitution: Past, Present & Future* (Oxford 1998), 1; cf. A. Tettenborn, “Misnomer: A Response” *ibid.*, at p. 31; M. McInnes, “Restitution, Unjust Enrichment and the Perfect Quadrature Thesis” [1999] *Restitution L. Rev.* 118; A. Burrows, “Quadrating Restitution and Unjust Enrichment: A Matter of Principle?” [2000] *Restitution L. Rev.* 257. See also P. Birks, “Unjust Enrichment and Wrongful Enrichment” (2001) 79 *Texas L. Rev.* 1767.

terms, Birks continues to recognise the division outlined in the previous paragraph. The difference is that he now narrowly confines “unjust enrichment” to the autonomous action of that name, while broadly defining “restitution” to include any remedy that, by design or chance, requires the defendant to hand over a benefit. The primary difficulty with that argument is terminological. The uninitiated are apt to interpret “restitution” and “unjust enrichment” at the same level of specificity. If so, the claimant’s action for “restitution” of a wrongful gain may lead a court to demand proof of the autonomous action in unjust enrichment. A subtractive enrichment will be required where a normative expense should suffice.³

I. INTERCEPTIVE SUBTRACTION

Birks more recently has pursued another argument which, if accepted, will indeed substantially affect the traditional division between enrichment by subtraction and enrichment by wrong.

The autonomous action in unjust enrichment requires a subtractive enrichment: the defendant’s gain must have come from the claimant. In a paradigm case of mistaken payment, £100 moves out of the claimant’s pocket and into the defendant’s. There is a *direct subtraction* between the parties. The courts, however, occasionally have been willing to extend that model to include cases of *interceptive subtraction*. Even if the defendant did not receive an enrichment directly from the claimant, liability may be imposed if he obtained from a third party a benefit that otherwise would have accrued to the claimant. A third party holds £100 that is (in some as yet undefined sense) destined for the claimant’s pocket. *En route* it is intercepted by the defendant. It is *as if* the defendant subtracted £100 from the claimant.

The scope of interceptive subtraction is somewhat uncertain.⁴ A number of situations commonly thought to be illustrative actually involve direct subtractions in disguise. That may be true, for instance, if property becomes impressed with a trust in the claimant’s favour after it is acquired by the defendant from a third party. The defendant’s retention of the asset constitutes a direct subtraction of something already belonging to the claimant (albeit not yet reduced to his possession).⁵ The clearest example of true

³ That error has occurred in Canada: *LAC Minerals Ltd. v. International Corona Resources Ltd.* (1989) 61 D.L.R. (4th) 14 (S.C.C.).

⁴ G. Jones, *Goff & Jones: The Law of Restitution* 6th edn. (London 2002), pp. 41–43; A. Burrows, *The Law of Restitution* 2nd edn. (London 2002), pp. 31–42; A. Tettenborn, *The Law of Restitution in England and Ireland* 3rd edn. (London 2002), pp. 18–20.

⁵ A trust may arise if the third party does everything possible to confer a gift upon the claimant, but, before the gift is perfected by possession, the defendant acquires legal title to the property:

interceptive subtraction involves the antiquated concept of usurpation of office.⁶ By virtue of holding an office, the claimant was entitled to extract a fee from a third party. The defendant stepped into the claimant's place and received payment for himself. Notwithstanding the unjustified nature of the defendant's conduct, the third party's obligation to the claimant was discharged. The defendant was liable to the claimant for the value of the intercepted benefit. A structurally similar analysis may apply if a person intercepts rent owed by a tenant to a landlord.⁷ So too, relief may lie in favour of a properly appointed representative against a self-appointed representative who receives a benefit due to an estate.⁸ Several other purported instances of interceptive subtraction are more controversial.⁹

Although the case law is under-developed, academic analysis has been generally consistent. In 1985, Birks stated that restitution should be possible only if a benefit "would *certainly* have arrived in the plaintiff if it had not been intercepted by the defendant *en route* from a third party. . . . The certainty that the plaintiff would have obtained the wealth in question does genuinely indicate that he became poorer by the sum in which the defendant was enriched".¹⁰ Others have taken a slightly more restrictive view.¹¹ Whereas Birks entertained the possibility that the requisite certainty could be either legal or factual, Virgo insists that the claimant suffers an expense only if, in making payment to the defendant, the third

Re Rose [1952] Ch. 78 (C.A.). So too, in a case of secret trust, if the defendant obtains property upon the third party's death, having promised the deceased that the benefit would be turned over to the claimant: *Ottaway v. Norman* [1972] Ch. 698. And again if, having received an identified fund from the third party with instructions to turn the benefit over to the claimant, the defendant "attorns" by informing the claimant that he will abide by that undertaking. At the moment of attornment, title becomes vested in the claimant, either equitably or perhaps legally: *Goff & Jones, ibid.*, ch. 28.

⁶ *Arris v. Stukely* (1677) 2 Mod. 660, 86 E.R. 1060; *King v. Alson* (1848) 12 Q.B. 971, 116 E.R. 1134.

⁷ *Lyell v. Kennedy* (1889) 14 App. Cas. 437; *Official Custodian for Charities v. Mackey (No. 2)* [1985] 1 W.L.R. 1308 (Ch. D.).

⁸ *Jacob v. Allen* (1703) 1 Salkeld. 27, 91 E.R. 26; *Yardley v. Arnold* (1842) C. & M. 434, 174 E.R. 577.

⁹ *Khan v. Permeyer* [2001] B.I.P.R. 95 (C.A.). It sometimes is said that restitution may be available for the purpose of rectifying a gift. A third party prepares a deed with the intention of donating property to the claimant. The donor dies without realising that, by mistake, the deed actually worked in favour of the defendant. *Dictum* in *Lister v. Hodgson* suggests that the claimant is entitled to restitution from the defendant: (1867) L.R. 4 Eq 30, 34; see also *M'Meachan v. Warburton* [1896] 1 I.R. 435, 441. More difficult still, interceptive subtraction may lie at the heart of the personal claim in *Ministry of Health v. Simpson*: [1951] A.C. 251 (H.L.); L.D. Smith, "Three-Party Restitution: A Critique of Birks' Theory of Interceptive Subtraction" (1991) 11 O.J.L.S. 481, 497–500.

¹⁰ *Introduction*, note 1 above, at pp. 133–134.

