Oxford University Comparative Law Forum

ISSN 1743-8713

Oxford University Comparative Law Forum

Unjust Factors or Restitution of Transfers *Sine Causa*

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Kleinwort Benson v Lincoln City Council[1] is sometimes said to support the proposition that English law does, or should, allow restitution in every case where there is no valid legally recognised reason for the transfer.[2] Such legally recognised reasons are called legal grounds. That particular method of structuring the law of unjust, or unjustified, enrichment is typical of civilian systems, in particular the German system. There is an apparent alternative in the mixed systems - Scotland and South Africa - here recovery is arranged to a much greater degree around the traditional Roman condictiones - but in fact absence of legal ground plays a role here also.[3] The aim of this paper is to examine whether English law should, or is following a Civilian route in developing its law of unjust enrichment. This is not in fact a new question, but there are still good reasons for examining it.

The first is the need to be clear on the effect of mistake. Kleinwort Benson had entered into a number of interest rate swap agreements. These were fully completed. They were then declared to be void because the swaps were ultra vires the local authorities.[4] The bank claimed that they had been mistaken as to the law relating to the validity of the contracts, under which they had paid the local authority, despite the fact that the payments had come earlier than the House of Lords decision as to the contracts' nullity. If the bank had not been mistaken, the case would be authority for restitution for nullity alone. If it had been, relief was properly based on mistake. The bank was actually mistaken,[5] although some commentators have denied this.[6]

Secondly, we accept the existence of natural obligations.[7] Natural obligations arise in cases of agreements where the reason for nullity does not protect the defendant, nor indicates a disapproval of the subject matter of the agreement. They bar relief for mistake of law. However, their recognition might be thought to support a legal grounds analysis, especially when combined with a belief that the result in *Kleinwort Benson v Lincoln City Council* was correct.[8] If that case cannot be explained in terms of mistake, and we recognise a type of valid but unenforceable obligation as barring relief, the conclusion may be that the presence of a natural obligation bars relief and the absence of one, along with other legal grounds, allows it.

Thirdly, the question arose in the recent decision of *Deutsche Morgan Grenfell v IRC*,[9] although the House of Lords refused to make any definitive ruling on the issue whether English law accepts an absence of basis approach generally. That decision involved a decision by the bank to pay Advance Corporation Tax, believing that they could not make a group income election, which would have delayed the point at which tax was due. In fact the rule that they could not was contrary to EU law, and overturned in *Metallgesellschaft v IRC*.[10] The House of Lords decided that the bank had made a mistake and could recover interim interest in a claim for restitution. They also decided that the Court of Appeal was wrong to suggest that mistake and relief for nullity of a tax demand could not co-exist. Birks, recently under pressure from comparative arguments, came over to believe that a legal grounds analysis, such as is found in Germany, is required.[11] Not all have done so; Krebs has not, nor has Edelman.[12] Lord Goff rejected the view in *Woolwich BS v IRC*.[13] Goymour and Baloch are more supportive.[14] The question whether English law does, or should, adopt the more Civilian approach is still live therefore, and indeed Lord Walker expressed a desire to see further academic debate.[15]

This paper is a response to that call, which has already been answered by a number of commentators. It is divided into three main sections. The first provides arguments against those comparatists who argue that the English law on mistake is too broad, and only mistakes as to purpose should count. The second reviews the introduction into English law of the idea of absence of consideration. Questions arise as to what will count as a legal ground. We see that uncertainty as to what will count as a basis will defeat the shift, as it may yet do in Canada. We need a complete and comprehensive list of valid bases for payment. We also need to be able to distinguish when one basis for payment operates, and when another operates, and related to that question what will count as invalidity. The third section draws on comparative material from Scotland and South Africa to demonstrate that the Birksian scheme fails in that Birks misapplied the concepts of transfer and causa.

(1) Distinguishing Mistakes

Meier and Zimmermann argue that English law fails to distinguish adequately between mistakes which should and should not ground relief. We set out their argument that legal grounds analysis is the only way to do so. Secondly we establish that recent English authority holds to the requirement of a mistake, and thirdly we argue that Meier and Zimmermann's argument is flawed and there are good reasons to support the current causal mistake model. We saw that one reason to look at the applicability of legal grounds analysis is the need to be clear on the effect of mistake; this section aims to fulfil that discrete purpose.

(A) The Argument to Distinguish Mistakes

There can of course be a need for restitution for non-liability mistakes.[16] However, Meier and Zimmermann argue that English law now fails to distinguish between relevant and irrelevant mistakes.[17] The reliance on the idea of mistake may strike some as surprising. A legal grounds analysis formally depends on the absence of a reason supporting the payment or transfer. However, the legal ground behind the property transfer can be identified either subjectively or objectively. Properly understood the legal grounds analysis depends on intention as much as the "unjust factors" approach - which legal ground did the claimant intend to create, or discharge?[18] That is the subjective view of legal grounds, and is the standard German method of identifying them.[19] Where the claimant's purpose, discharge of the debt, fails, recovery is available. There are, however, a limited number of purposes. These are *causa solvendi*, *obligandi*, *donandi* and *ob rem*. These are respectively - to discharge an obligation, create an obligation, give, or induce action in another.[20] The objective view suggests that there either is or is not a ground, irrespective of the parties' intention. Scots institutional writers seem to have taken that view.[21] Their view was that the knowledge of the lack of obligation to make the transfer makes it a gift. There are hints that the House of Lords in *Deutsche Morgan Grenfell v IRC* thought the issue was objective. Lord Hoffmann remarked that whether there was a valid causa was a matter of objective inquiry.[22] Yet this has severe problems. Absence of intention to donate is consistent with full knowledge of the facts; it does not follow for instance from knowledge that there is no obligation that there is an intention to make a gift.

English law has developed to allow all mistakes to ground a prima facie cause of action, provided they caused the payment to be made.[23] Meier and Zimmermann suggest that

this is too broad.[24] A causal mistake test could lead to a flood of claims.[25] Meier and Zimmermann suggest for instance that it would be unreasonable to allow the claimant relief where he has merely mistaken his tax liability, or discovered that the recipient of the money is an enemy of a relative of his.[26] However, where he meant to give £100 but actually gave £1000 relief would be reasonable. They therefore suggest a distinction between mistakes in forming the intention and executing it. Only mistakes as to the purpose of the claimant in making the payment affect the legal ground. The mistake must be purpose oriented;[27] it must affect the purpose that the party had in mind before making the gift or payment; that purpose must fail. Meier and Zimmermann suggest that this is in keeping with the old requirement of a liability mistake, because liability mistakes too were purpose oriented.[28]

Meier and Zimmermann point to *Bell v Lever Bros*[29] as demonstrating that English law does not take its unjust factors seriously.[30] It is clear that courts do not give relief for a merely causative mistake where there is a contract; a fundamental mistake is required. This needs to be explained as an exception to the general rule, according to Birks, and represents a big concession to the legal grounds approach.[31] No legal system, however, allows relief where the claimant was obliged to pay.[32] It proves little to recognise this, and the English position is explicable in terms of the consciously chosen allocation of risk by the parties.

There is a final argument that the comparatists have deployed. Meier argues that the rejection of Birks' spent mistake doctrine is hard to reconcile with a concentration on mistake. Krebs appears to agree.[33] The spent mistake doctrine is that if a party makes a mistake as to the validity of a contract, but the transaction is completed, the harm that might have occurred as a result of the mistake is avoided. Each party has received what he bargained for. Relief ought not to be available.[34] The importance of this is that in *Kleinwort Benson v Lincoln City Council* itself the swap was closed - that is all the payments had been made. If Birks is right, no relief should have been available in mistake. The argument appears to come to the following proposition. The payor would have paid the money anyway had he realised that he would get everything that he bargained for despite his mistake. The mistake was therefore not a causal factor.[35] In fact this argument fails. The claimant may have lost on the deal; had he realised this he may not have paid. The true counterfactual is whether the payor would have paid had he realised the transaction's invalidity, not had he realised the transaction would be fully executed anyway, which would have been a misprediction not a mistake.[36] The spent mistake doctrine should not be accepted; it runs counter to the nature of the cause of action.

(B) Recent English Authority on Mistake

Meier and Zimmermann argue that *Kleinwort Benson v Lincoln City Council* supports their analysis that English law revolves around absence of legal ground. Because the decision cannot be explained in terms of the bank's being mistaken, the result focuses attention on the fact that the payment was not due, which compels recovery. The purpose of the payment failed. It was paid to discharge a liability, but did not do so. Their argument that the bank was not mistaken focuses on the question whether we should accept a declaratory theory of law. They argue we should not; at the time the payments were made the law really was different.[37] The payor bank could not therefore have been mistaken. Birks agreed, arguing that mistakes cannot be retrospective. There was according to him no impairment of the decision to pay.[38] In fact more recently he suggested that the House of Lords in *Kleinwort Benson* could not be understood as eliminating absence of basis. "They had no intention of saying that the explanation must be mistake of law."[39] It is hard to agree with this sentiment. The majority had to conclude there was a mistake, essential to the cause of action, in order to invoke section 32(1)(c) Limitation Act 1980. The House of Lords in *Deutsche Morgan Grenfell v IRC* reaffirmed that traditional position on limitation,[40] although Lord Hoffmann dissented on this point, arguing that the mistake need not be an essential of the cause of action.[41] Furthermore, Lord Hope in *Kleinwort Benson v Lincoln City Council* explicitly required a mistake to be a counterfactual cause of the disputed payment, as a sine qua non of liability to return the money.[42]

I have argued in the past that Kleinwort Benson was mistaken. They had all the information available to them, and interpreted it incorrectly. It was possible to show at the time of the payment that they were so mistaken.[43] The possibility of retrospective mistakes has now been reaffirmed by the House in *Deutsche Morgan Grenfell v IRC*.[44] Lord Walker expressly rejected the settled understanding of the law defence,[45] and

characterised the mistake there as retrospective. The judgment which contradicted the belief under which the payments were made was only handed down later.

