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DISGORGEMENT FOR UNJUST ENRICHMENT?

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Introduction

GAIN-BASED remedies are now often characterised as either "restitution" or "disgorgement". Restitution is the giving back of wealth received by a defendant from a claimant, which must be given back or restored because it amounts to an unjust enrichment at the claimant's expense. Disgorgement is the giving up to a claimant of a gain made by a defendant, as a consequence of a wrongdoing committed against the claimant, but received from a third party. This dichotomy presents a difficult problem: what happens if a defendant, who is liable *only in* unjust enrichment and *not in* wrongdoing, makes a gain causally related to the unjust enrichment but by receipt from a third party? An answer to this question has important consequences for the coherence of an independent claim in unjust enrichment.

Two Types of Restitution

Unjust enrichment justifies imposing an obligation on a defendant to restore to a claimant the latter's economic wealth, when an otherwise legally effective transfer to the defendant of the asset representing that wealth ought not to be recognised as legitimating the defendant's receipt of that wealth.[1] The imposed obligation does not seek to institute a new state of affairs between the parties or to facilitate a transformation of their rights. It seeks simply to restore the state of affairs that formerly obtained between them. It

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[1] For elaboration of this point, see R. Grantham and C. Rickett, "On the Subsidiarity of Unjust Enrichment" (2000) 117 L.Q.R. 273 (hereafter G & R, *Subsidiarity*). This characterisation of unjust enrichment excludes the contested area of receipt of services by a defendant: in most cases, compensation explains a plaintiff's award on the basis of services rendered; and, in any event, services (while beneficial to their recipient) are very difficult to explain juridically as an enrichment (see further, R. Grantham and C. Rickett, *Enrichment and Restitution in New Zealand* (Oxford 2000), pp. 20–21 and 60–63, and chap. 11 (hereafter G & R, *Enrichment*).

is thus reflective of notions of restorative or corrective justice.[2] "Restitution" is the term commonly used to describe the content of this type of imposed obligation.

There is, however, no exclusive equation between restitution and unjust enrichment. Restitution is not only ever triggered by unjust enrichment. Where it is so triggered, its content is "restitution by restoration".[3] But in cases where a defendant's gain was received from a third party as a consequence of a wrong done to the claimant by the defendant,[4] the claimant's ability to reach that gain is determined as a response to the wrong, and while it might be called "restitution", it cannot mean restitution by restoration. It is better called "restitution by disgorgement".

A remedial response must be appropriate to the objectives of a cause of action. The only legitimate objective of the principle of unjust enrichment is the restoration of the wealth received by the defendant from the claimant. Thus, it appears that restitution by restoration is the *only* remedial response to unjust enrichment.[5] By contrast, claims in contract (or other consent-based types) or torts may give rise to a *range* of remedial responses, including compensation, coercion and (restitution by) disgorgement.[6] This is because the objectives of those particular claims are several rather than singular, and must be met by a response appropriate to the objective in question in the particular case.

The most important manifestation of gain-based remedies for causes of action other than unjust enrichment has been as disgorgement for a range of civil wrongdoing. "Wrongdoing" refers to an act or omission that triggers remedial legal consequences by reason of its being characterised as a breach of an existing legal or equitable duty. In such cases, the presumptive response is to compensate the claimant for loss, seeking thus to make good the

[2] See G & R, *Enrichment*, pp. 43–46; M. McInnes, "Unjust Enrichment: A Reply to Professor Weinrib" [2001] R.L.R. 29; M. McInnes, "The Measure of Restitution" (2002) 52 Univ. Toronto L.J. 163, 186–196. See also *Kleinwort Benson Ltd.* v. *Lincoln City Council* [1999] A.C. 349, 406, *per* Lord Hope; and *Regional Municipality of Peel* v. *R. in Right of Canada* [1992] 3 S.C.R. 762, 788, *per* McLachlin J.

[3] See G & R, *Enrichment*, chaps. 2, 3 and 5.

[4] Our concern here is only with restitutionary remedies in respect of unjust enrichment or civil wrongdoing. Remedies having a restitutionary effect that are granted in response to consensual obligations (such as a contract) or that arise in respect of other miscellaneous rights (such as a statutory right to restitution of overpaid taxes) might better be regarded as direct performance of the underlying obligation rather than as secondary remedial rights. Unjust enrichment claims can also, however, be understood as resulting in the performance of the primary obligation, and the exclusion of cases other than wrongs from the present discussion may not be easily justified on substantive grounds.

[5] Restoration is usually effected in a personal form (through the imposition of a personal obligation on the defendant to pay a sum of money equivalent to the value of the enrichment received). It may be effected in a proprietary form: see G & R, *Enrichment*, chap. 18.

[6] See J. Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Oxford 2002).

harm done to the claimant, but in some cases the claimant may be entitled to a remedy which strips the defendant of the gain made from (*i.e.*, causally attributable to) the wrong.[7] This has come to be known rather loosely as "restitution for wrongs"[8] or "restitutionary damages",[9] and more recently as "disgorgement".[10]

An Excursus on "Disgorgement"

The question this paper asks is whether "disgorgement" is available as a response to a claim in unjust enrichment. It re-examines from a particular perspective the notion referred to earlier, and now widely accepted as the orthodox position, that such a claim can only be met by a response of restitution as restoration. It is necessary at this stage to amplify briefly the meaning that we give to the term "disgorgement".

It is generally assumed that "disgorgement" extends *not only* to profit positively acquired (in effect from a third party) by the defendant as a consequence of wrongdoing (met historically by a requirement to pay over the accounted amount of the profit to the claimant), *but also* to expenditure saved by a defendant as a consequence of wrongdoing. For our purposes, however, disgorgement is awarded in more limited circumstances.

First, a defendant can profit by receipt from a third party where the defendant appears to have committed a wrong against the claimant, but where on closer examination it is clear that the profit results from the defendant's use of property in which the claimant has persisting property rights.[11] Declaring that such profit belongs to the claimant *appears* to be a restitutionary response of disgorgement, but it is *not* restitutionary. It is proprietary. It is in effect a declaration that the plaintiff's property rights extend to the *fruits* of the property. That the mechanism used to achieve this result is a "wrongdoing" should not blind us to the real focus. We exclude such circumstances from the response "disgorgement".

[7] See, for example, *United Australia Ltd.* v. *Barclays Bank Ltd.* [1941] A.C. 1 (H.L.) (conversion of a cheque); *Wrotham Park Estate Co. Ltd.* v. *Parkside Homes Ltd.* [1974] 1 W.L.R. 798 (breach of restrictive covenant); *Inverugie Investments Ltd.* v. *Hackett* [1995] 1 W.L.R. 713 (P.C.) (trespass to land); *Peter Pan Manufacturing Corp.* v. *Corsets Silhouette Ltd.* [1964] 1 W.L.R. 96 (breach of confidence). See further M. McInnes, "Disgorgement for Wrongs: An Experiment in Alignment" [2000] R.L.R. 516.

[8] Generally, see English Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (L.C. 247, 1997) Part III.