¹¹ The Canadian position appears to be much broader. The leading case of *LAC Minerals Ltd. v. International Corona Resources Ltd.* suggests that restitution is available as long as the defendant received from a third party a benefit that the claimant otherwise "would *probably*" have acquired: (1989) 61 D.L.R. (4th) 14, 45 (S.C.C.). There is, of course, a substantial difference between a "certainty" and a "probability".

party discharges a legal obligation owed to the claimant.¹² If he no longer can extract payment from the third party, the claimant undeniably suffers a loss that causally correlates to the defendant's gain. Grantham & Rickett offer the same opinion.¹³ And in *Official Custodian for Charities v. Mackey (No. 2)*, Nourse L.J. reviewed instances in which restitution was awarded for intercepted benefits and concluded that:

it is the essence of all those cases both that there is a contract or some other current obligation between the third party and the plaintiff on which the defendant intervenes and that the third party is indebted to the plaintiff in the precise amount of the sum which he pays to the defendant, so that he cannot reclaim repayment from the defendant in the face of a claim made against the defendant by the plaintiff.¹⁴

Significantly, however, Birks now advocates a very different position. That change is attributable to his belief that *Jones & Sons (Trustee) v. Jones*¹⁵ provides an "unequivocal example"¹⁶ of interceptive subtraction.

II. *JONES & SONS (TRUSTEE) v. JONES*

Mr. Jones was a member of a partnership. He drew a series of cheques, worth £11,700, on the partnership's account and gave them to his wife. She deposited them with a firm of commodity brokers and gave instructions to invest the fund in potato futures. Within three months, the investment increased to £50,760. Mrs. Jones then withdrew that amount and deposited it with Raphaels. The situation was complicated by the fact that the partnership had committed an act of bankruptcy before the cheques were drawn and was adjudicated bankrupt after funds had been placed with Raphaels. As a result, while title initially passed to Mrs. Jones, it retroactively vested in the trustee in bankruptcy as of the original date of bankruptcy.¹⁷ Faced with competing claims by Mrs. Jones and the trustee, Raphaels interpleaded and paid the money into court. The Court of Appeal unanimously held that the entire amount was due to the trustee.

¹² G. Virgo, *The Principles of the Law of Restitution* (Oxford 1999), pp. 109–113.

¹³ R.B. Grantham & C.E.F. Rickett, *Enrichment & Restitution in New Zealand* (Oxford 2000), p. 20.

¹⁴ [1985] 1 W.L.R. 1308, 1314–1315.

¹⁵ [1997] Ch. 159 (C.A.).

¹⁶ P. Birks, "At the Expense of the Claimant: Direct and Indirect Enrichment in English Law" in D. Johnston and R. Zimmerman (eds.), *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge 2001), 493, 509. See also P. Birks & C. Mitchell, "Restitution" in P. Birks (ed.), *English Private Law* (Oxford 2000), vol. 2, para. 15.19.

¹⁷ Bankruptcy Act 1914, s. 37(1); cf Insolvency Act 1986, s. 278.

This is not the place to dissect the many complexities of that decision.¹⁸ For present purposes, the significant point is that *Jones* was *not* decided on the basis of the autonomous action in unjust enrichment. True, Millett L.J. (with whom Beldam L.J. substantially agreed¹⁹) said, “in the language of the modern law of restitution”, that Mrs. Jones would be “unjustly enriched at the expense of the trustee”²⁰ if she was awarded the profit generated from the trustee’s property. But he also stressed that she had not been sued for money had and received, or indeed at all.²¹ The trustee actually brought an action in debt against Raphaels. The gist of the claim was that, as a result of the rules of tracing and the unique retroactivity of the bankruptcy legislation, the trustee all along held title to the chose in action that was located first in the partnership’s bank account, then in the account that Mrs. Jones opened with the commodity brokers, and finally in the account that she opened with Raphaels. That chose in action extended to the investment profits because it pertained not to value initially involved, but rather to “the balance, whether greater or lesser than the amount deposited”.²² Judgment simply recognised that the trustee, rather than Mrs. Jones, was able to “give a good receipt to Raphaels” in exchange for the enhanced fund.²³

¹⁸ P. Birks, “On Taking Seriously the Difference Between Tracing and Claiming” (1997) 11 *Trust Law Intl.* 1; D. Fox, “Common Law Claims to Substituted Assets” [1997] C.L.J. 30; N.H. Andrews & J. Beatson, “Common Law Tracing: Springboard or Swan-Song?” (1997) 113 L.Q.R. 21; R. Davern, “Common Law Tracing, Profits and the Doctrine of Relation Back” [1997] *Restitution L. Rev.* 92; R.B. Grantham & C.E.F. Rickett, “Disgorgement for Unjust Enrichment?” [2003] C.L.J. 159; S. Worthington, “Justifying Claims to Secondary Profits” in E.J.H. Schrage (ed.), *Unjust Enrichment and the Law of Contract* (The Hague 2001), 451.

¹⁹ Although Nourse L.J. agreed in result, he did so on the assumption that the trustee had sued Mrs. Jones for money had and received: [1997] Ch. 159, 172. Birks prefers that brief judgment to the much more extensive reasons provided by Millett and Beldam L.L.J.: P. Birks, “Property and Unjust Enrichment: Categorical Truths” [1997] *New Zealand L. Rev.* 623, 647–648.

²⁰ [1997] Ch. 159, 168.

²¹ Millett L.J.’s comments regarding unjust enrichment are best interpreted as being *preventative*. The fund held by Raphaels belonged to the trustee. If Mrs. Jones received payment in a way that reduced Raphaels’ liability on the chose in action, she would be unjustly enriched at the trustee’s expense.

²² [1997] Ch. 159, 170. In *Foskett v. McKeown*, the House of Lords similarly held that proprietary rights in the traceable proceeds of an asset are a function of the law of property, rather than the law of unjust enrichment: [2000] A.C. 51. Cf. P. Birks, “Property, Unjust Enrichment and Tracing” [2001] C.L.P. 231; A. Burrows, “Proprietary Restitution: Unmasking Unjust Enrichment” (2001) 117 L.Q.R. 412.

²³ *Ibid.* Birks rejects that conclusion on the basis that it amounts to “a *vindicatio*, leading into a declaration of entitlement”, which is a species of claim that is “unknown to the common law”: “Property and Unjust Enrichment” note 19 above, at pp. 646–648. It may well be true that there was no “historical warrant” for Millett L.J.’s approach. But if so, the conclusion to be drawn is that *Jones* is either novel or incorrect—not that it supports an extension of an action (*i.e.* unjust enrichment) that was never pled. See also Grantham & Rickett, “Disgorgement”, note 18 above, at pp. 170–173.