There are, however, problems with the decision in *Deutsche Morgan Grenfell v IRC*. Lord Hope said it was a mistake "that group relief could not be claimed which led inevitably to the liability to pay ACT."[46] Stevens has correctly pointed out that the money was due,[47] something about which Lord Hope seemed unconcerned. Williams has rejected this; she argues that a second mistake as to the lawfulness of the ACT was generated.[48] The fact of the unlawfulness of the bar on election meant the particular demand for the ACT was in fact unlawful, a position Lord Hoffmann at least seems to have taken as well. The Court of Appeal even seems to have thought the whole regime illegal. Stevens' views are preferable. Firstly Williams' views sit uneasily with the fact that only interest, not the principal, was repayable. Secondly, the overturning of the rule that no election could be made makes it possible to say there was a mistake. It does not make it possible to re-characterise history by retrospectively creating an election that never was. Lord Hoffmann did precisely that. He said "The mistake was about whether DMG was liable for ACT. The election provisions were purely machinery, which DMG would undoubtedly have used, by which it could enforce its right to exemption from liability."[49] As Lord Scott accepted, only if the EU law decision rendered the ACT unlawful would it be recoverable.[50] The tax was not invalid. The only possible action was one for compensation for breach of Community law.[51]

That action for compensation for breach of EC law was time barred. Only by finding the mistake, and declaring it operative, was the majority able to justify relief. This meant that the question whether English law recognises a legal grounds system did not come up for decision, and Lord Walker clearly did not want to be tied down to moving English law in that direction.[52] Lord Hoffmann also said, "At any rate for the moment ... unlike civilian systems, English law has no general principle that to retain money paid without any legal basis (such as debt, gift, compromise, etc) is unjust enrichment."[53] English law therefore formally retains its unjust factors approach, although the House's decision cannot be taken as wholly authoritative, given its error as to the effectiveness of the mistake.

(C) The Rejection of the Distinction between Mistakes

This section aims to undermine Meier and Zimmermann's argument, which they have sometimes expressed individually,[54] by showing that there are good reasons to treat all mistakes the same. There is no metaphysical distinction between mistakes that affect the formation of the intention to transfer the wealth and those that do not. Their suggestion to the contrary is one of the major flaws in their argument that we must look to the purpose to be achieved, and to the formation of the intention.[55] Take the example of a gift. Is the distinction drawn here stable? It is impossible to tell whether or not the donor's mistake is only in forming the intention to give. It is uncertain what 'intention to give' means. Is it his intention to give at all, his intention to give this present, or to this person, or in this place, or some other intention?

Even if such intentions could be distinguished, any mistake which counts as a sine qua non condition of the gift affects the donor's decision in some way; usually we say restitutionary liability in this area protects personal autonomy.[56] This explains the causal mistake test in restitution. Virgo and others have talked of the justification being the vitiation of the parties' intention.[57] By this we mean that the data used to arrive at the claimant's belief were wrong, or that the heuristic processes that he used to process the data were flawed. The party's intention is vitiated irrespective of the particular subject matter of the mistake. Despite some confusing subsequent dicta, Neuberger J accepted this in *Nurdin & Peacock Ltd v DB Ramsden & Co*. He said, "It is hard to see a good reason, either in principle or in practice, for holding that a person should be entitled to recover a payment made under a mistake if that mistake relates to the question of his liability, but that he should not be entitled to recover the payment if the mistake was of some other nature."[58] This is quite right; the logic of the claim extends to all mistakes; the effect on the mind or decision making process is the same. The process of looking for mistakes that affect the formation of the intention begins to look like the old English law question of what a fundamental mistake was, a requirement attacked as incurably vague.[59] The ideas of a mistake as to the legal nature of the transaction and motive are inextricably linked.

(2) Absence of Consideration

Deutsche Morgan Grenfell v IRC provides no clear authority for the Civilian approach, and there are good reasons why all causal mistakes should ground restitution. We might well leave it here; however, Professor Birks was converted to the legal grounds analysis, which he argued provided the best explanation for English law. English law in this area is complicated by the idea of "absence of consideration", which became entangled with failure of consideration. The first part of this section examines the infancy of absence of consideration, and how it equates to legal grounds analysis. The legal grounds approach is said to have greater explanatory power, and while that may occasionally be right, we show in the second part that it is not always so. Nonetheless, the Civilian system has been described as clearer and more elegant.[60] In reply, the English approach has been described as more intuitive.[61] Neither is a sufficient argument in itself to adopt or reject the Civilian approach, and it should be born in mind that only rarely will there be a different result under the new approach.

(A) The Genesis of Absence of Consideration

Absence of consideration has caused much confusion. It is derived from *Westdeutsche Landesbank Girozentrale v Islington LBC*.[62] Given the lack of comparative input in that case, it seems likely that it was intended to be an additional unjust factor. *Westdeutsche* was a swaps case. Some of the swaps were open swaps, where there were payments still to be made; however, one was closed, where there were no more payments to be made. The bank was the losing party in the closed swap and sought to recover. Hobhouse J said

> In my judgment, the correct analysis is that any payments made under a contract which is void ab initio, in the way that an ultra vires contract is void, are not contractual payments at all. They are payments in which the legal property in the money passes to the recipient, but in equity the property in the money remains with the payer... Neither mistake nor the contractual principle of failure of consideration are the basis for the right of recovery... I consider the correct analysis is absence of consideration...[63]

Absence of consideration grounds relief, whatever the reason for the avoidance of the contract, be it that the parties were mistaken, or that the contract was ultra vires. Hobhouse J held that in both the closed and open swaps the cause of action was absence of consideration, not failure of consideration.[64] *Guinness Mahon v Kensington v Chelsea RLBC*,[65] another swaps case, also necessitates relief for invalidity. The bank was the losing party and claimed relief on the grounds of failure of consideration. It succeeded. Morritt LJ said that the consideration had failed totally because the bank had bargained for a legally enforceable right to the money.[66] The Court believed to be bound by the Court of Appeal in *Westdeutsche Landesbank Girozentrale v Islington LBC*, which had likewise held that restitution was justified by the lack of a binding contract and of an enforceable right to the money.[67] This is a different way of saying that money was paid to discharge an obligation which did not exist - a failed payment *causa solvendi*. The Court of Appeal in *Westdeutsche* did this on the basis of the authority of a number of cases under the Grant of Life Annuities Act 1777, which Swadling argues they misinterpreted.[68] The open swap in Westdeutsche could be explained on the basis of failure of the counter-performance, and that was an alternative the Court of Appeal relied on.[69] Absence of consideration was never affirmed in the House of Lords in *Westdeutsche Landesbank Girozentrale v Islington LBC*,[70] as the council involved in the closed swap did not appeal.[71] *Guinness Mahon* remains, though, authority for relief in closed swaps cases under failure of consideration.

In his last book, Birks argued that there are now three possibilities, absence and failure of basis and mistake, which all cut across each other.[72] The cases have left them as alternative causes of action. Absence of consideration places importance on the sufficiency of nullity, whereas it is merely a necessary condition for the other two bases for relief, which also require either failure of reciprocation or mistake. All other things being equal, absence of basis renders proof of mistake superfluous. Even on a subjective view, mistake is assumed. On that view, the decision in *Deutsche Morgan Grenfell v IRC*[73] that mistake of law claims can co-exist with the *Woolwich BS v IRC* claim should be wrong. There is no reason to claim mistake. In fact at the time there was. Were the claim a mistake claim it would be possible to take advantage of section 32(1)(c) Limitation Act 1980. This is now no longer possible.[74] In future therefore there is no advantage in positing the additional mistake. Absence of consideration also renders failure of counter-performance superfluous. Absence of consideration for Birks was not a policy based factor, nor was it based on deficiency of consent.[75] It could not be a third type of factor because it was a necessary part of the group based on deficiencies of consent.

Birks' original argument was that the absence of consideration view fell foul of the *Chandler v Webster*[76] fallacy.[77] It should consequently be rejected. The true position he argued was that wherever there was a failure of performance, restitution follows. *Chandler v Webster* was one of the coronation cases. The contract was frustrated when the king's illness forced the cancellation of the coronation ceremony; the claimant was unable to obtain the return of any of his prepayment because frustration did not invalidate the contract. It was initially valid. To bar all relief in such circumstances and allow loss to lie where it falls seems unacceptable. What matters is performance, not liability, nor validity. That is the classic formulation of failure of consideration in *Fibrosa Spolka Ackcjyna v Fairbairn Lawson*.[78] That case involved the frustration of a contract to supply machinery to a Polish buyer in Gdansk, which was frustrated by the supervening illegality of trading with the enemy after the German occupation of Poland. Viscount Simon said[79]

> In English law, an enforceable contract may be formed by the exchange of a promise for a promise, or by the exchange of a promise for an act... and thus, in the law relating to formation of contract, the promise to do a thing may often be the consideration, but when one is considering the law of failure of consideration... it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise.

In other words, if performance is not forthcoming, restitution should follow. However, if performance is forthcoming, restitution ought not to be forthcoming on the basis of failure of consideration, invalidity notwithstanding.[80] The closed swaps should therefore not attract relief, at least not for failure of consideration. In *Guinness Mahon*, however, Morritt LJ distinguished *Fibrosa* as a case where the contract was originally valid.[81] There are at this point two distinct issues. Firstly, is failure of consideration to be understood as failure of actual performance? Secondly, if we see failure of consideration as failure of the validity of the obligation, how do we avoid a return to *Chandler v Webster*? In the particular context of frustration the answer is that the Law Reform (Frustrated Contracts) Act 1943 fills the field. However, the model lives on in termination for breach cases.

On the first question, Meier claims that there is no authority that the defendant must be unwilling to perform for the claimant in order to obtain relief from his performance in failure of consideration where the contract is void.[82] The classic case on readiness and willingness to perform is *Thomas v Brown*.[83] The contract was valid. Mellor J said that the buyer could not repudiate and recover his payment where the seller stood ready and willing to perform.[84] This rule is not so much a matter of unjust enrichment law as of contract law. The buyer was claiming that the contract was unenforceable; the court thought otherwise, and because the seller had not chosen to terminate the contract, it remained on foot. Had the vendor terminated, accepting what amounted to a repudiatory breach, relief would have been available. Meier argues that if recovery is denied where the defendant is ready and willing to perform a void contract, the contract is immune to being unwound just as if it were an unenforceable contract.[85] The party who performs an unenforceable contract cannot recover his performance, yet the party who has not yet performed escapes liability; the result depends on which party performs and when.[86] This strikes Meier as arbitrary.[87]

This argument only works, however, if the equivalence between failure of consideration and mistake is accepted. We saw in the previous section that Meier's arguments for distinguishing mistakes were unsatisfactory; a qualified rule that all causal mistakes ground relief is better. Unenforceable and natural obligations have the same effect in that executed agreements cannot be unwound for mistake as to liability to pay, but executory agreements are not enforced. That overlap, which also exists in Scotland,[88] has caused little difficulty. Natural and unenforceable obligations bar mistake claims, but not failure of consideration. Void obligations are susceptible to both. Even if a readiness and willingness exception is allowed in void obligations cases, there is a difference. The claimant under a void obligation can resort to mistake, but not under an unenforceable obligation. Illegal obligations may be susceptible to mistake,[89] but not in the normal course of events failure of consideration.[90] While locus poenitentiae, which allows withdrawal from unexecuted illegal transactions and the recovery of assets transferred, can be seen as a type of failure of consideration, there is no "ready and willing" exception.[91] To allow it would give legal weight to illegality. Meier is therefore wrong to say that unenforceable and void contracts have the same effect.

