The Law of Restitution at the End of an Epoch

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The law of restitution, so named by the American Restatement, has come of age. This article takes stock, developing four themes: (1) Restitution's relation to unjust enrichment is not as was at first supposed. Restitution is multi-causal; unjust enrichment may be its most important but is not its only causative event. To escape misunderstandings it will be prudent in future to refer to the law of unjust enrichment by its own name, a practice which will also allow the law to escape misalignments such as 'contract, tort and restitution'. (2) The mission of the law of unjust enrichment must be to perfect the typology of circumstances which render an enrichment unjust, the typology of 'unjust factors'. That mission requires the full range of unjust factors to be kept constantly in view, and under review. Some leading cases, failing to do that, have stretched and distorted the particular unjust factor which they had directly in their sights. (3) Civil wrongs constitute the other principal genus of causative event triggering restitution. The law of restitution for wrongs — that is, of gain-based awards for wrongs as such — has been behaving erratically. The proper diagnosis of this unsteadiness lies in the subterranean persistence of the dogma that all non-compensatory awards for civil wrongs somehow offend the nature of private law. (4) The law relating to both restitution's principal triggers is troubled by the difficulty of knowing when the restitutionary entitlement takes effect in rem, as a proprietary right in assets held by the defendant. The current hostility to proprietary restitution may be traceable to defective analysis of the rights in question.

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1. INTRODUCTION

This will seem to be an addition to the hundreds of millennial surveys with which the periodical literature will be plagued. It is not. Or only coincidentally. The epoch in question is differently marked. The life of the law of restitution divides neatly into three. In 1933, on 1 July, the American Law Institute commissioned Professors Austin Scott and Warren Seavey to produce the *Restatement of Restitution*, which was published four years later.[1] The gestation before 1933, when there was still no law of restitution, or none under that name, merits close attention and will one day be the subject of an important work of modern legal history. The key players in that phase were Ames, Keener and Woodward.

In 1966, the American *Restatement* gave birth to English offspring. The first edition of *Goff & Jones* came out in that year.[2] The *Restatement* had been warmly welcomed in England by influential reviewers, especially Lord Wright of Durley.[3] It seemed clear to them that English law must follow the American lead.[4] No doubt it would have done so rapidly but for the Second World War. *Goff & Jones* was the response, much delayed by that grim interruption.

To maintain the 33 year interval, the next marker should go down in 1999, but truth and symmetry are not always the best of friends. It falls one year earlier. The fifth edition of *Goff & Jones* was published in 1998 and, though there will of course be more editions, it happened that both its co-authors retired at midnight on 30 September 1998 — Lord Goff from his position as Senior Law Lord, Professor Jones from the Downing Chair at Cambridge. Professor Jones has been succeeded in that chair, once Maitland's, by Professor John Baker, surely the Maitland of his generation; Lord Goff's place as Senior Law Lord has been taken by Lord Browne-Wilkinson.

Even here in Australia, where there is now, among other works, *Mason & Carter*,[5] I think there will be no resentment against my taking this simultaneous retirement as marking the end of an epoch. The marker marks the end of the

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1. American Law Institute *Restatement of the Law of Restitution* (St Paul: ALI Publishers, 1937).
2. R Goff & G Jones *The Law of Restitution* (London: Sweet & Maxwell, 1966), now, in its 5th edition, part of 'The Common Law Library'. Unless expressly stated, *'Goff & Jones'* hereafter refers to the 5th edn (1998).
3. RA Wright 'Book Review' (1937) 51 Harv LR 369, reprinted in *Legal Essays and Addresses* (Cambridge: CUP, 1939) 34-65; cf PH Winfield 'The American Restatement of the Law of Restitution' (1938) 54 LQR 529.
4. This exhortation is present not only in Lord Wright's review ibid, but also in his speech in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour* [1943] AC 32, 61.
5. K Mason & JW Carter *Restitution Law in Australia* (Sydney: Butterworths, 1995).

beginning, the end of the period in which this once backward subject put itself in order and achieved recognition, the end of the period in which it had to catch up those other subjects, such as contract and tort, with which it ought always to have been on equal terms. Taking this double retirement as the end of an epoch, those of us who work in the field may well share the sense of exposure which underlies Matthew Arnold's elegiac ruminations in Rugby Chapel. We have been able to rest as under the boughs of a mighty oak and must now begin to face sunshine and rain as best we can.

Goff & Jones was not only the English response to the *Restatement.* It was also a rebirth. Much as the great book undoubtedly owed to the past, chiefly but not exclusively to the American past, the amazing subsequent vigour of the law of restitution in the common law world was due to its influence and only mediately to its predecessors. For a reason which has never been fully explained, the combined forces of the *Restatement* and Professor Jack Dawson failed to stir American lawyers and law schools to anything like the same degree to which *Goff & Jones* excited those of the Anglo side of the Anglo-American common law.[6]

In Australia it now seems a long time since *Pavey & Matthews v Paul* [7] and *David Securities Pty Ltd v Commonwealth Bank.*[8] The landscape has changed. Sir William Deane is Governor-General. The High Court is no longer the Mason court. For our part we have to get used to a House of Lords without Lord Goff. Lord Mustill's place had also not been filled. Lord Millett and Lord Hobhouse move up to complete what is now the Browne-Wilkinson court. In America another event may turn out to be an even more significant symptom of our entry into a new world. The American Law Institute has recently appointed a reporter for a new *Restatement of Restitution.* Scott and Seavey managed the first in four years. The job has become more complex. Professor Andrew Kull's work cannot but take the larger part of a decade, but somewhere around 2005 we will see what will surely be the final celebration of the subject's coming of age.

I have asked myself what four things most need to be said about the subject at this turn in its life. The available space stipulates not more than four. My choices are these. First, and much the most important because so fundamental, multi-causality: we must get used to the fact that the law of restitution responds to more than one causative event. Secondly, unjust factors: where the ground for restitution is unjust enrichment, the common law is historically committed to the requirement that the plaintiff identify a specific factual reason why there should be restitution.

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6. A mystery investigated by J Langbein 'The Later History of Restitution' in WR Cornish, RC Nolan, J O'Sullivan & G Virgo (eds) *Restitution: Past, Present and Future* (Oxford: Hart Publishing, 1998) 57.
7. (1987) 162 CLR 221.
8. (1992) 175 CLR 353.

Awareness of that commitment implies a constant vigilance to improve the typology of unjust factors. Thirdly, restitution for wrongs: the instabilities in this field will become an embarrassment if we cannot more consistently identify and address the most pressing questions. Fourthly, proprietary claims: there are different models of proprietary restitutionary claim, whether arising from wrongs or from unjust enrichment. The law must make a reasoned choice between them.

2. MULTI-CAUSALITY

Rights can be classified in different ways. In the diagram immediately below, they are divided by goal and causative event. That is to say, the diagram answers two questions: (i) From what events do rights arise? (ii) What goals do rights pursue?

Diagram 1: Rights classified by goal and causative event

Rights by goal (down), and by causative events (across)	**Consent**	**Wrongs**	**Unjust enrichment**	**Other events**
Restitution	1	6	11	16
Compensation	2	7	12	17
Punishment	3	8	13	18
Perfection	4	9	14	19
Other goals	5	10	15	20

The goal of restitution is, in this context, the surrender to the right-holder of a gain made by the defendant. The causative events are the vertical columns and the goals are the horizontal stripes. Restitution is thus a stripe, and the stripe crosses all four columns of events. The only thing that can be inferred from this relationship of stripe and columns is that, so far as the logic of categories is concerned, restitution indubitably has the potential to be multi-causal. It does not follow that it *is* multi-causal. The reason for this is that it could be that three of the squares formed at the intersections have no content. But in fact this is not the case.

There are different reasons why any one of these squares might have no content. A system might choose to allow it none or logic might require it to be empty. Jurists cannot always agree on the nature of the exclusion. For example, American law chooses to give considerable content to square 8. It approves of penal damages for torts. German law by contrast does not. It chooses to give that square no content. To some minds the German position presents itself as the other kind of exclusion, not a choice but dictated by logic. That is a difficult position to take in view of the fact that different positions have observably been taken at different times and places.[9] On the other hand, squares 12, 13, 14 and 15 cannot have content. That is to say, the proof of an unjust enrichment cannot in itself support any response other than an entitlement to restitution. If that is right, the exclusion of content from these squares is dictated by logic, not policy.[10]

The *Restatement of Restitution* appears to present a mono-causal picture of the law of restitution. The title suggests the work is about the law of restitution, but from the first article it appears also to be about the law of unjust enrichment. For that article immediately says: 'A person who has been unjustly enriched at the expense of another is required to make restitution to that other.' *Goff & Jones* is the same. It is about the law of restitution, but it immediately switches into unjust enrichment.[11] The assumption is that 'restitution' and 'unjust enrichment' are functional synonyms. They identify the same square, the one by reference to the response and the other by reference to the event which triggers that response. On this view, squares 1, 6 and 16 ought to be empty.

This is all the more emphatically insisted upon in my own book which boldly asserts, borrowing a word more familiar in Scotland than England, that there is a

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9. See infra p 52.
10. Another view: C Mitchell 'Book Review' (1998) 12 Trust Law International 191, 197-198. I do not deny measures ancillary to restitution (eg, Mareva injunctions), but that which is ancillary is included in the principal.
11. Every edition has opened with the words, 'The law of restitution is the law relating to all claims, quasi-contractual or otherwise, which are founded on the principle of unjust enrichment. Restitutionary claims are to be found in equity as well as at law': *Goff & Jones* supra n 2, 3.

perfect quadration between restitution and unjust enrichment.[12] But in retrospect I see that my own presentation then immediately falsifies that proposition. It does so in a manner and for a reason which was already latent in the *Restatement* and in *Goff & Jones*. With the zeal of a convert and the certainty that comes from hindsight, I am convinced these days that nothing more effectively removes scales from the eyes than the successful demonstration of the specious nature of that perfect square.[13]

That the perfect square is false is shown in the separation of restitution for wrongs as such — that is, for wrongs relied on in their character as wrongs. The big square supposedly made by unjust enrichment and restitution is divided to reveal restitution for autonomous unjust enrichment and restitution for wrongs.[14] But that is already an assertion of multi-causality. It is an assertion that squares 6 and 11 both have content. In terms of causative events, square 6 belongs in the law of wrongs. P is beaten up by D, who has been paid $2 000 to do the job. The words 'unjust enrichment at the expense of the plaintiff' can indeed stretch to cover such a case, thus drawing these facts into the big square. But it is done by sleight of hand. The words 'at the expense of' are used in the sense 'by doing wrong to'. However much he uses the language of unjust enrichment, a plaintiff who relies on the wrong in its character as such is activating the law of wrongs. The question whether P could recover the gain D made through the battery is a question for the law of wrongs. In short, it is part of the law of tort. It could only arise in the law of unjust enrichment if P could rely on the facts other than in their character as a wrong — that is, if he could establish that D had been unjustly enriched at his, P's, expense without at any point characterising the conduct of D as a wrong.

If the category of restitution for wrongs (square 6) really does have content, restitution cannot be mono-causal. If there were no more multi-causality than only this dual causality, to say that a plaintiff was asserting a right to restitution would not necessarily indicate a right arising from unjust enrichment; it would leave open the question whether the action arose in the law of wrongs or in the law of unjust enrichment. However, the multi-causality goes further than that. There are also examples of restitution in squares 1 and 16. 'Restitution' here means the surrender to P of a gain received by D. A right to restitution in that sense can be born of a contract (square 1). In the same way it can be born of a judgment (square 16). Subject to what will be said immediately below, the temptation to deny

12. P Birks *An Introduction to the Law of Restitution* (Oxford: OUP, 1989) 26.
13. Virgo may be the first to have seen this: see G Virgo 'What is Restitution About?' in Cornish et al supra n 6, 305. See also IM Jackman *The Varieties of Restitution* (Sydney: Federation Press, 1998).
14. Birks supra n 12, 26-27.

content to these two squares seems to be rooted in the dogma of mono-causality.[15] This habit of mind survives the demonstration that the dogma is false. Once one is prepared to define restitution independently of its cause, its multi-causality becomes readily acceptable. There is no choice but to go down that route because the dogma of mono-causality is false. It is falsified by restitution for wrongs.

(i) Can the mono-causal view be salvaged?

It is not my opinion that the mono-causal view could or should be salvaged, but it is nonetheless important to show how it might be attempted. There are two ways. Both focus only on the line between restitution for wrongs and restitution for unjust enrichment. The success of either would still leave consensual restitution (square 1), and restitution in response to any event, in the residual miscellany (square 16), to be swept discreetly under the corner of some carpet.

The first technique would argue that restitution for wrongs is in fact an illusion: what we see may look like restitution for wrongs, but is really in every case the wronged victim re-analysing the facts which have happened in order to reveal an unjust enrichment at his expense — that re-analysis being based on a characterisation of the story which at no point relies on it as a wrong. In other words the cause of action is never the wrong, but rather an unjust enrichment distinct from but implicated in the wrong.[16]

So far as German law is able to approach restitution for wrongs, it does it in that way. It holds that wrongs give rise only to compensation for loss, not to recovery of the wrongdoer's gains. It then has a broad notion of unjust enrichment which can reach instances in which the defendant has encroached upon wealth which the law is understood to attribute to the plaintiff. In that way, through this encroachment claim (the 'Eigriffskondiktion'), it can cover some of the ground which might otherwise be covered by allowing restitution for wrongs as such. The reach of the encroachment claim is all the greater because German law does not require the plaintiff to show that he has suffered a loss corresponding to the defendant's gain. In other words claims in autonomous unjust enrichment are not in German law restricted by a strictly subtractive notion of 'at the expense of the plaintiff'.[17] There are those who favour this German path.

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15. With great respect this seems to be what is going on in A Tettenborn 'Misnomer: A Response' in Cornish et al supra n 6, 31.
16. In this camp, see Beatson 'The Nature of Waiver of Tort' in J Beatson (ed) *Use and Abuse of Unjust Enrichment* (Oxford: OUP, 1991) 206; D Friedmann 'Restitution for Wrongs: the Basis of Liability' in Cornish et al supra n 6, 134.
17. The focus is on enrichment, not impoverishment. So long as the plaintiff is identified by reference to a sufficient connection to the enrichment, it is not necessary to show that he suffered a corresponding impoverishment. Particularly emphatic is HJ Wieling

It may possibly be that the common law countries' concept of unjust enrichment will turn out to be broader than has hitherto been suspected.[18] If so, the incidence of alternative analysis between wrongs and unjust enrichment will be increased. 'Alternative analysis' is familiar to lawyers. It refers to the fact that one story can disclose two or more causes of action. It often happens that a plaintiff can frame alternative causes of action in tort and breach of contract. If unjust enrichment turns out to be a broader category than was thought, it is obvious that, although the analytical distinctness of restitution for wrongs and restitution for unjust enrichment will remain untouched, the number of factual situations which will disclose both a wrong and an unjust enrichment will increase.