III. INTERCEPTIVE SUBTRACTION REVISITED

Since *Jones* was not decided on the basis of autonomous unjust enrichment, it cannot provide “unequivocal” support for the notion of interceptive subtraction. For the sake of argument, however, let it be assumed that the trustee did sue in unjust enrichment and that Mrs. Jones was held personally liable for the full amount of the enhanced fund. In those circumstances, *Jones* would be revolutionary. The orthodox view is that a restitutionary obligation is limited to the value of the defendant’s enrichment *at the moment of receipt*.²⁴ Millett L.J., for instance, said that if the trustee had sued Mrs. Jones for money had and received, “it would have been irrelevant what [she] had done with the money”.²⁵ Liability would have been confined in any event to the amount of the initial cheques (*i.e.* £11,700).

Birks’ revised model of interceptive subtraction attempts to reconcile the premise underlying the orthodox view with the imposition of liability for subsequently generated profits. It says that what the defendant initially receives from the claimant is the immediate value of a benefit *and* the ability to exploit that value. Consequently, if the defendant receives an enrichment of £11,700, invests it with a third party and later cashes out at £50,760, she takes a benefit that was destined for the claimant all along. The defendant “must be understood as intercepting wealth already attributed by the law to [the claimant] by virtue of arising from the earning opportunities inherent in his ownership of the original sum”.²⁶

That proposition fundamentally re-conceives the nature of interceptive subtraction. That doctrine traditionally has been used, in very limited circumstances, to award restitution with respect to a specific benefit that the defendant received from a third party in discharge of the latter’s legal obligation to the claimant. A tenant

²⁴ Grantham & Rickett, “Disgorgement”, note 18 above, at p. 164; S. Hedley & M. Halliwell (eds.), *The Law of Restitution* (London 2002), p. 9; Virgo, *Principles*, note 12 above, at pp. 95–96; cf. Burrows, *The Law of Restitution*, above note 4 at p. 28; Burrows “Quadrating Restitution”, note 2 above, at p. 266. Of course, the value of the defendant’s restitutionary obligation may be further limited by the operation of a defence, such as change of position.

²⁵ [1997] Ch. 159, 168.

²⁶ Birks & Mitchell, “Restitution”, note 16 above, para. 15.19. For Birks, *Jones* does double duty. In addition to expanding the scope of interceptive subtraction, it demonstrates that the English action in unjust enrichment, unlike its Canadian counterpart, does not require proof that the claimant suffered a loss equal in value to the defendant’s gain: *ibid.*, para. 15.18. Those two propositions appear, however, to be inconsistent. If the defendant is “understood as intercepting wealth *already attributed* in law” to the claimant, then it seems that the defendant’s retention of that wealth *does* constitute a corresponding deprivation to the claimant, notwithstanding the fact that it was materially acquired from the third party. As Birks previously explained, the whole point of interceptive subtraction is that, despite the lack of a direct nexus, the claimant genuinely “became poorer by the sum in which the defendant was enriched”: *Introduction*, note 1 above, at pp. 133–134.

owes £500 to his landlord. A rogue intercepts the money in a way that discharges the duty to pay rent. The rogue is liable to the landlord for £500. But for the rogue's intervention, the landlord *certainly* would have received that amount from the tenant.

Jones does not fit that pattern. It was not certain that, but for Mrs. Jones' intervention, the trustee would have received £50,760 from the commodity brokers or Raphaels. There obviously was no pre-existing legal obligation to that effect. Nor, even on a reduced standard, was the trustee's receipt of that benefit a matter of factual certainty. If the original cheques for £11,700 had not been drawn in Mrs. Jones' favour, there is no telling what would have happened to the funds in the partnership account. Perhaps nothing at all. But it is virtually certain that they would not have been invested for a five-fold profit.²⁷

Jones aside, Birks' revised model of interceptive subtraction is unprecedented. The critical question therefore is whether it *should* be adopted. The argument in favour rests on the basic belief that the defendant should not be able to retain a benefit generated from the claimant's property. That premise undeniably has intuitive appeal, but it cannot withstand scrutiny.

A. Creating Unjust Enrichment

The imposition of liability with respect to profits may actually *create* an unjust enrichment. The gist of the claimant's action is that he cannot be held responsible for an involuntary disposition. Restitution is available because the initial transfer was a function of his ignorance or mistake. As a matter of integrity, however, the same indulgence must be extended to the defendant. Mrs. Jones, for instance, exercised her quite remarkable investment skills in the mistaken belief that she was entitled to retain her initial enrichment. If the trustee was awarded restitution of the resulting profit, he would be unjustly enriched at her expense. He would take the benefit of services with which she did not freely part.²⁸

A court therefore would be required to off-set competing restitutionary claims and determine the proper allocation of the fund as a whole. The simplest solution would be the orthodox one: the claimant would recover the principal and the defendant would retain the profit. That conclusion might be defended, on practical

²⁷ Courts have refused restitution if, despite the usurpation of an opportunity, there is no necessary equivalence between the amount that the defendant received from the third party and the amount that the claimant otherwise would have received: *Official Custodian for Charities v. Mackey (No. 2)* [1985] 1 W.L.R. 1308 (Ch. D.); *Boytter v. Dodsworth* (1796) 6 Term. Rep. 681, 101 E.R. 770.

²⁸ That argument could be made even if, as in *Jones* itself, the claimant's action is not based on autonomous unjust enrichment. And indeed, Mrs. Jones might have deserved at least remuneration for her services. No such claim was made.

grounds, by a notion of “privity” or directness. It might be thought undesirable to complicate matters by allowing the claimant to reach beyond his transaction with the defendant. The initial enrichment and the subsequent investment would be treated as distinct events, relevant only to the immediate parties. And since the profit arose between the defendant and the third party, it would be inaccessible to the claimant.

The same conclusion could also be reached on more principled grounds. Accepting for the moment that the claimant *prima facie* was entitled to the entire fund, he ultimately would be required to acknowledge the defendant’s contribution. In assessing the value of that contribution, a court would ask: “But for the erroneous services, how much *less* would the fund be worth?” The answer appears obvious. If granted full recovery, the claimant presumably would be enriched to the full extent of the investment. Consequently, consistent with orthodoxy, it once again seems that the claimant should be limited to the principal, while the defendant takes the profit.

The preceding analysis nevertheless can be further refined with a partial nod to Birks. As he notes, the receipt of money may provide the defendant with two benefits: the money itself *and* the opportunity to exploit that money. Likewise, a subsequently generated profit is a function of two factors: the capital fund *and* the defendant’s investment services. The defendant should be required to provide restitution with respect to both parts of his initial enrichment. The latter part (*i.e.* the “earning opportunity”) should not, however, be measured by reference to the investment profit. That profit was subtracted from the third party. What was subtracted from the claimant was the *opportunity* to create a profit. More specifically, the defendant received, free of charge, the use of an investable fund for which he otherwise would have been required to pay. The earning opportunity component of the original enrichment therefore is most convincingly measured by reference to commercial lending rates.²⁹ The claimant presumably should recover the value of his initial payment plus compound interest.³⁰ Aside from quieting the discomfort created by the perception of the

²⁹ There is room for disagreement regarding the calculation of the defendant’s counterclaim. The argument presented in the text proceeds by analogy to a situation in which the defendant earns a profit on the basis of money borrowed from the claimant. In that situation, the entire profit belongs to the defendant and the claimant merely receives the return of the principal sum plus compound interest. An alternative analysis, however, might emphasise the claimant’s enduring interest in the principal sum. From that perspective, the proper analogy might be a case in which the defendant provides financial advice with respect to the claimant’s property. If so, the defendant should not receive the resulting profit, but rather a fee for advice and services. The former view is more consistent with the orthodox position.

