
TOPIC I: ISSUES OF RESTITUTION DOCTRINE

RESTITUTION OF MISTAKEN ENRICHMENTS

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INTRODUCTION

The restitution of a mistaken payment is generally regarded as the paradigm example of the restitution of an unjust enrichment. The central issues are clear cut, the case law is voluminous, and mistaken payments are commonplace in everyday life. It follows that if we can be clear and content about our law on mistaken payments, we can use it as a model for much of the rest of the law on restitution of an unjust enrichment. This was the precise strategy used by Peter Birks in *Unjust Enrichment*.¹ In the first paragraph, he described the mistaken payment of a non-existent debt as the “core case”; and he went on, “The law of unjust enrichment is the law of all events materially identical to the mistaken payment of a non-existent debt.”² At the end of the first chapter he wrote,

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¹ See PETER BIRKS, *UNJUST ENRICHMENT* (2d ed. 2005).

² *Id.* at 3.

Analysis of the receipt of a mistaken payment of a non-existent debt reveals a causative event of a third kind. It is not a manifestation of consent such as a contract, and it is not a wrong. The consequent liability, surprisingly at first, is strict, albeit subject to defences. The generic conception of that causative event is unjust enrichment at the expense of another. That generalization enables us to look for other examples materially identical to the core case.³

We find a similar approach in the *Restatement (Third) of Restitution and Unjust Enrichment*.⁴ The introductory note under “Benefits Conferred by Mistake” in chapter 2 reads as follows:

The relatively detailed treatment of restitution for mistake within Chapter 2 should not be taken to indicate that the mistaken transferor receives broader protection from the law of restitution than does, for example, the victim of fraud or duress. . . . Mistake receives more extensive treatment because of its relatively voluminous and accessible case law, and because it offers a reliable template for analogous restitution claims.⁵

It follows that, in welcoming the *Restatement (Third)* and in seeking to compare the law in England and the United States, no apology is needed for a paper examining mistaken enrichments.

My particular focus is on four mistaken enrichments issues that are, at present, hotly debated in England. I shall set out in some detail the English law and why it is proving controversial before looking at the position on each under the *Restatement (Third)*.

Before proceeding any further, it is important at the outset to appreciate that the approach taken throughout the *Restatement (Third)* is more contextual and less conceptual than that which would be adopted by restitution scholars in England. This is not intended as a criticism but rather is designed to ensure that English and American scholars are fully aware that, in trying to learn from each other, we have different starting points. So, for example, in chapter 1 on “General Principles” there are only four black letter propositions;⁶ none of these four deals with what is meant by “enrichment” or “at the expense of the claimant” or the approach to deciding “injustice”; and no fundamental distinction is drawn in those general principles between restitution of an unjust enrichment and restitution for wrongs.⁷ Admittedly, there is a sentence on the meaning of “at the expense of” in the commentary to section 1⁸ and some more

³ *Id.* at 16.

⁴ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (2011).

⁵ *Id.* pt. II, ch. 2, topic 1, introductory note.

⁶ *Id.* §§ 1-4.

⁷ But note that “wrongful gain” is the subject matter of a separate black letter rule. *Id.* § 3.

⁸ *Id.* § 1 cmt. a.

extensive discussion of “enrichment” in the commentary to section 1⁹ and in relation to some other black letter rules (such as on “benefits other than money” conferred by mistake).¹⁰ The distinction between restitution for unjust enrichment and for wrongs is referred to very briefly in the commentary to section 1 where it is said that “nothing practical turns on this . . . except the identification of the applicable period of limitations.”¹¹ There is barely any discussion of the “unjust factors” as opposed to the “absence of basis” approach to injustice that has traditionally distinguished common-law and civilian approaches to the subject and underpinned Birks’s dramatic change of heart in *Unjust Enrichment*.¹² Moreover, the four-step analysis that now guides English courts (benefit, at the expense of, injustice, and defences)¹³ finds no place. On the contrary, albeit that those particular four steps are not directly in mind, it is said that “checklists of factors” and “formulas” are “not helpful and . . . can lead to serious errors.”¹⁴

We see the same contextual approach when one turns to mistake. The introductory note to the chapter precisely states that, instead of relying on general principles of unjust enrichment, specific rules have been developed by the courts for particular types of mistake and that the approach taken in the *Restatement (Third)* is to try to identify the rules at a “useful, intermediate level of generalization.”¹⁵ This no doubt explains the considerable overlap between the different sections and headings. So, for example, the analysis of “risk-bearing” in the black letter rule in section 5(3)¹⁶ comes back into the discussion in section 6 on “Payment of Money Not Due” under the comment headed “Allocating the Risk of Uncertainty.”¹⁷ Section 9 is headed “Benefits Other Than Money”¹⁸ and yet there are other sections on “Mistaken

⁹ *Id.* § 1 cmt. d.