Even then it would be difficult for common law countries to follow German law in relying on a broad concept of unjust enrichment to dispense altogether with restitution for wrongs. It could not be done without adopting the initial dogma, to which Lord Reid with his Scottish background certainly subscribed, that the only proper response to a civil wrong is compensation for loss.[19] The Law Commission in England has only recently come down against that. And the Commission is surely right in taking a stand nearer to that of Lord Wilberforce,[20] according to which this self-denial is neither necessary nor useful.

The second way of trying to eliminate the multi-causality of restitution is not to deny the phenomenon of restitution for wrongs, but to withdraw from it the word 'restitution'. In one version this would simply take us back to the error of defining responses by reference to particular causes. If we re-named the gain-based response to wrongs and said that wrongs gave disgorgement while unjust enrichment gave restitution, we would be reducing the multi-causality of restitution by a cheap semantic trick. There is clearly no future in that. In the other version which is, I think, the one commended by Dr Smith,[21] 'restitution' would be used of any givings up which were also givings back, while 'disgorgement' would be used of all other givings up. The same conclusion would then be reached by showing that wrongs triggered giving up (disgorgement), while unjust enrichment triggered restitution (giving back).

Bereicherungsrecht (Berlin: Springer Veralg, 1993) 1-3; cf HG Koppensteiner & EA Kramer *Ungerechtfertigte Bereicherung* 2nd edn (Berlin: De Gruyter, 1988) 16-17, 84.

18. *Commissioner of State Revenue v Royal Insurance Australia Ltd* (1994) 126 ALR 1, Mason ACJ; *Kleinwort Benson v Birmingham CC* [1996] 4 All ER 733 (CA). In considering the defence of 'passing on', these cases have indicated that there may be no requirement of an impoverishment corresponding to the plaintiff's enrichment, which is indeed the German position.
19. *Rookes v Barnard* [1964] AC 1129; *Cassell & Co v Broome* [1972] AC 1027.
20. *Cassell & Co v Broome* ibid, 1114-1116. Law Commission (Eng) *Aggravated, Exemplary and Restitutionary Damages* Report No 247 (London: HMSO, 1997).
21. LD Smith *The Law of Tracing* (Oxford: OUP, 1997) 297-298; see also 'The Province of the Law of Tracing' (1992) 71 CBR 672.

But this distinction would not easily or obviously yield that result. Its first consequence would be to put two stripes across our diagram where there is presently only one. That is, the stripe called 'restitution' would have to be followed by a second stripe called 'disgorgement'. We would then have to ask of each event whether it triggered an entitlement to restitution (a giving back) and whether it triggered a right to disgorgement (a giving up not entailing a giving back).

It is not clear that this nomenclature would serve any useful purpose. At the moment the word 'restitution' is given the broad sense of 'disgorgement' and made to cover all givings up, thus including both those which are and those which are not givings back. There is no purpose in switching from 'restitution' to 'disgorgement' to express that meaning. The German word equivalent to 'restitution' is 'Herausgabe' and the verb 'to make restitution' is 'herausgeben', which has the same broad sense, 'to surrender' or 'to give up'. We need not pursue the merits, for our immediate concern is only with the possible restoration of mono-causality. A return to mono-causality would require the further conclusion that wrongs gave only disgorgement and unjust enrichment only restitution. Provided one could then sweep instances in columns 1 and 4 under a carpet, that conclusion would then make disgorgement and restitution mono-causal.

It is, however, highly unlikely that that conclusion could be reached. The inquiry whether in common law countries unjust enrichment yields only givings back has barely begun. It is the same question as whether 'at the expense of the plaintiff' can be satisfied only by a minus corresponding to the plus to the defendant. If there is no requirement of a corresponding minus, nothing obstructs liability to give up rather than give back. Recent indications suggest that there may be no such requirement.[22] It would certainly be a bad thing if terminological pressures distorted the debate which must take place on this point.

Meanwhile, in the law of wrongs it would seem impossible to defend the notion that a wrong could give rise to disgorgement (giving up) but not to restitution (giving back). Trespass to land, for example, appears to trigger an entitlement to both restitution and disgorgement in these senses.[23] It would be unreasonable to suggest that the latter was explicable as a consequence of a wrong while the former

22. See cases in supra n 19.

23. *Phillips v Homfray* (1883) 24 Ch D 439 (CA) may be a case in which the cause of action was, by re-analysis, not trespass but unjust enrichment. If the cause of action was trespass, it is an instance of a gain-based award for a wrong, where the giving up is a giving back. Cf *Minister of Defence v Ashman* [1993] 2 EGLR 102 (CA); *Minister of Defence v Thompson* [1993] 2 EGLR 107 (CA). *Edwards v Lee's Administrators* (1936) 96 SW (2d) 1028 is a gain-based award for a giving up of the profits of a trespass, the giving up not being a giving back. Dr Smith would have those two givings up, one back and the other not, called by different names.

could be explained only in terms of re-analysis as an unjust enrichment. Again, breach of fiduciary duty seems to give rise to both giving up and giving back.[24] No doubt the giving back can be explained in terms of an alternative analysis in unjust enrichment, but it would be difficult to deny that that must be only one of two possible explanations, the other being the wrong itself.

The likely conclusion is that any attempt to separate restitution (giving back) from disgorgement (other givings up) will do more than produce two multi-causal categories where previously there was only one (namely, restitution in the larger sense including all givings up).

Disappointment or liberation?

To some the recognition of the multi-causality of the law of restitution (ie, of the law of restitution as represented by the top stripe in our diagram) will appear as an admission of failure or indeed as a demolition of that which has been so vigorously erected since 1933. In a suitably restrained manner, Mr Jackman's recent book, whose central thesis is neatly encapsulated by its title, *The Varieties of Restitution*,[25] adopts that triumphantly destructive tone, as does the distinguished author of its preface, the Honourable Justice WMC Gummow. With the greatest respect, I think this is quite wrong. The open assertion of multi-causality is a liberation — indeed a series of liberations.

First, it clears the mind to see (i) that the question whether and when the victim of a wrong, suing on the basis of the wrong as such, can obtain the wrongdoer's gains is, unambiguously, a question which arises in the law of wrongs and has nothing whatever to do with unjust enrichment; and (ii) that the one way in which the law of unjust enrichment can become relevant is through the possibility of alternative analysis, a phenomenon familiar enough to lawyers in which one set of facts can be shown to reveal two or more causes of action. The mind thus cleared, the law might possibly one day embrace the dogma which so attracted the House of Lords in *Rookes v Barnard*[26] and come to the conclusion that the answer to (i) was no and never: a civil wrong should give only compensation. In the unlikely event that it did, square 6 in our diagram would be emptied.

New pressure would then be put on (ii), which raises a question which must be answered anyhow, namely whether unjust enrichment (square 11) is big enough to allow the victims of many wrongs to reach the wrongdoer's gains by a different route, not by suing for the wrong qua wrong, but by dispensing with that

24. Compare *Boardman v Phipps* [1967] 2 AC 46 (giving up) with *Maguire v Makaronis* (1997) 144 ALR 729 (giving back).
25. Jackman supra n 13.
26. Supra n 19.

characterisation of the facts and, by re-analysis, presenting them as an unjust enrichment independent of wrongdoing. Is such re-analysis available in few cases or in many? Much depends on the future of the phrase 'at the expense of the plaintiff'. The stronger the commitment to a requirement that the plaintiff must identify himself as a person who has suffered a loss corresponding to the defendant's gain, the less the scope for dual analysis. Meanwhile, German law provides a model for the rejection of any such commitment.

Next, multi-causality liberates the law of unjust enrichment (square 11). It makes it not only possible, but also necessary, to discuss unjust enrichment under its own proper name. The necessity should be obvious. Once we recognise that the law of restitution is multi-causal, we cannot but see that it will generally be unsafe to refer to a cause of action as arising in restitution or to a claim as being for restitution — unsafe because that way of speaking leaves open the question whether the plaintiff's entitlement is supposed to arise from a wrong, from unjust enrichment, or from some other event. We obviously have to learn to identify the causative event to which we mean to refer, and that entails speaking openly of unjust enrichment.

Through much of the 20th century it was impossible to talk of a law of unjust enrichment. To do so would have been to wave a red rag at a common law bull. By comparison the law of restitution was not provocative. In retrospect this seemingly small matter, the inhibition against calling the law of unjust enrichment by its own name, will seem to have been an enormous handicap, holding back development and creating unnecessary confusion. The project of the *Restatement of Restitution,* and its rebirth in *Goff & Jones*, was to demonstrate that, no less than the civilian systems, the common law did have a law of unjust enrichment. Now, at the end of its first epoch, it finally dares to speak its name. Far from being a disappointment or a retreat, the recognition of the multi-causality of restitution finally sets that project free. The very ambiguity of 'restitution' obliges us to talk the language of unjust enrichment. It will at last be obvious from the outset that the inquiry is directed to a cause of action, not to a response. The notion that the subject might be combined with a treatment of 'remedies' — something as distorting as the old habit of pushing it into contract or partly into contract and partly into trusts — will be shown up as the impossible nonsense that it has always been. Our vision will be clearer and more secure, and analysis, no longer distracted by inappropriate language, will rapidly improve.

3. UNJUST FACTORS

At this point we are in square 11 of Diagram 1. This is the square which represents the law of unjust enrichment properly so-called, or that part of the law of restitution in which the entitlement to restitution is triggered by unjust enrichment. The primary mission of the law of unjust enrichment is to create a

typology of the facts which turn an enrichment into an unjust enrichment. Unjust enrichment is an event described generically. Its species are enrichments in particular circumstances calling for restitution — mistaken enrichment, compelled enrichment and so on. The common law's way of doing the primary job is to identify and classify these specific 'unjust factors'. It has done this in a typically pragmatic way without theoretical discussion, perhaps even without consciously making a choice between different available approaches. At the end of the epoch, with the aid of almost unprecedented excursions into comparative law, it has begun to make itself explicitly aware of the nature of the approach which it has adopted and the general outline of the differences from the approach of the Roman-based systems.[27] That is an advance in itself. On the other hand, the need to keep the typology of unjust factors constantly in view cannot yet be said to have been fully appreciated. That necessity is the subject of this section.

Three more diagrams follow. Their aim is to establish an overview of the typology of unjust factors. Every typology is a hypothesis. It does not assert, 'I am perfect', but only, 'I seem to be the best that can at the moment be advanced.' The first of these three diagrams takes us inside square 11 of Diagram 1. Diagram 1 itself establishes the first level. Diagram 2, at the second level, reveals the three families of unjust factor. Passing to the third level, Diagram 3 takes us inside the largest and most frequently encountered of these three families. That family has two branches. Then, at level four, Diagram 4 shows the finer ramifications of one of those branches.[28]

The roots of this scheme go back to Lord Mansfield.[29] The goal must be to perfect it. That 'must' assumes acceptance of the proposition that the law should strive towards transparent rationality. In other words, it should be rational and should so far as possible be easily perceived to be so. On that assumption, it is essential that in the resolution of every difficult problem within this field the entire scheme (that is, the whole typology of unjust factors) must be kept constantly in mind. Only in that way can we be sure that we are on the path to perfecting it. We might otherwise be blindly damaging or distorting it.

Every problematic case is a challenge. The challenge can in principle be met in one of three ways: by showing that the facts do disclose an unjust factor known

27. *Woolwich Equitable Building Society v IRC (No2)* [1993] AC 70, Lord Goff 172; *Kleinwort Benson Ltd v Lincoln CC* [1998] 4 All ER 513, Lord Goff 532, Lord Hope 561.

28. For predecessors of these diagrams, see P Birks & R Chambers *The Restitution Research Resource* 2nd edn (Oxford: Mansfield Press, 1997) 3, 5. A large question mark requires to be placed against 'unconscientious receipt' in Diagram 2, there being considerable doubt whether the examples which might be placed there are not in reality instances of imperfect intention which, for one reason or another, are thought to need to be restricted by an additional requirement of guilty knowledge on the part of the defendant.

29. *Moses v Macferlan* (1760) 2 Burr 1005, 1012.

Diagram 2: Inside square 11 — three families of unjust factor

Non-voluntary transfer	**Unconscientious receipt**	**Policy-motivations**
'I did not mean him/her to have it!'	'It was shabby of you to receive it!'	'There is a good reason for giving it back!'
11(1)	11(2)	11(3)

Diagram 3: Inside non-voluntary transfer

Imperfect intent	**Qualified intent**
'I formed no intent to transfer or the intent which I formed was impaired!'	'It was clear on what basis I was transferring!'
11(1)(a)	11(1)(b)

Diagram 4: Inside imperfect intent

No intent	**Mistake**	**Pressure**	**Undue influence**	**Inequality**	**Other impairment**
11(1)(a)	11(1)(a)	11(1)(a)	11(1)(a)	11(1)(a)	11(1)(a)
(i)	(ii)	(iii)	(iv)	(v)	(vi)

to the typology, by radically revising the typology to accommodate a new unjust factor (thus admitting that the scheme was previously deficient) or by concluding that the facts disclose no unjust factor whatever. There are analogies in the natural world. Take the discovery of the duck-billed platypus, an animal which is warm blooded, lays eggs and feeds its young from mammary glands. The third of our responses was not available. It would have required a conclusion that the discovery was a hoax and that there was in fact no such animal. The other possibilities were, first, to accommodate the platypus in the existing taxonomy as, say, an egg-laying mammal or a milk-feeding, wingless bird or, alternatively, to declare the taxonomy deficient and make a radical revision of the division between mammals, reptiles,

birds and fish.[30] On good grounds the platypus became a mammal. But, had the whole taxonomy not been kept in view, we could not have been sure that we had not over-stretched the category of 'mammal' simply to absorb and eliminate a deeply puzzling phenomenon. In the same way, if we do not keep constantly in mind the taxonomy of unjust factors, we cannot know when we are distorting the single category which we have stumbled on.

Two illustrations will have to suffice. Both will have to be compressed. The first is domestic security for business borrowing. The second is the latest and perhaps the last episode in the saga of void interest swaps in England.