[9] See, for example, H. McGregor, "Restitutionary Damages" in P. Birks (ed), *Wrongs and Remedies in the Twenty-First Century* (Oxford 1996), chap. 9. The term is often used loosely to denote a monetary award that is not obviously compensatory, but appears to be directed at removing from a defendant a gain made as a result of wrongdoing. In *Attorney General* v. *Blake* [2001] 1 A.C. 268, 284, Lord Nicholls disapproved of this term.

[10] See G & R, *Enrichment*, pp. 470–473. Cf. *Attorney General* v. *Blake* [2001] 1 A.C. 268, where "account" was preferred to "disgorgement".

[11] See discussion herein of *Edwards* v. *Lee's Administrators*, 96 S.W. 2d 1028 (C.A. Kentucky, 1936).

Similarly, a claimant's persisting property rights are critical in those circumstances where the focus is on the defendant's *saved expenditure in using assets of the plaintiff* without the claimant's permission (*e.g.*, use of the claimant's equipment without paying a rental charge).[12] Awarding the claimant the defendant's saved expenditure in truth recognises the value of the claimant's property rights. Again, that the mechanism used to achieve this result is a "wrongdoing" should not blind us to the real focus. The saved expenditure results from an interference with property rights. The remedy is concerned to compensate for improper use, not to disgorge gain.

The two circumstances above belong together conceptually because their concern is with protection of persisting property rights. They differ only in respect of a fine line between fruits attributable to an asset and savings made by use of an asset.

"Disgorgement", for our present purposes, is therefore limited to profits positively made as a consequence of wrongdoing, where neither the claim in wrongdoing nor the gain-based response are referable to the protection of persisting property rights. The relevant wrongdoing protects interests other than persisting property rights. The gain is measured by receipt of assets from third parties causally attributable to the wrongdoing, but which are neither fruits of, nor saved expenditure by, improper use of the claimant's property.[13]

Rights to Restoration and Disgorgement

One important way to understand and maintain the conceptual distinction between restoration and disgorgement (as we understand it) is by reference to the rights of the claimant in question.

The relationship between restoration and unjust enrichment can be analysed in terms of a distinction between primary and secondary rights.[14] A "primary right" arises where the existence of the right is not dependent on the prior breach of some other right. The right exists by virtue of the correlative assumption (*e.g.* contractual promise) or imposition (*e.g.* duty of care) of a duty. In contrast, a "secondary right" depends for its existence on a prior breach of such a primary right. For example, a claim in negligence requires a primary right in the claimant, being the right to receive

[12] See, for example, *Penarth Docks Engineering* v. *Pound* [1963] 1 Lloyd's Rep. 359; *Ministry of Defence* v. *Ashman* [1993] 66 P. & C.R. 195 (C.A.).

[13] Some forms of equitable wrongs may, in substance, also indirectly protect property rights: *e.g.* knowing receipt.

[14] Generally, see J. Austin, *Lectures in Jurisprudence* (3rd edn., Campbell (ed.), London 1869), pp. 44–47. See also P. Birks, "Obligations, One Tier or Two?" in P. Stein and A. Lewis (eds.), *Studies in Justinian's Institutes* (London 1982), chap. 3.

care (the correlative of a duty of care), which has been breached (breach of the duty of care), giving rise to a secondary right to a remedy in respect of that breach.

A claimant's right to restoration constitutes a primary right, which, however, *because of its very content*, requires no secondary right to found the grant of restoration. The primary right is defined in terms of the event of unjust enrichment (understood doctrinally as a transfer of wealth from the plaintiff to the defendant which is infected by a defective subjective consent).[15] Where that occurs, the claimant's primary right is to restoration from the defendant (the correlative of the defendant's duty to make restoration).[16] There is nothing at all prior to the event of unjust enrichment that affects the claimant's rights as against that defendant. These cases have thus been described as "autonomous unjust enrichment", recognising that the right to restoration is not dependent upon any other right-generating event. In such cases, there is no *logical* requirement to find a secondary right in a claimant to explain a response. The primary right (to restoration) already defines the response (restoration).[17] Accordingly, it "functions" as a remedial (or secondary) right,[18] but analytically it is a primary right.

However, the right to restitution as disgorgement is clearly a secondary right. It does not arise because of the defendant's acquisition of a gain *per se*. It arises because that gain has been acquired through an event other than unjust enrichment. The primary right of the claimant is defined by that other event.

The important consequence of recognising the dual role of restitution, as both a primary right (restoration) and a secondary right (disgorgement), is that where restitution as disgorgement is sought in respect of a cause of action in the law of wrongs, the principle of unjust enrichment itself has no part to play.[19] The only

[15] See G & R, *Subsidiarity*.

[16] The source or basis of the right/duty to restoration lies, in our view, in the principle that no-one is to be deprived or his or her property except by consent. This in turn is a manifestation of the liberal socio-political basis of Western society. The various factors which determine when the right/duty arises identify the circumstances in which there has been a transfer of property but where that transfer lacks true consent. Cf. S. Smith, "Justifying the Law of Unjust Enrichment" (2001) 79 Texas L.R. 2177.

[17] The (primary) contractual right to performance might also be an exceptional case that defines the response (performance); there is logically no secondary remedial right ("if A's right to performance is not forthcoming, A has a right to performance" makes a nonsense).

[18] This "functional" dimension means that issues relevant only to the response itself might quite legitimately be entertained (*e.g.*, valuation of the assets received to assess the measure of the claimant's wealth).

[19] See also P. Birks, "Unjust Enrichment and Wrongful Enrichment" (2001) 79 Texas L.R. 1767; M. McInnes, "Restitution, Unjust Enrichment and the Perfect Quadration Thesis" [1999] R.L.R. 118; M. McInnes, "Disgorgement for Wrongs: An Experiment in Alignment" [2000] R.L.R. 516; M. McInnes, "The Measure of Restitution" (2002) 52 Univ. of Toronto L.J. 163. Cf. A. Burrows, "Quadrating Restitution and Unjust Enrichment: A Matter of Principle" [2000] R.L.R. 257.

prerequisite to the availability of disgorgement for a wrong is that the wrong must be one for which restitution or a gain-based remedy is an alternative remedial option to the presumptive compensatory remedy for that wrong. This matter is *not* determined by the principle of unjust enrichment, but by other independent factors,[20] about which there is still considerable dispute.

"Gain" in Restoration and Disgorgement

Drawing a distinction between different sources of gain, and then linking that distinction to the doctrinal argument about the plaintiff's rights, creates a coherent conceptual map. In autonomous unjust enrichment, the gain came to the defendant from the claimant. The gain here is to be "given back". In wrongdoing cases, the gain came to the defendant not from the claimant but from a third party. The gain here is to be "given up".