³⁰ A claim for compound interest would have to overcome the hurdle of *Westdeutsche Landesbank Girozentrale v. Islington LBC* [1996] A.C. 669 (H.L.).

defendant getting something for nothing, that approach sensitively implements restitutionary principles.

B. The Justification for Restitution

Courts require a reason to become involved in a private dispute. The mere fact that the claimant suffered a detriment, or that the defendant received a benefit, is a matter of judicial indifference. Losses and gains are inevitable incidents of life. People are presumed to be self-reliant and unaccountable.³¹ Against that backdrop, purely loss-based remedies and purely gain-based remedies are especially difficult to justify. Compensation and disgorgement obviously displace the presumptions of self-reliance and unaccountability. And even more significantly for present purposes, they do so in ways that disturb the *status quo ante* for one party (while restoring it for the other). In a case of compensation, the defendant is forced to repair a loss, even though he did not receive a corresponding gain. The remedy consequently leaves him worse off than he was before the triggering event. Similarly, in a case of disgorgement, the defendant is forced to give up a gain to the claimant, who did not suffer a corresponding loss. The remedy consequently leaves the claimant with a windfall. Finally, whether the remedy is compensation or disgorgement, it can be secured only at the cost of scarce societal resources.

In such circumstances, the law will not intervene without strong justification. It finds that justification in the concept of fault. A loss without a gain, or a gain without a loss, is reversible only if it is attributable to the breach of an obligation.³² It is the defendant's wrong that explains why he must bear responsibility for the claimant's loss. Similarly, it is the defendant's wrong that explains why he may be required give up a gain.³³ Though not entirely consistent, the law often refuses to allow a person to profit from

³¹ M. McInnes, "The Measure of Restitution" (2002) 52 U. of Toronto L.J. 163, 180–196.

³² That is true even in "strict liability" cases like *Rylands v. Fletcher* (1868) L.R. 3 H.L. 330. "Strict liability" is an ambiguous phrase. As used in tort, for instance, it refers to a situation in which the defendant is held responsible for non-intentionally and non-carelessly committing a wrong. In such circumstances, the defendant's breach of a primary obligation (e.g. to refrain from a non-natural use of land that results in the escape of a harmful agent) gives rise to a secondary obligation (e.g. to pay compensatory damages to the claimant). As discussed below, however, as used in the law of unjust enrichment, "strict liability" refers to a situation in which the defendant is held responsible even though he did not commit any wrong. There is only ever a primary obligation (i.e. to provide restitution), which the claimant enforces directly against the defendant. There is no question of a breach or a secondary obligation. See generally J. Austin, *Lectures in Jurisprudence*, 3rd edn. (London 1869), pp. 44–47.

³³ There are several theories regarding the availability of gain-based relief for civil wrongs. Not all are based on the policy and practical considerations discussed in this paragraph: see e.g. I.M. Jackman, "Restitution for Wrongs" (1989) 48 C.L.J. 402; E.J. Weinrib, "Restitutionary Damages as Corrective Justice" (2000) 1 *Theoretical Inquiries in Law* 1; M. McInnes, "Disgorgement for Wrongs: An Experiment in Alignment" [2000] *Restitution L. Rev.* 516.

his own wrongdoing.³⁴ Having prohibited trespass to land, for instance, it would be incongruous for the legal system to allow a tortfeasor to retain an ill-gotten gain. Furthermore, disgorgement creates an useful deterrent. While it should never positively hurt the defendant,³⁵ it does reduce the potential profitability, and hence attraction, of breach. Practical considerations also help to explain why the claimant enjoys the fruits of disgorgement, even though he did not suffer any loss and even though he did not have any pre-existing connection to the impugned enrichment. It is desirable, from a societal perspective, for someone to take action against the defendant. The fact that the claimant suffered the profit-generating wrong uniquely identifies him as a candidate. And even in the absence of a compensable loss, the prospect of a windfall gain motivates him to sue, thereby helping to both protect the integrity of the underlying prohibition and deter wrongdoing.

The situation is much different with autonomous unjust enrichment. Restitution merely reverses a transfer and restores a benefit as between the parties. The defendant is required to return an enrichment that he subtracted from the claimant—but nothing more. There is no question of compensation *per se*. Unless he received a corresponding enrichment, the defendant need not repair a loss that the claimant suffered. Likewise, there is no question of disgorgement *per se*. Unless it was obtained from the claimant, the defendant need not give up a gain. In such circumstances, there is little inhibition, and considerable motivation, to judicial intervention. The court need not be concerned about taking from the defendant something that he did not gain, nor giving to the claimant something that he did not lose. At the same time, restitution “presents twice as strong a claim” as compensation or disgorgement. It is not merely that the claimant lost something *or* that the defendant gained something, but rather that the defendant gained something *from* the claimant. Following Fuller & Perdue, “the resulting discrepancy between [the parties] is not one unit but two”.³⁶

³⁴ *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109, 286 *per* Lord Goff (H.L.).

³⁵ In that sense, compensation tends to be a more effective deterrent because it is measured exclusively by reference to the claimant's loss and without regard to the defendant's gain. Whereas disgorgement merely requires the defendant to give up something to which he was never entitled, compensation generally requires him to satisfy judgment by means of pre-existing resources. That analysis sometimes is skewed, however, by evidentiary presumptions that are applied against a wrongdoer. For instance, in the absence of proof to the contrary, a court may presume that *all* of a tortfeasor's gains are attributable to breach, even though part of the profit in fact is attributable to other factors (*e.g.* the tortfeasor's own industry): A. Kull, “Restitution's Outlaws” (2002) 78 *Chicago-Kent L. Rev.* 17.

³⁶ L.L. Fuller & W.J. Perdue, “The Reliance Interest in Contract Damages” (1936) 46 *Yale L.J.* 52, 56.

