Chapter 23

Additional chapter: An outline of the law of restitution

23.1 Restitution is a large subject in its own right. This chapter is intended to provide an outline of the area. Further reading could include:

Mitchell, Mitchell, and Watterson, *Goff and Jones: The Law of Unjust Enrichment*, 9th edn, 2016
Burrows, *The Law of Restitution*, 3rd edn, 2011
Birks, *An Introduction to the Law of Restitution*, 1989 (Birks(a))
Birks, *Unjust Enrichment*, 2nd edn, 2005 (Birks(b))
Beatson, *The Use and Abuse of Unjust Enrichment*, 1991
Burrows, (ed.), *Essays on the Law of Restitution*, 1991
Finn (ed.), *Essays on Restitution*, 1990
Burrows, McKendrick, and Edelman, *Cases and Materials on the Law of Restitution*, 2nd edn, 2006
Virgo, *Principles of the Law of Restitution*, 3rd edn, 2015
Cornish, Nolan, O'Sullivan, and Virgo, *Restitution, Past, Present & Future*, 1998
Hedley, *A Critical Introduction to Restitution*, 2001.

Background

23.2 The law of restitution should basically be seen as part of the law of obligations, alongside contract and tort, although it also includes elements of property law. Historically, it was linked with contract because, at a time when the thinking of English lawyers was dominated by the forms of action, many of the cases which we would now regard as restitutionary were brought within the action of assumpsit, the normal remedy for breaches of contract. This created difficulties once lawyers sought to move beyond simple lists of cases falling within a particular

form of action. Claims based on contract were recognized as such but, for the most part,[1] restitutionary actions were not. The historical connection led to the label 'quasi-contract' and to the idea that the cases which we would now regard as restitutionary were based on implied contract as in, for example, the decision of the House of Lords in *Sinclair* v *Brougham* (1914). Of course, the 'implied agreement' rationale was not uniformly accepted, but it is only in very recent times that its artificiality has been fully recognized and the basis of restitution properly considered. In *Lipkin Gorman* v *Karpnale Ltd* (1992) and *Woolwich Equitable Building Society* v *IRC* [1992] 3 All ER 737, the House of Lords recognized unjust enrichment as the principle behind all restitutionary claims, and in *Westdeutsche Landesbank Girozentrale* v *Islington LBC* (1996) it overruled *Sinclair* v *Brougham*. In the *Woolwich Building Society* case Lord Browne-Wilkinson said (at 780):

> Although as yet there is in English law no general rule giving the [claimant] a right of recovery from a defendant who has been unjustly enriched at the [claimant's] expense, the concept of unjust enrichment lies at the heart of all the individual instances in which the law does give a right of recovery.

23.3 Although there have been those who have argued against it,[2] there has been much academic support for unjust enrichment as the basis of restitution (for example, Burrows and Birks(a)). However, Birks later modified his view of the relationship of unjust enrichment and restitution (Birks(b)). He went on to contend that unjust enrichment should not be seen as the basis of all restitutionary claims, but rather that the law of restitution should be seen as the law of gain-based recovery and that that is larger than the law of unjust enrichment. Restitution is seen as the response, whereas unjust enrichment is just one of the causative events which may lead to it. A basic division of such events being between those involving manifestations of consent (such as contract) and those operating independently of consent, with unjust enrichment falling within the latter, alongside wrongs and 'miscellaneous others' (Birks(b)).

Basic questions

23.4 If the principle on which restitution is based is that D should not be unjustly enriched at the expense of C, then four basic questions can be identified in determining if restitution is available—they were indicated by Lord Steyn in *Banque Financière de la Cité* v *Parc (Battersea) Ltd* [1998] 1 All ER 737 (at 740):

> **(1)** Has [D] benefited or been enriched?
>
> **(2)** Was the enrichment at the expense of [C]?
>
> **(3)** Was the enrichment unjust?
>
> **(4)** Are there defences?

1 But see, e.g., *Moses v Macferlan* (1760) 2 Burr 1005. Lord Mansfield said (at 1012): 'The gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.'

2 See, e.g., S. Hedley, *Restitution: Its Divisions and Ordering*, Sweet & Maxwell, 2001; S. Hedley, *A Critical Introduction to Restitution*, Oxford University Press, 2001.

If restitution is broader than unjust enrichment, then these questions deal with when restitution is available on the basis of unjust enrichment, and there will be other situations in which it is available. The case of *A-G* v *Blake* (2000) was considered earlier (para. **20.18**ff). The Attorney-General was able to prevent Blake from receiving the profits from his book on the basis that if he received them, restitution would enable the Crown to recover them. Birks saw the restitutionary claim as based on the wrong of breach of contract and not on unjust enrichment (Birks(b), p. 12). Nevertheless, plainly these four questions are important, whether they furnish the answer as to the availability of restitution in all cases or merely a significant proportion of them. The issues raised by them are considered below.

Enrichment

23.5 Enrichment may be positive or negative. It is positive if, for example, D has acquired money or property from C or if C has improved D's property. It is negative if C has saved D an expense. The clearest form of enrichment is the situation in which D has been positively benefited by the receipt of a sum of money from C. Equally, there is no difficulty in establishing enrichment if C is simply seeking the return of property from D, which D has retained. The difficulties arise if property cannot simply be returned in its original form or if services are involved. Under those circumstances, any benefit will have to be valued so that C can receive a money sum. However, whilst C may argue that he or she has conferred a benefit upon D and enriched D, D may argue that, whatever the objective assessment might be, D has not been benefited and should have a right to choose how his, or her, limited resources are used. D should not necessarily be regarded as enriched simply because C has conferred upon D something which would commonly be regarded as a benefit. In *Taylor* v *Laird* (1856) 25 LJ Ex 329 Pollock CB said (at 332):

> Suppose I clean your property without your knowledge, have I then a claim on you for payment? How can you help it? One cleans another's shoes; what can the other do but put them on.