As autonomous unjust enrichment has been further refined, so various features of the claim have been clarified. One feature is the determination of the point at which the enrichment is to be assessed. In essence, *for the purpose of liability*, the gain (or enrichment) of the defendant is determined at the point of receipt by the defendant of the asset from the claimant. That is the measure of the claimant's wealth gained by the defendant. That measure of wealth is what the defendant must, *prima facie*, give back.[21] Further, the defendant's liability does not depend at all upon his or her knowledge or notice, or upon any measure of moral impropriety.[22] It is strict liability.[23] This is justified by the fundamental link between the protection of a claimant's wealth position and claims in unjust enrichment. Where assets have been legitimately transferred by a claimant to a defendant ("legitimately"

[20] Unjust enrichment might be one of these independent factors, but, used in this context, it cannot bear the same meaning as it does in the context of a claim in autonomous unjust enrichment. P. Birks, "The Law of Unjust Enrichment: A Millennial Resolution" [1999] Singapore J.L.S. 318, 327, describes this as a "tautologous" sense of unjust enrichment. A remedial version of "unjust enrichment" seems both opaque and little more than an attempt to cloak an unfettered discretion with some degree of respectability. It is worth remembering that in the case of equitable remedies, even though they are formally regarded as discretionary, this discretion is governed by well settled rules: see P. Loughlan, "No Right to the Remedy?: An Analysis of Judicial Discretion in the Imposition of Equitable Remedies" (1989) 17 M.U.L.R. 132; and P. Birks, "Rights, Wrongs, and Remedies" (2000) 20 O.J.L.S. 1.

[21] See further, below, the discussion of the "passing on" defence.

[22] Cases of compulsion (*e.g.*, duress and actual undue influence), which might appear to be concerned with the defendant's impropriety, are actually better understood as cases where the claimant's consent to the relevant transfer is defective because of the way in which it was brought about. The law intervenes because of the effect of the defendant's conduct on the claimant's ability to exercise a free and independent choice. Generally, see G & R, *Enrichment*, chap. 9.

[23] This is the orthodox view of restitutionary liability. It is not, however, without its problems: S. Smith, "Justifying the Law of Unjust Enrichment" (2001) 79 Texas L.R. 2177, 2184–2193. Strict liability does, however, follow if as suggested above the duty to make restoration is a primary duty.

because the transfer satisfies the objective consent rules of property law and the law of contract), but the wealth they represent has not also been legitimately transferred (because the transfer of the assets is accompanied by a defect in the claimant's capacity going to his or her ability actually to consent to the transfer, or by a defect in the claimant's actual consent itself), that claimant's wealth position requires protection.[24] Neither the law of wrongs nor the law of property can deal with this case. The defendant has committed no wrong; and the law of property having legitimated the transfer of the assets cannot then de-legitimate the transfer of the wealth. So unjust enrichment fills the gap thus created, by defining the liability of the defendant as being to give up a receipt of wealth. The claimant's wealth entitlement is thus defined at the point of receipt.

The Problem

What, however, if the claimant seeks to bring into the range of relief sought not only the receipt itself but also post-receipt gains made by the defendant? The claimant will want to do this in a circumstance where the defendant has used the assets received to create a further gain, which has come to the defendant not from the claimant but from a third party. Consider the following simple example:[25]

> **Case 1**
> C mistakenly pays D £10. D purchases a lottery ticket. D would not have purchased the lottery ticket had she not received the mistaken payment. The ticket is the winning ticket. D receives £1m from the lottery board.

In this example, C's immediate problem is that he appears to be limited to a claim for restoration of the wealth *received* (or subtracted, hence "subtractive unjust enrichment" as a synonym for "autonomous unjust enrichment") from him by D, being the £10. Since C's claim is in unjust enrichment, the measure of the response, mandated by the purpose that that claim exists to further, is defined by gain as receipt to be restored, and *not* by gain as receipt to be disgorged. Of course, it may be that C can find a way to characterise his claim alternatively, on the same facts, as a wrong, and thus access disgorgement in that way. But, if that is C's strategy, C "defines himself out of the law of unjust enrichment".[26]

[24] The normative justification of this protection lies in the socio-political commitment to individual autonomy and the protection of property and wealth. See G & R, *Subsidiarity*.

[25] This is not the same case as that discussed in S. Worthington, "Justifying Claims to Secondary Profits" in E. Schrage (ed.), *Unjust Enrichment and the Law of Contract* (The Hague 2001), p. 451. In Worthington's example, the £1 coin used to purchase the winning ticket is the property of C at the time of the purchase.

[26] P. Birks, "'At the Expense of the Claimant': Direct and Indirect Enrichment in English Law" in D. Johnson and R. Zimmermann (eds.), *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge 2002), chap. 18, at p. 497.

The concern, however, is the case where C's *only claim* is in unjust enrichment. Has C got a problem, or not?

A Wider Definition of "Gain" in Restoration Cases?

One response is to say that the alleged problem does not exist because, although gain in restoration is initially understood as that received "directly" from or "subtracted" from the claimant, the apparent correspondence that implies between the defendant's gain and the claimant's loss is nevertheless misleading.

The "correspondence analysis" runs as follows. A defendant must receive an enrichment "at the claimant's expense" if she is to be made liable to render restoration. The enrichment should be restored to the party from whom it came. That party will therefore have had his wealth subtracted from. In that respect, therefore, he will have made a loss. The fact that he has made this loss identifies him as the correct claimant. His loss being correlative to the defendant's gain, the claimant is the proper party to whom the wealth is to be restored. "It is only by proving that the defendant's enrichment was subtracted from [him] that the [claimant] can establish [himself] as the appropriate recipient [of the defendant's divestment]."[27] "Restoration" clearly implies that the party to whom restitution is being made is to regain wealth he previously had and which passed from him to the defendant. Thus, although the focus of the claimant's claim is the defendant's gain, the principle of unjust enrichment properly operates to ensure that the claimant's restitutionary claim is limited to "the highest amount common to the defendant's *ultimate* gain and the [claimant's] *ultimate* loss".[28]

The "correspondence analysis" has already faced one challenge, in the refusal of English and some Commonwealth courts to recognise a "passing on" defence. The analysis suggests, as a matter of logic, that if a defendant is able to establish that the claimant's loss is less than the gain the defendant is alleged to have received, the claimant's recovery will be limited to his loss. This does not mean that the claimant's claim ceases to be one for restoration, becoming instead compensatory. What it means is that if, in respect of the relevant transaction, the defendant's wealth was increased by £100, but the claimant's wealth was decreased by only £50 (because he has charged £50 of the payment made to the defendant to third parties), then only £50 of the increase in the defendant's wealth can

[27] M. McInnes, "'At the Plaintiff's Expense': Quantifying Restitutionary Relief" [1998] C.L.J. 472, 475. See also M. McInnes, "Unjust Enrichment: A Reply to Professor Weinrib" [2001] R.L.R. 29, 33 and 48–49.

[28] M. McInnes, "Disgorgement for Wrongs: An Experiment in Alignment" [2000] R.L.R. 516, 521 (emphasis in original).

be said to be made at the claimant's expense within the generic conception explaining the claimant's claim, unjust enrichment. If the claimant is to recover £100, then only £50 can be accounted as restoration to him. Recovery of the other £50 needs to be legitimated by some other principle.