¹⁰ *Id.* § 9.

¹¹ *Id.* § 1 cmt. e(3). There are other consequences of this division in England as regards, e.g., the applicable defences (especially change of position) and private international law.

¹² For the discussion that does exist, see *id.* § 1 cmt. b; *id.* § 1 reporter’s note cmt. b.

¹³ That these are the four questions to be answered was expressly approved by Lord Steyn in *Banque Financière de la Cité v. Parc (Battersea) Ltd.*, [1999] 1 A.C. 221 (H.L.) 227 (Eng.), by the Court of Appeal in *Chief Constable of the Greater Manchester Police v. Wigan Athletic AFC Ltd.*, [2008] EWCA (Civ) 1449, [45] (Eng.), and *Cressman v. Coys of Kensington (Sales) Ltd.*, [2004] EWCA (Civ) 47, [22] (Eng.), and by Mr. Justice Lightman in *In re Rowe v. Vale of White Horse District Council*, [2003] EWHC (Admin) 388, [11] (Eng.). For similar, albeit not identical, treatments, see Lord Hoffmann in *Banque Financière*, [1999] 1 A.C. at 234, and *Portman Building Society v. Hamlyn Taylor Neck*, [1998] 4 All E.R. 202 at 206 (Millett L.J.).

¹⁴ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. d; *id.* § 1 reporter’s note cmt. d.

¹⁵ *Id.* pt. II, ch. 2, topic 1, introductory note.

¹⁶ *Id.* § 5(3).

¹⁷ *Id.* § 6 cmt. d.

¹⁸ *Id.* § 9.

Performance of Another's Obligation"¹⁹ and "Mistaken Improvements,"²⁰ which also deal with non-money benefits. The heading of section 12, "Mistake in Expression," overlaps with much of what has gone before and is really designed to deal only with the remedy of rectification.²¹ Mistakenly paid tax is given its own later section.²² Perhaps most importantly of all, topic 1, "Benefits Conferred by Mistake," which comprises sections 5 through 12, is separated out from section 13 on "Fraud and Misrepresentation," which falls within topic 2 on "Defective Consent or Authority."²³ Yet, leaving aside restitution for wrongs, fraud and misrepresentation are ultimately only important in relation to the law of restitution because they induce a mistake in the claimant (who, after all, may have enriched someone other than the fraudster or misrepresenter).

With that introductory point about the different approaches in mind, I now turn to look in more detail at the law on mistaken enrichments.

I. CAUSAL MISTAKES OF FACT OR LAW AND A DEFENCE OF CHANGE OF POSITION

To place the four hotly debated issues in context, it is helpful to look first at the general state of play on the restitution of mistaken payments. Along with the pivotal acceptance of a change of position defence, the English law on mistaken payments has been revolutionised over the last thirty years by the judicial removal of two major irrational restrictions.

First, under the old law, only certain types of mistakes of fact, principally so-called "liability" mistakes of fact, counted. But in *Barclays Bank v. W.J. Simms* the liability mistake restriction was removed in favour of allowing restitution for all mistakes of fact that caused the payment and applying a but-for test of causation.²⁴

Secondly, the old law was that only mistakes of fact, and not law, counted. That restriction was removed, and mistakes of law assimilated to mistakes of fact, by the House of Lords in *Kleinwort Benson Ltd. v. Lincoln City Council*.²⁵ The case involved payments made under a void interest rate swap agreement²⁶

¹⁹ *Id.* § 7.

²⁰ *Id.* § 10.

²¹ *Id.* § 12.

²² *Id.* § 19.

²³ *Id.* §§ 5-13.

²⁴ *Barclays Bank Ltd. v. W.J. Simms Son & Cooke (S.) Ltd.*, [1980] 1 Q.B. 677 at 695 (Eng.).

²⁵ [1999] 2 A.C. 349 (H.L.) 375 (Eng.).