All of that is true even if, as seems likely, English law eventually will adopt the Australian, rather than the Canadian, approach to the quantification of relief. It is accepted that restitution is limited to the value of the defendant's *ultimate* economic enrichment. Consequently, for instance, despite receiving a mistaken payment, the defendant's remedial obligation is reduced to the extent that he incurred a change of position.³⁷ In contrast, there is considerable debate as to whether or not restitution also is limited to the value of the claimant's *ultimate* economic loss. Canadian law answers in the affirmative. Consequently, for instance, despite providing a benefit to the defendant, the claimant's right of recovery is reduced to the extent that he passed the attendant burden on to a third party.³⁸ Australian law, in contrast, demands restoration of the full value of the initial enrichment in such circumstances.³⁹ And while the issue has yet to be settled by the House of Lords, the Court of Appeal similarly has rejected the passing on defence.⁴⁰ That does not mean, however, that Anglo-Australian law conflates disgorgement and restitution, or unjust enrichment by wrongdoing and autonomous unjust enrichment. Even if a loss need not be established at the time of trial (*e.g.* because the law disregards the claimant's efforts to mitigate the effect of an impugned transfer), there is an important distinction between a benefit that the defendant received from a third party and a benefit that he received from the claimant. From the claimant's perspective, that distinction consists of the difference between "getting" and "getting back", between a pure windfall and the restoration of wealth previously held.⁴¹

³⁷ *Dextra Bank & Trust Co. v. Bank of Jamaica* [2002] 1 All E.R. (Comm.) 193 (P.C.); *Lipkin Gorman (a firm) v. Karpnale Ltd.* [1991] 2 A.C. 548 (H.L.); *David Securities Pty Ltd. v. Commonwealth Bank of Australia* (1992) 175 C.L.R. 353 (H.C.A.); *Storthoaks (Rural Municipality) v. Mobil Oil Canada Ltd.* (1975) 55 D.L.R. (3d) 1 (S.C.C.).

³⁸ *Air Canada v. British Columbia* (1989) 59 D.L.R. (4th) 161, 194 (S.C.C.). As usual, the passing on issue arose because the claimant business, having paid an apparent tax to the defendant government, attempted to shift the attendant burden onto its customers in the form of higher prices.

³⁹ *Roxborough v. Rothmans of Pall Mall Australia Pty Ltd.* (2002) 76 A.L.J.R. 203 (H.C.A.); *Commissioner of Revenue (Vic) v. Royal Insurance Australia Ltd.* (1994) 182 C.L.R. 51 (H.C.A.); *Mason v. New South Wales* (1959) 102 C.L.R. 108 (H.C.A.).

⁴⁰ *Kleinwort Benson v. Birmingham C.C.* [1996] 4 All E.R. 733 (C.A.); *Kleinwort Benson v. South Tyneside MBC* [1994] 4 All E.R. 972 (C.A.); cf. *Greenwood v. Bennett* [1973] 1 Q.B. 195 per Lord Denning M.R. (C.A.); M. McInnes, "At the Plaintiff's Expense: Quantifying Restitutionary Relief" (1998) 57 C.L.J. 472; Grantham & Rickett, "Disgorgement", note 18 above, at pp. 166–170.

⁴¹ As Grantham & Rickett observe, an approach that allows for a windfall "implies a rationale of a claim in unjust enrichment which differs markedly from that usually associated with it, being to achieve restoration of the claimant's wealth position *status quo ante*". That gist of that approach "is the stripping away of the defendant's gain. The relief which the claimant will be able to obtain will ... extend beyond restoration" "Disgorgement", note 18 above, at p. 167.

Because restitution merely reverses a transfer that occurred between the parties, it is justified relatively easily. There is, unusually within private law, no need for fault. Liability is strict. It is triggered not by the defendant's breach, but rather by the claimant's impaired intention. Regardless of any wrongdoing, it is enough that the claimant did not truly intend to confer the benefit upon the defendant.

That regime of strict liability is based on the paradigm of direct subtraction. The defendant obtains an enrichment from the claimant. Restitution reverses the transfer and, at least in that narrow sense, restores the *status quo ante*. As traditionally interpreted, interceptive subtraction creates a minor, and readily defensible, extension of the same model. The claimant becomes entitled to a benefit which, as a matter of legal certainty, he would have obtained from a third party but for the defendant's unjustified (though not necessarily wrongful) intervention. With a little poetic licence, restitution can be said to restore the situation that should have been.

That model breaks down, however, with Birks' revised conception of interceptive subtraction. The gist of the claimant's action is not that he wants to get something back, nor that he wants to get something that was owing to him before the triggering event occurred. It is, much more broadly, that he wants to get something that he never would have enjoyed in the normal course of events. Accepting that possession of £11,700 carries "earning opportunities", it nevertheless is difficult to see, on an unjust enrichment analysis, how the award of £50,760 in *Jones* reversed a transfer of wealth. To the contrary, the trustee was able to extract from Mrs. Jones some £39,000 that he did not provide to her and to which he was not previously entitled.⁴² To that extent, liability constituted disgorgement of a windfall.

That is rather more work than autonomous unjust enrichment is used to doing and it is far from obvious that such relief is warranted. The claimant involuntarily conferred an enrichment upon the defendant. The defendant innocently used that enrichment to generate a separate gain. If recovery is limited to the value of the initial enrichment (including, perhaps, compound interest representing the earning opportunity), the defendant will benefit

⁴² That point is obscured in *Jones* by the fact that, as a result of legislative retroactivity, the trustee was treated as having all along been entitled, as owner, to the entire chose in action, whatever it was worth. As explained below at note 50, however, Birks' argument does not presume that, as in *Jones*, the defendant's profit arises as an accretion within the claimant's subsisting ownership. His argument, rather, is that as a result of owning an earning opportunity, the claimant can assert a personal right with respect a *separate benefit* that the defendant generated from that earning opportunity.

from the episode. But so what? The strict liability claim turns on the claimant's impaired intention. In contrast to the situations that historically have supported disgorgement, there is no question of stripping an ill-gotten gain, nor of deterring breach. Fault, the normal triggering mechanism for purely gain-based relief, is conspicuously absent. Mrs. Jones did nothing wrong. As Birks forcefully notes,⁴³ the Court of Appeal resisted the temptation to find that she had tortiously converted the trustee's property.

C. Alternative Analysis

Birks' revised notion of interceptive subtraction effectively supports not only restitution, but also disgorgement. It therefore is not surprising that he sees in *Jones* the potential for substantially increasing the incidence of *alternative analysis*. Alternative analysis is possible whenever a single set of events is capable of supporting more than one cause of action. That concept is well established as between tort and contract.⁴⁴ It can also arise as between the two branches of "unjust enrichment". Suppose, for instance, that the defendant misappropriates the claimant's property. The claimant has an option. Under the concept of "unjust enrichment by wrongdoing", he may sue for the tort of conversion and seek disgorgement of the defendant's gain.⁴⁵ Alternatively, he may "waive" the tort, in the sense of ignoring the defendant's breach, and use the autonomous action in unjust enrichment to compel restitution of the benefit with which he did not freely part.