Some scholars reject this reasoning. Mr. Virgo, for example, states:[29]

> That body of law which we call the law of restitution is simply concerned with the award of remedies to deprive the defendant of benefits.... Changes in the [claimant's] circumstances are of no consequence to the question whether the defendant should be deprived of a particular benefit.

On this view, all that a claimant needs to do to satisfy the requirement that the defendant's enrichment is "at the claimant's expense" is to establish "a causally related plus and minus"[30] in the transaction between himself and the defendant.[31] A claimant can have *all* the defendant's enrichment, however, because he experienced *some* expense. This view actually implies an interpretation of the 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 to the *status quo ante*. The role asserted by Mr. Virgo for the claim in unjust enrichment is the stripping away of the defendant's gain. The relief which the claimant will be able to obtain will therefore, quite legitimately, extend beyond restoration. The "windfall" recovery to the claimant, or "disgorgement", will be justified by the principle of unjust enrichment, because that principle is about gain stripping, not wealth restoration.

The arguments used to support the rejection of the passing on defence turn out in fact to be arguments that contradict the very principle which it is claimed sustain them. The principle of unjust enrichment articulates a reason why an otherwise effective transfer of wealth should be undone or reversed and the parties restored to the *status quo ante*. Accordingly, unjust enrichment is inherently limited to wealth restoration and cannot provide a right to disgorgement. That point was crisply made by La Forest J. in *Air Canada* v. *British Columbia* (where the defence was recognised by a majority of the Supreme Court of Canada) when he said: "the law

[29] G. Virgo, *The Principles of the Law of Restitution* (Oxford 1999), p. 739.
[30] M. McInnes, "'At the Plaintiff's Expense': Quantifying Restitutionary Relief" [1998] C.L.J. 472, 475.
[31] I. Jackman, *Varieties of Restitution* (Sydney 1998), p. 181: "... if there is a requirement that the payment which the plaintiff seeks to recover be 'at the plaintiff's expense', it means only that the plaintiff must be the person who made the payment in the first place."

of restitution is not intended to provide windfalls to [claimants] who have suffered no loss."[32]

The defence has been the subject of a number of important decisions, and, unsurprisingly, although the preponderance of the authorities is against recognising it, there is no unanimity of view.[33] Apart from the rather telling point that most of the earlier cases in which the defence was discussed concerned a claimant seeking repayment of an invalid tax from the Crown or a public body (but where the burden of the tax had been effectively transferred to the claimant's clients by increased charges, and there were accordingly special instrumental and public policy considerations),[34] the more general statements rejecting the defence (including those found in more recent cases arising out of failed commercial ventures)[35] have all promoted a view of unjust enrichment as concerned simply to prevent the defendant's enrichment. This view unashamedly ignores the claimant's actual wealth position.

The Court of Appeal has rejected the defence of passing on. In *Kleinwort Benson Ltd* v. *Birmingham City Council*,[36] two grounds for its rejection were stated, both revealing a focus on stripping away the defendant's gain as the very objective of a claim in unjust enrichment. First, since restitutionary recovery is focused on the defendant's gain, the fact that the claimant has passed on his loss is simply irrelevant as a defence to a claim in unjust enrichment.[37] Secondly, even if the defence were to be analysed within a restitutionary matrix, the notion of "at the claimant's expense" refers only to the initial receipt of the enrichment by the defendant

[32] (1989) 1 S.C.R. 1161, 1202. See also *Roxborough* v. *Rothmans of Pall Mall Australia Ltd.* (2002) 185 A.L.R. 335, paras. 119–120 and 125–144, *per* Kirby J. (dissenting); *Banque Financière de la Cité* v. *Parc (Battersea) Ltd.* [1999] 1 A.C. 221, 237, *per* Lord Clyde; *Citadel General Assurance Co.* v. *Lloyds Bank Canada* [1997] 3 S.C.R. 805, 824, *per* La Forest J. Cf. *Mason* v. *New South Wales* (1959) 102 C.L.R. 108, 146.

[33] See further W. Woodward, "Passing on the Right to Restitution" (1985) 39 U. Miami L.R. 873; G. Jones, *Restitution in Public and Private Law* (London 1991), pp. 28–37 and 46–47.

[34] Indeed, discussion of the defence in R. Goff and G. Jones, *The Law of Restitution* (6th edn., London 2002), pp. 677–679, is in a chapter titled "Money Paid to the Revenue or to a Public Authority Pursuant to an Ultra Vires Demand". See also comments of Lord Goff in *Woolwich Equitable Building Society* v. *IRC (No. 2)* [1993] A.C. 70, 177–178; and Kirby J. in *Roxborough* v. *Rothmans of Pall Mall Australia Ltd.* (2002) 185 A.L.R. 335, paras. 119–120 and 125–144. Passing on is well-established in civil law systems: see, for example, *Les Files de Jules Bianco SA* v. *Directeur General des Douanes (Cases 331/85 etc)* [1989] 3 C.M.L.R. 36; *Amministrazione dello Stato* v. *SpA san Giorgio* [1983] E.C.R. 3595; *Hans Just I/S* v. *Danish Ministry for Fiscal Affairs* (Case 68/79) [1981] E.C.R. 501; *European Communities* v. *Italian Republic (case 104/86)* [1988] E.C.R. 1799; and B. Rudden and W. Bishop, "Gritz and Quellmehl: Pass it On" (1981) 6 E.L.R. 243.

[35] *Kleinwort Benson Ltd.* v. *South Tyneside MBC* [1994] 4 All E.R. 972; *Kleinwort Benson Ltd.* v. *Birmingham City Council* [1997] Q.B. 380. See further F. Rose, "Passing On" in P. Birks (ed.), *Laundering and Tracing* (Oxford 1995), chap. 10, at p. 262. In New Zealand, see *Equiticorp Industries Group Ltd. (In Statutory Management)* v. *The Crown (Judgment No. 47)* [1998] 2 N.Z.L.R. 481, 641–644.

[36] [1997] Q.B. 380.

[37] *Ibid.*, p. 394 *per* Saville L.J.; cf. p. 393 *per* Evans L.J.

from the claimant, not to a determination at a later time dependent upon the claimant's actions after the receipt.[38]

The most recent discussion of passing on is found in the High Court of Australia's decision in *Roxborough* v. *Rothmans of Pall Mall Australia Ltd.*[39] In a joint judgment, Gleeson C.J., Gaudron and Hayne JJ. rejected the defence because, as between a claimant and a defendant, a claimant's claim could not be affected by the defendant's assertion as to the extent of the claimant's enrichment. The claimant's claim was superior in this context, because the avoidance of the transaction as between the parties deprived the defendant of any claim to such a defence.[40] This reasoning suggests once again that the claim in unjust enrichment is not about restoring the plaintiff's wealth position to the *status quo ante*, but is concerned simply to strip away the gain made by the defendant. The important consequence of this focus, revealed in *Roxborough*, is that it beckons towards regarding unjust enrichment, if that principle retains any definitional or justificatory role, as in essence a form of wrongdoing, for which simple gain stripping, whether by restoration or disgorgement, is the response. Indeed, Gleeson C.J.'s, Gaudron and Hayne JJ.'s concern with "equitableness" or "conscientiousness" expressly takes unjust enrichment in the direction of wrongdoing.[41]

Does the rejection of passing on support the rejection of the "correspondence analysis"? In our view, the answer is "no". The doctrinal basis for rejecting passing on, as articulated in the cases, is misguided and confused. To the extent to which the debate is engaged within the law of unjust enrichment (as opposed to being concerned with issues of public law and fiscal policy), the interpretation given to the relevant element of "at the claimant's expense", as meaning that what was received by the defendant came from the claimant, is too simplistic. There is clearly a failure to recognise that the objective of permitting a claim in unjust enrichment is to provide protection of the claimant's wealth position. The concern is the restoration *of the claimant* to the *status*

[38] *Ibid.*, p. 395 *per* Saville L.J., p. 400 *per* Morritt L.J. Note, however, the confusion in the decision as to whether the defence was being ruled out entirely, or could be applied in "public law cases": see p. 393 *per* Evans L.J.