Birks dealt with the second question in his last book, while acknowledging that *Chandler v Webster* remains incorrect. *Fibrosa Spolka Ackcjyna* fell into error, he now argued, in saying that only void or voidable contracts invalidated the obligation sufficiently to allow restitution; terminable contracts should do so, too.[92] In saying this, he criticised

Hobhouse J in *Westdeutsche Landesbank Girozentrale* for insisting that failure of consideration was only available within contract.[93] These terminability cases were for Birks examples of cases where there is no basis for the payment. Below [section (3)(C)(ii)] we will see that comparative analysis points up serious issues with Birks' reformulation.

(B) The (Dis)Advantages of Legal Grounds Analysis in General

One argument that comparatists raise in order to show that a shift to an absence of basis approach is required is that it has greater explanatory power, and is more economical. This may seem counter-intuitive. The layman would hardly understand that he could get money back because there was no legal basis; he would, though, understand getting money back because he didn't owe it. The unjust factors frequently replicate the factors that render the basis a nullity. They are therefore superfluous. Birks' example was *Mason v New South Wales*.[94] An invalid NSW statute allowed the state to levy dues on trade across the border into Victoria. In raising the taxes, the NSW Government threatened to detain the claimant's property. He paid, and recovered the money for duress. This, Birks argued, was unnecessary. The statute's unconstitutionality sufficed, as it subsequently did in *Woolwich v IRC*.[95] However, McKendrick has argued that a liability mistake is needed to justify restitution after the nullity of a contract for mistake.[96] This might seem redundant; first a fundamental mistake is raised to avoid the contract, and secondly a liability mistake is raised to justify restitution - nullity suffices to explain recovery.

Birks acknowledged that there could be different rules for gifts and for contracts. Gifts remained on his view invalidated by causative mistake. However, he was then forced to say that the legal ground was invalidated ab initio by the mistake. That invalidity led to relief.[97] In other words, the mistake invalidates the gift. The invalidity justifies restitution. In contract cases, the mistake invalidates the legal ground much less frequently than in gifts. However, in the gift case, at least where there is no pre-existing promise to make the gift, the utility of a two stage test is at best questionable. There, the unjust factors approach is more economical. Similarly, in cases of rescission of contracts for misrepresentation it seems less than economical to say as Millett LJ did in *Portman BS v Hamlyn Taylor Neck* that the obligation to make restitution stems from invalidity and not from the misrepresentation.[98]

Birks attempted a list of possible bases justifying retention, but the experience of Canadian law sounds a very important cautionary note; it is in fact on the verge of chaos. It calls legal grounds juristic reasons.[99] Whether it took the idea seriously at first is doubtful. It now does. *Garland v Consumer Gas*[100] and *Pacific National Investments v Victoria (no 2)*[101] clearly purport to shift Canadian law to a more civilian approach. In *Pacific National Investments v Victoria (no 2)* the company was trying to recover the costs of its improvements to land on the basis of an ultra vires commitment by the City to rezone it, although in fact it seems no such commitment was ever made - the company took a risk. Binnie J argued that the claimant must show there is no juristic reason. He allowed recovery, and commented that this new approach required the claimant to prove a negative, although bizarrely positive proof of mistake seems to remain relevant; he also said had there been no mistake the position might have been different.[102] This implies an objective approach, but the main problem is that a negative proposition is almost impossible to prove. Furthermore, the list of juristic reasons which the Supreme Court of Canada provides in these two cases is somewhat eclectic and haphazard, and clearly does not cover the field completely. Iaccobucci J said in *Garland*, a case concerned with restitution of interest on late payments demanded illegally, that reasonable expectations and public policy may lead to the recognition of new juristic reasons.[103] Defining reasonableness will be difficult, and fails to provide the certainty required. Birks also acknowledged his scheme was incomplete. Given one of his original concerns was that English law would not draw up a list quickly enough, this is a matter of concern.[104] The failure to draw up a list of valid bases is as essential for Birks' subjective approach as an objective approach. The subjective approach cannot focus entirely on party intention; if it did, it would become an unjust factors approach.

Helen Scott has identified another problem with the legal grounds approach. In *Kelly v Solari*,[105] there is no putative contract under which the parties perform. She argues that while there are some cases where the legal grounds approach has greater explanatory power it breaks down in other cases.[106] The claimant's payment in *Kelly v Solari* was extra-contractual, and it is here that the problems lie.[107] The failure of the claimant's purpose cannot be directly inferred from the invalidity of a contract. This seems doubtful.

The failure of the purpose can be inferred from the fact that the only conceivable relationship between the insurance company and Mrs Solari, was a contractual one. The contract, having lapsed, did not compel the payment. It is hardly plausible that the insurance company intended a gift to Mrs Solari. Scott's point about the absence of a ready inference of the claimant's purpose rendering the legal grounds analysis no better than the alternative is valid, but it is unclear that there is no ready inference in the range of cases she suggests.

The real, and related, problem lies in the case where the claimant pays money, knowing it is not owed in order to prevent the cut off of some supplies by the defendant. Scott suggests the only sensible explanation for recovery is compulsion,[108] and proof of compulsion within the condictio indebiti is required for relief in South African law.[109] Compulsion is also important for another reason. There is a defence in German law that the payor knew that the payment was not due.[110] This is typical of Civilian systems. The defence cannot logically apply where the legal ground is void because of mistake. It can only apply where the ground is void for some other reason, but not as a defence in cases of physical duress.[111] The subjective view of legal grounds has difficulty here - your purpose in closing the dispute was after all fulfilled. In the end a fiction is needed. The purpose of the payment is not to prevent the threatened outcome, but to discharge the debt that does not exist.

The defence of knowledge also provides a difference of approach between the systems in cases of doubt. English law denies relief; German law allows it. There is therefore a minute broadening of liability. Lord Hope insisted on a sine qua non mistake and said, "A state of doubt is different from that of mistake. A person who pays when in doubt takes the risk that he may be wrong... whether the issue is one of fact or of law."[112] The defence of knowledge brings in many of the same questions as the unjust factor of mistake under a different guise.[113] There are clear examples therefore of the unjust factors approach intruding into a legal grounds analysis. It is not obviously significantly more elegant than unjust factors.

(3) Drawbacks of the Birksian Scheme

English law has a ready comparator nearby; Scots law is based on a Civilian tradition, although it has had considerable infusions of English influence. Lord Walker made an interesting comment in *Deutsche Morgan Grenfell v IRC*. He said, referring to the Birksian scheme, "The recognition of "no basis" as a single unifying principle would preserve... the purity of the principle on which unjust enrichment is founded, without in any way removing... the need for careful analysis of the content of particular "unjust factors""[114] This was in the context of a plea for English law to align itself more closely with Scots law.[115] Lord Hope has commented that the basis of unjust enrichment in both English and Scots law is to prevent the defendant's retention of assets without a basis,[116] a principle Lord Walker referred to approvingly.

This section takes up the challenge Lord Walker implicitly laid down, of examining the Birksian scheme from the perspective of Scots and South African law, to which the scheme has similarities. We see that there are in turn three major difficulties, relating to Birks' treatment of indirect or non-participatory enrichment, mistake claims and terminability of contracts for breach. The mixed systems' unjustified enrichment law has traditionally been arranged around the condictiones. These actions include the condictio indebiti and the condictio causa data causa non secuta, or condictio cd for short. Each represents a different mode by which there could be no basis for the payment to be retained. They are mutually exclusive grounds of recovery,[117] something Lord Walker seems not have fully appreciated in talking of unjust factors, which are not.

Birks' legal grounds approach relies on a subjective determination of what the ground was. What purpose did the claimant intend? The importance of nullity of a contract is that the claimant's purpose was to discharge a debt that never was. Birks commented, "If the purpose is discharge of an obligation and there is indeed a valid obligation which is discharged the enrichment has an explanatory basis. If there turns out to be no valid obligation discharged, the enrichment is inexplicable."[118] This cannot be understood as an objective approach; it is a subjective approach based on the failure of a purpose to discharge an obligation, the *causa solvendi*. Birks' subsequent comment, "voluntary enrichments are those transferred without obligation but in order to achieve some outcome" refers to a different possibility and a different purpose, the *causa ob rem*. Baloch suggests that Birks retains unjust factors as a means of deciding whether the

basis had failed.[119] He argues that both absence of basis and reasons for invalidity are essential to a system of unjust enrichment.[120] He goes on that on the new Birksian view, "the justification, and therefore controlling factor, for the restitutionary award is the particular invalidity involved."[121] If so, the scheme in fact approximates the mixed systems' condictio structure, including, given the reference to "the particular invalidity involved", their mutual exclusivity. Birks' own preference, despite his separation of obligatory and voluntary enrichments, seemed to be for a single action, and the removal of reasons for invalidity to other areas, and other books.[122]

That may be impossible. Elements of the unjust factors, as we have seen, force their way to the surface even on an absence of basis approach. The Scots and South African approach may prevent this. They are said to be multi-actional; the different condictiones are different types of claim, rooted in the absence of basis approach.[123] We have seen that despite coming under the condictio indebiti in South African law, positive proof of compulsion is needed. A multi-actional system, allowing for easier disuniformity may therefore be preferable. Ironically, perhaps, the major structural question in both mixed jurisdictions is, however, whether a general unjust enrichment action should be recognised,[124] and at the same time whether the explicit error requirements, which exist under the condictio indebiti in both Scots and South African law[125] ought to be removed.

(A) Non-Participatory Enrichment

Non-participatory enrichment comes in several different varieties. The defendant may be enriched incidentally, and possibly unavoidably, as a result of actions aimed either to benefit the claimant or a third party. The defendant may receive the property via an intermediary, or the claim may be that the benefit was interceptively subtracted. Baloch has suggested that the greater unity of the new Birksian scheme over the German system is an advantage.[126] This section demonstrates that the Birksian scheme fails - precisely because of its greater unity. It treats unlike cases alike. This criticism can indeed also be directed at the Canadian formulation, which again has a much greater unity than the German.