²⁶ An interest rate swap transaction is an agreement under which each party agrees to pay to the other on specified dates the interest which would have accrued over a given period on a notional principal sum assuming that each party agrees to pay a different rate of interest. Usually one party (the fixed rate payer) agrees to pay a fixed rate of interest while the other party (the floating rate payer) agrees to pay a rate of interest that is equivalent to, for

between a bank and a local authority.²⁷ The bank was held entitled to restitution of the payments it had made, subject to giving counter-restitution of the payments received by it from the local authority, on the ground that it would not have made the payments had it known that the contract was void.²⁸ In other words, the bank successfully alleged that it had made the payments by a mistake of law. The practical advantage of establishing that it had a restitutionary claim for mistake, rather than for failure of consideration by not receiving the promised counter-performance, was that the bank could rely on section 32(1)(c) of the Limitation Act 1980,²⁹ which lays down an extended period to bring claims based on mistake.³⁰ This enabled the bank to have restitution of all payments made under the void contract provided the claims were brought within six years of when the bank could reasonably have discovered the mistake; and the mistake could not have been reasonably discovered until the House of Lords decision in *Hazell v. Hammersmith & Fulham London Borough Council*, which decided that such transactions were ultra vires the local authorities and therefore void.³¹ In other words, the practical advantage of founding the claim on mistake of law, as opposed to another ground for restitution, was that the claimant could effectively circumvent the normal limitation period of six years from payment.

For those interested in the English law of restitution, the void swaps litigation in the 1990s was a golden period. While the removal of the mistake-of-law bar was the most important development, there were several other important decisions on restitution in swaps cases, including the rejection of a defence of passing on³² and the denial that money paid under a void contract was held on constructive trust so as to attract compound interest.³³

We are now fortunate to be in another wonderful period of restitution litigation, this time concerning mistakenly paid tax, with many interesting points on restitution being argued and decided on by courts at all levels. The catalyst for this has been the decision of the European Court of Justice in the conjoined cases of *Metallgesellschaft Ltd. v. IRC* and *Hoechst v. IRC* (commonly referred to as the *Hoechst* case).³⁴ It was here decided that the tax regime in the United Kingdom for advance corporation tax was, in some respects, contrary to European Union law.³⁵ Companies that paid advance

example, the six-month London Interbank Offered Rate (LIBOR).

²⁷ *Kleinwort Benson Ltd.*, [1999] 2 A.C. at 352-53.

²⁸ *Id.* at 379.

²⁹ *Id.* at 389.

³⁰ *Id.* at 387-88 (excerpting § 32(1)(c)).

³¹ *Id.* at 376.

³² *Kleinwort Benson Ltd. v. Birmingham City Council*, [1997] Q.B. 380 at 393 (Eng.).

³³ *Westdeutsche Landesbank Girozentrale v. Islington LBC*, [1996] A.C. 669 (H.L.) 708 (Eng.).

³⁴ Joined Cases C-397/98 & C-410/98, 2001 E.C.R. I-1727.

³⁵ *Id.* at [96].

corporation tax that fell within the ambit of that decision have therefore been seeking restitution. In *Deutsche Morgan Grenfell v. IRC*, the House of Lords decided that, applying *Kleinwort Benson Ltd. v. Lincoln City Council*, the taxpayers could found their claims to restitution of tax on mistake of law and thereby take advantage of the favourable limitation period for mistaken payments in section 32(1)(c) of the Limitation Act 1980.³⁶ While there is often a statute that provides an exclusive restitutionary regime for overpaid tax, there was held to be no such statutory provision excluding the common law applicable here; and there was no justification, according to the House of Lords, for carving out a separate regime for restitution of tax payments from other payments made by mistake.³⁷ Moreover, in *Sempra Metals Ltd. v. IRC*, which similarly followed on the *Hoechst* decision, the House of Lords decided that the enrichment of the Inland Revenue Commission (Revenue), by being paid advance corporation tax that was not due, could be best measured by compound, rather than simple, interest rates where the taxpayer could prove that the windfall to the Revenue meant that the Revenue had saved itself borrowing that sum at those compound rates.³⁸ Several other similar cases, some involving massive claims for overpaid tax, are going through the courts at the moment.³⁹

This widening of (strict) restitutionary liability for payments by mistake of fact or law has been balanced by the acceptance of the defence of change of position, which is crucial both theoretically and in practice. First recognised in *Lipkin Gorman v. Karpnale Ltd.*,⁴⁰ the precise ingredients of the defence have been clarified in subsequent cases.⁴¹ In general terms, the defence can be said to ensure that defendants (unless dishonest) are no worse off by having to make restitution than they would have been had they not received the mistaken enrichment.