As regards disgorgement and restitution, alternative analysis historically has been more significant in theory than in practice. The reason is simple. The option presumes that the defendant committed a wrong against the claimant *and* thereby subtracted a benefit from his victim. That is an unusual set of circumstances. A breach of obligation typically imposes a loss upon the claimant without generating any benefit for the defendant. And even if the defendant does wrongfully realise a gain, the material source of his enrichment frequently is a third party. If so, the claimant suffers a normative expense capable of supporting disgorgement, but not a subtractive expense capable of supporting restitution.

The orthodox conception of interceptive subtraction extends the scope of alternative analysis only slightly. The court must be satisfied that, as a result of committing a wrong, the defendant obtained from a third party a benefit to which the claimant already

⁴³ P. Birks, "On Taking Seriously the Difference Between Tracing and Claiming" (1997) 11 *Trust Law Intl.* 1, 6–7.

⁴⁴ *Henderson v. Merrett Syndicates* [1995] 2 A.C. 145 (H.L.).

⁴⁵ *United Australia Ltd. v. Barclays Bank Ltd.* [1941] A.C. 1 (H.L.). Of course, the claimant may also use the tort of conversion to claim compensation for his own loss.

was legally entitled. The situation will be much different, however, if Birks' re-conception of interceptive subtraction is adopted. The defendant will then be required to hand over, as either disgorgement *or* restitution, any benefit that he acquired from a third party as a result of wrongfully exploiting the claimant's earning opportunity.

Birks illustrates his position with *Edwards v. Lee's Administrator*.⁴⁶ The parties owned neighbouring properties that sat atop a spectacular set of caves. Although approximately $\frac{1}{3}$ of the caves were located beneath the claimant's land, the defendant enjoyed the only point of access. He developed a lucrative business conducting tours through the entire underground site. The claimant sued for trespass to land and received, as disgorgement, a proportionate share of the defendant's net profit. Birks states that, to a limited extent, the facts are uncontroversially susceptible to alternative analysis. Leaving aside the fact that he received money from tourists as a result of committing a tort, the defendant directly subtracted a benefit from the claimant insofar as he used his neighbour's land without permission. Significantly, however, if restitution had been awarded on the basis of that direct subtraction, it would have been limited to "a reasonable rental, the value of the benefit taken".⁴⁷ And as the Kentucky Court of Appeal stressed, there is a significant difference, in both theory and practice, between rent and profit.

For present purposes, the much more interesting question is whether the concept of interceptive subtraction could be used to draw the defendant's profits into the autonomous action in unjust enrichment. The orthodox answer is certainly not. The money that the defendant received from the tourists was not already legally bound for the claimant. To the contrary, because the claimant's property did not provide access to the caves, he could not possibly have obtained that benefit in the normal course of events. On the basis of *Jones*, however, Birks arrives at a much different conclusion.

The law attributes the earning opportunities inherent in a thing to that thing's owner, and their realisation by a non-owner is an interception of money destined for the owner.⁴⁸

...

If the yield from a successful investment of the plaintiff's money can be recovered as an unjust enrichment at his expense, the same must be true where the exploitation of the claimant's property consists of hiring it out. The two earning

⁴⁶ 96 SW 2d 1028 (1936 Ky. C.A.).

⁴⁷ Birks & Mitchell "Restitution", note 16 above, para. 15.21.

⁴⁸ Birks, "Direct and Indirect Enrichment", note 16 above, at p. 510.

opportunities are essentially of the same kind and cannot be treated differently.⁴⁹

Those quotations reveal two important points regarding the nature and scope of the revised conception of interceptive subtraction. First, they confirm that, on Birks' interpretation of *Jones*, the trustee did not simply receive restitution of the chose in action, whatever it was worth. Rather, to use Davern's phrase, "tree and fruit" were distinct.⁵⁰ The initial fund and the proceeds of Mrs. Jones' investment—like the use of land and the tourists' payments in *Edwards*—were separate (though related) benefits.

Second, the quotations indicate that liability for profits is triggered by the defendant's exploitation of an earning opportunity that *belongs* to the claimant. That requirement presumably excludes the common case in which the claimant mistakenly pays money to the defendant, but the error is not so fundamental as to prevent title from passing. The only thing that belongs to the claimant in that situation is the right to enforce a personal obligation against the defendant for the value of the initial enrichment.⁵¹ Since the transferred fund itself indefeasibly belongs to the defendant, the earning opportunity that it represents must belong to him as well. Consequently, liability cannot arise with respect to any subsequently generated profit.

In contrast, the paradigm case for the revised model of interceptive subtraction occurs when the defendant generates a gain by exploiting the claimant's property. Mrs. Jones invested the trustee's money; Mr. Edwards guided tourists through Mr. Lee's caves. On Birks' analysis, the resulting profit "is regarded as having been destined to [the claimant] all along", and therefore "is already attributed in law"⁵² to him. And, as *Jones* and *Edwards* demonstrate, that conclusion applies with respect to the *entire (net) profit* that the defendant obtained by virtue of the claimant's earning opportunity.

The significance of that last statement should not be underestimated. The real importance of alternative analysis is not that it allows the same conclusion to be reached by different routes. From the perspective of a litigant interested only in the final result,

⁴⁹ *Ibid.*

⁵⁰ "Common Law Tracing", note 18 above, at p. 94. Cf. Grantham & Rickett, "Disgorgement", note 18 above, at p. 161 (arguing that the response in *Edwards* was neither restitution nor disgorgement, but rather proprietary—"in effect a declaration that the plaintiff's property rights extend to the *fruits* of the property").

⁵¹ The analysis would be much different, however, to the extent that the claimant was entitled to proprietary restitution in the form of a resulting trust: P. Birks, "Restitution and Resulting Trusts" in S. Goldstein (ed.), *Equity & Contemporary Legal Developments* (Jerusalem 1992) 335; R. Chambers, *Resulting Trusts* (Oxford 1997).

⁵² Birks, "Direct and Indirect Enrichment", note 16 above, at p. 509.

two explanations for one answer is overkill. The real importance of alternative analysis, rather, is that on the basis of a single set of events, different causes of action can be pursued to different conclusions.⁵³ Birks' expanded conception of interceptive subtraction is illustrative. It increases the possibility of alternative analysis in a way that substantially affects the quantum of relief.