(i) Incidental Benefits

Hedley has been startled by Birks' treatment of an example used by the Lord President in *Edinburgh Tramway v Courtenay*.[127] That was of the scenario where a man lit a fire and claimed his upstairs neighbour was unjustly enriched by having his flat heated also. It is not a gift, which is Birks' explanation for the lack of liability.[128] For there to be a gift, which would count as a valid transfer of enrichment, there would have to be a transfer. But there is no transfer. A transfer is a transfer of assets with a purpose. Even taking the view that the reduction in the upstairs neighbour's heating bills is enrichment at the expense of the claimant, there is no putative purpose to fail. It is not a conscious transfer. Edelman's example is different, involving the claimant's work on his land raising the value of the neighbour's. He also suggests there is no juristic reason for the enrichment,[129] so prima facie relief should be available. Yet again it is not a conscious purposive transfer. For that reason the case could not be brought into a condictio claim. Those cases sometimes called "ignorance" cases in English law cannot therefore be condictio claims.[130] There is a possible apparent exception. South African law, unlike Scots, accepted the condictio furtiva, available against a thief.[131] This may be a delictual action, and in its Roman inception may well have been seen as such. However, despite this slightly anomalous condictio action a significant difference lies between enrichments by transfer, and enrichments by act of the party enriched.

Scots law takes the position that incidental benefits such as this are not enrichments "at the expense" of the claimant. There is nothing anyone can do to prevent them and the claimant downstairs flat owner has just as nice and warm a flat whether some warmth rises to his neighbour or goes straight out the roof. The Court of Session dismissed the claim in the example on the ground that the party claiming recompense must have lost something. This appears the most sensible conclusion, and it is notable that it was not reached in the context of a condictio claim. Baloch concedes in his paper that the new Birksian view deals only with difficulty with these cases,[132] but they represent a much greater problem than he admits.

(ii) Indirect Enrichment

There are several different ways in which enrichment might be indirect. Hedley observes that Birks argued the law should be the same whether the enrichment was direct or more

circuitous.[133] Birks argued "at the expense of" asks "what variations upon knowing transfer are possible without losing touch with the logic which explains the right to restitution of a mistaken payment."[134] These indirect enrichment cases may be proprietary claims, which we treat first. They may involve a personal claim leapfrogging an intermediary, or interceptive subtraction.

Birks quite properly said that on his view many proprietary claims were condictio indebiti type cases. Birks also argued that all proprietary claims contingent on tracing were unjust enrichment claims.[135] That is where A (usually a trustee) passes property to B, who passes it to C, A's beneficiary's claim against C is an unjust enrichment claim. This, however, is a step too far. It cannot be the same type of claim as a condictio indebiti. In order for a condictio claim to operate there must be a putative basis for a transfer. Yet as between the trust beneficiary and C there is no such transfer, or putative basis. Indeed in German law "at the expense of" is almost entirely redundant under the *Leistungskondiktion* as it is inherent within the concept of transfer.[136] That need not mean that proprietary claims contingent on tracing are not unjust enrichment. In fact they are, but it requires an acceptance that these are quite different types of claim.

Much the same argument can be put to suggest that neither *Lipkin Gorman v Karpnale*[137] nor knowing receipt can be personal unjust enrichment cases as Birks claimed. These are the leapfrogging cases, alluded to earlier, where a causal link from the claimant to the defendant via an intermediary suffices to demonstrate enrichment. Birks acknowledged the problem in a footnote, when he said this type of claim was a type of actio de in rem verso. Giglio has also suggested that *Lipkin Gorman* is an anglicised version of the action.[138] In that case Cass withdrew money from the claimant firm's client account and paid it to the defendant club in payment of gambling debts. The firm successfully recovered.

From a comparative standpoint the actio de in rem verso, while it undoubtedly has a long history back to classical Roman law, has its modern Civilian detractors. German law has rejected the action although Giglio suggests it cannot do so completely. South African law has also largely rejected the actio de in rem verso.[139] De Vos suggested that in principle no claim should be available in cases where an intermediary is involved in the transfer of assets from claimant to defendant. In support of his argument that these leapfrogging, or indirect enrichment, cases are personal unjust enrichment cases Birks pointed to a number of agency cases,[140] and argued relief could not be limited to those agency cases. However, South African law limits liability to a number of agency situations.[141] In South African law this seems to take place under the heading of the actio de in rem verso. *ABSA Bank v CB Stander*[142] provides a further, but related, exception. That decision involved Kent's loan of a car subject to a retention of title clause in favour of ABSA to Bezuidenhout. He crashed the car and delivered it to Stander to be repaired before disappearing. ABSA took the car back and Stander counter-claimed for the value of the repairs. He succeeded in an extended actio negotiorum gestorum, which the court saw as related to the actio de in rem verso. The extended action applied as an enrichment action where the contractual action against Bezuidenhout was useless, and another party, ABSA, was enriched.[143]

In Scots law as well, the general rule is that indirect enrichment cannot be recovered. The two main exceptions Whitty identifies are agency cases,[144] and more uncertainly some cases involving fraud. These are cases where recompense, partly derived from the actio de in rem verso, applies. From a comparative standpoint it makes sense therefore to restrict such personal claims in English law to agency cases.

Interceptive subtraction takes place in those cases where the defendant makes money from another's asset. This allowed Birks' re-conception of *Edwards v Lee's Administrator*[145] as an unjust enrichment case. There the defendant had taken tours into a cave which started on his land, but extended under his neighbour's. That was a trespass, but Birks was able to reconceptualise it as unjust enrichment.[146] Yet even if this can be seen as enrichment at the expense of the claimant,[147] it cannot be seen as a transfer. The difficulty is quite deep in unjust enrichment theory, and is related to the incidental benefits point made earlier. Edelman refers to restitutionary damages as retransferring value from defendant to claimant.[148] He uses the example of a trespasser squatting on land. Value in the form of the use of the premises is transferred to the trespasser, and subtracted from the owner's dominium. Later he describes this measure as an almost perfect parallel to unjust enrichment. Further he describes enrichment as the narrower term,[149] when in fact it is the wider, because it does not need a putative purpose. Birks described Edelman's work as irrefutable,[150] yet it causes terminological

confusion. The sense in which Birks and Edelman use the word transfer is incompatible with the meaning of the word in the condictio-type claim, and leads to the quite false conclusion that these use claims can be treated as if they were condictio claims. In German law this would be a case of the *Eingriffskondktion*, if anything. In Scots and South African law there are two sets of rules, concerning reasonable sums for the use of another's asset, and profits from possession of another's asset.[151] The relationship between the latter claim and enrichment law is unclear,[152] but what is clear is that in none of these jurisdictions are they covered by performance claims. Birks stated that the law of unjust enrichment was the "law of all events materially identical to the mistaken payment of a non-existent debt."[153] These cases are not.

(B) Mistake Claims

This might strike some as odd. Surely all mistake claims now fall under a condictio system. They do not. Birks does not in fact deal with this in detail. The Scots decision of *Shilliday v Smith*[154] demonstrates the problem. In that case the pursuer claimed money back spent improving a house on the basis that she and the defender would marry. They did not. She recovered under the condictio cd. One case that Lord Rodger relied on is *Newton v Newton*.[155] That though is a different type of case. There the pursuer believed he owned the property. The mistake was explicitly relied upon. A mistake that you own the property negatives the possibility of a purposive transfer, which is why it cannot be a condictio claim. While there are clearly some improvement cases in Scots law that can be fitted into a condictio, many cannot be.[156] In German law this might not in fact be unjust enrichment at all. Where the claimant is in possession § 964ff BGB will apply. Otherwise the *Verwendungskondiktion* applies.[157] German law has a problem here. The fact that my act improved your property is insufficient to ground relief. What is sufficient is controversial, although it is obvious that some substantive reason is needed.[158] This is more apparent in the *Rückgriffskondiktion*. That applies where a party mistakenly pays a debt believing it his own, and succeeds in discharging it. An example is a shareholder paying a company's tax bill believing himself also liable. The tax was due, so he cannot recover from the Government. He intended to discharge his own liability, so there is no purposive transfer to make the company liable. Some other route must be found. Markesinis, Lorenz and Dannemann expressly talk of the mistake, although this is not typical of German lawyers.[159] Dannemann suggested later that the separation of the *Rückgriffskondiktion* from performance claims artificially divides up similar claims that would be better treated together.[160] Scots law, however, took the obvious route - rely on the mistake.

English law currently does so too. *Greenwood v Bennett*[161] is the same sort of case. The claimant undertook repairs to a car before realising it in fact belonged to the defendant rather than himself. He sought to recover for the repairs. While the Court of Appeal did not deal in detail with the question of improvements, they did comment that the car had to be worth more repaired. With no possibility of being fitted into the new structure the easy answer is to stick with mistake.[162] Indeed this is linked to the point we saw earlier about enrichment in English law being wider than transfer. There is no transfer, but the defendant is unquestionably enriched. Indeed this is quite clearly also true in Scots law in those cases where recompense is available outside a condictio.[163] Indeed *Morgan Guaranty v Lothian RC*[164] makes it clear that there is currently a mistake requirement in the condictio indebiti in Scots law, although many commentators wish to remove it.[165] If we have a mixed unjust factors/absence of legal ground approach as found in Scotland, and advocated by Scott as the best solution for South African law, where the law has also developed specific unjust factors outside the condictio structure,[166] the question still arises what mistakes should ground relief. The obvious answer is causal mistakes. Why then reject that test in transfer scenarios, when we saw earlier it has benefits?

(C) Termination for Breach

We have seen that one lesson from comparative law is that Birks' concept of transfer is too broad. However, as well as over-extending the concept of transfer and absence of basis, Birks misapplied the idea in one of the main areas where a transfer does take place. This section is divided into two. The first part looks at the situation in the main jurisdictions targeted for comparison here; the second shows that the internal logic of the system is not reflected in Birks' reformulation of the law. Contrary to Baloch's view, to make Birks' scheme work will require considerable upheaval in English law.[167]

(i) Termination for Breach in the Civilian Systems

There is, according to McQueen, a clearly articulated rule in Scots law that outside frustration the condictio causa data causa non secuta cannot apply where there is a valid contract.[168] He generalises this to all enrichment remedies. In Scots law it is clear that termination for breach only effects prospective obligations;[169] in South Africa only obligations, accrued and due and enforceable independent of any element of the executory contract, remain so.[170] There seems little difference with Scots law.[171] The position seems to be that where there are continuing obligations cancellation is prospective, and where not, it will be retrospective. This is pretty much identical to the English position.[172] Indeed since the South African law of cancellation for breach is largely an import from English law, and English cases have been influential in its development, this ought not to be surprising.