Turning to U.S. law, we see the same general position on mistaken payments – with a but-for causal test being applicable to mistakes of fact and law plus a change-of-position defence – set out in the *Restatement (Third)*. So by section 5, restitution follows where the mistake is “a misapprehension of either fact or law” and “but for the mistake the transaction in question would not have taken place.”⁴² The commentary goes on to say that there is “a claim

³⁶ *Deutsche Morgan Grenfell Grp. plc v. IRC*, [2006] UKHL 49, [2007] 1 A.C. 558 (Eng.).

³⁷ *Id.*

³⁸ *Sempra Metals Ltd. v. IRC*, [2007] UKHL 34, [2008] 1 A.C. 561 (Eng.).

³⁹ See, e.g., *Test Claimants in the Franked Inv. Grp. Litig. v. Comm’rs of HM’s Revenue & Customs*, [2010] EWCA (Civ) 103 (Eng.).

⁴⁰ [1991] 2 A.C. 548 (H.L.) (Eng.).

⁴¹ For the details, see ANDREW BURROWS, *THE LAW OF RESTITUTION* 524-50 (3d ed. 2011). For an earlier examination, see Andrew Burrows, *Change of Position: The View from England*, 36 *LOY. L. REV.* 803, 804-30 (2003).

⁴² *RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT* § 5(2)(a) (2011).

in restitution only if the mistake induces the transfer” but that “[i]n almost all cases . . . causation is obvious if the mistake is established.”⁴³ And as regards law and fact,

[t]he present section rejects any distinction between mistake of fact and mistake of law, adopting a conclusion reached long ago by the better-reasoned American decisions. The old distinction between mistake of fact and mistake of law is repudiated because it has always been theoretically unsound; because the two types of mistake are frequently impossible to distinguish as a practical matter; and because the distinction, even when it is possible, has no relevance to the real analysis by which restitution is either granted or withheld.⁴⁴

The recovery of tax payments is separately addressed in section 19 of the *Restatement (Third)*. The general position is that there should be restitution of mistakenly paid tax but that may be qualified where restitution would “disrupt orderly fiscal administration or result in severe public hardship.”⁴⁵ It is explained in the commentary that the traditional approach has been to deny restitution of overpaid tax by reliance on the discredited distinction between mistakes of fact and law.⁴⁶ The focus on fiscal disruption and hardship is stated to be “a more candid statement . . . of the true grounds on which restitution may be resisted.”⁴⁷

As regards the postponement of the running of the limitation period where the claim is based on mistake, the *Restatement (Third)* does not lay down any black letter rule but rather defers to local law and any applicable statute of limitations.⁴⁸ It is pointed out in the commentary that in most (but not all) U.S. jurisdictions there is no such postponement.⁴⁹

While perhaps not being given the prominence that it enjoys in England, and differing in some respects, the defence of change of position is set out in section 65 of the *Restatement (Third)*: “If receipt of a benefit has led a recipient without notice to change position in such manner that an obligation to make restitution of the original benefit would be inequitable to the recipient, the recipient’s liability in restitution is to that extent reduced.”⁵⁰

In general terms, therefore, the law on the restitution of mistaken payments as set out in the *Restatement (Third)* is much the same as in England. I now

⁴³ *Id.* § 5 cmt. e.

⁴⁴ *Id.* § 5 cmt. g.

⁴⁵ *Id.* § 19(2).

⁴⁶ *Id.* § 19 cmt. d.

⁴⁷ *Id.* § 19 cmt. f.

⁴⁸ *Id.* § 70(1); *id.* § 70 cmt. a.

⁴⁹ *Id.* § 70 cmt. f, illus. 11.

⁵⁰ *Id.* § 65. For a discussion in the context of valuing benefits, see *id.* § 50(3) (“The liability in restitution of an innocent recipient of unrequested benefits may not leave the recipient worse off . . . than if the transaction giving rise to the liability had not occurred.”).

wish to turn to four issues on mistaken enrichments in which there is controversy in England as to what the law is or should be.