[39] (2002) 185 A.L.R. 335. See also *Commissioner of State Revenue* v. *Royal Insurance Australia Ltd.* (1994) 182 C.L.R. 51.

[40] *Ibid.*, paras. 22–29. Their Honours referred to the conscientiousness of the defendant's retention of the funds as against the plaintiff, and suggested that the superior claim of the plaintiff rested on the fact that the defendant "has no title to retain the moneys" (para. 27). This suggests the essence of the unconscientiousness is the defendant's suggestion as to passing on. Gummow J. also rejected passing on on a similar basis (para. 69: "unconscientious conduct of the defendant in refusing to account to the plaintiff").

[41] *Ibid.*, para. 16. See also the lengthy concurring judgment of Gummow J., especially at paras. 70–75 and 90–100 See R. Grantham, "Restitutionary Recovery *Ex Aequo et Bono*" [2002] Singapore J.L.S. 388.

quo ante, not the improvement of the claimant's position or the stripping of the defendant's gain. In particular, it is not correct to conclude, as those who reject the defence must, that the defendant's enrichment, in so far as it has been at the claimant's expense, is defined by the claimant's *immediate* expense.[42] That fails to perceive that the central concern is with "expense" as the claimant's overall wealth diminution. Most unsatisfactory of all is the fact that the rejection of the defence is buttressed by appealing to a notion of the objective of the claim which is completely at odds with the objective as understood in the framing of the claim in the first place.

Professor Birks has promoted a more serious challenge to the "correspondence analysis", and one which is of clear and direct relevance to the issue under discussion. He states:[43]

> "You have my money. You invest it and roll the investment over ten times. You produce a five-fold increase.... [I]t is hard to turn a blind eye to the fact that if, as is the case, I can claim the yield of your successful investment, my recovery will give me five times the amount of the value which I lost at the beginning of the story."

He continues:[44]

> "It seems to be perfectly clear that if D invests C's money and doubles it, C is entitled to the doubled proceeds.... D invests £10,000 and gets £20,000. That £20,000 was not C's before D received it, but C can trace from the £10,000 to the £20,000, and C can claim the £20,000. There is no need to spend time here on the exact nature of the entitlement, *in rem* or *in personam* or both. C has suffered no 'corresponding loss'. The outcome does not depend on the commission of a wrong. There is no doubt about any of these propositions. They underlie the operation of the presumption which produces the trust which operates when one party buys an asset with resources provided by another. And they have recently been seen in action in a case which was decided entirely at law, namely *F.C. Jones (Trustee in Bankruptcy)* v. *Jones*."

Birks' position is, therefore, that unjust enrichment law is not "impoverishment law". Rather, in our hypothetical case outlined above, C, *by relying on unjust enrichment*, can acquire the "indirect" gains made by the lottery win. C does not have to rely on wrongdoing by D in order to do so. In essence, it appears that

[42] See M. McInnes, "'Passing On' in the Law of Restitution: A Re-consideration" (1997) 19 Sydney L.R. 179, 181.

[43] P. Birks, "'At the Expense of the Claimant': Direct and Indirect Enrichment in English Law" in D. Johnson and R. Zimmermann (eds.), *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge 2002), chap. 18, at p. 501.

[44] *Ibid.*, p. 509.

Birks is simply defining recoverable gain in an unjust enrichment claim to mean "wealth received from the plaintiff *and* wealth received by the defendant from a third party but accountable as gain received from the plaintiff".

There is a fundamental problem with this argument, which manifests itself in a closer examination of the authority Birks suggests stands in the way of someone seeking to deny his position. The case he trumpets is *Trustee of Jones* v. *Jones*.[45] But this is not a case in unjust enrichment. This is a case about the enforcement of property rights. Indeed, the terminology Birks uses in the extracts cited above is resonant with property rights notions (*e.g.* "my money", "C's money"). It is not at all surprising that the profit made by a defendant using property which at law belongs to the claimant should be recoverable by the claimant. In *Trustee of Jones*, money was transferred from the account of the claimant trustee to Mrs. Jones, who had no right to it (and obtained no right to it).[46] Mrs. Jones speculated with the money and multiplied it several times. She deposited the sum in an account specially opened for that purpose. The claimant successfully sought recovery of all the funds thus deposited. The Court of Appeal was clearly of the view that the claimant was simply seeking to protect his property rights and that the medium of this protection was the action in debt (or possibly money had and received). The response was to the plaintiff's property right, not to an unjust enrichment. Thus, although the mechanism for recovery was the ("restitutionary") action of debt[47] (or possibly money had and received),[48] it was not a claim properly analysed as arising from unjust enrichment. The remedy was in effect an indirect vindication of persisting property rights.[49] *Trustee of Jones* simply cannot bear the burden placed upon it by Birks. It does not stand in the way of the "correspondence analysis". It can only do that if an argument that Birks has made elsewhere, and which we and others have challenged, can be sustained.[50] That is the argument that persisting property rights do not themselves provide a basis for a claim.

[45] [1997] Ch. 159.

[46] Had Mrs. Jones obtained "ownership" of the money, the claimant's claim would have been in unjust enrichment. Would the claimant then have recovered the profit made by the speculation? That is the very question at issue in this paper, which the Court of Appeal did not answer.

[47] See *Goss* v. *Chilcott* [1995] 1 N.Z.L.R. 263 (N.Z.C.A.) (dealt with as a claim in contractual debt); cf. [1996] A.C. 788 (P.C.) (dealt with as a claim in unjust enrichment). Interestingly, the Court of Appeal made no mention of a well established separate cause of action in debt, which, in effect, adopts a property rationale.

[48] See *National Bank of New Zealand Ltd.* v. *Waitaki International Processing (NI) Ltd.* [1999] 2 N.Z.L.R. 211, 226 (N.Z.C.A.).

[49] For discussion, G & R, *Enrichment*, pp. 30–41.

[50] See G & R, *Enrichment*, chap. 3, for the parameters of the debate and citation of the relevant literature.