The prospective effect of termination creates problems for the use of the condictio causa data causa non secuta. Indeed the problems are common to frustration cases as well. *Cantiere San Rocco v Clyde Shipbuilding*[173] is the classic case in Scots law. It involved a sale of engines to an Austrian company, frustrated by the outbreak of the First World War and the illegality of trading with the enemy. It is clear authority for the use of the condictio in that context, and this seems to be too firmly embedded now to be easily removed. Evans-Jones has criticised the extension into termination for breach cases.[174] His argument is essentially twofold. Firstly, the House of Lords in *Cantiere* did not properly appreciate the history of Scots private law when they applied the Corpus Iuris Civilis, and in any case applied an incorrect reading of Justinianic Roman law. Secondly, in cases of termination for breach or frustration the reason why the party pays is to discharge his obligation. He did so.[175] That is why the condictio is traditionally said to apply "outwith contract". This means that Morritt LJ's comments distinguishing *Guinness Mahon v Kensington & Chelsea RLBC* from *Fibrosa* on the grounds that *Fibrosa* was a valid contract make sense, as do Hobhouse J's comments on contractual failure of consideration. They are no more than recognition that the condictio indebiti cannot apply within a valid contract.

Connelly v Simpson[176] where the pursuers were claiming under the condictio cd in a termination for breach case seems to have followed this line of reasoning. It was a case of a sale of shares. The shares were paid for but never transferred before the voluntary liquidation of the company. Lord McCluskey said that there was no right to elect between contractual and unjustified enrichment remedies,[177] and Lord Sutherland expressly said that the payment was in consideration for a personal right to demand the shares, which they had received.[178] *Connelly v Simpson* has its difficulties, however, and they are instructive as to the English law. It suggested that not only was the condictio cd not available, but restitution was not available at all; the remedy was damages. Restitution refers to reversal of transfers. That reversal need not be in pursuance of unjustified enrichment.

Despite the lack of a principle of consideration in Scottish contract law, there is a principle of mutuality. In effect bilateral contractual obligations are conditional on the other side's performance. There was a justifiable rescission of the contract in *Connelly v Simpson*, which meant that had the purchaser not paid for the shares, he could not have been sued. The question is whether the principle can require repayment. Hogg suggests it does.[179]

Connelly v Simpson is a money case; other cases suggest an enrichment remedy is possible where benefits unreturnable in specie are at issue.[180] In *PEC Printers v Forth Printers*[181] a type setting firm completed part of the work for a printers' firm, but then said they could not finish it on time. The printers rescinded the contract and hired a typesetter to work in-house. The subcontractors sued for the work they had done. A quantum meruit was granted on the basis of an implied contract; this was a true implied contract, not a disguised enrichment claim. The sheriff said obiter, however, that there might be a recompense claim for work done. After *Shilliday v Smith* recompense is to be seen as a remedy for any of the condictiones.[182] If so, and as *Connelly v Simpson* bars repetition (payment of money) under the condictio cd in termination cases, it should bar recompense, too. Attitudes to recompense and repetition have not always been consistent, though. Lord Clyde said in *Morgan Guaranty*, "In recompense the emphasis is on the enrichment, the loss and the absence of intention of donation. In repetition the emphasis is on the payment of money in the mistaken belief it was due."[183] There is no real justification for the difference, and this tends to support those suggesting a general action in Scots law.

Hutton focuses on South African law.[184] In South African law, the return of money or returnable benefits after termination is a contractual remedy, but restitution of unreturnable benefits such as services is frequently said to be unjustified enrichment.[185] The asymmetry is indefensible;[186] the question is merely whether liability in both cases is unjustified enrichment or contract. Hutton's argument is that it is unjustified enrichment. Termination of the contract removes the future obligations to perform. The assumption that the contract will be completed fails at the moment of termination; she then argues that the condictio cd is an appropriate action.[187] She reaches this conclusion by drawing on English jurisprudence on failure of consideration. This and her other argument that the obligation to perform is removed by termination retrospectively and that therefore despite the original validity of the contract, the causa falls away and the condictio ob causam finitam is appropriate, sits uneasily with the availability of damages for breach of contract.[188] It is trite that there is no rule in South African law that damages based on the "positive interesse" are not available in cancellation cases. Crudely, they are the equivalent of expectation damages. It implies enrichment remedies are available in South African law alongside contractual ones,[189] precisely the position correctly rejected in Scotland by *Connelly v Simpson*. The logic behind a condictio system seems to bar such concurrency of remedies.

In the context of money transfers, South African scholars have developed the transformation theory.[190] It is not clear why the transformation theory does not, or cannot apply to non-money cases, but it is clear that some South African commentators believe that where enrichment is measured with reference to the contract price, as it should be, contract law is doing the work.[191] The theory distinguishes between two sorts of contractual rights, the primary obligations and the secondary obligations to pay damages or make restitution. By cancelling, the claimant transforms the contract into an obligation to pay damages and perform restitution. As Lubbe puts it, cancellation or rescission of a contract for misrepresentation protects the autonomy of the parties, cancellation for breach should fulfil it, providing enforcement of the contract where other means are impossible or impracticable.[192] Consequently positive interesse damages are available, and damages for "out of pocket expenses", or negative interesse damages, ought not to be, as they shift the risk of a bad bargain from one party to another.[193]

This transformation theory appears in a modified form in German law. § 346ff BGB provides the law on restitution after termination of a contract for breach. This is a contractual remedy, not an unjust enrichment remedy.[194] Prior to 2002, unlike in South African law, however, expectation damages were not available.[195] This is no longer the case. Termination and all damages claims are compatible, with one exception - a claim for the difference between defective and correct performance.[196] The defective performance is returned - the correct claim is for the full expectation value of perfect performance. It is seen as unsatisfactory to have two methods of unwinding mutual performances, yet the availability of expectation damages forces the conclusion that this is a contractual regime. Nonetheless there has been an appreciation of the need for further harmonisation.[197]

Krebs suggests that if unjust enrichment does not disturb the risk allocation in the contract the two can act concurrently.[198] In an unjust factors approach, Krebs is right. Without the conceptual need to divide contractual restitution from unjust enrichment, we need to be careful not to disturb the contractual risk allocation in restitution. That need not always preclude restitution within a valid contract.[199] The Civilian system, however, is insufficiently nuanced to be able to say despite your purpose being fulfilled unjust enrichment is available. What it can, and does do, most obviously in Germany, is look at the policy behind the invalidating provision to decide if the obligation is void, or not.[200] It would do so in all cases - sometimes in common law countries we say an obligation is unenforceable, yet allow restitution, because of the effect of the policy behind unenforceability. Under an absence of basis approach we would have to say it was void, and so we would have to be much more careful about classifying obligations and contracts than previously.

(ii) Birks' Reformulation of English Law - Causa Misapplied

As we have seen, Birks argued that terminability was merely a means of showing invalidity triggering restitution. Terminability bit immediately, so it operated retrospectively. McMeel correctly points out that the power to terminate is premised on wrongdoing, and Birks underplayed the distinctiveness of termination for breach.[201] McMeel argues that rescission ab initio, which might be triggered by misrepresentation, duress or undue influence, may not be appropriate in breach cases.[202] Birks needed though to give

terminability retrospective effect to get round *Chandler v Webster* and allow recovery in unjustified enrichment, when otherwise there would be none. The rule seems also designed to justify the decision in *Neste Oy v Lloyds Bank*.[203] That decision involved six payments to a company, PSL. PSL were to use the money to make payments on behalf of the claimants for services rendered. The first five gave rise to personal claims; the company resolved only after the payments had been made to the company but before any payments had been made on behalf of the claimant. The failure of basis, or consideration, only arose after the payments had been made. The sixth payment was made when it was already clear that contractual reciprocation would not be coming; it was credited when the company had already resolved to cease trading and Lloyds Bank had appointed a receiver. It is questionable whether it is appropriate to grant a proprietary remedy, where the payor has taken the risk of his contracting party's insolvency.[204]

It seems that the need to give terminability retrospective effect, but only for the innocent party, is felt because English law never needed to distinguish clearly as Scots law does between lack of causa and lack of contractual mutuality.[205] South African contract law, by jettisoning causa as a requirement for a valid contract, does not have the same problem, although the reciprocity idea does surface in this context and in the separate context of the remedy of withholding performance.[206] English law now does need to distinguish these two ideas. Birks' suggestion fails to do so. His attempts to justify restitution after termination within the confines of his new law of unjust enrichment run against the internal logic of the law. There is, contrary to Burrows' suggestion,[207] a causa present; at the time the payment was made the payment was due. Termination in English law is prospective only. The parties are no longer liable for executory obligations, but accrued and due obligations are enforceable. Obligations performed for which payment has been made cannot be reversed; recovery in unjust enrichment is only possible where the counter-obligation is not rendered nor due.[208] Unearned enrichments are recoverable. Where the contract is void or voidable the payment either was not due, or the causa is retrospectively removed. Damages, except in tort or delict, are unavailable, in contrast to termination cases where damages are available in contract. For terminability to suffice there must therefore be degrees of invalidity.[209] Terminability would be a peculiar half way house between validity and invalidity, invalid enough for restitution, but not so invalid as to evade liability for damages. The conceptually easier solution is that restitution must take place within the confines of contract.

Three consequences follow. Firstly, it is the failure of reciprocation that matters not the failure of validity of the obligation. Secondly, *Neste Oy v Lloyds Bank* cannot stand. Proprietary claims cannot stand within contract. Thirdly, *Chandler v Webster* could still be condemned as wrong, but this time for failure to distinguish between two contractual concepts. It is noticeable that this would not disturb the new structure of unjust enrichment. We saw earlier Meier's criticism of the *Thomas v Brown* requirement applying to void contracts. If *Thomas v Brown* is seen as an aspect of a mutuality principle in contract it will not apply in extra-contractual contexts.[210] Indeed it is notable that its applicability was rejected in the non-contractual context in *Chillingworth v Esche*.[211] In that case, £240 was paid prior to the completion of a contract to purchase land. The claimant refused to sign the contract and asked for the money back. This was a payment on a non-contractual condition, that a contract would be signed. It was recoverable.