II. FOUR HOTLY DEBATED ISSUES

A. *The Interplay Between Mistake and a Legal Obligation to Pay*

What is the position if a mistaken payor was under a valid contractual, statutory, or other legal obligation to make that payment to the payee? Is the injustice by reason of the mistake overridden by the fact that the money was owed anyway? Although this can arise whatever the ground for restitution (whether, for example, duress, undue influence, failure of consideration, or ultra vires exaction by a public authority), it has recently been judicially examined in England in the context of mistaken payments.

The following hypothetical example illustrates the question. *C* owes £1000 to each of *X* and *D*. *C* intends to pay off *X* but by mistake of identity pays *D* £1000 instead of *X*. Is *C* entitled to restitution from *D* by reason of mistake even though *C* has a legal obligation to pay that sum to *D*?

Although, until recently, there has been very little discussion of this by judges or commentators, it would appear that the normal position, and the answer in that example, is that *C* has no right to restitution from *D*. Hence in setting out the requirements for restitution of a mistaken payment, Lord Hope in obiter dicta in *Kleinwort Benson Ltd. v. Lincoln City Council* stated that, in addition to a mistake which caused the payment, “the payee cannot be said to have been unjustly enriched if he was entitled to receive the sum paid to him.”⁵¹ This was then relied on by Justice Arden in giving the judgment of the Court of Appeal in *Test Claimants in the FII Group Litigation v. Revenue & Customs Commissioners*.⁵² In that case the claimants argued that they were entitled to restitution not only of the unlawful corporation tax paid plus interest but also for the value of the reliefs or allowances (e.g., group relief and management expenses) that they had used up on unlawfully exacted tax and they they could not therefore now use to offset lawfully exacted tax.⁵³ They argued that the correct test to apply was simply one of but-for causation between the mistake and the relevant enrichment; and hence the relevant

⁵¹ *Kleinwort Benson Ltd. v. Lincoln City Council*, [1999] 2 A.C. 349 (H.L.) 408 (Lord Hope of Craighead) (Eng.). See also the obiter dicta in the joint judgment of Chief Justice Mason and Justices Deane, Toohey, Gaudron, and McHugh in *David Securities Pty. Ltd. v Commonwealth Bank of Australia*, (1992) 175 CLR 353, 376 (Austl.), that restitution for mistake of law “would not, for example, extend to a case where the moneys were paid under a mistaken belief that they were legally due and owing under a particular clause of a particular contract when in fact they were legally due and owing to the recipient under another clause or contract.”

⁵² *Test Claimants in the Franked Inv. Grp. Litig. v. Comm’rs of HM’s Revenue & Customs*, [2010] EWCA (Civ) 103, [181] (Arden L.J.) (Eng.).

⁵³ *Id.* at [175].

enrichment was the lawful tax that, but for their mistake, they would not have paid.⁵⁴ The Court of Appeal rejected that argument for two reasons. First, it stated that the enrichment in paying more lawful tax than the claimants would have done but for the exaction of the initial unlawful tax was too indirectly related to the mistake and was therefore too remote.⁵⁵ The second explanation, with which we are here concerned, was that, in contrast to the initial unlawful corporation tax paid, the secondary payment of tax was lawfully exacted and was due.⁵⁶ There could be no restitution of tax that was legally owed.⁵⁷ Justice Arden cited Lord Hope's statement in *Kleinwort Benson* and continued, "The short answer to the claim is that the tax paid in . . . subsequent years was lawfully due and so cannot be the subject of recovery . . . as a payment under a mistake."⁵⁸

Traditionally, this qualification of the right to restitution for mistake has not been fully and clearly recognised by commentators. Admittedly, it has long been accepted that a purported contract under which the payment was made must be invalidated, whether for mistake or otherwise, before one can apply the law on mistake in restitution; and it is on this basis that a contrast has been drawn between the narrow doctrine of contractual mistake (unilateral mistake insufficient) and the wider doctrine of mistake in the law of restitution (unilateral mistake sufficient). Also, in *Barclays Bank v. W.J. Simms* it was accepted by Mr. Justice Robert Goff as one of his three qualifications on restitution for causal mistake that a payment made for "good consideration" could not be recovered;⁵⁹ but the precise ambit of that was left somewhat unclear and, in particular, that qualification appeared to be limited to contract. It is further correct that, with the exception of their first edition in 1966, each edition of Goff and Jones's *The Law of Restitution* has included as a limit on the principle of unjust enrichment that "the claimant conferred the benefit . . . in pursuance of a valid common law, equitable or statutory obligation which he owed to the defendant."⁶⁰ But the content of that limit was not tightly explained. Moreover, there was no reference to this general qualification in the highly influential scheme for the subject put forward by Birks in *An*

⁵⁴ *Id.* at [178].