(i) Domestic security and business borrowing

There has been a spate of litigation arising from the situation in which business borrowing has been supported from the sphere of the entrepreneur's home life. A spouse or companion has given personal guarantees and mortgaged his or her own home or, more often, his or her interest in the home. It turns out that, when things go wrong, such domestic guarantors can quite often repudiate the personal guarantee and recover the security interests which they have conveyed. The flagship case in Australia is now *National Australia Bank v Garcia*.[31] In England it is still the slightly different *Barclays Bank plc v O'Brien*.[32]

The uncertainties in this sector, and the consequent wasteful multiplication of law suits, derive at least in part from the difficulty of identifying the precise basis of the relief. Does it rest on the law of wrongs or the law of unjust enrichment? Lord Browne-Wilkinson appears to have favoured wrongs, for his speech in *O'Brien* constantly repeats the language of wrongdoing. His explanation seems to suppose that the borrowing entrepreneur commits a wrong to the guarantor, and the lending bank implicates itself in the wrong. But what wrong is committed? The candidates appear to be undue influence and misrepresentation, but these are not in themselves wrongs and, even if they were, the bank could hardly be said to be implicated in them by virtue of the extremely attenuated degree of notice which is deemed sufficient. The explanation based on wrongs will not work, certainly not for most of the cases.

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30. At lower levels the taxonomy of the natural world is nowadays constantly being revised, as the study of DNA re-orders classifications previously made with infinite care but by what now seem very primitive methods. Darwin warned the taxonomist not to be deceived by morphology, but even he had no inkling of modern genetics. 'We must not, therefore, in classifying, trust to resemblances in parts of the organisation, however important they may be for the welfare of the being in relation to the outer world': C Darwin *The Origin of Species* in Gillian Beer (ed) using the second 1859 edition (Oxford: OUP, 1996) 336.
31. (1998) 155 ALR 614.
32. [1994] 1 AC 180 (HL).

An explanation in unjust enrichment requires the careful identification of an unjust factor and the application of the law relating to that unjust factor. Impaired intent suggests itself (square 11(1)(a) in Diagrams 3 and 4). Although particular cases will reveal undue influence or mistakes or both, and although some of those cases will then genuinely satisfy the conditions under which these unjust factors can be made to operate against parties outside the relationship in which they arose, an inquiry along these lines actually offers no hope of a general solution. The relief is clearly intended to extend far more widely than these unjust factors can ever explain. A double fictionalisation is necessary in order to make them seem to do the expected work. First, the court must not look with eagle eyes to see whether the guarantor's impairment has been correctly proved. Secondly, the lenders, as the parties who, according to the general law, ought not to be affected without actual knowledge of the impairment, have to be made to be affected merely because they are taken to have been aware of the possibility. 'Taken to be aware' is a friendly phrase which neatly papers over the exercise of deeming. To stretch and distort these unjust factors and their normal operation in this way will do immense damage in the long run. That which is stretched and distorted soon becomes difficult to understand and impossible to apply.

Without the help of distortions, there is no hope of a general solution from mistake or undue influence. Subject to one further possibility which will be mentioned immediately below, that eliminates 'Imperfect Intent' in square 11 (1)(a) (Diagrams 2, 3 and 4), for, if one runs through the boxes of Diagram 4, it is apparent that there are no other species of imperfection obviously in play. What about unconscientious receipt in square 11(2)? That also fails to yield any general explanation of what is going on. Even if it were possible to find a special vulnerability in every case, it would still be necessary, unless this notion too were stretched, to prove an unconscientious exploitation of that vulnerability. These lenders lose their security in circumstances in which they have no more than attenuated constructive notice of the vulnerability or were merely 'taken to know' of it.[33] In the *Garcia* case the majority of the High Court were content to accept and rely on the notion of unconscientiousness in retention, rather than unconscientiousness in acquisition. But that kind of unconscientiousness ex post is itself fictitious. It is not true unconscientiousness but an inference automatically drawn from different facts. If you decide that mistaken payments ought to be given back, the inference lies ready at hand that failure to return is unconscientious: one ought to do what one ought to do. But the operative fact is then mistake, for the

33. *National Australia Bank v Garcia* supra n 31. Lord Jauncey has exposed the superconstructive nature of the *O'Brien* requirement of notice: *Smith v Royal Bank of Scotland* [1997] SCLR 765 (HL).

rest is automatically dependent on the assessment of the effect of that impairment of the decision to pay. Similarly, if in our cases a bank ought to give up its security (on the basis of other facts), it will automatically follow that it is unconscientious in not doing so. The path through square 11(2) thus also seems to lead away from transparent rationality. It does not tell us in an honest and straightforward way why we are sure that the lending bank ought to give up its security.

There are, however, categories of unjust factor which might offer a better chance of an unforced explanation of the relief which appears to be available. In square 11(3) in Diagram 2 belong all examples of unjust factors which consist simply in a policy requiring restitution. Thus the right explanation of *Woolwich Equitable Building Society v Inland Revenue Commissioners (No 2)*[34] may simply be that the policy of reinforcing respect for the rule of law requires governmental bodies to return money which they could not lawfully demand. It is a case of policy-motivated restitution. In the same way these lending cases may respond to a policy to the effect that the conflict between the public interest in liberating wealth locked up in domestic assets and the equally strong public interest in the inviolability of the home and of family life within it can only be reconciled by imposing a code of conduct and, further, that that code of conduct must be reinforced by compelling lenders to give up all securities which have failed to conform.

More controversially, it might after all be possible to find the solution in one of the boxes within 'Imperfect Intent'. It can be argued that the notion of inequality, at square 11(1)(a)(v) in Diagram 4, can include a sub-form which focuses on certain transactions which not even competent adults can cope with. Inequality denotes a failure to come up to the general standard of self-management. A disadvantage, such as a mental handicap, can render a person unequal in this sense. In some transactions none of us are up to defending our own best interests. Within this sub-class, it is the nature of the transaction itself that impairs our decision-making process. In respect of that particular transaction our autonomy is limited or defective, much as happens less specifically within some relations and because of some mental conditions.[35] A solution from this box would require a careful definition of the kind of transaction which falls within these cases. This is not the place to attempt it. The core idea would be that those in the sphere of the home, which sphere is characterised by a trust and confidence which justifies them in dropping their guard, are not autonomous (that is, are not equal to defending their own interests) when, from within that sector, they are invited to stake their home assets on a venture in the world of business, which is red in tooth and claw and in which the players know never to drop their guard.

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34. Supra n 27.
35. On 'transactional inequality': see Birks supra n 12, 208-216.

This brief discussion does not pretend to solve the incredibly difficult complex of problems encountered in the situation exemplified by *National Australia Bank v Garcia*. Its theme is only the need to avoid avoid pseudo-solutions and, in particular, not to go in for distorting or denaturing particular unjust factors. It prescribes a protection against that danger, namely to keep the full range of such factors in mind and, at the same time, to accept that the full typology as stated at any one moment may require to be extended or reformed.

(ii) Void interest swaps: *Kleinwort Benson*

With a similar purpose I now turn to the latest and possibly the last episode in the saga of the void interest swaps. In this section the inquiry is primarily directed to two important questions: (i) What, if any, is the unjust factor which calls for restitution when benefits have been transferred under a void contract? (ii) When we say that mistake is an unjust factor, what exactly do we mean? The second of these questions is in this paper restricted to a particular context, which emerges if it is more specifically re-stated: if a party pays money under a view of the law which is subsequently repudiated by the courts, was that party mistaken in the relevant sense at the time of the payment? The strongest example is that in which a payment is made under a case which is later overruled.

The swaps saga began with the revelation, in *Hazell v Hammersmith & Fulham London Borough Council*,[36] that all interest swaps entered into by local authorities were void as being beyond the authorities' statutory powers. Any discussion of it requires us to have in mind the nature of the contract which has acquired the name 'interest swap', or just 'swap', and also the difference between an open but interrupted interest swap and a closed swap. An interest swap is a species of contract now well known in the money markets. There are many variations, but the core is common to all. One party promises to pay the other a fixed rate of interest on a notional capital sum, say 5 per cent on $5 million, for a fixed period, say five years. The counter-party promises to pay a floating rate on the same sum for the same period, the rate being determined by an agreed formula.

Until the House of Lords decided that these transactions were beyond their money-management powers, a vast number of public authorities in the United Kingdom were heavily engaged in this kind of trading. When the time-bomb of nullity exploded, some of these local authority swaps had already been completed. The period had run and the game had been played out to the end. Both parties had received exactly what they had bargained for, albeit their bargain had all along been void. Those are the 'closed swaps'. Others were still in progress, with time

36. [1992] 2 AC 1 (HL).

still to run. They were 'open'. Of course, no further payments were made. Hence these open swaps were interrupted.

Litigation established that the consequence of nullity was in general automatic restitution. Each party thus got back what it had paid. More accurately, the one which had paid most, giving credit for what it had received, got back the sum by which its payments out had exceeded its receipts. Different cases probed different variations on this common theme. The final case, if final it turns out to be, was *Kleinwort Benson Ltd v Lincoln City Council.*[37] Kleinwort Benson, a merchant bank, had been the loser under the contracts in question. It wanted restitution of the sums by which its payments out to local authorities had exceeded the payments they had made to it. There were important particularities in its situation, which had either not arisen at all in any of the previous rounds or, where they had arisen, had never reached the House of Lords.

First, these contracts had all been fully performed before the nullity was discovered. They were closed swaps, not open swaps which had been interrupted. Secondly, Kleinwort Benson insisted on basing its claim to restitution on mistake, something which had previously been tried, successfully, in Scotland.[38] Thirdly, it was imperative that Kleinwort Benson should win on that ground because only then could it hope to bring all its payments over the line drawn by the Limitation Act 1980 (UK). In favour of a party seeking relief for mistake, section 32(1)(c) of the Act postpones the running of time to the moment at which the true situation was discovered or could reasonably have been discovered.

It is important not to overlook the procedural context in which these matters were tested. As Lord Goff said, the parties agreed on what must have seemed the most expeditious and economical way of getting the essential questions answered. On the basis of that agreement, Langton J ordered the trial of two preliminary issues: essentially whether the bank's pleadings disclosed a cause of action in mistake and, if so, whether that cause of action took the benefit of section 32(1)(c) of the Limitation Act 1980. He then found against the bank on the first of these two questions, on the ground that the only mistake was a mistake of law.[39] The bank

37. Supra n 27. The case was argued in March 1998. The speeches were handed down on 29 October 1998. According to the marker which I am using, this might give it to be both the last case of the old epoch and the first of the new.

38. *Morgan Guaranty Trust Co of New York v Lothian Regional Council* [1995] SLT 299 (Court of Session).

39. *Kleinwort Benson* supra n 27, Lord Goff 525. It would not have been in the interest of posterity to investigate the precise meaning of Bowen LJ when he said, in *West London Commercial Bank Ltd v Kitson* (1884) 13 QBD 360, 363, that a misrepresentation by a corporation that it has an Act which gives it such and such a power is 'as much a representation of a matter of fact as if I had said that I have a particular copy of *Johnson's Dictionary*'.

appealed and the appeal was allowed to leapfrog the Court of Appeal, that court being likewise bound by the longstanding bar to restitution for mistake of law.

The House of Lords was thus presented with a pair of narrow questions and at the same time deprived of the usual advantage of weighty judgments below. Their Lordships held, by a majority of three to two, that it was within the competence of the House to reject the old rule that money paid by mistake of law was not recoverable. On the basis that mistakes of law in principle operated in the same way as mistakes of fact in engendering entitlements to restitution, the pleadings did disclose a cause of action in mistake. Their Lordships then held that that cause of action was indeed within the terms of section 32(1)(c). Furthermore, contrary to the argument advanced in this *Law Review*, there was no room for a doctrine of 'spent mistake'. That is to say, it was no answer to a claim for restitution grounded on mistake that the only potential of the mistake to prejudice or disappoint the party mistaken never in fact materialised.[40]

In view of the ruling on mistake of law, there may be rather few cases in which it will be necessary to know how the House of Lords would have decided this case if it had been asked to do so independently of mistake. Moreover, the nature of the preliminary points of law put to the House mean that, mistake apart, this case does not take us much further forward with the difficult question of whether, when both parties have fully performed a void contract, the mere fact of the contract's nullity leads automatically to mutual restitution (or, as Hobhouse J said that it should be more precisely put,[41] to restitution of the enrichment measured by the difference between the greater and the lesser performance). Nevertheless, it is an important question and there is some new evidence on it. It will involve a short departure from the *Kleinwort Benson* case itself.

(a) Mistake apart, what, if any, unjust factor calls for restitution of benefits transferred under a void contract?

In order to get an answer to this question we have to fall back on a closed swap case which, shortly before *Kleinwort Benson,* went as far as the Court of Appeal.

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40. P Birks 'No Consideration: Restitution after Void Contracts' (1993) 23 UWAL Rev 195, 230-231 n 137. The note argued that the mistake was 'spent' because the belief in the validity of the contract did not in fact prevent performance. Both parties got exactly what they would have got had the belief been true. The House of Lords said that the cause of action accrued when each payment was made: see *Kleinworth Benson* supra n 27, Lord Goff 541-542, Lord Hope 568. This point must be regarded as settled, though it is not completely clear to me that, if a change of position after the receipt can reduce liability, it is impossible for a cause of action in mistake to be extinguished by subsequent events.

41. *Westdeutsche Landesbank Girozentrale v Islington LBC* [1994] 4 All ER 890, 929, 940-941.

That was *Guinness Mahon & Co Ltd v Kensington & Chelsea Royal London Borough Council.*[42] The Court of Appeal, unable to open the issue of mistake of law, nonetheless affirmed an earlier decision of Hobhouse J to the effect that a closed swap should be treated in exactly the same way as an interrupted swap. In the closed swap no less than in the open and interrupted swap, the payer of the larger sum was entitled to restitution of the difference.

The paragraphs which follow seek to establish these three propositions: (i) where the performance of a void contract is interrupted before completion, the ground for restitution is failure of consideration; (ii) where a void contract is fully performed, the ground for any restitution that may be ordered cannot be failure of consideration; and (iii) where a void contract is fully performed, the ground for restitution must be found, if at all, in the policy underlying the nullity — and the relevant question is whether that policy also requires restitution.