To say that liability to return is contractual, and to develop a contractual mutuality principle, separate from unjust enrichment, is, however, an exceptionally difficult route given that such a doctrine would have to be carefully distinguished from consideration as a requirement for the validity and enforceability of the contract. It is notable that neither Scots nor South African law have a consideration requirement for the validity of contracts. The doctrine of consideration in English law requires reciprocity - something of economic value to be given in return for a promise to be enforceable. It rests on the idea of benefit to the promisee or detriment to the promisor, either of which suffices.[212]

English law has not yet properly developed such principles. It is true, of course, that there are rules as to, for example, conditions precedent, relating to the order of performance.[213] These rules, however, have a different function. Similarly, we can say that English law allows termination where the term breached is a condition, or where there is substantial failure of performance.[214] However, there is at best only a loose connection between that idea and the extent to which restitution might be ordered, if at all. We might also look at entire and severable obligations. Entire obligations are those

which need to be completely performed before the other party is required to pay. Severable obligations arise where payment is due from time to time as performance of specified parts of the contract is rendered.[215] However, although these contractual concepts clearly have an impact, they do not cover the field. Hobhouse J talked of the contractual idea of failure of consideration, and did not examine these other ideas at the same time.

Confusing this new contractual idea of failure of mutuality with contractual validity, or unjust enrichment ideas is already well afoot. It is notable that in their otherwise excellent article on *Sumpter v Hedges*[216] Stevens and McFarlane talk of failure of consideration as the common law counterpart to causa data causa non secuta.[217] This is not unprecedented. It is dangerous, though. In *Cantiere san Rocco v Clyde Shipbuilding* Lord Shaw said, "It is an admitted fact in the case that that consideration has entirely failed. Therefore, this, as I say, would be a typical case of restitution under the Roman law and one for the application of the maxim causa data causa non secuta."[218] Assimilating causa data causa non secuta to the English idea of total failure of consideration meant Lord Shaw had to demonstrate total failure through an argument that the engines were not in fact supplied, despite the validity of the contract. The House of Lords evaded what they saw as the problem posed by *Chandler v Webster* by saying each side performs in consideration for full performance. Any failure of performance on one side entailed a total failure of consideration.[219] Yet if so, payments under valid contracts need not be made in order to discharge the debt, they can also be made in order to obtain counter-performance. The flipside of this is that payments under void contracts have additional purposes than discharge of a debt, and it has been suggested that the condictio cd applies alongside the condictio indebiti.[220] That destroys the mutual exclusivity of the condictiones. Ultimately, this drives us towards an unjust factors approach, and Stewart, who made the suggestion, included, amongst others, an account of an unjust factor of mistake in his book.[221]

In any case McFarlane and Stevens' examples of the operation of the causa data principle are not properly such examples. They point to the non-recoverability of a deposit. That principle is entrenched in Scots law,[222] but it is properly a contractual principle. Their next example is *Re Phoenix Life Assurance*.[223] That case involved an ultra vires insurance contract. The policy holders recovered on the basis that they received nothing for their premiums. It would be a case of the condictio indebiti in Scots law, not the condictio cd.

Moving from unjust enrichment to undoing the transaction within contract law may nevertheless have beneficial effects. If the claim is in unjust enrichment, change of position is available as a defence. Miller has, however, suggested that change of position might subvert contractual risk allocation.[224] Were relief contractual, change of position would not be available. In German law, provisions on restitution after termination of contract (§ 346ff BGB) do not include the general notion of cession of enrichment which can be found in § 818 BGB for unjust enrichment (with § 346 para. 3 covering some situations where the claimant is somehow responsible for the fact that the enrichment cannot be returned) . Hedley has repeatedly argued, most recently in 2004, that since the contract survives for some purposes, treating the rules, perhaps especially of valuation, as extra-contractual is unreal.[225] Treating the valuation question within contract obviates the problem of deciding whether bad bargains can be overturned within unjust enrichment.[226] This is an old argument. However, the two German regimes for unwinding mutual performances do not always produce consistent outcomes. Contract and unjust enrichment may still rub uncomfortably together.

(4) Conclusion

We set out to show that English law should not move to a Civilian system. There are good reasons for supporting a causal mistake test for liability, and the advantages said to adhere to a Civilian style system are marginal at best once it is realised that specialist rules for different scenarios will still be needed. Birks put forward in his last book a comprehensive model of how absence of basis should work in English law, a model suffering some serious flaws. The paper has set out to expose some of those flaws. There are three main difficulties.

Birks failed to provide an exhaustive list of potential bases for transfers. Some help may now be garnered from Canadian law. That said, while the shift is further advanced in Canada, the law is in greater confusion about what counts as a basis. Secondly, Birks' scheme, and the nascent Canadian law, fail to appreciate the bipartite nature of transfer,

and the linked need for a putative basis. This led Birks to problems with proprietary claims and incidental benefits. Linked to this, the mixed systems demonstrate that mistake claims will be needed where there is no condictio claim. Thirdly, terminability of a contract for breach is a type of invalidity sufficing for unjust enrichment. In Civilian systems payments are made to discharge an obligation, which was discharged. Restitution occurs through contract. The question arises whether English (and for that matter Canadian) law can separate out the new concepts that will be required. It is unlikely that they can, which is neither to their credit nor discredit. The price in terms of the reorganisation of contract law is too high, given the minimal benefits in terms of improvements to the results of cases.

Endnotes

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1 [1999] 2 AC 349 (HL).

2 T Krebs 'A German Contribution to English Enrichment Law' [1999] RLR 271, 278, discussing S Meier's doctoral thesis in German, S Meier *Irrtum und Zweckfehlung; Das System der Unjust-Gründe bei rechtgrundlosen Leistungen im englischen Recht* (JCB Mohr Tübingen 1999); S Meier and R Zimmermann 'Judicial Development of the Law, *Error Juris*, and The Law of Unjustified Enrichment- A View from Germany' (1999) 115 LQR 556, 563-565; PBH Birks 'Mistakes of Law' [2000] CLP 205, 233 and PBH Birks and WJ Swadling 'Restitution' [1998] All England Law Reports Annual Rev 390, 397.

3 M Hogg 'Unjustified Enrichment in Scots Law Twenty Year on: Where Now?' [2006] RLR 1.

4 *Hazell v Hammersmith & Fulham LBC* [1992] 2 AC 1.

5 D Sheehan 'What is a Mistake?' (2000) 20 LS 538.

6 Birks (n 2) 223-230; C Mitchell 'Retrospective Mistakes of Law' [1999] King's College LJ 121, 125-126.

7 D Sheehan 'Natural Obligations in English Law' [2004] LMCLQ 172; contrast TH Wu 'Natural Obligations and the Common Law of Unjust Enrichment' [2006] OUCLJ 133.

8 Krebs (n 2) 277; T Krebs 'In Defence of Unjust Factors' (2000) Oxford U Comparative Law Forum 4 at http://www.ouclf.iuscomp.org text at n 37.

9 [2006] UKHL 49; [2006] 3 WLR 781.

10 [2001] Ch 620.

11 PBH Birks *Unjust Enrichment* (2nd edn Clarendon Press Oxford 2005) ch 5.

12 T Krebs *Restitution at the Crossroads* (Cavendish London 2001); J Edelman 'The Meaning of "Unjust" in the English Law of Unjust Enrichment' (2006) 3 ERPL 309.

13 [1993] AC 70 (HL) 172.

14 T Baloch 'The Unjust Enrichment Pyramid' (2007) 123 LQR 636; A Goymour 'Premature Tax Payments and Unjust Enrichment' [2007] CLJ 24.

15 [2006] UKHL 49, [154]; [2006] 3 WLR 781.

16 Krebs (n 2) 274.

17 Meier and Zimmermann (n 2) 561. See also N Whitty and D Visser 'Unjustified Enrichment' in R Zimmermann, K Reid and D Visser *Mixed Legal Systems in Comparative Perspective* (OUP Oxford 2004) 398, 417.

18 Birks (n 11) 104.

19 H Scott 'Restitution of Extra-Contractual Transfers: Limits on the Absence of Legal Ground Analysis' [2006] RLR 93, 100; Münchener Kommentar zum Bürgerlichen Gesetzbuch, 4th ed., Vol. 5 (CH Beck München 2004) § 812, no 170 (Lieb); D Reuter and M Martinek *Ungerechtfertigte Bereicherung* (JCB Mohr Tübingen 1983) 81; Baloch appears to identify this as the objective approach; Baloch (n 14) 640.

20 Krebs (n 2) 219-222; R Zimmermann *The Law of Obligations* (Juta Cape Town 1996) 889.

21 Mackenzie I 3.1; R Evans-Jones 'Some Reflections on the Nature of the Condictio Indebiti in a Mixed Legal System' (1994) 111 SALJ 759.

22 [2006] UKHL 49, [28].

23 Meier and Zimmermann (n 2) 562.

24 Ibid 562-563.

25 S Meier 'Restitution after Executed Void Contracts' in PBH Birks and FD Rose (eds) *Lessons of the Swaps Litigation* (Mansfield Press London 2000) 168, 212.

26 Meier and Zimmermann (n 2) 562-563; see D Visser 'Unjustified Enrichment' [2001] Annual Survey of South African Law 303.

27 § 812-I (2) BGB; MünchKomm (n 19) § 812, no 170; B Dickson 'The Law of Restitution in the Federal Republic of Germany: A Comparison with English Law' (1987) 36 ICLQ 751, 775. For South African law see P O'Brien 'A Generally Applicable *Condictio Sine Causa* for South African Law' [2000] TSAR 752, 755-756.

28 Meier and Zimmermann (n 2) 561-562; Krebs (n 2) 274.

29 [1932] AC 161 (HL).

30 Meier and Zimmermann (n 2) 563 .

31 Birks (n 11) 139.

32 P Gallo 'Unjust Enrichment: A Comparative Analysis' (1992) 40 AJCL 431, 432.

33 Krebs (n 8) text to nn 26-27.

34 PBH Birks 'No Consideration: Restitution after Void Contracts' (1993) 23 U Western Australia L Rev 195, 230 n 137; Birks (n 2) 220-222.

35 Krebs (n 2) 278; AS Burrows 'Swaps and the Friction between Common Law and Equity' [1995] RLR 15, 19.

36 See Sheehan (n 5) 551-552.

37 Meier and Zimmermann (n 2) 557-560; R Zimmerman and N Jansen 'Quieta Movere: Interpretative Theory in a Codified System' in P Cane and J Stapleton (eds) *The Law of Obligations: Essays in Celebration of John Fleming* (OUP Oxford 1998) 285, 302-307. The idea that a legal ground can become retrospectively void is not unchallenged, however. T Weir (tr) K Zweigert and H Kötz *An Introduction to Comparative Law* (3rd edn Clarendon Press Oxford 1997) 571-572.