The American court in *Edwards* responded to the tort of trespass by awarding the claimant disgorgement of the defendant's net profit. In contrast, it is quite likely that an English claimant, in the same circumstances, would be limited to reasonable rental value. The law, unfortunately, is somewhat unclear. English courts seldom have addressed the specific question of a tortfeasor's liability to hand over a benefit acquired from a third party, as opposed to the benefit (*i.e.* the use of property without payment) that he wrongfully took from the claimant.⁵⁴ Moreover, many decisions that purportedly support the availability of disgorgement are ambiguously reasoned and equally consistent with either a compensatory or a restitutionary analysis. Nevertheless, the precedents consistently indicate that while the defendant is required to give up his entire gain if he wrongfully *sells* the claimant's property,⁵⁵ he merely is required to pay a hiring fee for improper *usage*.⁵⁶ According to Birks' interpretation of *Jones and Edwards*,

⁵³ The claimant will, of course, generally choose the option with the biggest payoff.

⁵⁴ In *Strand Electric & Engineering Co. Ltd. v. Brisford Entertainments Ltd.*, the defendant retained possession, beyond the rental period, of theatre equipment that it had hired from the claimant: [1952] 2 Q.B. 246 (C.A.). The majority of the Court of Appeal awarded a reasonable rental fee as compensation for the claimant's loss. Denning L.J. awarded the same amount as "restitution" (or, more accurately, disgorgement). The claimant had not presented any evidence as to the profit that the defendant earned with the property. Somervell L.J. nevertheless said in *dicta* that "damages could not ... be increased by showing that the defendant had made by his use of the chattels much more than the market rate of hire": at 252. Denning L.J., in contrast, could "imagine cases where an owner might be entitled to the profits made by a wrongdoer by the use of a chattel": at 255. In *Carr-Saunders v. Dick McNeil Associates Ltd.*, the defendant developer committed the tort of nuisance by constructing a building in a way that interfered with the claimant's right to light: [1986] 1 W.L.R. 922 (Ch. D.). In discussing the quantification of relief, Millett J. said that he was entitled to take account of the profit that the defendant expected to make from the development. Significantly, however, that fact was relevant only insofar as it, along with many other factors, would have affected negotiations between the parties regarding a reasonable fee. Millett J. did not suggest that the defendant could be required to give up *all* of his wrongful profit.

⁵⁵ *Oughton v. Seppings* (1830) 1 B. & Ad. 241, 109 E.R. 776; *Lamine v. Dorrell* (1701) 2 Ld. Raym. 1216, 92 E.R. 303; *Chesworth v. Farrar* [1967] 1 Q.B. 407. If the defendant sold the property at a discount, the claimant is entitled to claim its market value as compensation.

⁵⁶ *Jegon v. Vivian* (1871) L.R. 6 Ch. App. 742; *Whitwham v. Westminster Brymbo Coal & Coke Co.* [1896] 2 Ch. 538 (C.A.); *Penarth Dock Engineering Co. Ltd. v. Pounds* [1963] 1 Lloyd's Rep. 359. Relief is not denied merely because the defendant's tort was unprofitable: *Invergie Investments Ltd. v. Hackett* [1995] 1 W.L.R. 713 (P.C.).

The situation may, however, be changing. In contrast to courts of law, which merely required the defendant to pay a reasonable rental fee for use, courts of equity habitually imposed an account of profits to strip the defendant of his entire ill-gotten gain (*e.g.* for intellectual property violations and breach of fiduciary duty). In *Attorney General v. Blake*, Lord Nicholls said that the "difference in remedial response appears to have arisen simply as

however, if an action is brought in autonomous unjust enrichment, rather than tort, the defendant must hand over his profit, even if he merely used the claimant's property. Alternative analysis has a dramatic effect. The claimant becomes entitled to everything attributable to his earning opportunity, and not merely to the payment of reasonable rent.

Birks' model of interceptive subtraction suggests similarly revolutionary results in other circumstances. The crucial fact in *Edwards* is that the defendant usurped an earning opportunity that belonged to the claimant. That usurpation took the form of tortious interference with land. There are, however, many ways in which one person may wrongfully appropriate another's opportunity. A trustee may take a benefit that should have been available to a beneficiary.⁵⁷ Likewise, while it seems odd to relate the bribe in *Attorney General for Hong Kong v. Reid*⁵⁸ or *Reading v. Attorney General*⁵⁹ to a legitimate earning opportunity, that characterisation applies quite easily if, for instance, an agent directs his principal's business to a particular purchaser in exchange for a secret commission. Given the third party's willingness to pay the commission to the agent, he presumably would have been prepared to pay the same amount as an additional price to the principal.⁶⁰

It already is common, in each of those situations, for a court to respond to the defendant's breach by awarding disgorgement of his ill-gotten gain. Consequently, alternative analysis would merely provide a new path to the same conclusion. But in other circumstances, Birks' conception of interceptive subtraction would substantially affect the remedy. That presumably would be true if an earning opportunity was usurped in a contractual context. Consider *Surrey County Council v. Bredero Homes Ltd.*⁶¹ The defendant bought land from the claimant, subject to a covenant limiting the number of houses that could be built on the property to 72. The covenant existed for strategic purposes. The claimant wanted leverage to extract additional payment if the defendant wished to build more. The defendant nevertheless erected and sold 77 houses

an accident of history" and not as a matter of principle: [2001] 1 A.C. 268, 280. He then used the broader approach in response to a breach of contract at law.

⁵⁷ Since the claimant in *Edwards* enjoyed an earning opportunity despite the factual impossibility of conducting tours himself, Birks' conception of interceptive subtraction presumably is capable of capturing even those opportunities that, for some reason, the beneficiary under a trust or fiduciary relationship could not actually have exploited: *Keech v. Sandford* (1726) Sel. Cas. Temp. King 61, 25 E.R. 223; *Boardman v. Phipps* [1967] 2 A.C. 46 (H.L.); *Regal (Hastings) Ltd. v. Gulliver* [1967] 2 A.C. 134n (H.L.).

⁵⁸ [1994] 1 A.C. 324 (P.C.).

⁵⁹ [1951] A.C. 507 (H.L.).

⁶⁰ Cf. *Lister & Co. v. Stubbs* (1890) 45 Ch. D. 1 (C.A.); cf. *Jaggard v. Sawyer* [1995] 1 W.L.R. 269 (C.A.).

⁶¹ [1993] 1 W.L.R. 1361 (C.A.).

without securing a relaxation of the covenant. The claimant successfully sued for breach of contract, but, being unable to establish any loss, received only nominal damages. That seems an unnecessarily harsh decision. On similar facts in *Wrotham Park Estate Co. Ltd. v. Parkside Homes Ltd.*,⁶² the claimant was awarded, as either compensation or disgorgement, a sum equal to five per cent. of the profit that the defendant developer earned from its breach.