The background can be shortly stated. At first instance in the most important of all the swaps cases, *Westdeutsche Landesbank Girozentrale v Islington London Borough Council,* Hobhouse J decided that the relevant unjust factor requiring restitution under void swaps was 'absence of consideration'.[43] That phrase was in this context no more than a restatement of the fact that the contract was void. One might equally have said that the very fact of the nullity of the contract dictated restitution. Hobhouse J, evidently building out from the notion of failure of consideration, preferred to say that, there never having been any legal nexus between the parties' performances, those performances had been made for 'no consideration', or there had been in relation to them an 'absence of consideration'. This was as true of closed swaps as of interrupted swaps.[44] In short, restitution on the ground of 'absence of consideration' was code for automatic restitution under all void contracts — a conclusion not in the least surprising to lawyers from civilian jurisdictions.

There were three problems with this.[45] First, it did not accord with our case law. There were cases of void contracts where the nullity seemed not to lead to automatic restitution. Secondly, it did not appeal to common sense, in that in the case in which both parties had got exactly what they bargained for, the mere finding of nullity did not in itself seem to suffice to make it necessary or desirable to dig up their transaction and reverse it. After all, both parties had received exactly what they had bargained for. Thirdly, 'absence of consideration' had no place in the typology of unjust

42. [1998] 2 All ER 272 (CA).
43. Supra n 41, 924-930.
44. Hobhouse J so held in relation to one closed swap in *Kleinwort Benson Ltd v Sandwell BC*, which he tried with the *Westdeutsche Landesbank* case: supra n 41, 930.
45. These problems constitute the main theme of Birks supra n 40. Cf Birks supra n 12, 214, 220-228.

factors. In particular, it did not indicate an impaired intention to transfer or a transfer made subject to a manifest qualification which had never been purified (squares 11(1)(a) and (b) in Diagrams 2 and 3); and, beyond non-voluntary transfer, it did not imply that any recipient had behaved badly (square 11(2) in Diagram 2); and it did not identify any policy reason why, irrespective of the integrity of the transferor's intention to transfer and the conduct of the recipient's intention in receiving, it was, all things considered, desirable that there be full restitution (square 11(3) in Diagram 2).

The duck-billed platypus reminds us of the nature of the objection that 'absence of consideration' had no place in the typology of unjust factors. It could be that the typology needed to be overhauled to make room for something unexpected. It could be that the unexpected something would on second and third thoughts fit comfortably into one of the existing categories. Or it could be a hoax, something that did not fit in because it ought to be repudiated — in short something that had no claim all to be an unjust factor.

The higher levels to which the *Westdeutsche Landesbank* case proceeded never decisively repudiated 'absence of consideration'. Nor was it unequivocally accepted. It certainly was never integrated into the typology of unjust factors. In fact the pressure for doing any of these things was taken off. The reason was that, although at first instance Hobhouse J had had before him open swaps and one closed swap, as it happened the closed swap (the 'Sandwell closed swap') dropped out of the appeal, which was thus concerned with various issues in relation to interrupted swaps.

(b) Failure of consideration can and does explain the interrupted swaps cases

'Failure of consideration' is the traditional language which expresses a thought which is now better conveyed by the words 'failure of basis'. A transfer is made on a particular specified basis and that basis fails to materialise or to sustain itself. A transfer thus made on a particular basis is made with qualified intent: the recipient is to have the value in question if and so long as the basis holds good. In an interrupted swap there is always a clear failure of consideration. The interruption signifies that the basis on which the parties had previously been paying (ie, that the agreed performances would go on for the whole of the agreed period) has fallen away. Each side has up to that point been paying with a manifestly qualified intent and in the event that qualification is not purified (square 11 (1) (b) in Diagram 3). As in the *Fibrosa* case, the condition for retaining the money therefore fails.[46] It

46. *Fibrosa* supra n 4, Lord Wright 64-65.

appears to have been accepted by the Court of Appeal in the *Westdeutsche Landesbank* case that failure of consideration provided a satisfactory factual explanation for the restitution which Hobhouse J had ordered Islington London Borough Council to make.[47] In the House of Lords there were also dicta in favour of that conclusion.[48]

It has become clear, through the swaps litigation, and also through *Goss v Chilcott,* a New Zealand appeal to the Privy Council, that the cause of action called 'failure of consideration' no longer requires that the failure be 'total'.[49] The old requirement of total failure of consideration is now reinterpreted to mean that the plaintiff cannot obtain restitution without giving up, or giving credit for, any benefit which he has received: there cannot be restitution without counter-restitution.

The Australian case, *Baltic Shipping Co v Dillon,*[50] ought not to be read as saying anything to the contrary. Mrs Dillon had paid for a cruise on the 'Mikhail Lermontov'. The cruise was interrupted when the liner hit a rock. Amongst other things, she wanted back the price she had paid. The High Court quite rightly insisted on a total failure of consideration because the plaintiff was seeking total recovery of the price paid for the aborted cruise. The crucial fact justifying the insistence on total failure can easily be missed. The plaintiff had already been repaid the sum referable to that part of the cruise which she never had. She wanted to say, and she had persuaded the courts below of this proposition, that the sinking of the liner had retrospectively destroyed all the benefit she had received from the cruise up to that point.

(c) Failure of consideration cannot explain restitution under closed void swaps

As we have seen, in *Guinness Mahon & Co Ltd v Kensington & Chelsea RLBC* the Court of Appeal decided that closed swaps and interrupted swaps must lead to the same consequence. In both, the party which had been the winner under the void contract had to make restitution to the loser of the sum by which its receipts exceeded its payings out. What did the court think to be the relevant unjust factor in the case of a closed swap? In some passages it appears to have nailed its colours to failure of consideration (square 11 (1)(b) in Diagram 3). It is

47. [1994] 4 All ER 890, Dillon LJ 960-961, with whom Kennedy LJ agrees. Legatt LJ seems to adhere to absence of consideration, though he also uses the language of failure of consideration at 969.
48. [1996] AC 669, Lord Goff 682-683, Lord Browne-Wilkinson 710.
49. [1996] AC 788.
50. (1993) 176 CLR 344.

to be hoped that this will be denied at the earliest opportunity. There is an alternative explanation. It is present even in the judgments themselves.

Failure of consideration will not work in a situation in which both parties have received full performance. It cannot be relied on without being distorted and fictionalised. The words 'failure of consideration' suppose a situation in which a transfer is made upon a particular basis, and in which that basis is manifest to the recipient, in most cases because the transferor has expressly told him what the basis is.[51] Then the manifest basis of the transfer fails to materialise or, in other cases, fails to sustain itself. The conditionality of the intent to benefit the recipient is not purified. This notion does not fit the facts of a closed swap in which the intended basis of the transfer has materialised or has sustained itself. The parties have received exactly what they wanted to receive albeit, unbeknown to them, without any legal obligation.

There are three reasons why a stretched and fictionalised notion of failure of consideration cannot be enlisted to do this work. The first is that the stretched version is a falsehood. It asserts that a basis has failed when in truth it has not. The second is that it provides no criterion for distinguishing between instances of nullity which do give rise to restitution and instances which do not. The third is that it is impossible to apply a notion of failure of consideration which is stretched to reach closed transactions without contradicting *Fibrosa* and returning to the error in *Chandler v Webster*.[52]

Where the basis of a transfer is a contractual reciprocation, that basis has two aspects. In the short term, what is crucial is the legal liability of the other to make the counter-performance; in the long term, what matters is the counter-performance itself, the initial liability being the means to that substantial end. In *Fibrosa,* the Polish company had made a prepayment for machinery which, because the contract was frustrated as a result of the German invasion of Poland, it never got. *Chandler v Webster* obstructed the recovery of that prepayment. It seemed to say that the consideration could not have failed because, when the money was paid, the legal liability to make the counter-performance was indeed in place. But that was merely the means to the end. The House of Lords rightly said that the basis of the payment failed because the Polish company never got the machinery. In the beginning it got the legal tie, but it never got what that tie was supposed to deliver.

The logic of that great decision applies just as much to the converse case in which the party seeking restitution does get the machinery, but then discovers that the other could have refused to deliver it: he got it despite the fact that the contract

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51. Eg, 'I am giving you this $1 000 because you are getting married to X, to help you set up your new home.'

52. *Fibrosa* supra n 4, overruling *Chandler v Webster* [1904] 1 KB 493 (CA).

had all along been a nullity. *Fibrosa* tells us that the initial legal tie, which is a means to an end, is not sufficient in itself to prevent there being a failure of basis if in fact the contract goes off without the end's being achieved. Conversely, the nullity of the supposed legal tie cannot in itself make for a failure of consideration if, as things turn out, the substantial end to which it was the means was anyhow achieved.

(d) Mistake apart, the proper explanation of restitution under fully performed void contracts is 'policy motivation'

None of this in itself implies that there ought not to be restitution under a closed swap which turns out to have been a nullity. It only means that, when the parties have received all that they bargained for, any restitution which follows cannot be attributed to a failure of basis. This is clearly stated in *Goff & Jones*.[53] If, still without relying on mistake, there is an unjust factor which requires restitution, it has to be found elsewhere in the typology or, this being the routine alternative, the typology must be shown to be deficient.

The proper solution is to be found in square 11(3) in Diagram 2. Although a fully performed void contract discloses no species of non-voluntariness on the part of the transferor (square 11 (1)), and no shabby behaviour on the part of the recipient (square 11 (2)), there remains the possibility that the policy behind the nullity is also a policy which dictates that there must be restitution even of benefits transferred under a fully executed contract (square 11 (3)). The attractions of this approach (ie, via square 11(3)) are that it fits the current typology, requires no stretching or deeming and leaves room to explain why some void contracts do and some do not trigger automatic restitutionary entitlements. The answer to that last conundrum will be that the policy behind the nullity will sometimes be furthered by leaving things where they are and sometimes by insisting on restitution.

There are passages in *Guinness Mahon & Co Ltd v Kensington & Chelsea RLBC* which focus on the policy behind the ultra vires rule, emphasising that the purpose of the rule is to protect the public. These passages say that the courts cannot stand by and watch that protective policy being torpedoed. There had to be restitution in order to uphold the policy behind the ultra vires rule.[54]

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53. '[W]here a party has received all that he bargained for under a contract which is ineffective, he should be denied a restitutionary claim if his claim is based on failure of consideration. But he may succeed on other grounds': *Goff & Jones* supra n 2, 657.
54. [1998] 2 All ER 272, Morritt LJ 284, Waller LJ 287. Walker LJ preferred to remain squarely within the language of failure or absence of consideration.

It will be necessary to highlight these passages and show that they contain in themselves a sufficient unjust factor. Otherwise a fictionalised 'failure of consideration' will be relied upon. There is no failure of consideration. There is, so it is asserted, a policy of protection which needs to be reinforced by ordering restitution. Such relevant fragments as there are in *Kleinwort Benson* point the same way.[55] If anything dictates this restitution, it must therefore be the policy behind the doctrine of ultra vires. Mistake apart, this must be the true unjust factor in the case of a closed swap.

However, every instance of policy-motivated restitution requires the policy to be spelled out so as to reveal why it would be better promoted by restitution rather than by letting the benefits lie where they have fallen. This has not yet been adequately done in the context of void swaps. It is obviously difficult to do in cases such as these in which the local authority is being asked to pay over a large sum of money received under the closed swap. For the authority itself and the section of the protected public inhabiting its locality are then being hurt precisely by the protective incapacity.[56] We needed to be told more about the way in which the banks were able to take hostile advantage of the protective policy.

It may be that the protected public is contemplated as being the whole public, not just that section of the public within the particular locality. If the whole public is protected, the banks are the authentic agents of the protective policy. Their right to restitution is the vindication of the protection to which every citizen is entitled. If, however, the local public was alone the beneficiary of the protective policy, logic would lead to the conclusion that the local authorities could sue successfully when they had lost the game but should have had a good defence when they had won. Such one-sidedness would not have been easy to explain to the tabloid press. Were the banks only the beneficiaries of a principle of reciprocity which operated to prevent that awkward one-sidedness? It is not clear that policy-motivated restitution can go in for soft concessions of that kind. Nevertheless, the reason for

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55. *Kleinwort Benson* supra n 27, Lord Goff 542-543, Lord Hope 567-568.

56. The doctrine of ultra vires, which is presented in these cases as a single doctrine, has, even if it should not formally be divided into two, two aspects. One, presumably the one at stake here, has to do with legality in government, the other with the protection of investors. The latter has been found little more than an inconvenience and has been whittled away to nothing. Nevertheless it is worth remembering that the doctrine, in its latter commercial manifestation, caused problems of exactly this kind: could it be pleaded by the outsider in circumstances in which it would hurt the company and its investors? Cf Fullagar J in *Re KL Tractors Ltd* (1961) 106 CLR 318, 337-338: 'The so-called doctrine of ultra vires was evolved for the protection of corporations of limited capacity and of their corporators, not for the advantage of persons who deal with corporations of limited capacity.... It would be entirely inconsistent with [that policy] that, if a corporation makes an ultra vires lending, the borrower should be able to maintain that he was never indebted.'

restitution has to be seen as the policy behind the ultra vires rule, subject only to a note to the effect that the reasons why that policy dictated restitution by the local authority to the bank remain to be further explored.

(e) When we say that mistake is an unjust factor, what do we mean?

We can now return to *Kleinwort Benson.* All their Lordships thought the bar to restitution for mistake of law should be relaxed. The majority in favour of allowing the appeal[57] thought that the appellant bank would be able to make out a claim for restitution for mistake of law, even if it turned out at the trial that it had paid in accordance with a settled understanding of law current at the time.[58] The minority[59] thought it unsafe to take so large a step without statutory assistance to cope with the swarms of restitutionary claims which would be released as judicial decisions developed the law.[60] The minority also disagreed with the majority on the important question whether, when there could be said to have been a settled view of the law at the time of the payment, a subsequent judicial decision which showed the settled view to have been incorrect would entail the conclusion that the payment had been made under a mistake of law. The majority thought it would; the minority thought it would not.[61]

The principal point, the breaking down of the bar to restitution for mistakes of law, is not quite as exciting as it may at first sight seem, for, in the language of the market, the result has already been discounted. In Western Australia, where the step was taken by statute many years ago, nobody will run up flags.[62] Even in England, where a few short decades ago a restitutionary claim based on mistake of law would have been struck out,[63] it has now been assumed for some time that the tide of cases in which one jurisdiction after another has reversed its previous

57. *Kleinwort Benson* supra n 27, Lords Goff, Hoffmann and Hope.
58. Ibid, Lord Goff 538-540, Lord Hoffmann 554, Lord Hope 563-564.
59. Ibid, Lords Browne-Wilkinson and Lloyd.
60. Ibid, Lord Browne-Wilkinson 523, Lord Lloyd 552.
61. Ibid, Lord Browne-Wilkinson 522, Lord Lloyd 549-551. Given the nature of the questions before their Lordships, it was not open to them to decide whether on the facts there was or was not a settled view of the law that local authorities had capacity to enter swaps before the House of Lords held that they had not.
62. Law Reform (Property, Perpetuities and Succession) Act 1962 (WA) s 23.
63. 'That a voluntary payment made under a mistake of law cannot be recovered is, I should have thought, beyond argument at this period of our legal history': *Sawyer and Vincent v Window Brace Ltd* [1943] 1 KB 32, Croom-Johnson J 34. It is clear that in this context the word 'voluntary' was included to allow for a contrary conclusion where there had been duress, for the judgment is concerned to show that mere pressure of legal process is not duress.

antipathy to relief for mistakes of law would sooner or later reach those shores.[64] Ever since the English Law Commission began its project in this area,[65] it has been clear that the mistake of law rule would be changed, whether by the courts or by Act of Parliament.