38 Birks (n 2) 225-226.

39 Birks (n 11) 112.

40 *Phillips-Higgins v Parker* [1954] 1 QB 411.

41 [2006] UKHL 49, [22].

42 [1999] 2 AC 349 (HL) 408.

43 Sheehan (n 5) 558-560; this view is based on Dworkin's theory of law, which amounts to a sophisticated declaratory theory.

44 [2006] UKHL 49, [23].

45 Ibid [145].

46 Ibid [62].

47 R Stevens 'Justified Enrichment' [2005] OUCLJ 141; M Chowdry and C Mitchell 'Tax Legislation as a Justifying Factor' [2005] RLR 1, 16-18; Birks (n 11) 138-139.

48 R Williams 'The Beginnings of a Public Law of Unjust Enrichment' (2005) 15 KCLJ 194, 199

49 [2006] UKHL 49, [32].

50 Ibid [81-90].

51 As a consequence of *Metallgesellschaft & others* [2001] EUECJ C-397/98 [96].

52 [2006] UKHL 49, [155]; B Häcker 'Still at the Crossroads' (2007) 123 LQR 177.

53 Ibid [21]; see also *Uren v First National Home Finance* [2005] EWHC 2529, [13] (Mann J).

54 See R Zimmermann 'Unjustified Enrichment: The Modern Civilian Approach' (1995) 15 OJLS 403, and Meier (n 25).

55 Krebs (n 2) 275.

56 K Barker 'Theorising Unjust Enrichment' (2006) 26 OJLS 603.

57 G Virgo *The Principles of the Law of Restitution* (2nd edn OUP Oxford 2006) 159-160; *Midland Bank v Brown Shipley & Co* [1991] 2 All ER 690, 700-701; *Barclays Bank v Simms* [1980] QB 680; *David Securities v Commonwealth Bank of Australia* (1992) 175 CLR 353; *Air Canada v British Columbia* [1989] 1 SCR 1161, 1200 (1989) 59 DLR (4th) 161, 191-192.

58 [1999] 1 WLR 1249, 1272; G Jones 'Lord Goff's Contribution to the Law of Restitution' in G Jones and WJ Swadling (eds) *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (OUP Oxford

1999) 207, 224-225.

59 PBH Birks *An Introduction to the Law of Restitution* (Revised edn Clarendon Press Oxford 1989) 155-156; for a related critique of Meier's argument see Krebs (n 12) 78-80.

60 Zimmermann (n 54) 415-416.

61 Birks (n 2) 231; see generally Krebs (n 12) ch 12.

62 [1994] 4 All ER 890.

63 Ibid 929-930.

64 Ibid 930.

65 [1999] QB 215 (CA).

66 Ibid 227; Meier (n 25) 209-210.

67 [1994] 1 WLR 938 (CA) 946 (Dillon LJ); 953 (Leggatt LJ).

68 WJ Swadling 'Restitution for no Consideration' [1994] RLR 73; the cases include *Hicks v Hicks* (1802) 3 East 16, 102 ER 502 and *Holbrook v Sharpey* (1792) 19 Ves Jun 131, 34 ER 467. Swadling argues they omitted to consider *Davis v Bryan* (1827) 6 B&C 651, 105 ER 591, which clearly supports the *Fibrosa* approach. But see Krebs (n 12) 240, *Guinness Mahon v Kensington & Chelsea RLBC* [1999] QB 215 (CA) 228-229 (Morritt LJ).

69 [1994] 1 WLR 938 (CA) 945.

70 But see [1996] AC 669 (HL) 710-711 (Lord Browne-Wilkinson).

71 Birks (n 2) 232.

72 Ibid 111.

73 [2006] UKHL 49, [17] (Lord Hoffmann), [56] (Lord Hope), [83], (Lord Scott).

74 Finance Act 2004, s 320.

75 Birks (n 11) 114-116.

76 [1904] 1 KB 493.

77 Birks and Swadling (n 2) 394.

78 [1943] AC 32 (HL).

79 Ibid 48.

80 *Linz v Electric Wire Co. of Palestine* [1948] AC 371 (PC).

81 [1999] QB 215 (CA) 226.

82 Meier (n 25) 209.

83 (1876) LR 1 QB 714.

84 Ibid 722-723.

85 Meier (n 25) 209-210.

86 Ibid 209.

87 Ibid 210.

88 Scottish Law Commission *Recovery of Benefits Conferred under Error of Law* (Scot Law Comm DP no 95 1993) Vol 2 para 2.73.

89 *Oom v Bruce* (1816) 12 East 225, 104 ER 87.

90 *Parkinson v College of Ambulance* [1925] 2 KB 1; *Berg v Sadler & Moore* [1937] 2 KB 158 (CA).

91 Virgo (n 57) 728-729.

92 Birks (n 11) 141-142.

93 Ibid 118.

94 (1959) 102 CLR 108; see also Meier (n 25) 211.

95 [1993] AC 70.

96 E McKendrick 'The Reason for Restitution' in PBH Birks and FD Rose (eds) *Lessons of the Swaps Litigation* (Mansfield Press Oxford 2000) 95; *David Securities v Commonwealth Bank of Australia* (1992) 175 CLR 353.

97 Birks (n 11) 148-149; Lord Scott suggests causation is insufficient at *Deutsche Morgan Grenfell v IRC* [2006] UKHL 49, [87].

98 [1998] 4 All ER 202 (CA) 208.

99 *Rathwell v Rathwell* [1978] 2 SCR 436, 455 (1978) 83 DLR (3d) 289, 306 (Dickson J); *Pettkus v Becker* [1980] SCR 834 (1981) 117 DLR (3d) 257 and *Sorochan v Sorochan* [1986] 2 SCR 38 (1986) 29 DLR (4th) 1.

100 (2004) 295 DLR (4th) 385.

101 [2004] 3 SCR 575, critiqued by M McInnes 'Making Sense of Juristic Reasons: Unjust Enrichment after *Garland v Consumer Gas'* (2004) 42 Alberta L Rev 399, M McInnes 'Juristic Reasons and Unjust Factors in the Supreme Court of Canada' (2004) 120 LQR 554; M McInnes 'The Test of Unjust Enrichment in Canada (2007) 123 LQR 34.

102 [2004] 3 SCR 575, [23-24]; in *Kingstreet Investments v New Brunswick (Dept of Finance)* [2007] SCC 1, [58] Bastarache J appears, albeit obiter, to reintroduce compulsion into the common law of unjust enrichment. M McInnes 'Restitution for Ultra Vires Taxes' (2007) 123 LQR 365.

103 (2004) 295 DLR (4th) 385, [46].

104 Birks (n 34) 231-232.

105 (1841) 9 M&W 54, 152 ER 51.

106 Scott (n 19) 97-98.

107 Ibid 102.

108 Ibid 103.

109 *Union Government v Gowar* 1915 AD 426.

110 § 814 BGB.

111 B Markesinis, W Lorenz and G Dannemann *An Introduction to the German Law of Obligations: Contract and Unjustified Enrichment* (Clarendon Press Oxford 1997) 736; MünchKomm (n 19) § 814, no. 12; Reuter and Martinek (n 19) 182-185; AS Burrows 'Absence of Basis: The New Birksian Scheme' in AS Burrows and A Rodger (eds) *Mapping the Law* (OUP Oxford 2006) 33, 39 has another example where the defence may not run - the open swap where the bank paid knowing the contract was void.

112 *Kleinwort Benson v Lincoln City Council* [1999] 2 AC 389 (HL) 410.

113 S Hedley 'The Empire Strikes Back: A Restatement of the Law of Unjust Enrichment' (2004) 28 Melbourne U L Rev 754, 773.

114 [2006] UKHL 49, [158].

115 Ibid [158].

116 *Kleinwort Benson v Lincoln City Council* [1999] 2 AC 349 (HL) 408.

117 Hogg (n 3) 4.

118 Birks (n 11) 129.

119 Baloch (n 14) 641.

120 Ibid 644.

121 Ibid 646.

122 Birks (n 11) 112.

123 Hogg (n 3) 5; *Shilliday v Smith* 1998 SLT 976.

124 Hogg (n 3) 19; *Kommisaris van Binnelandse Inkomste v Willers* 1994 (3) SA 283 (A); *Shortdistance Carriers v McCarthy Retail* 2001 (3) SA 482 (A).

125 For Scots law see *Morgan Guaranty v Lothian RC* 1995 SC 151 (IH); for South African law see *Willis Faber Enthoven v Receiver of Revenue* 1992 (4) SA 202 (A).

126 Baloch (n 14) 643-644.

127 1909 SC 99; *Shilliday v Smith* 1998 SLT 976; Hedley (n 113) 780.

128 Birks (n 11) 158.

129 Edelman (n 12) 319-320; Smith raises the idea of a "juristic reason" of risk-taking, but this also seems to be a fudge. LD Smith 'Demystifying Juristic Reasons' (2007) 45 Canadian Business LJ 281, 291.

130 Contrary to Birks (n 11) 104.

131 J Blackie and I Farlam 'Enrichment by Act of the Party Enriched' in D Visser, K Reid and R Zimmermann *Mixed Legal Systems in Comparative Perspective* (OUP Oxford 2004) 469, 488-489.

132 Baloch (n 14) 653.

133 Hedley (n 113) 777-778.

134 Birks (n 11) 72.

135 Ibid 198.

136 G Dannemann 'Unjust Enrichment by Transfer: Some Comparative Remarks' (2001) 79 Texas L Rev 1837.

137 [1991] 2 AC 549.

138 F Giglio 'A Systematic Approach to Unjust and Unjustified Enrichment' (2003) 23 OJLS 455, 468; Zimmermann (n 20) 879.

139 Ibid 464; Zimmermann (n 20) 887.

140 *Bannatyne v D&C MacIver* [1906] 1 KB 103; *B Liggett (Liverpool) Ltd v Barclays Bank* [1928] 1 KB 48; *Reid v Rigby & Co* [1894] 2 QB 40; *Re Cleadon* [1939] Ch 286; *Butler v Rice* [1910] 2 Ch 277.