Surrey and *Wrotham Park* are notoriously difficult decisions. What they clearly demonstrate, however, is that the claimant generally cannot rely upon a breach of contract to strip the defendant of the profit that he received from a third party.⁶³ *Attorney General v. Blake*⁶⁴ is famous precisely because it carved out a narrow exception to that rule in the most pressing of circumstances. The House of Lords simply could not stomach the prospect of allowing a traitorous spy to receive royalties on memoirs that he had promised not to publish. The remedy was as remarkable as the facts.

On Birks' reasoning, however, it seems that the claimants in *Surrey* and *Wrotham Park* similarly could have had the defendants' profits simply by arguing autonomous unjust enrichment, rather than breach of contract. True, in contrast to the claimant in *Edwards*, they owned covenants, rather than land. But the covenant in *Wrotham Park* was a restrictive covenant, which is a non-possessory interest in land. And even a simple contractual right, as found in *Surrey*, may be treated as a form of property.⁶⁵ In any event, the real essence of Birks' position is not that the defendant abused the claimant's property, but rather that interceptive subtraction captures a profit that the defendant generated on the basis of the claimant's earning opportunity. And in that respect, the cases seem indistinguishable. Since he lacked a point of access, the claimant in *Edwards* could not possibly have guided tourists through his underground caves. He nevertheless enjoyed an earning opportunity because he was entitled to charge the defendant for the right to do so. Likewise, since they did not own the lands in

⁶² [1974] 1 W.L.R. 798.

⁶³ Cf. *Tito v. Waddell* [1977] Ch. 106, 332.

⁶⁴ [2001] 1 A.C. 268 (H.L.). Subsequent courts have been reluctant to interpret *Blake* broadly: *AB Corp. v. CD Co. (The Sine Nomine)* [2002] 1 Lloyd's Rep. 805; *World Wide Fund for Nature v. World Wrestling Federation Entertainment Inc.* [2002] F.S.R. 32; *Experience Hendrix LLC v. PPX Enterprises Inc.* [2003] EWCA Civ 323; *JS Bloor (Measham) Ltd. v. Calcott* [2001] E.W.J. No. 5717 (Ch. D.); cf. *Esso Petroleum Co. Ltd. v. Niad Ltd.* [2001] E.W.J. No. 5715 (Ch. D.); *Hospitality Group Pty Ltd. v. Australian Rugby Union Ltd.* [2001] F.C.A. 1040 (Aust. F.C.).

⁶⁵ *Adras Building Material Ltd. v. Harlow & Jones GmbH* [1995] Restitution L. Rev. 235, 270 (Israel SC); D. Friedmann, "Restitution of Property Obtained Through the Appropriation of Property or the Commission of a Wrong" (1980) 80 Columbia L. Rev. 504, 513; L. Smith, "Transfers" in P. Birks and A. Pretto (eds.), *Breach of Trust* (Oxford 2002) 111, 112–119.

question, the claimants in *Surrey* and *Wrotham Park* could not possibly have directly profited from development. They nevertheless enjoyed earning opportunities because they were entitled to charge the defendants for the right to do so. Consequently, if interceptive subtraction is capable of capturing the defendant's net profit in *Edwards*, it should be capable of doing so in *Surrey* and *Wrotham Park* as well.⁶⁶

That conclusion appears to flow inevitably from Birks' position. There certainly are differences between the cases, but none seem analytically significant. For instance, *Edwards* might be distinguished from *Surrey* insofar as an injunction was sought in the former, but not the latter. As Professor Waddams has argued, the availability of specific enforcement enhances the claimant's bargaining power (*i.e.* earning opportunity).⁶⁷ That enhancement, however, is merely a matter of degree. And in any event, a mandatory injunction was sought in *Wrotham Park*. It was refused only because it would have been "unpardonable waste"⁶⁸ to order the destruction of the houses that the defendant had built.

IV. CONCLUSION

Birks insists that the profits in *Edwards*, like those in *Jones*, should be caught by the concept of interceptive subtraction and hence available as restitution under the autonomous action in unjust enrichment. At the same time, however, he acknowledges that "[w]hether the law has really come so far is open to debate. It has travelled blind and may not care for the destination. It may turn back".⁶⁹

⁶⁶ Query whether the same might be true even in *Blake*. There was, of course, no realistic possibility of an earning opportunity in that case. The Crown never would have allowed George Blake to buy his way out of his contractual obligation. (Interestingly, however, despite having advance notice of publication, the Attorney General did not take action until it subsequently discovered the size of Blake's advance on royalties: £150,000.) But the same is true in *Wrotham Park*. The claimant felt honour-bound to uphold the restrictive covenant. It never would have sold out. Similarly, perhaps, in *Edwards*. The claimant sought and received both an account of profits and an injunction to prevent future trespass. Granted, it may have requested the injunction in order to enhance its bargaining position, but there is no suggestion in the judgment that the result would have been any different if Mr. Lee had been as firm as the claimant in *Wrotham Park*. Finally, it would be odd, as a matter of practical justice, if Birks' conception of interceptive subtraction favoured the commercially-minded over the principled. The defendant should not be able to exploit the claimant's earning opportunity simply because that opportunity is considered too precious to ever be realised. See also Grantham & Rickett, "Disgorgement", note 18 above, at p. 174 (suggesting that Birks' approach would subject every case of disgorgement for wrongdoing to alternative analysis as restitution for unjust enrichment).

⁶⁷ S.M. Waddams, "Profits Derived From Breach of Contract: Damages or Restitution" (1997) 11 J. of Contract Law 115.

⁶⁸ [1974] 1 W.L.R. 798, 811.

⁶⁹ "Direct and Indirect Enrichment", note 16 above, at p. 510.

With respect, there is not really any choice to be made. *Jones* did not enlarge the scope of interceptive subtraction for the simple reason that it was not decided on the basis of autonomous unjust enrichment. And even if there is a choice to be made, the preferable option seems clear. Interceptive subtraction should *not* be expanded to capture benefits that the defendant acquired from a third party as a result of exploiting the claimant's earning opportunity. In such circumstances, restitution paradoxically would create one unjust enrichment as it purportedly reverses another. It also would effectively amount to disgorgement, despite the absence of factors that historically have supported that measure of relief. Finally, and perhaps most worryingly, the revised notion of interceptive subtraction would substantially collapse the distinction that Birks previously worked so hard to establish between the two forms of generic "unjust enrichment". It is not just that situations previously addressed under the rubric of "unjust enrichment by wrongdoing" could be alternatively analysed in terms of autonomous unjust enrichment. The real concern is that the quantum of relief would be substantially increased as a result. Very often, the defendant would be required to hand over his profit where he previously could have satisfied judgment by paying a reasonable rental fee.