That argument has, since Birks wrote the article from which the above quotations come, been decisively and correctly rejected by the House of Lords. In *Foskett* v. *McKeown*,[51] their Lordships concluded that a claimant's proprietary rights in the traceable product of an original asset arise in response to, and as a means to vindicate, the claimant's proprietary rights in the original asset. The claimants in *Foskett* claimed a proportionate share of the proceeds of a life insurance policy. This claim arose out of the use by a trustee of money held in trust for (*i.e.*, owned in equity by) the claimants. This money had been settled upon trust to finance a real estate development. In fact, the trustee misappropriated the trust money to pay at least two, and possibly three, of the five premiums paid under a life insurance policy. This policy was held for the benefit of the trustee's children. Their Lordships were agreed that the claimants' claim was not one in unjust enrichment, but was to vindicate their undoubted equitable property rights in the original trust money. Their Lordships differed, however, over whether the proceeds of the insurance policy could be regarded as the traceable product of the trust money.[52] The majority[53] held they could and, accordingly, that the claimants were able to assert an equitable property right to a proportionate share of the proceeds of the insurance policy.

The majority viewed the origin of this equitable property right as the claimants' rights in the trust money. Lord Browne-Wilkinson stressed that once the claimants had successfully identified the insurance proceeds as the traceable product, "then as a matter of English property law the [claimants] have an absolute interest in such moneys".[54] His Lordship saw this "absolute interest"[55] as being a consequence of the claimants' original interest in the money. Thus, the trust upon which the insurance proceeds would be held for the claimants was *the same express trust* as that upon which the original trust money had been held. In Lord Millett's view, the claim to a "continuing beneficial interest in the insurance money"[56] involved the "transmission of a claimant's property rights from one asset to its traceable product".[57] This process was, his

[51] [2000] 1 A.C. 102. For comment, see R. Grantham and C. Rickett, "Tracing and Property Rights: The Categorical Truth" (2000) 63 M.L.R. 905. See P. Birks, "Property, Unjust Enrichment, and Tracing" [2001] C.L.P. 231, for Birks' argument that *Foskett* does not stand for what their Lordships therein clearly said it stood for. See also A. Burrows, "Proprietary Restitution: Unmasking Unjust Enrichment" (2001) 117 L.Q.R. 412.

[52] Lords Steyn and Hope dissented on the narrow, though difficult, point of when the funds were mixed. Their Lordships did not, however, differ as to the nature of tracing or the nature of the claimants' claim as one to vindicate their equitable title.

[53] Lords Browne-Wilkinson, Hoffmann and Millett.

[54] [2000] 1 A.C. 102, 109.

[55] "Absolute" was used by Lord Browne-Wilkinson to indicate that no discretion was involved.

[56] [2000] 1 A.C. 102, 127.

[57] *Ibid.*, p. 127.

Lordship stated, part of the law of property, not of the law of unjust enrichment.[58]

It must be concluded that *Trustee of Jones*, as decided, and in any event being impossible to re-classify after *Foskett* as a claim in unjust enrichment rather than one vindicating persisting property rights,[59] does not invalidate the "correspondence analysis". Therefore, it does not explain why C should be able to recover the lottery win in our hypothetical case. The justification for the apparent "disgorgement" in both *Trustee of Jones* and *Foskett* is the fact that the claimant never transferred title in the original asset to the defendant. The profit made by the defendant belonged to the claimant for the simple reason that it was the claimant's property all along. In fact, the "remedy" was not disgorgement at all, but simply, in effect, a declaration that the assets representing the "profits" were the claimant's property all along.[60]

In making his argument that an unjust enrichment claim reaches post-receipt profit, Birks also discusses *Edwards* v. *Lee's Administrators*.[61] It is worth quoting his argument in full:[62]

> That case is a paradigm of restitution in the law of wrongs: restitution for the wrong as such. It could easily be reanalysed in unjust enrichment if what was at issue were the value of the user itself. Far below the ground the taking of that user caused no loss, but it was nonetheless taken from Mr. Lee in the simple sense: it was user of land that was his. The question now is whether an unjust enrichment analysis can reach even the money paid by the tourists. The answer must be that it can. If investment of the whole value of another's asset—selling it—can later give that other the traceable substitute, exactly the same must apply to the investment of the user of another's asset—hiring it out. Mr. Edwards exploited the user of Mr. Lee's land and turned it into money. If the right of ownership attributes the earning opportunities of an asset to its owner, the same must be true of the earning opportunities inherent in the user of the land. Hence, it must be true that Mr. Lee could have secured his award without relying on the

[58] *Ibid.*

[59] Cf. the (unconvincing and unsustainable) argument by A. Burrows, "Proprietary Restitution: Unmasking Unjust Enrichment" (2001) 117 L.Q.R. 412.

[60] Cf. S. Worthington, "Justifying Claims to Secondary Profits" in E. Schrage (ed.), *Unjust Enrichment and the Law of Contract* (The Hague 2001), p. 451, who argues that a claimant who owns an asset can only sustain a claim to the profits inherent in a substitute asset acquired in exchange for the initial asset on the basis that he or she can establish a positive duty in the defendant possessor of the substitute asset, owed to the claimant (to invest the asset on behalf of the claimant or to refrain from making a profit from a relationship with the claimant). Worthington argues that neither a property rights nor an unjust enrichment analysis is sustainable to justify an automatic claim to the profits from substitute assets.

[61] 96 S.W. 2d 1028 (C.A. Kentucky, 1936).

[62] P. Birks, "'At the Expense of the Claimant': Direct and Indirect Enrichment in English Law" in D. Johnson and R. Zimmermann (eds.), *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge 2002), chap. 18, at p. 510 (footnotes omitted).

> facts in their character as a trespass but analysing them instead as an unjust enrichment at his expense in the subtractive sense. 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. There is no need for the connection between such a claimant and such an enrichment to be established by reliance on a wrong.
>
> The logic seems irresistible: if without relying on wrongdoing one can have the proceeds of the sale and the assets thereby obtained, one must be similarly entitled to the gains made by hiring it out. Whether 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. Strong renewed insistence on "corresponding impoverishment" would immediately narrow the law of unjust enrichment. However, the *Jones* case will be an obstacle to any turning back. It seems to show that the English law is committed to the broad notion of "at the expense of" . . .

Two comments can be made about this analysis. First, is *Edwards* really a case of "restitution in the law of wrongs"? Or does it belong in the same category as *Trustee of Jones*, as a case of the *indirect* vindication of persisting property rights in land (which rights include user rights)[63] by means of an action in trespass (rather than, as in *Trustee of Jones*, by debt or money had and received)? The characterisation of trespass as a wrong must not displace the focus of Lee's claim, that his property was being used. That use must either be compensated for, or profits made by that use belonged to Lee because they were the product of *his* property.[64] It is therefore incorrect to suggest the possibility of an unjust enrichment claim as an alternative legal analysis for the case. Secondly, if *Edwards* were conceptually a case of true "disgorgement" for a wrong, it would be difficult to see—without going around in circles by seeking a limiting factor in a notion of persisting property rights!—how, as a consequence of Birks' argument, all cases of profits made by wrongdoing should not also be characterised as recovery on the basis of unjust enrichment. In other words, since the extended definition of gain which Birks' advocates necessarily covers "disgorgement", and since "disgorgement" is a gain-based remedy available for (some) cases where actual profits are made by a wrongdoing, wherever disgorgement can be given that is a case where an alternative analysis in unjust enrichment lies. What is this but a re-appearance of the notion that all cases where gain-based remedies are granted are cases of unjust enrichment?