141 A Honoré 'Third Party Enrichment' [1960] AJ 238, 246-251.

142 1998 (1) SA 939 (C); Zimmermann (n 20) 880 points out a close relationship between the actio de in rem verso and the actio negotiorum gestorum contraria in the Digest D.15.3.3.2.

143 1998 (1) SA 939 (C) 953.

144 N Whitty 'Indirect Enrichment in Scots Law' [1994] JR 200, 207; *Commercial Bank of Scotland v Biggar* 1958 SLT (Notes) 46; *ABSA Bank v CB Stander* 1998 (1) SA 939 (C) 947.

145 96 SW (2d) 1028 (1932); see also *Martin v Porter* (1839) 5 M&W 351, 151 ER 149; *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 (HL).

146 Birks (n 11) 89-90.

147 Against this, see D Sheehan 'Subtractive and Wrongful Enrichment: Identifying Gain in the Law of Restitution' in C Rickett (ed) *Justifying Private Law Remedies* (Hart Oxford 2008) 331 and C Rotherham 'The Conceptual Structure of Restitution for Wrongs' [2007] CLJ 172, 181-183.

148 J Edelman *Gain-Based Damages* (Hart Oxford 2002) 66-68.

149 Ibid 70.

150 Birks (n 11) 282.

151 Blackie and Farlam (n 131) 473-485 - on the different nature of use claims in English law see P Jaffey *Private Law and Property Claims* (Hart Oxford 2007) 99-103; Jaffey's position encapsulates Birks' problem - the logic of a condictio claim supports Jaffey's critique, although both commentators' assumption that in English law these need not be wrongs claims is dubious - Sheehan (n 147).

152 Blackie and Farlam (n 131) 479-480, MJ Schermaier '"Performance Based" and "Non-Performance Based" Enrichment Claims: The German Pattern' (2006) 3 ERPL 363, 374.

153 Birks (n 11) 3.

154 1998 SLT 976.

155 1925 SC(HL) 925.

156 J Wolffe 'Enrichment by Improvement in Scots Law' in R Zimmermann and D Visser (eds) *Unjustified Enrichment: Key Issues in Comparative Perspective* (CUP Cambridge 2001) 384, 402-407.

157 T Krebs 'Unrequested Benefits in German Law' in J Neyers et al (eds) *Understanding Unjust Enrichment* (Hart Oxford 2004) 247.

158 Ibid 255-256.

159 Markesinis, Dannemann and Lorenz (n 111) 754.

160 Ibid 769-770; Dannemann (n 136) 1850-1851.

161 [1973] QB 195.

162 Contrast R Evans-Jones 'The distorting images of *Newton v Newton* and its lessons for the law of property and unjustified enrichment in Scotland' (2005) 9 Edinburgh Law Rev 449 arguing that it was a condictio cd.

163 *Rankin v Wither* (1886) 13 R 903; *Buchanan v Stewart* (1874) 2 R 78.

164 1995 SC 151 (IH) 165.

165 Hogg (n 3) 7; Glover suggests that the only way to make sense of the South African condictio indebiti is in terms of encrusted unjust factors. G Glover 'The Condictio Indebiti and Unjust Factors' (2006) 69 THRHR 419, 435; he too wishes to remove those elements from the corresponding South African law.

166 Scott (n 19) 94.

167 Baloch (n 14) 643.

168 H McQueen 'Contract, Unjustified Enrichment and Concurrent Liability: A Scots Perspective' [1997] Acta Juridica 176, 185; *Connelly v Simpson* 1994 SLT 1096.

169 *Lloyds Bank v Bamberger* 1993 SC 570.

170 *Crest Enterprises v Ryckloff Beleggings* 1972 (2) SA 863.

171 E Clive and D Hutchison 'Breach of Contract' in K Reid, D Visser & R Zimmermann (eds) *Mixed Legal Systems in Comparative Perspective* (OUP Oxford 2004) 176, 204-205.

172 *Hurst v Bryk* [2002] 1 AC 185.

173 1923 SC(HL) 105.

174 R Evans-Jones 'Unjust Enrichment, Contract and the Third Reception of Roman Law in Scotland' (1993) 109 LQR 663.

175 Ibid 669-673.

176 1994 SLT 1096..

177 Ibid 1101.

178 Ibid 1110.

179 M Hogg *Obligations* (Avizandum Edinburgh 2003) 200; R Evans-Jones and J Dieckmann 'The Dark Side of *Connelly v Simpson*' [1995] JR 95.

180 *Ramsay v Brand* (1898) 25 R 1212, *Kerr v Dundee Gas Light* (1861) 23 D 343, *PEC Printers v Forth Print* 1980 SLT (Sh Ct) 118, *Watson v Shankland* (1871) 10 M 142.

181 1980 SLT (Sh Ct) 118.

182 1998 SLT 976.

183 1995 SC 151 (IH) 169.

184 S Hutton 'Restitution after Breach of Contract: Rethinking the Conventional Jurisprudence' [1997] Acta Juridica 201, 212-217; S Miller 'Unjustified Enrichment and Failed Contracts' in K Reid, D Visser and R Zimmermann (eds) *Mixed Legal Systems in Comparative Perspective* (OUP Oxford 2004) 437, 445.

185 Miller (n 184 above) 441; *Probert v Baker* 1985 (3) SA 429 (A).

186 It has become almost axiomatic that different types of enrichment be treated the same in English law; Virgo (n 57) 308; this now seems to be the case in Scots and South African law. See *Shilliday v Smith* 1998 SLT 976; Hutton (n 184) 205-207.

187 Hutton (n 184) 215.

188 Clive and Hutchison (n 171) 204-205; G Lubbe 'Assessment of Loss upon Cancellation for Breach of Contract' (1984) 101 SALJ 616, 636-637; in Scots law see Bell *Commentaries* I, 478.

189 D Visser 'Rethinking Unjustified Enrichment: A Perspective on the Competition between Contractual and Enrichment Remedies' [1992] AJ 203, 227; complete concurrency is advocated for English law by SA Smith 'Concurrent Liability in Contract and Unjust Enrichment: The Fundamental Breach Requirement' (1999) 115 LQR 245, but a subsidiarity rule is usually applied in all (common law and Civilian) systems.

190 Miller (n 184) 446-447.

191 Ibid 452.

192 Lubbe (n 188) 636.

193 Ibid 640.

194 Krebs (n 12) 106; R Zimmermann 'Restitution after Termination for Breach of Contract: German Law after the Reform of 2002' in AS Burrows and A Rodger (eds) *Mapping the Law* (OUP Oxford 2006) 323, 326-327; Meier (n 25) 344; BGB § 346 ff - unjustified enrichment is regulated by § 812ff.

195 NJW 1979, 762, NJW 1982, 1279.

196 § 325 BGB; D Coester-Waltjen 'The New Approach to Breach of Contract in German Law' in N Cohen and E McKendrick (eds) *Comparative Remedies for Breach of Contract* (Hart Oxford 2005) 135, 154.

197 Zimmermann (n 194) 338.

198 Krebs (12) 108-109; there is a small but growing list of cases where restitution is permitted despite a contract eg *Roxborough v Rothman Pall Mall of Australia* (2001) 208 CLR 516; R Chambers 'Deutsche Morgan Grenfell Group Plc v IRC' [2006] OUCLJ 227, 234.

199 A Tettenborn 'Subsisting Contracts and Failure of Consideration: A Note of Caution' [2002] RLR 1

200 BGHZ 111, 308; this is an illegality case, but the technique is the only one open to the Civilian system.

201 G McMeel 'Unjust Enrichment, Discharge for Breach and the Primacy of Contract' in AS Burrows and A Rodger (eds) *Mapping the Law* (OUP Oxford 2006) 223, 225.

202 Ibid 232-235; Smith also believes that under a juristic reasons approach these are unjust enrichment cases, but it is less clear how he believes this to work Smith (n 132) 292.

203 [1983] 2 Lloyds Rep 683.

204 Meier (n 25) 347; F Maher 'A New Conception of Failure of Basis' [2004] RLR 96, 100-101.

205 See J du Plessis 'Common Law Influences on the Law of Contract and Unjustified Enrichment in Some Mixed Legal Systems' (2003) 78 Tulane L Rev 219, 223.

206 Clive and Hutchison (n 171) 196; this developed from the *exceptio non adimpleti contractus* of the *ius commune*. See § 320 BGB for the remedy in German law, and in South African law *BK Tooling BPk v Scope Precision Engineering BPk* 1979 (1) SA 391 (A).

207 AS Burrows 'Absence of Basis' in AS Burrows and A Rodger (eds) *Mapping the Law* (OUP Oxford 2006) 33, 39-40; see also Smith (n 132) 292 who describes as a wild fiction the idea that the claim is contractual.

208 *Stocznia Gdanska v Latvian Shipping* [1998] 1 WLR 574.

209 Birks (n 11) 125-126.

210 *PEC Printers v Forth Printers* 1980 SLT (Sh Ct) 118.

211 [1924] 1 Ch 97.

212 E Peel (ed) *Treitel's Law of Contract* (12th edn Sweet and Maxwell London 2007) 75; *Thomas v Thomas* (1842) 2 QB 851.

213 Treitel (n 212) 813-814..

214 Ibid 870-871.

215 Ibid 821-827; for the relevance of these ideas see B McFarlane and R Stevens 'In Defence of Sumpter v Hedges' (2002) 118 LQR 569.

216 [1898] 1 QB 678.

217 Stevens and McFarlane (n 215) 575.

218 [1924] AC 226 (HL) 251.

219 R Evans-Jones 'Receptions of Law, Mixed Legal Systems and the Myth of the Genius of Scots Private Law' (1998) 114 LQR 228, 238; R Evans-Jones 'Roman Law in Scotland and England and the Development of One Law for Britain' (1999) 115 LQR 605, 607-614; Evans-Jones appears to prefer a statutory loss adjustment regime, although that is not essential to the current argument.

220 WJ Stewart 'Restitution: First Thoughts on Swaps in Scotland' 1992 SLT (News) 315.

221 WJ Stewart *The Law of Restitution in Scotland* (W Green & Sons Edinburgh 1992) 67-73.

222 *Zemhunt v Control Securities Ltd* 1992 SLT 151.

223 (1862) 2 J&H 441, 70 ER 1131.

224 Miller (n 184) 448; it may in any case only very rarely be applicable R Stevens 'The New Birksian Approach to Unjust Enrichment' [2004] RLR 260, 271.

225 S Hedley 'Implied Contract and Restitution' [2004] CLJ 235.

226 Miller (n 184) 447-448.