⁵⁵ *Id.* at [182].

⁵⁶ *Id.* at [181].

⁵⁷ See *supra* text accompanying notes 36-37.

⁵⁸ *Test Claimants in the Franked Inv. Grp. Litig.*, [2010] EWCA (Civ) 103, [181] (Arden L.J.).

⁵⁹ *Barclays Bank Ltd. v. W.J. Simms Son & Cooke (S.) Ltd.*, [1980] 1 Q.B. 677 at 695 (Eng.). See similarly the idea of this as a defence of "receipt in satisfaction of a right," in JAMES EDELMAN & ELISE BANT, *UNJUST ENRICHMENT IN AUSTRALIA* 344-46 (2006).

⁶⁰ LORD ROBERT GOFF & GARETH JONES, *THE LAW OF RESTITUTION* 53 (7th ed. 2007). There is now an eighth edition under a new editorial team. See CHARLES MITCHELL, PAUL MITCHELL & STEPHEN WATTERSON, *GOFF AND JONES: THE LAW OF UNJUST ENRICHMENT* (8th ed. 2011).

Introduction to the Law of Restitution.⁶¹ It would seem, therefore, that the importance of this general restriction on the “unjust factors” scheme has only recently been appreciated, probably as a result of the close comparison of the common-law and civilian approaches to the subject triggered by Birks’s advocacy of an “absence of basis” approach in *Unjust Enrichment*.⁶²

The real difficulty, however, is that this restriction is not always applied. So, for example, two much discussed cases on mistake, one in Australia and the other in England, go the other way and allow restitution for a mistaken payment, even though the money was owed under a valid legal obligation. In the Australian case of *Roxborough v Rothmans of Pall Mall Australia Ltd.*, an identified part of the price of cigarettes being bought by a retailer, *C*, from a wholesaler, *D*, represented a tax that it was thought *D* would have to pay over to the State.⁶³ The tax was subsequently held to be invalid, so that part of the price did not have to be paid over by *D* (and was not paid over or was refunded to *D*).⁶⁴ Although the contract for the payment of the full price was valid, so that the full payment, including the tax, was contractually owed by *C* to *D*, *C* was held entitled to restitution of that part of the payment that represented the tax as paid by mistake.⁶⁵ In *Deutsche Morgan Grenfell v. IRC*, *C* paid advance corporation tax under a statutory scheme that was ultra vires the Revenue (*D*) because, contrary to European Union law, the scheme did not give *C* an option to avoid paying the tax by making a group income election.⁶⁶ The House of Lords held that *C* was entitled to restitution from *D* for mistake even though *C* had a statutory duty to pay the tax unless and until it validly exercised a group income election, which, because that had not been provided, it had not done.⁶⁷

Are those two decisions correct? This has been hotly debated, and in each of the two cases there was a powerful dissent (by Justice Kirby and Lord Scott, respectively) precisely on the ground that the money was legally owed and could therefore not be recovered in the law of restitution.⁶⁸ It is submitted that the decisions are correct. They illustrate that the rule that one cannot have

⁶¹ PETER BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION (1985).

⁶² BIRKS, *supra* note 1, at 129-60.

⁶³ *Roxborough v Rothmans of Pall Mall Austl.* (2001) 208 CLR 516, 517 (Austl.). This case is also important for its rejection at common law in Australia of a defence of “passing on.” See *id.* at 542. This defence has also been rejected at common law in England. See *Kleinwort Benson Ltd. v. Birmingham City Council*, [1997] Q.B. 380 (Eng.). In contrast, the *Restatement (Third)* accepts such a defence. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 64 (2011).

⁶⁴ *Roxborough* (2001) 208 CLR 516.

⁶⁵ *Id.*

⁶⁶ *Deutsche Morgan Grenfell Grp. plc v. IRC*, [2006] UKHL 49, [2007] 1 A.C. 558 (Eng.).

⁶⁷ *Id.*

⁶⁸ See *Roxborough* (2001) 208 CLR at 559-80 (Kirby J., dissenting); *Deutsche Morgan Grenfell Grp. plc*, [2006] UKHL 49, [2007] 1 A.C. 558 [84]-[85] (Lord Scott of Foscote, dissenting).

restitution for mistake where the mistaken payment was legally owed is not an absolute one but permits of limited exceptions. How, then, does one explain the exceptions?