[63] See discussion in G & R, *Enrichment*, pp. 30–32.

[64] This analysis does not necessarily exclude the possibility of some (remedial) recognition of the defendant's expertise, etc., in bringing the profit to fruition. See also K. Barker, "Riddles, Remedies, and Restitution: Quantifying Gain in Unjust Enrichment Law" [2001] C.L.P. 255.

Neither rejection of passing on nor reliance on *Trustee of Jones* supports the rejection of the "correspondence analysis". That analysis leaves alive our question: can C in our hypothetical cases reach the lottery win or the share price increase?

Equation With the Post-receipt "Rights" of the Defendant?

A further argument that might be made in favour of recovery by C is that there should be an equation of the position of a claimant with that of the defendant when it comes to matters that occur post-receipt. For a defendant to a claim in unjust enrichment, post-receipt factors are very relevant. A defendant is able to argue post-receipt change of position where, in certain circumstances, the wealth received has been lost.[65] For example:

> **Case 2**
> C mistakenly pays D £10. D purchases a lottery ticket. D is in good faith and would not have purchased the lottery ticket had she not received the mistaken payment. The ticket is a losing ticket. D can deflect C's claim to have restoration of her wealth by saying he (D) has changed his position.

Why should a defendant be permitted to deflect the claimant's claim on the basis of the losses incurred post-receipt (Case 2), but a claimant not be permitted to inflate a claim on the basis of the gains made by the defendant post-receipt (Case 1)? Why, in Case 1, should D be able to retain £1m (less £10) and restore £10, when, but for the receipt of the initial £10,[66] she would not have achieved a wealth position of £1m (less £10)?

The answer to this argument is that the apparent equation is false. There is no inconsistency. The fact that D can plead change of position in Case 2 is actually sustained by exactly the same consideration that sustains the inability of C to recover the lottery win in Case 1. That consideration is the very structure of a claimant's claim in unjust enrichment against the particular defendant. We shall examine the claim from the point of view of C in the next section. Here we ask why D *must* have the defence available when facing a claim in unjust enrichment.

In *Lipkin Gorman (a firm)* v. *Karpnale Ltd.*,[67] the House of Lords accepted that a change in the defendant's position following

[65] The case law and literature on change of position is enormous and growing. Our view on change of position is found in G & R, *Enrichment*, pp. 333–362; and in R. Grantham and C. Rickett, *Restitution—Commentary and Materials* (Wellington 2001), pp. 404–442.

[66] We assume here that this position has been established on the evidence and that such other legal tests as are relevant have been met. The hypothetical is aimed therefore at one issue only, there being no other impediments or distractions.

[67] [1991] 2 A.C. 548.

his receipt of the enrichment would afford a defence at common law to the claimant's claim for restoration. Lord Goff said:[68]

> In these circumstances, it is right that we should ask ourselves: why do we feel that it would be unjust to allow restitution in cases such as these? The answer must be that, where an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the [claimant] restitution.

In *David Securities Pty. Ltd.* v. *Commonwealth Bank of Australia*,[69] the High Court of Australia followed suit. The majority stated:[70]

> If we accept the principle that payments made under a mistake of law should be *prima facie* recoverable ... a defence of change of position is necessary to ensure that the enrichment of the recipient of the payment is prevented only in circumstances where it would be *unjust*.... However, the defence of change of position is relevant to the enrichment of the defendant precisely because its central element is that the defendant has acted to his or her detriment on the *faith of the receipt*.

Although both Lord Goff in *Lipkin Gorman* and the majority in *David Securities* appeared to envisage a single defence, in both cases their descriptions draw upon two analytically distinct matters.[71] The first is that restoration should not be ordered because a defendant who has incurred an expenditure or loss on the faith of the receipt is no longer enriched. The defendant's expenditure cancels out the enrichment received because it was caused by the receipt of the enrichment. In terms of the principle of unjust enrichment, therefore, change of position affords a defence by denying the defendant's enrichment. The second matter, apparent in both descriptions, is one of the balance of justice between the claimant and the defendant. The change in the defendant's position makes it unfair or unjust, as against the claimant, to require restoration of the defendant's enrichment. This suggests a second version of the defence, which operates upon the justification for restoration by establishing factors which cancel out, or at least outweigh, the injustice to the claimant of denying him

[68] *Ibid.*, p. 579.

[69] (1992) 175 C.L.R. 353. For Canada: *Rural Municipality of Storthoaks* v. *Mobil Oil Canada Ltd.* (1975) 55 D.L.R. (3rd) 1 (S.C.C.). For New Zealand: *National Bank of New Zealand Ltd.* v. *Waitaki International Processing (NI) Ltd.* [1999] 2 N.Z.L.R. 211.

[70] *Ibid.*, p. 385, *per* Mason C.J., Deane, Toohey, Gaudron and McHugh JJ. (emphasis in original).

[71] P. Birks, "Change of Position: The Nature of the Defence and its Relationship to Other Restitutionary Defences" in M. McInnes (ed.), *Restitution: Developments in Unjust Enrichment* (Sydney 1996), chap. 3, at p. 51; J. Dawe, "The Change of Position Defence in Restitution" (1994) 52 Univ. Toronto Faculty of Law Rev. 275.

restoration. Thus, although the defendant remains enriched, the claimant's claim is nevertheless denied because of the injustice its success would inflict upon the defendant.

There is little indication in the authorities which have applied change of position whether two discrete versions of the defence are recognised. The tendency has been to describe the defence in terms of the injustice of ordering restoration, and then to draw on both restoration-related and enrichment-related factors to explain why.[72] It is clear, both as a matter of principle[73] and from those authorities, that the content of "injustice" for this purpose must be established either by matters which demonstrate that the defendant is no longer enriched, or by matters that outweigh the initial reasons justifying restoration to the claimant.[74]

Even given the presence of some roughness around the edges of the change of position defence, its existence is based on and justified as an application of the very principle that sustains the claimant's *prima facie* claim. The defendant is permitted to plead post-receipt losses on exactly the same foundation that, as we shall see, prevents the claimant from reaching post-receipt gains. The argument from change of position therefore fails.

Can Unjust Enrichment Fill the Gap?

Neither the charge against the "correspondence analysis" nor the equation with change of position argument has provided any basis upon which to answer our question, "can C hang on to the lottery win?", in the negative. We are left, therefore, with something of a gap in Case 1. Is this a gap which unjust enrichment can fill? Should C's claim in unjust enrichment reach D's gain? Should there be disgorgement for unjust enrichment? The notion of unjust enrichment as a gap-filler should not be misunderstood. It fills a gap created in the context of property transfers, where the transfer of property is legally effective but there is reason why the wealth

[72] See, for example, *Goss* v. *Chilcott* [1996] A.C. 788, 798–799 (P.C.). See also *Philip Collins Ltd.* v. *Davis* [2000] 3 All E.R. 808 (H.C.); *Derby* v. *Scottish Equitable plc* [2001] 3 All E.R. 818; *National Westminster Bank plc* v. *Somer International (UK) Ltd.* [2002] 1 All E.R. 198 (C.A.); and *Dextra Bank and Trust Co. Ltd.* v. *Bank of Jamaica* [2002] 1 All E.R. (Comm.) 193 (P.C).