In the world-wide series, the English decision is in one respect different from the others. Not only in the two dissents but also in the majority speeches there is a greater awareness of the obstacles. There is some advantage in coming to this matter last. Some of the earlier cases found it possible to ridicule the old rule. But it was rash — or, as Lord Goff says, 'unhistorical' — to suppose that a question which has troubled the Western legal tradition for the best part of 2 000 years, and which has received a negative answer in our own corner of the wood for nearly 200 years, could suddenly present itself as lacking all complexity and admitting of only one obvious answer.

It is of course true that the liberalisation of the law of unjust enrichment has been made much easier. The recognition of the defence of change of position has heavily reduced the need for a restrictive attitude by taking care of the routine anxieties about security of receipts. Unless the defence is interpreted very narrowly, it gives all honest people the assurance that they can safely use up all that wealth which appears to be at their disposal without the fear that the law of unjust enrichment might later make them repay that which they have already consumed. But the defence is not a universal panacea. There are problems peculiar to mistakes of law which it does not solve, or arguably does not solve. The curious thing is that, despite being so evidently aware of the magnitude of the problems, the majority thought it safe to press on with what on its face appears to be a right to restitution for mistake of law which is as large and liberal as it could be.

(f) Special anxieties surrounding mistakes of law

There are five anxieties in relation to mistakes of law which are not present in relation to mistakes of fact. They will bear these short labels: natural obligations, inhibiting judicial freedom, usurpation of legislative style, fabrication and conceptual instability. Some people might count the five as three, for the second

64. These cases are discussed in *Kleinwort Benson* supra n 27, Lord Goff 530-531. The most important have been *Air Canada v British Columbia* (1989) 59 DLR (4th) 161 (Sup Ct Canada); *David Securities Pty Ltd v Commonwealth Bank* supra n 8; *Willis Faber Enthoven Pty Ltd v Receiver of Revenue* [1992] 4 SA 202 (Sup Ct South Africa, Appellate Division); *Morgan Guaranty Trust Co v Lothian Regional Council* supra n 38.

65. The Lord Chancellor initiated the work in 1990, giving rise to a Consultation Paper (CP No 120) in 1991 and finally, 3 years later, to the Law Commission's Report *Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments* No 227 (London: HMSO, 1994).

and third can be lumped together as distortions of legal reasoning, and the fourth and fifth both emanate from the inherent complexity of the law.

• Natural obligations

Thanks to his civilian learning, Lord Mansfield, who probably assumed that one could in principle recover for a mistake of law, identified a problem arising from the difference between legal and moral obligation. If you honour a moral obligation because you believe that you are legally obliged to do so, and you are mistaken in that belief, can you recover? The answer is no.[66] If you do not know anything about the law relating to limitation of actions and you pay a time-barred debt, you cannot recover. Though the civil obligation is barred, the natural obligation is not. But a moment's reflection will reveal that it is intensely difficult to say in which cases a moral obligation does remain untouched despite not being legally enforceable.

• Inhibiting judicial freedom

Especially in systems in which judicial decisions make law, there is a danger that liberal recovery for mistake of law might inhibit the judges' interpretation of the law, by making them apprehensive of releasing swarms of restitutionary claims. 'Just see what consequences would follow — that wherever there has been a reversal of judgment all the money that has been paid under the previous notion of the law can be recovered back! Has that ever been held? Can it be that every reversal of a decision may give rise to hundreds of actions to recover money previously paid?'[67]

• Usurpation of legislative style

There is an opposite danger arising from the same fear. It might force judges to overstep the limits of interpretative creativity by compelling them to admit to having changed the law, rather than having restated it correctly. That is to say, from fear of releasing swarms of claims they might feel driven to make clear that, as with a reforming statute, their decision had overtly overthrown the previous law, correct though it may have been. Such an overtly proclaimed interpretative change in the law would not imply prior error. This is important. Judges do change the law. But a judge who finds that the law is X and then decides Y has over-stepped the most important restraint on unelected law-making. Lawyers' skills confer no special competence in the taking of political decisions. A decision that

66. *Moses v Macferlan* supra n 29.
67. *Henderson v Folkestone Waterworks Co* (1885) 1 TLR 329, Lord Coleridge CJ.

the law, once stated, ought to be changed is a political decision. Most lawyers would be unhappy with that role. And most laypeople ought to be unhappy to see signs that they might be pushed into it.

• Fabrication

The law being complex and easy to get wrong there is a danger of there being too much restitution. Even supposing that the defence of change of position can sufficiently deal with that, there is concurrently an undoubtedly aggravated danger of fabrication ex post. The very plausibility of the proposition that people do not understand the law might be thought to encourage fabrication of mistakes ex post by those who are casting around for grounds to recover value which, after the event, they reproach themselves for transferring.[68]

• Conceptual instability

Precisely because the law is complex and the subject of disagreement, the very concept of mistake of law is inherently more difficult than that of mistake of fact. This will become apparent in the paragraphs which follow. The key to the difficulty is that facts stay still and the law does not. A present or past fact is finally true or false at the moment at which a belief about it is formed. Mistake is much more slippery in relation to the law, where beliefs are not once and for all true or false but are subject to supervening, and retrospective, falsification.

Not all these matters rise to the surface in *Kleinwort Benson*. There is, for example, no discussion at all of the natural obligation honoured in the mistaken belief that it was a legal obligation. The pressures on interpretative method are prominent, but they figure, not as dangers to be avoided, but as aspects of the inquiry into the fifth difficulty, namely the problem of saying what counts as a mistake of law.

(g) Too broad a concept of mistake

In *Kleinwort Benson*, the majority appears to have approved a notion of operative mistake of law which is broader than operative mistake of fact. Without saying so expressly, it has moved English law towards a civilian condictio indebiti. 'Condictio indebiti' means 'claim in respect of something not due'.[69] We can

68. Lord Brougham showed himself keen to nip this in the bud in *Wilson and M'Lennan v Sinclair* (1830) 4 Wils & S 398 (HL). His views on mistakes of law are more fully expounded in *Dixon v Monkland Canal Co* (1831) 5 Wils & S 445 (HL).

69. An 'indebitum' is something not owing or not due, the opposite of the English legal Latin 'indebitatus', which means 'having become indebted'. The 'condictio' was the Roman

indeed agree that it is retrospectively true that the money was never due. But it is difficult to agree with the majority that there could be, retrospectively, a mistake. When the House of Lords decided that local authorities had no power to enter into interest swaps, it became, retrospectively, true that the money paid under the swaps which they had purported to enter into had never been legally due. But, on close analysis, it is difficult to see that a party who was not initially impaired could become retrospectively impaired. In the paragraphs which follow, an attempt will be made to show that the decision may have the effect of destroying the distinction between true mistakes and mispredictions of the future. This distinction is an established feature of the English typology of unjust factors.

Lord Hoffmann says: 'The lawyer would, I think, start by considering why, in principle, a person who had paid because he held some mistaken belief should be entitled to recover'.[70] And Lord Goff says of the minority position that it is 'based on the theory that a payment made on [the basis of a settled understanding of the law] is not made under a mistake at all'.[71] The contention of the following paragraphs will be that a correct answer to Lord Hoffmann's question reveals that that for which relief is given under the title of 'mistake' is indeed absent when the alleged mistake can only be established by reference to facts which come into existence after the transfer in question was made.

There are three models to be considered. In the first a payment is made in the belief that a given case states the law, and later that case is overruled. In the second a payment is made in ignorance of a case or statute already extant. In the third, which is intermediate between the other two, a payment is made on the basis of settled, but untested, lawyerly opinion.

(h) Where a decision is subsequently overruled

The majority declines the invitation to say that there is no mistake when a payment is made in the light of a case which is later overruled. A local authority pays up because of *Anns v Merton London Borough Council.*[72] Later, along comes *Murphy v Brentwood District Council,*[73] which holds that there was after all no duty of care, hence no breach and no liability. This is the strongest example of settled law. The law is so settled that all courts other than the House of Lords are bound. This was the position in England in relation to mistakes of law until the

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action of debt, though taking its name from a feature, early obsolete, which involved the 'giving of notice' ('condicere').

70. *Kleinwort Benson* supra n 27, 553.
71. Ibid, 538.
72. [1978] AC 728 (HL).
73. [1991] 1 AC 398 (HL).

Kleinwort Benson case. Even the Court of Appeal was bound to say that there could be no recovery, and this despite the fact that every law school in England was saying that at the next opportunity the House of Lords would say the contrary. Even in this extreme case it seems that, according to the majority view, everyone who believed that the old rule represented the law was, in retrospect from the day of the overruling, making a mistake of law.

Of those who incline to the contrary minority view, some will think, perhaps, that there is room to say that there is a mistake, but one which meets, or ought to meet, a special defence designed to protect payments made under the law as it seemed to be. But the better view is that in such a case there is simply no mistake. Lord Browne-Wilkinson and Lord Lloyd take that position. On such facts there never was a mistake. That must be right.

The proper starting point may seem at first to be far away. In *Edgington v Fitzmaurice*[74] Bowen LJ famously observed that 'the state of a man's mind is as much a fact as the state of his digestion'.[75] What was the importance of that observation? What was the point of reducing expressions of intention to representations of present fact? Bowen LJ's intention was to underline the proposition that there is a huge difference between, on the one hand, disappointments suffered when the future turns out badly and, on the other, disappointments due to mistakes of present fact. As Professor Beatson has said: 'Neither a promise nor a prediction can be regarded as true or false at the time when it is made, except so far as a person misrepresents the state of the maker's own mind or power to bring an event to pass'.[76]

The traditional position has not been that a misprediction cannot found relief, but only that it cannot do so under the rubric of mistake, whether spontaneous or induced. In the case of the prediction later falsified, the first hope of redress lies in the search for something which will support the conclusion that the defendant bound himself — typically by contract — to bring the hoped for future about. Another possibility is that he accepted a benefit on a specified basis whose failure would compel him to make restitution. Even in the absence of any contract, a person may be able to obtain restitution on the ground that he made manifest as the basis of the transfer a state of affairs that must come about in the future, or sustain

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74. (1885) 29 Ch D 459 (CA).
75. Ibid, 483. Cf (i) 'expected ready to load': *The Mihalis Angelos* [1971] 1 QB 164, 194, 205; (ii) misprediction of development potential: *Amalgamated Investment & Property Co Ltd v John Walker & Sons Ltd* [1977] 1 WLR 164 (CA); (iii) statements of expectation or belief in relation to insurance contracts: *Economides v Commercial Union Assurance Co plc* [1997] 3 WLR 1066 (CA), discussed by HN Bennett 'Statements of Fact and Statements of Belief in Insurance Contract Law and in General Contract Law' (1998) 61 MLR 886.
76. J Beatson *Anson's Law of Contract* 27th edn (Oxford: OUP, 1998) 236.

itself into the future, and that basis failed. For example, A gave B $1 000 on the basis that B would in one month's time be getting married. Later B called off the wedding. That is a failure of consideration; it belongs in another sector of the spectrum of unjust factors.[77] In retrospect, A will say that he was mistaken in thinking that a wedding would happen, but that is a mistake with the benefit of hindsight. It was at the time a mere misprediction, not a true mistake.

The true mistake is different. Not every true mistake will entitle the mistaken party to relief. But, so long as the mistake in question passes the appropriate tests, it is certain that you do not need a contract, or anything like a contract, or any failure of a specified basis, in order to obtain relief for disappointments due to your having acted on a mistaken view of the facts. If the mistake of fact has been fraudulently induced you will probably be able to claim in tort for deceit. Even if it has been innocently induced or not induced at all, you may be able to seek relief in the law of unjust enrichment. The crucial difference between a true mistake and a failure to predict the future is that in the former your decision-making capacity is impaired from the outset, much as though a computer had been loaded with wrong data; in the latter, there is no impairment, for you know the future is uncertain and, in the absence of a contract or something similar, you know that you are trusting your own judgment. Your later disappointment shows that you made a misjudgment or a bad judgment, not that the exercise of judgment was impaired.

That is what Bowen LJ was getting at in *Edgington v Fitzmaurice*. If you simply trust your own judgment that, if you advance certain money to me, I will in the future lay it out on a particular project, you may in the event be disappointed but you are not impaired. The mere fact that I told you that I would behave in a given way in itself makes no difference. Whatever relief you can get, it will not be on the basis of the impairment of your decision to transfer. If, on the other hand, you load into your brain data to the effect that I do now intend so to employ the money, and I do *not* so intend, then the data on which you make your decision are incorrect ab initio and your decision to invest is impaired. There are cases which fall into the category of impairment (square 11 (1) (a) in Diagrams 3 and 4) and there are others which do not. Those which do not must find their help elsewhere.

A simple but vivid example is this. A professor comes to his lecture late and evidently soaked to the skin. 'I got caught in the rain,' he says, 'I made a mistake. Despite the dark clouds, I thought the storm would hold off. I should have carried an umbrella.' He knows with hindsight that his exercise of judgment turned out to be bad. He got the weather wrong. But his decision not to take an umbrella was not impaired. One can run the same example in a stronger form, stronger because

77. The distinction is sometimes overlooked: *Kerrison v Glynn Mills Currie & Co* (1911) 81 LJKB 465 (HL) appears to be such a case. It should have been decided as a case of failure of consideration.

even more obviously a gamble: 'The home team lost the toss. Heads had come up three times running in the preceding matches. The captain called tails. A bad mistake. Heads came up yet again, and the visitors went into bat.' This is again a misprediction, a mistake only with hindsight. There is no impairment of the decision to call tails.