The question at root is whether the injustice constituted by *D* receiving a payment that *C*, because mistaken, did not mean to make is outweighed by the fact that *C* owed *D* that money. In each of those two cases one might say that it was not so outweighed because it was in a technical sense only that *C* owed *D* the money. In the *Roxborough* case, the tax element was a fixed separate element from the rest of the price and did not conflict with the valid contractual allocation of risk in the contract because that tax element was imposed outside the risks bargained for. Separated out in this way, one can see that, once the tax was held not to be owing, that part of the price could also be said not to be owing albeit that no particular clause could be struck down as void. Similarly, in the *Deutsche Morgan Grenfell* case, one can say that, as the exaction of advance corporation tax was unlawful in relation to U.K. companies with non-resident parent companies because it did not allow them to make a group income election that they would have made had it been possible, it was “over-analytical” to say that the tax was due unless and until that group income election was made.⁶⁹ As the whole scheme was ultra vires, none of the tax was properly due and those who paid believing that it was due were entitled to restitution.

It would seem, therefore, that a helpful way to understand at least some of the exceptions to the general rule that money legally owed cannot be recovered is that the legal obligation is technical only. It is helpful to contrast the facts of *Deutsche Morgan Grenfell* with a case where there is no doubt that the tax paid was lawfully due but the claimant argues that it would not have paid so much tax had it exercised an election in a deed of variation, which it mistakenly failed to make.⁷⁰ In that situation, where the tax regime was lawful, and the claimant had simply mistakenly failed to operate it to its advantage, there should be no restitution. The obligation to pay the tax was not technical only.

The qualification appears only to apply to a *legal* obligation owed by *C* to pay *D*. A moral or natural obligation does not override the ground for restitution. So, say *C* gratuitously promises *D* £1000. That promise is not legally binding in England. *C* no longer wishes to pay *D* but, mistakenly believing that she is legally bound to do so, *C* pays *D* the £1000. Although there is no authority on this, it would appear that *C* would be entitled to

⁶⁹ *Deutsche Morgan Grenfell Grp. plc*, [2006] UKHL 49, [2007] 1 A.C. 558 [143] (Lord Walker of Gestingthorpe).

⁷⁰ This hypothetical example (concerning inheritance tax) was suggested in argument in *Test Claimants in the Franked Investment Income Group Litigation v. Revenue and Customs Commissioners*, [2008] EWHC (Ch) 2893, [257] (Eng.). Similarly, could it seriously be said that a tenant can reclaim rent paid to his landlord because the tenant mistakenly failed to make an application for a rent review that would have reduced the rent?

restitution of £1000 from *D* as paid by a mistake of law. The natural or moral obligation that, one might say, *C* owed *D* is overridden by the mistake.

Is any help on these matters to be derived from the *Restatement (Third)*? No direct discussion of this issue occurs in the chapter on mistake,⁷¹ although it is made clear at various points throughout the commentary that restitution cannot be given for mistake where there is a valid contract to make the payment or where a contract of compromise has been entered into to deal with the risk that the payment might not be due. It would seem, however, that the issue is largely covered by the defences of “recipient not unjustly enriched” in section 62⁷² and being a “bona fide payee” in section 67.⁷³ The first of these is very wide-ranging and reads,

Even if the claimant has conferred a benefit that results in the unjust enrichment of the recipient when viewed in isolation, the recipient may defend by showing that some or all of the benefit conferred did not unjustly enrich the recipient when the challenged transaction is viewed in the context of the parties’ further obligations to each other.⁷⁴

A two-creditor mistaken payment is given as one of the illustrations, as is a mistaken payment of a statute-barred debt.⁷⁵ By section 67, there is no right to restitution of a payment discharging a legal obligation owed to the payee by the payor provided the payee had no notice of the mistake (or other ground for restitution) prior to the discharge of the obligation.⁷⁶ A two-creditor example is given as the first illustration under the black letter rule,⁷⁷ but it is pointed out that there is a conflict in the authorities between those applying the defence as set out in section 67⁷⁸ and those which require instead that there has been a change of position by the payee (for example, by giving up a security that it

⁷¹ Section 6 reads, “Payment by mistake gives the payor a claim in restitution against the recipient to the extent payment was not due.” RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 6 (2011). But it is clear that this is regarded as a category of claim for mistake and not as a restriction. Note also that it is not made clear how section 34 on “Mistake or Supervening Change of Circumstances” (in the chapter headed “Restitution and Contract”), dealing with avoidance of a contract for mistake, *see id.* § 34, links back to the sections on mistake in the chapter headed “Transfers Subject to Avoidance.” *See id.* pt. II, ch. 2.