Clean shoes might generally be regarded as a benefit, but D might have preferred dirty shoes rather than to pay for their cleaning. The law should not necessarily regard the cleaning as a benefit and force D to 'pay' for that 'enrichment' through allowing C a restitutionary claim.

23.6 There is a tension between what would objectively be regarded as a benefit and D's right to choose how to allocate his or her limited resources. Generally, the view is taken that D has a right to choose how to use his or her resources, but it is also recognized that that right should be denied in certain circumstances. Birks ((a), pp. 109–32) explained the problem in terms of the exceptional circumstances in which D will be unable to rely upon his or her 'subjective devaluation' (from the objective valuation) in order to deny that he has been enriched, and that terminology was adopted by, for example, Hoffmann LJ in *Ministry of Defence* v *Ashman* (1993). Various tests have been put forward: 'incontrovertible benefit and other tests'.[3]

3 Burrows at p 47.

At the expense of the claimant

23.7 Birks originally identified two basic situations to be considered here, representing two different senses in which a gain can be said to be 'at the expense of' another:[4]

1. enrichment by subtraction;
2. enrichment by a wrong to C.

However, whilst others continue to equate restitution with unjust enrichment and so continue to see restitution for a wrong as based on unjust enrichment (for example, Burrows at p. 5), we have seen that Birks ceased to do so. He continued to recognize restitution based on a wrong, but saw that as a basis for restitution distinct from that of unjust enrichment—although the same facts may give rise to both possibilities in some cases (Birks(b) at pp. 11–15).

Subtraction

23.8 Restitution where there has been an unjust enrichment by subtraction covers those cases where there is an enrichment of D which can be viewed as derived from C's wealth.

Wrong

23.9 What is relevant to restitution here is simply that D gained through a wrong done to C. So, for example, in *Reading* v *A-G* (1951) the sum claimed by the Crown was the money which Sergeant Reading had received, in breach of duty, as a bribe for travelling with smugglers to assist them to go through road blocks in Cairo. The money did not represent a reduction in the property of the Crown.

23.10 Of course, not all legal wrongs by which D gains will give rise to a restitutionary action. The wrongs in question are, for example, some torts, breach of fiduciary obligations, breach of confidence and, as we have seen in *A-G* v *Blake* (2000), some unusual cases of breach of contract (see para. **20.18**ff).

Is the enrichment 'unjust'?

23.11 It has been emphasized that 'the decision on the unjust question is not a matter for a judge's . . . individual discretion but must essentially be gleaned from the existing case law' (Burrows at p. 86). Thus, the approach has generally been to identify distinct, legally recognized 'unjust factors', one of which C must establish to succeed in a restitutionary claim. Generally, also, a division has been made between those factors dealing with the situation in which the enrichment was by subtraction and where the restitution is being sought in relation to a wrong. As was indicated above, not every wrong will suffice; the wrongs in question are,

4 Birks(a) at pp. 23–5, 39–44, 132–9 and see *Halifax Building Society v Thomas* (1996); *Banque Financière de la Cité v Parc (Battersea) Ltd* [1998] 1 All ER 737 at 740 per Lord Steyn. But see Beatson, ch. 8.

for example, some torts, breach of fiduciary obligations, breach of confidence and, as we have seen in *A-G* v *Blake* (2000), some unusual cases of breach of contract (see para. **20.18**ff). When unjust enrichment by subtraction is in question, the possible unjust factors might be listed as 'mistake, duress, undue influence, exploitation of weakness, human incapacity, failure of consideration, ignorance, legal compulsion, necessity, illegality, and public authority ultra vires exaction and payment' (Burrows at p. 86), although any list will not be complete. Consideration of what exactly is required for any of these factors to be made out in relation to a restitutionary claim would fill a book in themselves and must be left to the now numerous works specifically devoted to restitution (see para. **23.1**).

Defences

23.12 The recognition of apt defences is essential to an appropriate treatment of when an enrichment is unjust. Without such recognition, fear of restitution being given too widely impacts upon the willingness to recognize an enrichment as unjust, or produces a situation in which restitution is, indeed, too readily available. The recognition of a defence of change of position by D (or 'disenrichment') has, for example, been seen as key to the establishment of a right of recovery where an enrichment has occurred through mistake of law. In *Kleinwort Benson Ltd* v *Lincoln City Council* [1998] 4 All ER 513 Lord Goff took the view that the recognition of two major matters of principle made removal of the general bar on recovery for mistake of law inevitable (at 530):

> first, recognition that there exists a coherent law of restitution founded upon the principle of unjust enrichment, and second, within that body of law, recognition of the defence of change of position.

Obviously, many defences relevant elsewhere will be relevant in relation to restitution; some of those of particular relevance in the area might be listed as change of position, estoppel, bona fide purchase, finality, and counter restitution. Just as in relation to the factors making enrichment unjust, the reader is referred to the now numerous works on the law of restitution (see para. **23.1**) for detailed consideration of the operation of these and other defences in the area.

Summary

- The basis of the law of restitution has been seen as unjust enrichment. It is questioned whether restitution extends beyond unjust enrichment.
- Unjust enrichment requires:
  - one party to have been enriched;
  - the enrichment must have been at the expense of the other party;
  - the enrichment must have been unjust.
- The defences available to the enriched party must also be considered.