(i) The majority position entails relief for mispredictions

In *Kleinwort Benson* Lord Hoffmann, who admits to having changed his mind on the central issue in the course of writing his judgment, asks why, in principle, a person who had paid because he held some mistaken belief should recover. He answers that it is prima facie unjust for the recipient to retain the money when, if the payer had known the true state of affairs, he would not have paid. A line or two later he says that there is an evident distinction in principle between mistakes of fact and cases in which the law is falsified by a later decision in that the truth or falsity of an existing fact could have been ascertained at the time, whereas the law, as it was subsequently declared to have been, could not. With trepidation, I suggest that the sentences which follow then go wrong:

> One must therefore ask why, in the context of unjust enrichment, this should make a difference. In both cases it has turned out that the state of affairs at the time was not (or was deemed not to have been) what the payer thought. In the case of a mistake of fact, it is because things were actually not what he believed them to be. In the case of a mistake of law, it is by virtue of the retrospectivity of the decision.[78]

When a case is held to have been incorrectly decided, the law is changed retrospectively. Even in relation to facts which happened before the overruling, the law to be applied is the law as set out in the case which does the overruling.[79] Let that be accepted without further examination, because we are for the moment only concerned with the precise nature of the unjust factor which we call 'mistake' and the nature of that unjust factor is best tested against that strong assumption. The crucial point is that, even giving full effect to the retrospectivity of the new declaration of the law, that retrospectivity does not and cannot render impaired the decision to pay up made in the light of the now overruled case. The unjust factor which we call 'mistake' works because it identifies an impairment of the decision to pay. Unless and until the typology is revised, this sufficiently appears from the

78. *Kleinwort Benson* supra n 27, 553.

79. Cf Lord Browne-Wilkinson's discussion of *R v Governor of HM Prison Brockhill ex parte Evans* [1998] 4 All ER 993, where the Governor had calculated a prison sentence under the then existing decisions which were later overruled. He could not claim the protection of the overruled decisions: *Kleinwort Benson* supra n 27, 521.

nearest congeners of mistake in Diagrams 2 to 4. The impairment consists in the decision's being made on incorrect data. It is impossible to prove an impairment of that kind if the only different data which could have been fed into the decision were not in existence at the time. In short, if the facts falsifying the belief then held came into existence later (ie, after the payment) the decision to pay was not impaired.

It may be that this can be shown to be philosophically naive. But the existing law of mistake, spontaneous and induced, would look very different if falsification of hopes and beliefs by subsequent events were treated as identical to the making of decisions on grounds already false. This position has, moreover, considerable benefits in relation to judicial method. We noted among the anxieties underlying the old rule about mistakes of law two which were directly concerned with judicial method (ie, inhibiting judicial freedom and usurpation of legislative style). If there is no mistake when beliefs are falsified by facts which come into existence after they are formed, no judge need fear that a reinterpretation of authority will release swarms of restititutionary claims and, likewise, there will be no temptation to try to anticipate the swarms of restitutionary claims by usurping the thought-processes and language of the legislature, speaking of overt, discontinuous innovation: the law is X, but let it henceforth be Y.

(j) Genuine impairment by mistakes of law: overlooking extant law

The argument of the preceding paragraphs does not imply that there can never be a mistake of law. The falsification does not always come after the event. A payment can be made overlooking a statute or applying a decision which had already been overruled. We have been considering the kind of situation in which, under the influence of *Kleinwort Benson,* everyone has been feverishly repaying money paid by mistake of law, and then a new case comes along and holds that in some such cases there is after all no liability to repay. The position we have taken is that the later case, though it changes the law retrospectively, does not render the earlier repayments mistaken. The example which is clearly at the opposite end of the spectrum is then the repayment which is made after that new case. The new case narrows the liability to return money paid under a mistake of law. Some people, perhaps some lawyers, are slow on the uptake. They pay up unaware of the modification. They are now unequivocally mistaken and (subject to the point about natural obligations, which we will not chase) they can recover. Their decisions were impaired because they proceeded on the wrong data. The right information was already extant. If there was a pressing need to dismantle the mistake of law bar, it was precisely for this kind of case, in which a transfer is made without taking into account a statute which has already been passed or a case which has already been decided.

(k) The intermediate case, the instant case

Our first model was payment under a case overruled after the payment was made: no mistake. Our second was the payment under a case which had already been overruled: unequivocally a mistake. The third model, to which the closed swaps cases conform, is payment made on the basis of interpretation, advice and practice never actually tested in any case. The question is whether payments so made were impaired by mistake. The test must be whether the beliefs which caused the payments can be falsified by facts already extant at the time or only by facts which came into existence subsequently. There will be no one answer in this category. In the swaps saga, it seems unlikely that the relevant beliefs could be falsified without reference to a subsequent fact, namely the decision in *Hazell v Hammersmith & Fulham LBC*.[80] But in some rare cases the decision revealing that payments need not have been made might itself rely on arguments so compelling and unequivocal as itself to show that the interpretation and practice, however prevalent, could indeed have been falsified from the beginning of the story. However, examples of this kind would generally move themselves into the previous category, since means of falsification revealed by the disruptive case would be likely to consist in earlier authorities or statutes which the prevailing practice had overlooked.

(l) The lesson to be learned

The general theme of this part of the discussion has been that in the law of unjust enrichment (square 11 in Diagram 1) it is imperative to keep the full range of unjust factors in view and under review, in order to avoid stretching or distorting any one of them. The particular moral of this example has been that the name of an unjust factor must not be allowed to distract from the understanding of how and why it and its immediate congeners work. Mistake, like duress and undue influence and the other factors which figure in Diagram 4, works (unless the typology needs revising) because it impairs the decision-making process. A prediction which turns out badly is not impaired. A misprediction, often called a mistake, is therefore not a mistake for these purposes.

When the decision-making process inside one's head has not been impaired by wrong information, one cannot seek restitution on the ground of mistake. One may nonetheless be able to do so on some other ground. For example, as we have seen, the Woolwich Building Society was able to take advantage of an overriding reason which dictated that there must be restitution (square 11 (3) in Diagram 2). The overriding reason was the imperative to uphold the ideal of the rule of law in

80. Supra n 36.

government. Again, if one specified that the basis of one's payment or other transfer of value was that the doubt in question be resolved in a particular manner, then if it was resolved in any other manner one would be entitled to restitution. The unjust factor would then be failure of basis or, in the traditional language, failure of consideration, not in square 11(1)(a) but in square 11(1)(b) in Diagram 3.

4. RESTITUTION FOR WRONGS

This is square 6 in Diagram 1. There are in principle two ways in which the victim of a wrong can go about recovering the gains made by the wrongdoer. One is to re-analyse the facts as an unjust enrichment, ignoring their character as a wrong. The other is to insist on their character as a wrong and to argue that the wrong is one in respect of which a victim is entitled to the wrongdoer's gains. Square 6 is only about the latter, restitution for wrongs as such. The old language of waiver of tort never distinguished between the two.

Square 6 is indubitably the business of the law of restitution. That is what the diagram tells us. It is part of the law which considers the circumstances in which a plaintiff is entitled to compel a defendant to surrender gains.[81] But the law of restitution is multi-causal. Square 6 has nothing to do with unjust enrichment. When we think in terms of categories of causative event, square 6 belongs in the law of wrongs. Again, that is what the diagram says. The law of wrongs is not co-terminous with the law of tort, though the distinction between them is intellectually indefensible.[82] The law of civil wrongs includes not only torts but also equitable wrongs, such as breach of fiduciary duty, and also such statutory wrongs as may not qualify to be described as torts. The question which square 6 asks and ought to answer is simply this: which wrongs give rise, qua wrongs, to an entitlement to the wrongdoer's gains? It is one of the great advances which comes with the overt recognition of the multi-causality of restitution that we can see with absolute clarity that that is a question for the law of wrongs and that it has nothing to do with the law of unjust enrichment.

It is not possible in this context to do more than identify the most glaringly obvious feature of the law in this area, which is that it has become erratic. It is behaving like a ship without a rudder. In some cases the courts appear to be convinced of the necessity and utility of allowing victims of wrongs to pursue the wrongdoer's gains. In others the very idea that that might be an available option is perceived as dangerously heterodox. We can see this in the contrast between, on

81. This assumes that the word 'restitution' is not restricted to givings back but includes all givings up (every 'Herausgabe'): supra p 22.

82. This is discussed in P Birks 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 UWAL Rev 1, 25-26.

the one hand, *Attorney-General (Hong Kong) v Reid* [83] or *Warman International Ltd v Dwyer* [84] and, on the other, *Stoke-on-Trent County Council v W & J Wass Ltd* [85] or *Halifax Building Society v Thomas.*[86]

In the first pair, we find the courts confident that the wrongdoers (in the one case a corrupt prosecutor and in the other disloyal executives) must not only pay over their ill-gotten gains but must even be turned into trustees of their receipts, with the effect of giving the victim a proprietary right in those gains and their traceable products. In the second pair, the Court of Appeal in England found that it could not impose on the wrongdoing defendants even a personal liability to disgorge. In the one case the defendants had, in the pursuit of profit, flouted both the planning laws and the plaintiff council's proprietary rights in relation to the holding of markets; in the other a fraudster had obtained money from a lending institution and profitably invested it. Neither was under any obligation to disgorge. Then, very recently, the same court adopted a very different attitude in relation to a profitable breach of contract. The traitor, George Blake, whose activities cost many lives, had been lifted from prison by a helicopter and smuggled to Moscow, where he still lives. He wrote a book. The question was whether it was possible to issue an injunction preventing his getting the large sum of money which he thereby earned. In *Attorney-General v Blake* [87] the Court of Appeal issued the injunction on the basis that the Attorney was entitled to invoke the civil law's duty to support and reinforce the criminal law. However, it went out of its way to say that, had the matter been rested on the proposition that the money represented the profits of a breach of contract, it would also have issued the injunction on that basis. The current Lord Chief Justice, Lord Bingham, had indeed earlier said that we had not heard the last word on the subject.[88] Yet the recent case law suggested that the wrong of breach of contract would not be in the vanguard of any development of this kind.[89]

It is evident that more work has to be done here. It can now be done with a much clearer vision. Which wrongs can be re-analysed as unjust enrichments independent of wrongdoing? Which wrongs qua wrongs engender gain-based

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83. [1994] 1 AC 324 (HL).
84. (1995) 182 CLR 544.
85. [1988] 1 WLR 1406 (CA).
86. [1996] Ch 217 (CA).
87. [1996] 3 WLR 741 (CA).
88. *Jaggard v Sawyer* [1995] 1 WLR 269. See too the judgment of Deane J in *Hospital Products v US Surgical Corp* (1984) 156 CLR 41 and the *Adras* case decided by the Supreme Court of Israel: *Adras Building Material Ltd v Harlow & Jones GmbH* [1995] Restitution L Rev 235.
89. *Jaggard v Sawyer* ibid was itself discouraging in this regard; much more so *Surrey CC v Bredero Homes Ltd* [1993] 1 WLR 1361 (CA).

entitlements? These questions now present themselves as analytically distinct. Why is the latter — the square 6 question — not receiving a clear answer? It is possible here, not to give the complete answer, but to say what is obstructing it. There are two reasons, deep in the foundations of our thought. If we bear them constantly in mind, they will cease to inflict their secret damage. One emanates from the separation of law and equity. The other has its roots in an unresolved uneasiness about the natural limits on the activity of the law of civil wrongs.

(i) The concealment of the account of profits

It is a historical fact that the Court of Chancery took over the real business of the early action of account. Some of the liabilities which grew up in the old common law action were moved into the action of debt and thence into the sub-form of assumpsit known as indebitatus assumpsit, but the actual taking of accounts came to be a Chancery matter.[90] Most, though not all, of the evidence that the law does allow victims of wrongs to claim the wrongdoer's profits comes from the taking of accounts in Chancery. For example, in the law of intellectual property it is taken for granted that an account of profits is one of the victim's options. Historically, that derives from the general availability of the Chancery machinery for the taking of accounts in respect of wrongs.[91] It is not confined to those wrongs with pure Chancery pedigrees, such as abuse of confidence and breach of fiduciary duty. In that sector of the law of wrongs, accounts of profits are a standard response. Nobody bats an eyelid.

However, this evidence has been swept out of sight, at least in the sense that it has not been built into the constant consciousness that lawyers have of the operation of the law of civil wrongs. The books on torts do not deal with it; the books on damages do not deal with it. An account of profits is very similar to an inquiry as to damages, in that both are ways of fixing the amount of a money award. Nevertheless, Dr Harvey McGregor, the greatest living authority on the law of damages, is incensed by the notion that the word 'damages' might extend to gain-

90. Jackson says that, though the taking of accounts was known in Chancery from an early date (the 15th century), the extinction of the common law action was not complete until towards the end of the 17th century. There was one last revival, an 18th century action of account at common law which took 14 years to resolve: *Godfrey v Saunders* (1770) 3 Wils KB 73; RM Jackson *The History of Quasi-Contract in English Law* (Cambridge: CUP, 1936) 34-35.

91. *Bishop of Winchester v Knight* (1717) 1 P Wms 406 is liberal in this regard. Lord Hardwicke in *Jesus College v Bloom* (1745) Amb 55 is more restrictive. Cf *Phillips v Homfray* [1892] 1 Ch 465, as explained by WMC Gummow 'Unjust Enrichment, Restitution and Proprietary Remedies' in PD Finn (ed) *Essays on Restitution* (Sydney: Law Book Co, 1990) 47, 60-67.

based awards. He is incensed by the language, not the substance. He is not opposed to gain-based awards.[92]

This continuing segregation of the account of profits has the effect of reducing the weight of the evidence from the equity side. Something which looks perfectly normal so long as one is wearing an equitable hat disappears as soon as that hat is taken off. Even for those for whom it does not actually disappear, it shrinks and begins to look peculiar. We have to get over this. Things which have their roots in the Chancery are not to be treated as more quaint and unusual than things stemming from the courts of common law, no more than things done on Tuesdays can have a different theoretical weight from things done on the other days of the week. Under whatever name, whether as damages or as an account of profits, we have to get used to the fact that our law of civil wrongs does give gain-based awards.

(ii) The false monopoly of compensation

Then, and perhaps even more important, there is the melancholy, long, withdrawing roar of *Rookes v Barnard*.[93] If one vacillates between accepting and rejecting the message of that case, one is more or less bound to vacillate in one's attitude to all forms of non-compensatory response to civil wrongs. Australia rejected what the House of Lords tried to do in that case.[94] The English Court of Appeal under Lord Denning tried not to accept it[95] and got its knuckles seriously rapped.[96] Nevertheless, as we shall see immediately below, it seems that the tide has turned and the destabilising influence of the views espoused in that case will now recede.