[73] Logically, a defence works by denying one or other aspect of the cause of action. Thus, change of position must operate upon either the reason for restoration, or the defendant's enrichment.

[74] If the claim in unjust enrichment has its foundations in "equitable notions", then of course the existence of a change of position defence is supported not by appeal to a defendant's right to show that the claimant has not established, as against the defendant himself, the component parts of the unjust enrichment claim, but by appeal to more general and free-floating considerations permitted by a wider discretion. See, for example, the position in Canada (discussed by M. McInnes, "The Canadian Principle of Unjust Enrichments; Comparative Insights in the Law of Restitution" (1999) 37 Alberta L.R. 1). See also *Kleinwort Benson Ltd.* v. *Lincoln City Council* [1999] 2 A.C. 349, 408, *per* Lord Hope (unjust enrichment as absence of legal cause or legal ground).

effect of that transfer should be undone. It fills that gap by virtue of its being a coherent legal principle. It is the gap-filler for that gap, but not for this gap. Why is this so?

We have already spoken of the fundamental purpose of unjust enrichment, being the protection of the wealth position of a claimant. Obviously, the strongest form of practical protection of a wealth position is by the vindication of property rights in an identifiable asset (or its product). But the *legal focus* of that mechanism is not wealth as such, but the asset. If, on the other hand, a claimant cannot protect his wealth by founding a claim on any right to the asset transferred, since property rights in the asset have been effectively transferred, unjust enrichment allows him to protect his wealth position by pointing to a reason why the wealth should be restored. That reason is the fact that, in respect of the transfer of the asset representing his wealth, there was a defect in his consent to the transfer. The interest of the plaintiff that is protected by unjust enrichment is that he should only be deprived of wealth as a consequence of truly consensual transactions. This form of wealth protection is not as far-reaching as that effected by vindicating property rights precisely because it is not, and cannot be, centred on vindicating a right *in rem*. Its focus is *in personam*. It goes only as far as to restore the claimant's wealth position; it cannot reach beyond that. Protecting the claimant's position implies neither an allocation of the defendant's post-receipt gains to the claimant, nor that the undoing of the initial transfer of wealth involves also an "undoing" of such post-receipt gains. It implies only the undoing of the initial transfer of wealth.[75]

Indeed, conceptually, the defendant's gain is the product of the use of assets in which the defendant has acquired legally effective property rights. The gain is accordingly not attributable to the wealth that the claimant has transferred, which must be the proper focus of the claim in unjust enrichment, but to the asset as its fruit, and the rights to both the asset and its fruit belong to the defendant. There is nothing in the unjust enrichment claim in itself that would justify re-directing the fruit of the asset to the claimant. That would in effect amount to a re-ordering of property rights. Such re-ordering may, of course, be legitimately undertaken when there is some justification for it, such as wrongdoing. But unjust enrichment does not provide any such justification.

[75] See J. Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Oxford 2002), pp. 38–39, 90–91 and 106–107.

The Taxonomic Consequences if Gain is to be Reached

A claim in unjust enrichment, as in our view properly understood, cannot usher forth a response of disgorgement. Were disgorgement to be permitted on the basis of unjust enrichment, we would be talking of a very different notion of unjust enrichment from that which has emerged in recent decades. Instead of its present *raison d'être*, the protection of a claimant's wealth position, it would require a new *raison d'être*, stripping away a defendant's gain.[76]

To sustain disgorgement, unjust enrichment must *at the very least* be concerned with more than wealth subtracted from the claimant. If such an extension is adopted, our view is that the taxonomy which presently articulates an identifiable and coherent independent claim in unjust enrichment simply falls apart. As we have argued earlier in this paper, the boundary between unjust enrichment and property rights is already being flouted, in part in order to reach gains. Fortunately, this is a reasonably easy corruption to withstand, even though, and surprisingly, it essentially comes from Professor Birks, one of the leading exponents of the independent claim itself.

More difficult to cope with, however, is the danger of unjust enrichment being characterised as a form of wrongdoing, or as being based on or intimately connected with notions of "equitableness" or "unconscientiousness",[77] and which can only become even stronger if and when disgorgement is concluded to be a response legitimately within its reach. Redefining unjust enrichment as a wrongdoing would seem to require its placement, within the general category of wrongs, in a dual rights regime. If wrongs are breaches of prior duties, then the wrong termed unjust enrichment must describe a breach of a prior right of the plaintiff. There is enormous difficulty in conceptualising what that right is. Indeed, the conceptualising of the wrong reveals the incoherence that must follow. Can it seriously be suggested that the wrong is to be found in the breach of a defendant's duty not to be enriched?

The likelihood is that unjust enrichment would take on the role of a general abstract principle, applicable in many contexts *to justify relief* for a "deserving" plaintiff. In such a world, unjust enrichment might (and perhaps in many cases would) be concerned with *restoration* of the nature and in the circumstances described in this paper. But, in other cases, it might be called upon to justify

[76] Cf. K. Barker, "Riddles, Remedies, and Restitution: Quantifying Gain in Unjust Enrichment Law" [2001] C.L.P. 255, esp. 290ff.

[77] See the trend illustrated by *Roxborough* v. *Rothmans of Pall Mall Australia Ltd.* (2002) 185 A.L.R. 335. See R. Grantham, "Restitutionary Recovery *Ex Aequo et Bono*" [2002] Singapore J.L.S. 388.

compensation to a plaintiff, as, for example, in those cases where the response is to order payment of a hire charge to a plaintiff whose property has been used without permission (*e.g.*, no contract of hire). And in yet other cases, it might be said to justify *disgorgement* of gain acquired from a third party, as in Case 1. In this kind of world, unjust enrichment starts to look like little more than a tool for justifying broad discretion in the granting of "appropriate" remedies.[78]

Indeed, when we first asked the question of this paper—can C reach, by a claim in unjust enrichment, the lottery winnings?—it seemed, intuitively, that the answer ought to be "yes". How could a claimant in "*unjust enrichment*" fail to get the gain? But the term is notoriously slippery and induces conceptual error very easily. The answer actually turns out to be that C ought not to be able—*at least by claiming in unjust enrichment*—to recover the lottery winnings. The gap, if it ought to be filled at all, is not one for unjust enrichment to fill, unless attempts to provide a generic conception of unjust enrichment are put to one side and instead there is embrace of a mantra whose essence is that, if it does provide any boundaries, they are unpredictable and possibly even unknowable.

[78] See further M. McInnes, "The Measure of Restitution" (2002) 52 Univ. Toronto L.J. 163, 196–202.