The view which the House of Lords adopted in *Rookes v Barnard* and re-affirmed in *Cassell & Co v Broome* was that the law of civil wrongs was subject to a natural limitation, namely that it could not do anything about wrongs except ensure that their victims were compensated for the loss they suffered. This might be described as the welfare notion of the role of this area of law, an interpretation of civil wrongs which denies them normativity and abdicates to the criminal law all the business of deterrence and retribution. Moreover, it does this on the basis of

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92. H McGregor 'Restitutionary Damages' in P Birks (ed) *Wrongs and Their Remedies in The 21st Century* (Oxford: OUP, 1996) 203, especially 208-210. It will be observed that he never uses the term 'restitutionary damages' without putting it in quotation marks.
93. [1964] AC 1129.
94. *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118. The post-*Uren* case law is reviewed and re-affirmed in *Gray v Motor Accident Commission* (unreported) HCA 17 Nov 1998.
95. *Broome v Cassell & Co* [1971] 2 QB 354 (CA)
96. *Cassell & Co v Broome* [1972] AC 1027 (HL).

the nature of things, not as a political choice which one society might make and another reject.

Of course, the target in their Lordships' sights was punitive damages, and punitive damages, so far as they survived at all in England, survived as anomalies. But the platform from which the attack on punitive damages was launched was the proposition that a plaintiff's loss was the proper measure of recovery and that a plaintiff's recovery of more than he had suffered loss was anomalous. Gain-based awards, although immune to some of the secondary criticisms of punitive damages, are also caught in any attack of that nature. They also give what is pejoratively described as a 'windfall'.

The evidence of the practice of equity in relation to accounts of profits, the evidence of American law and practice in relation to punitive damages, and the evidence of Roman law in relation to the penal nature of actions for wrongs, all show that it cannot be right to portray a restriction to compensation for loss as other than a choice which some systems happen to prefer. Legal systems do with their law of civil wrongs whatever seems to them to be useful and wise. This was the view for which Lord Wilberforce stood out against the majority of their Lordships in *Cassell & Co v Broome*.[97] And it is the position which has been vindicated in England, after a long study and much consultation, by an important report of the Law Commission. This report takes the view that punitive damages should not be abolished but should be put on a principled basis and that gain-based awards should likewise survive and be developed on a principled basis.[98]

In Australia the *Rookes v Barnard* bug has never got a grip on the law. But even here the message of most lawyers' legal education is that any response to civil wrongs other than compensation for loss is odd and requires explanation. That seems to be the starting point. Surprisingly since equity so flourishes here, the regular practice of the Chancery in taking accounts of profits tends to be sidelined. A report of the English Law Commission has no more weight than its reasoning commands. But even in Australia the Wilberforce-ian stand taken by the Law Commission may have some importance.[99]

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97. *Cassell & Co v Broome* ibid, 1114. Cf in New Zealand *Donselaar v Donselaar* [1982] 1 NZLR 81, especially Richardson J 90, and very recently *Daniels v Thompson* [1998] 3 NZLR 22 (CA).

98. Law Commission supra n 20, especially ¶¶ 5.40-5.128. The report also endorses the practice of gain-based awards (restitutionary damages) but, subject to one exception, thinks they require no legislative help: ¶¶ 3.1-3.84, especially ¶¶ 3.38-3.57. The report is reviewed by P Jaffey 'The Law Commission Report on Aggravated, Exemplary, and Restitutionary Damages' (1998) 61 MLR 860-869.

99. The report is indeed taken into consideration in *Gray v Motor Accident Commission* supra n 94. Even in that case, which in general confirms the rejection of the attempt to extirpate punitive damages, there are passages which seem to accept that recovery greater than loss suffered is nonetheless 'anomalous'.

So far as gain-based awards are concerned the true position is that they are regularly given and that they are not anomalous. 'Anomalous' means something like 'irregular'. It is pejorative. It immediately suggests that the non-conforming matter in question should be restricted and worked out of the system. On the contrary, gain-based awards are a useful product of the intuitive wisdom of our law and have been made to behave 'irregularly' for no better reason than that an erroneous dogma as to the natural limits of the civil law has infected, and has never been completely flushed out of, the subterranean channels of the legal mind.

If the matter is approached on that basis, with both self-deceptions out of the way (the one being that we do not really go in for gain-based awards and the other being that so far as we do go in for them they are contrary to the nature of the civil law), it will not be long before all gain-based awards for wrongs are brought together and put on a principled basis. The remaining danger will be that words such as 'fiduciary' might be taken to be capable of expressing or sustaining a statement of principle. In *Halifax Building Society v Thomas*, Peter Gibson LJ seemed to say that restitutionary liability for wrongs was confined to breach of fiduciary duty and proprietary torts.[100] The tort of deceit was excluded from this magic company.

A selective answer to the central question in square 6 — that is, an answer which would say that for some wrongs you can and for some you cannot get the wrongdoer's profits — will have to speak in plainer English, and English which can be more easily paraphrased. A wonderful feature of Isaiah Berlin's lectures was that he constantly practised what he also not infrequently preached, namely that if the same thing can be said in at least three different ways there is some chance of its being properly understood. If a bribee is accountable for his profits (and is a trustee of them) and a common fraudster is not, the reason for the difference must be capable of being spelled out in at least three different ways. Otherwise we might have to infer that the negative answer given in the case of the fraudster is attributable only to a merely visceral reluctance to abandon the notion that the civil law is behaving anomalously whenever it does anything that is not compensation for loss.

5. THE PROPRIETARY RESPONSE

Diagram 1 contains no square for this. The reason is simple. There are more than two classifications of rights. The diagram maps only two, the classification by causative events and the classification by goals. Rights can also be classified as personal (in personam) or proprietary (in rem). The latter are the subject of the law of property, the former of the law of obligations. An obligation is a personal

100. Supra n 86.

right contemplated from the other end. The only way of mapping this third classification onto the diagram would be to divide every square in two. Suppose that we drew a diagonal line across each. In each square one triangle would then be asking whether any right which arose in that square was proprietary, the other whether any such right was personal.

Attorney-General (Hong Kong) v Reid,[101] where a corrupt prosecutor in Hong Kong took bribes and invested them in farms in New Zealand, would then belong in square 6 (restitution for wrongs) and, within that, it would merit a tick in the proprietary triangle — indeed in both triangles. For the Privy Council held that by virtue of the wrong which he committed the prosecutor not only became personally accountable for the bribes but also became, immediately, a trustee of all the bribes he received. Correspondingly, the Government of Hong Kong obtained an immediate equitable interest in them, which could then be claimed in their traceable proceeds. *Warman International Ltd v Dwyer*[102] would belong in the same box and get the same treatment.

By contrast *Chase Manhattan Bank NA v Israel-British Bank Ltd,* [103] where one bank paid another the same sum twice, would, as decided, go in square 11 (restitution for unjust enrichment) and, within that, it too would get a tick, not only in the personal but also in the proprietary triangle. For what Goulding J decided was that a payment made by mistake, at least where the mistake consisted in paying in the afternoon what had already been paid in the morning, though it passed legal title to the payee, created an immediate equitable interest in the mistaken payer, thus turning the payee into a trustee.

These proprietary interests generated by wrongs and by unjust enrichment have come under severe criticism, chiefly because they confer what are thought to be undeserved priorities in insolvency. That kind of criticism is difficult to meet. Insolvency is a disaster which inflicts indiscriminate hardship. For my part I find it difficult to say who deserves to suffer or which groups deserve to suffer more than others. Giving an answer or changing the answer already given seems to be precisely the kind of issue which has to be left to the legislature. If, which is broadly true, the answer is that those with personal claims must suffer while those

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101. *A-G (Hong Kong) v Reid* supra n 83, severely criticised by Professor Goode in Cornish et al supra n 6, 69-71; cf D Crilley 'A Case of Proprietary Overkill' [1994] Restitution L Rev 57. In *Satnam Investments Ltd v Dunlop Heywood & Co* (unreported) Ch D 25 Jul 1997, Chadwick J, a constructive trust was raised by disloyalty on the part of the plaintiff's solicitors.
102. Supra n 84.
103. [1981] Ch 105. The case is coming under strong but not necessarily completely justified criticism, most recently by Lord Millett writing extra-judicially: see PJ Millett 'Restitution and Constructive Trusts' (1998) 114 LQR 399, 413, commenting on Lord Browne-Wilkinson's criticisms of the case in *Westdeutsche Landesbank* supra n 48, 714-715.

with proprietary claims can pull their assets out of the fire, the business of the lawyer can only be to say with as much precision as possible on what facts proprietary interests arise. 'Do you or do you not have a proprietary interest?' is, and should remain, a technical question, utterly different from, 'Do you or do you not deserve to suffer less than these other colleagues in calamity?'

Be that as it may, it is a fact that the courts have reacted against these proprietary interests and, fairly clearly, they have done so because of a conviction that they do give undeserved or unfair priorities. Recently, in America, a singularly direct form of hostility has manifested itself. By orthodox standards of law-finding it is almost inexplicable. If it has been doubtful in England, it has been clear in America for a century that a mistaken payment did turn the recipient into a trustee.[104] Moreover, there has been no doubt, or so it seemed, that these trusts had full effect. They conferred priority in an insolvency. Suddenly this is being departed from. In two important recent cases judges have refused to give effect to the payer's equitable interest in the context of an insolvency.[105]

A similar hostility is apparent in Lord Browne-Wilkinson's speech in the first leading case on interest swaps, *Westdeutsche Landesbank.*[106] His Lordship's preferred strategy has two prongs. One is a novel emphasis on a high requirement of fault on the part of the person who is to be turned into a trustee. The other is the emasculation of equitable interests raised by operation of law by making them depend entirely on the discretion of the court. The second prong of this strategy, by his own admission, has, at least in England, no warrant in precedent.[107] Nevertheless, it is tolerably clear from his speech that Lord Browne-Wilkinson envisaged the possibility of overcoming that obstacle when a suitable opportunity presented itself. Immediately after the *Westdeutsche Landesbank* decision, it seemed that the 'remedial' constructive trust must be regarded as already standing in the wings waiting to make its appearance. Since then the tone has changed.

In *Re Polly Peck International plc (No2)*[108] the English Court of Appeal, and in *Fortex Group Ltd v MacIntosh*[109] the New Zealand Court of Appeal, have one after the other poured several buckets of cold water on the 'remedial' constructive trust. Both cases arose in the context of corporate insolvency. In each case claimants were struggling to escape from the queue of unsecured creditors. Their last hope was 'a remedial constructive trust.' In the one the claimants said that the liquidator

104. Certainly since *Re Berry* 147 F 208 (1906).
105. *Re Omegas Group Inc* 16 F 3d 1443 (1994); *Re Dow Corning Corp* 192 BR 428 (1996).
106. Supra n 48.
107. *Westdeutsche Landesbank* supra n 48, 716.
108. [1998] 3 All ER 812 (CA) Mummery, Potter and Nourse LJJ.
109. [1998] 3 NZLR 171 (CA) Gault, Keith, Tipping, Henry and Blanchard JJ.

of Polly Peck was sitting on the traceable proceeds of trespass. He had sold shares in subsidiaries of Polly Peck. The subsidiaries ran hotels. The hotels stood in land which, in the claimants' view, belonged to them. In the other the claimants said that the liquidator of Fortex was sitting on payments which Fortex should have made to its pension fund. Fortex had deducted pension contributions from its employees' pay. It had paid the pension scheme neither those deducted funds nor its own employer's contribution.

In both these cases, the courts found that there was no 'institutional trust'.[110] In other words, on the facts, no proprietary interest had arisen in favour of the claimants. Coming to the remedial constructive trust, neither court was willing to bring a discretionary interest into being. Both thought that they were being asked to play with dynamite in varying the statutory regime for insolvency. The English court could see no circumstances at all in which it would ever do such a thing. The New Zealand court was a shade more hesitant, though it cannot be said to have managed to enunciate any basis upon which it might accept the invitation to make a discretionary intervention in the statutory regime.

If we were to take the other claimants in the insolvency as merely one example of third parties who might be adversely affected, we would have to read these cases as saying that the courts would never raise discretionary proprietary interests to the detriment of third parties. That is essentially what they seem to be saying. But a proprietary interest which cannot prejudice third parties is not one. It has lost the very thing that defines such an interest. So these cases can be interpreted, not merely as throwing cold water on remedial proprietary interests, but as killing them stone dead.

In *Polly Peck,* one would certainly have to read Nourse LJ in that way. He says: '[W]e must recognise that the remedial constructive trust gives the court a discretion to vary property rights'.[111] He then goes on to deny that the courts have any such jurisdiction. Even outside the context of insolvency, the claimants' case for a remedial constructive trust would have been thrown out:

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110. The opposition 'institutional/remedial' is unintelligible until endowed with meaning. These two courts were substantially agreed that it meant what Lord Browne-Wilkinson had said in *Westdeutsche Landesbank* supra n 48, 714-715: 'Under an institutional constructive trust the trust arises by operation of law as from the date of the circumstances which give rise to it: the function of the court is merely to declare that such trust has arisen in the past. The consequences that flow from such a trust having arisen (including the potentially unfair consequences to third parties who in the interim have received the trust property) are also determined by rules of law, not under a discretion. A remedial constructive trust, as I understand it, is different. It is a judicial remedy giving rise to an enforceable equitable obligation: the extent to which it operates retrospectively to the prejudice of third parties lies in the discretion of the court.'

111. *Polly Peck* supra n 108, 831.

> For myself, I would go further and hold that it would not be seriously arguable even if PPI were solvent. It is not that you need an Act of Parliament to prohibit a variation of property rights. You need one to permit it: see the Variation of Trusts Act 1958 and the Matrimonial Causes Act 1973.[112]

(i) An alternative strategy

'Remedialisation' of the constructive trust offers no kind of solution to the problem of unwanted priorities. There is an alternative strategy which is much more sound. It also has two prongs. First, we must accept the technical nature of the inquiry into the incidence of proprietary rights and abide by its consequences. If the facts do according to the law raise an 'institutional' proprietary interest in the plaintiff, that interest must be given full effect. Thus, if it is true that receipt of a mistaken payment turns the recipient into a trustee and at the same instant raises a full beneficial proprietary interest in the payer, that proprietary interest must be recognised and conceded its proper priority.

However, proprietary interests are not all identical. Secondly, therefore, we must be vigilant as to the precise nature of the proprietary interest in question. Careful analysis might well reveal that assumptions which have provoked the withdrawal of some proprietary rights and the call for discretionary emasculation of others are to a large extent false. Two matters need attention. One is the difference between vested rights and powers to vest. The other is the operation of the defence of change of position. Both are considered in the paragraphs which follow.

(a) The structure of proprietary rights contingent on tracing

Nearly all the cases which provoke discussion of the remedial trust, whether concerned with the profits of wrongs or unjust enrichment, involve the assertion of proprietary rights contingent on a successful tracing exercise. In other words, in these cases the claimants want proprietary rights in assets which have been substituted for other assets (as where I assert a proprietary right, not in the money which you obtained from me, but in the lottery ticket which you bought with that money).[113] In *Cave v Cave,*[114] Fry J examined the nature of proprietary rights contingent on a successful tracing exercise. It was a matter of first impression. He

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112. Ibid.
113. It is important to note, but unnecessary to pursue here, the argument that all rights contingent on tracing belong in square 11 in Diagram 1. That is, all rights in the substitute are raised by unjust enrichment, irrespective of the origin of the right in the original: P Birks 'Property and Unjust Enrichment: Categorical Truths' [1997] NZ Law Rev 623, 661-662.
114. (1880) 15 Ch D 639.

adopted a vested rights analysis. He took the view that a perfect proprietary right arose as the substitution happened. Where a trustee diverted trust money to buy an asset, the beneficiary obtained an equitable interest in that asset as soon as the legal title passed to the trustee. Priority dated from that moment.

This view is still defended.[115] But it was almost immediately criticised, precisely for creating invisible priorities. A different analysis was proposed.[116] The beneficiary had to do something to perfect his claim. In other words he had at first only a power to vest. In the result there are some cases which support an analysis which bestows a very weak priority, dating from the exercise of the power.[117] An analogy lies to hand in the right to rescind as analysed in *Car & Universal Finance Co Ltd v Caldwell.*[118] The power is 'institutional' which, in the prevailing mumbo jumbo, means that it arises as facts happen. But it is weak. The power analysis weakens unwanted priorities without involving the courts in the discretionary variation of rights.

(b) Proprietary rights and the defence of change of position

The other matter which needs to be taken into account is the potential of the defence of change of position to effect radical change in the law of unjust enrichment. Of course much depends on the interpretation of that defence. Its potential is to strike a new balance between the interest in getting restitution and the interest in the security of receipts. That new balance will make it easier in principle to get restitution, but it will weaken the right to restitution so that no honest recipient need fear being made liable beyond the extent to which his assets remain swollen.[119]

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115. Smith supra n 21, 356-361. This view also seems to underlie the view of tracing in *Re Diplock* [1948] Ch 465 (CA), affirmed as *Ministry of Health v Simpson* [1951] AC 251 (HL).
116. *Re French's Estate* (1887) 21 LR Ir 283 (CA, Ireland).
117. *Re Leslie Engineers Co Ltd* [1976] 1 WLR 292, Oliver J; *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL). The latter case is unequivocal and can only be evaded by insisting that its analysis be applied only to tracing at common law. But there is only one law of tracing: P Birks 'The Necessity of a Unitary Law of Tracing' in R Cranston (ed) *Making Commercial Law* (Oxford: OUP, 1997) 239. Arguably, *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717, reversed on another ground [1994] 2 All ER 685 (CA), also requires the power analysis in order to explain the irrelevance of the tracing chain's passing through countries whose law would not recognise the claimant's interest.
118. [1965] 1 QB 525.
119. It is important to notice that the question whether his wealth remains swollen has nothing to do with tracing. In the example which follows in the text D retains traceably surviving enrichment (the shares bought with the money), but the swelling of the fund has been reduced by his reliance expenditure. Two concepts of surviving enrichment are in play, traceably surviving enrichment and abstractly surviving enrichment, where the force of 'abstractly' is that D's wealth is to be regarded as one abstract fund.

Suppose that P pays D $10 000 by mistake. D buys shares with that money. Feeling better off, D then spends $1 000 from his current account on a short holiday abroad which he would not otherwise have taken. It is clear on these facts that P's personal claim in respect of the value received by D will be reduced by the change of position to $9 000. Suppose, however, that P advances a proprietary claim based on *Chase Manhattan Bank NA v Israel-British Bank Ltd* .[120] As decided, that case says that the recipient of a mistaken payment is turned into a trustee for the payer. By asserting in the shares the proprietary interest implicit in that trust, does P circumvent the defence of change of position? Is it necessary to 'remedialise' *Chase Manhattan* in order to prevent him doing so?

We have already noticed that the right to the shares might anyway be no more than a power, the shares being the traceable proceeds of the money received. We may for the moment lay that aside and proceed as though the shares were not the traceable product of the asset first received but that first asset still surviving in specie. Even on that basis, the answer is no. There are indeed dicta in *Westdeutsche Landesbank* which might be taken to suggest that there is no room for the application of the defence of change of position to any claim which asserts a proprietary right.[121] With respect, however, that cannot be correct. In the *Chase Manhattan* case both rights, personal and proprietary, arose from the same analysis of the same facts.

Every claim based on a right which arises from unjust enrichment must be subject to this defence, unless either the defendant is personally disqualified from pleading it or very good reasons can be given why claims of that particular class must be immune to it. It makes sense to say that the defence applies to the assertion of rights arising from unjust enrichment. It makes no sense to say that it applies to one class of rights so arising.

It can of course be objected that there are practical difficulties in operating the defence in relation to proprietary interests, but those difficulties are not overwhelming. And they seem all the less overwhelming when the alternative is seen to be an opportunistic circumvention of the essential new defence. Where the proprietary interest is a lien, the amount secured by that lien can be reduced to allow for the defendant's change of position. Where it is a beneficial interest, the plaintiff can be put on terms which compel him to make allowance for the change of position.

The importance in the present context of the defence of change of position is this. It shows that institutional proprietary rights (ie, those which arise on the facts

120. Supra n 103.

121. Supra n 103, Lord Goff 690 citing AS Burrows 'Swaps and the Friction between Law and Equity' [1995] Restitution L Rev 15, 27.

as they happen) are not always as fierce as has been supposed and do not stand in desperate need of discretionary modification or amelioration. Institutional property rights which arise from unjust enrichment are by nature somewhat weak. They have to acknowledge the defence of change of position. And, which is very important, the acknowledgment of the defence of change of position entails a considerable degree of protection, where they need it, for honest third parties who have given value.

The honest defendant who has given value to a third party will not usually need any help from the defence of change of position. That defendant will often be protected by the defence of bona fide purchase. It is true that there are some gaps in that defence. At law it is of general application only in relation to money, to rights to rescind. In relation to other things, it applies only in special cases. In equity it applies to the purchaser of the legal interest, but in general not where the defendant has taken only an equitable interest. Few of our cases will in practice fall through these gaps. But for any that do the defence of change of position is still available. Every bona fide purchaser for value has changed his position by the amount of the value given.[122]

It is an intriguing fact that, if we put aside the behaviour of property in money, a common law right to rescind is the only common law property right which is systematically defeated by bona fide purchase.[123] Similarly, equitable rights to rescind are uniquely vulnerable to bona fide purchase, in that they will fall even to a purchaser for value of an equitable estate.[124] Rights to rescind, when they are raised by operation of law, form one class of proprietary rights which indubitably arise either from unjust enrichment or, more rarely, from wrongs. It may be that their special vulnerability to bona fide purchase will come to be seen as a general characteristic of all property rights so arising.

At the moment it is very difficult to sum up the present law in relation to proprietary rights arising from unjust enrichment. Some propositions can be advanced with tolerable confidence. First, remedial constructive trusts are to be ruled out, because a non-statutory discretion to vary property rights is a bad thing

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122. *Lipkin Gorman* supra n 117 illustrates this. On certain assumptions change of position can confer a degree of protection equal to that of bona fide purchase. A party who has given value to a third party through a valid contract can plausibly argue that it is impermissible to go behind the contract to value the benefits passing each way. If that argument prevailed, those benefits would be regarded as of equal value and, pleading change of position, the defendant could say that he was disenriched to exactly the same extent as he was enriched. That is an argument for a 100% defence, in effect the same as bona fide purchase.

123. *Stevenson v Newnham* (1853) 13 CB 285; *Scholefield v Templer* (1859) 4 D & J 429.

124. *Phillips v Phillips* (1862) 4 De G F & J 208, Lord Westbury 218 obiter; *Latec Investments v Hotel Terrigal* (1965) 113 CLR 265. This notoriously difficult subject is discussed at length in R Chambers *Resulting Trusts* (Oxford: OUP, 1997) ch 7.

in itself and, if it took hold, would tempt courts to toy with impossible questions which belong exclusively to the legislature. Above all it is a legislature's business, not an interpreter's, to decide who must suffer when the chopper of insolvency falls.

Secondly, all attempts to restrict trusts which arise from unjust enrichment must be suspended until account can be taken of the two crucial matters raised in the immediately foregoing discussion. These are (i) that it is possibly correct to analyse rights contingent on tracing as mere powers, with priority dating only from the exercise of the power; and (ii) that change of position weakens all rights arising from unjust enrichment, rendering them exigible only to the extent that the defendant's wealth, regarded as an abstract fund,[125] remains swollen when the claim is made or sufficient knowledge supervenes to require an honest defendant to regard the excess as no longer at his disposition.

(ii) Incompatible software

In working through this programme it will be very important to recall, what was overlooked in *Westdeutsche Landesbank*, that there is no opposition, much less competition, between the law of trusts and the law of unjust enrichment. Although it is usual to think of trusts as express, implied, resulting or constructive, clarity of thought requires us to cultivate the parallel habit of seeing them, or the rights which they entail, as arising, as do all rights, from the causative events which form the columns in our principal diagram, namely consent, wrongs, unjust enrichment and other events.

Only if we think in that way will we be sure of seeing which proprietary rights have special characteristics which are due to the nature of the event from which they arise. Unfortunately traditional classificatory terms such as 'resulting' and 'constructive' tell us nothing about that essential variable. 'Resulting' tells us that the beneficial interest 'resalit': it jumps back to the person from whom the legal interest proceeded. 'Constructive' tells us that the trust is construed from the facts and is not attributable to the consent of any relevant party — in other words that the trust is an inference of law rather than the creature of consent. That is negative information. It tells us that the trust does not arise in column 1 of Diagram 1. That leaves three others: wrongs, unjust enrichment and the residual miscellany of causative events.

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125. For this purpose surviving enrichment has nothing to do with tracing. The unjust enrichment persists as long and only as long as the defendant's assets remain swollen. In the example at supra pp 59-60 the swelling has been partially eliminated even though the enrichment traceably survives intact.

If the detailed characteristics of rights differ according to the event from which they arise, the traditional classification leaves us without essential information. We cannot know, for instance, whether the defence of change of position applies unless we first know that the right being asserted by the plaintiff arose from unjust enrichment. All rights must acknowledge the same systems of classification. Otherwise one package will not be able to talk to another. Incompatible software is a recipe for chaos.

6. CONCLUSION

On an earlier visit to Western Australia I was rash enough to give some lectures on the future of the law of restitution, and the lectures shortly afterwards were turned into a small book, *Restitution: The Future*.[126] My record as a prophet is not good. The near future has since then crept into the recent past. Already some of my predictions have proved unsound or been otherwise falsified. I hope I have learned my lesson. Taking the retirement of Lord Goff and Professor Jones on 30 September 1998 as marking the end of an epoch in the life of the subject which they have brought to maturity, this paper has stuck close to the shore, avoiding the high seas of prediction. Its necessarily selective task has been to assess the present state of the subject. Reduced to the narrowest possible compass, the paper says these four things about it at this moment of its coming of age.

The most exciting thing is the dawning realisation that the law of restitution is a larger subject than the law of unjust enrichment. It is multi-causal. Unjust enrichment is one of its causes, the most important but still only one of several. The best thing about this open recognition of its multi-causality is that it finally liberates the law of unjust enrichment from the sometimes encumbering and distracting instances of restitution triggered by other causative events. Nothing is thereby given up, or nothing that was sought to be retained. Ever since 1933, when the first *Restatement of Restitution* was commissioned, and since 1966 when the project was reborn in *Goff & Jones,* the aim, perhaps imperfectly articulated, has always been to identify and order the law of unjust enrichment. For various reasons that project was disguised. But it was all along a project to find the law of unjust enrichment, not the law of restitution.

Within the law of unjust enrichment thus identified and liberated, what is most needed is a constant awareness of the particular way in which the common law has chosen to go about the characterisation of an enrichment as unjust. The common law is committed to 'unjust factors', specific factual reasons why an

126. P Birks *Restitution: The Future* (Sydney: Federation Press, 1992).

enrichment is unjust. Lord Mansfield made the first typology in *Moses v Macferlan*.[127] The constant endeavour must be to keep it up to date and to perfect it. The individual unjust factors must be more perfectly analysed and no case should be decided without identifying its place in the typology of unjust factors or, if necessary, reviewing and modifying the typology.

Outside the law of unjust enrichment, the largest part of the law of restitution is found in the law of civil wrongs: restitution for wrongs. The central question remains whether all or only some wrongdoers have to surrender their gains to their victims and, if only some, which. This question has been answered erratically. The reason may be in part that the instincts of judges, and other lawyers, are to some extent disabled by the way the relevant law is packaged. In part it is due to an unresolved sympathy with the *Rookes v Barnard* dogma, that the civil law ought not to do anything other than provide compensation for loss. Finding stable answers is here emphatically a matter for the law of wrongs, not the law of unjust enrichment. The law of unjust enrichment has nothing to say unless and until the victim of an acquisitive wrong seeks to re-analyse his story as an unjust enrichment independent of wrongdoing.

Finally, both the law of restitution of unjust enrichment and the law of restitution for wrongs share one large problem, which is the question whether the restitutionary right takes effect as a proprietary right and, if it sometimes does, on what facts. Here the last thing that the law needs is to assert or accept an embarrassing discretion. The question must be treated as a technical one, inviting a technical answer. The technique of giving that answer cannot but include an exact knowledge of the nature of the particular proprietary right that is in question, in particular of the structure of proprietary rights which are contingent on successful tracing and of the characteristics of all proprietary rights which arise from unjust enrichment. When these things are better understood, anxieties about excessive priorities, which should anyhow be left to the legislature, may be seen to have been exaggerated.

127. Supra n 29, borrowed in 1768 by W Blackstone *Commentaries on the Laws of England* vol 3 (London: Sweet, Pheney, Maxwell & Stevens, 1829) 161.