⁷² *Id.* § 62.

⁷³ *Id.* § 67.

⁷⁴ *Id.* § 62.

⁷⁵ *Id.* § 62 cmt. b, illus. 2 & 4. As authority, the reporter’s note refers to hypothetical cases put by Lord Mansfield in *Moses v. Macferlan*. *See id.* § 62 reporter’s note cmt. b (citing *Moses v. Macferlan*, (1760) 97 Eng. Rep. 676 (K.B.)).

⁷⁶ *Id.* § 67.

⁷⁷ *Id.* § 67 cmt. b, illus. 1.

⁷⁸ *See, e.g.*, *Wilson v. Newman*, 617 N.W.2d 318, 319 (Mich. 2000); *Banque Worms v. BankAmerica Int’l*, 570 N.E.2d 189, 191 (N.Y. 1991).

had for the debt).⁷⁹ Even if the former view is preferred, this differs from the English approach in that the payee who has notice that the payment has been made by mistake is not protected. The precise relationship between section 62 and section 67 is not made clear, but presumably, as these are defences, the burden of proof will be on the defendant. In contrast, on the English approach it would appear that the burden is on the claimant to show that, in addition to the mistake, the payee was not entitled to the payment.

B. *Risk, Doubt, and Suspicion*

There has, until recently, been little discussion by English judges as to the effect of risk-taking, doubt, and suspicion on recovery for mistake. A rare example was *Maskell v. Horner*,⁸⁰ in which it was held, *inter alia*, that the claimant who paid market tolls was “in doubt as to his liability to pay,” but wishing to avoid litigation, was not making a mistake.⁸¹

More recently, in *Barclays Bank v. W.J. Simms*, Mr. Justice Goff’s first qualification on restitution of a mistaken payment was where “the payer intends that the payee shall have the money at all events, whether the fact be true or false, or is deemed in law so to intend.”⁸² Although far from clear, it may be that this was a reference to denying restitution for the mistaken risk-taker. In *Kleinwort Benson Ltd. v. Lincoln City Council*, Lord Hope stated,

Cases where the payer was aware that there was an issue of law which was relevant but, being in doubt as to what the law was, paid without waiting to resolve that doubt may be left on one side. A state of doubt is different from that of mistake. A person who pays when in doubt takes the risk that he may be wrong – and that is so whether the issue is one of fact or one of law.⁸³

In *Deutsche Morgan Grenfell v. IRC*, however, Lord Hope subsequently qualified or refined this by clarifying that a degree of doubt is not incompatible with recovery for mistake and that the question was ultimately whether the

⁷⁹ See, e.g., *Mfrs. Hanover Trust Co. v. Chem. Bank*, 559 N.Y.S.2d 704, 710 (N.Y. App. Div. 1990).

⁸⁰ [1915] 3 K.B. 106 (Eng.).

⁸¹ *Id.* at 117-18 (Lord Reading C.J.); see also *id.* at 123 (Buckley L.J.); *id.* at 126 (Pickford L.J.); cf. *Woolwich Equitable Bldg. Soc’y v. IRC*, [1991] 3 W.L.R. 790, 832 (Ralph Gibson L.J.); GOFF & JONES, *supra* note 60, at 209 n.56. In the *Woolwich* litigation, which went to the House of Lords, none of the nine judges involved thought that the claimant was mistaken as to the law: claimant’s actions in challenging the ultra vires demand showed that it had no (serious) doubt as to the correct law. See *Woolwich Equitable Bldg. Soc’y v. IRC*, [1993] A.C. 70 (H.L.) (Eng.).

⁸² *Barclays Bank Ltd. v. W.J. Simms Son & Cooke (S.) Ltd.*, [1980] 1 Q.B. 677 at 695 (Eng.).

⁸³ *Kleinwort Benson Ltd. v. Lincoln City Council*, [1999] 2 A.C. 349 (H.L.) 410 (Lord Hope) (Eng.).

payor “should bear the risk or can recover on the ground that he was mistaken.”⁸⁴ In the same case, Lord Hoffmann stated,

I do not think that Lord Hope [in *Kleinwort Benson*] could have meant that a state of doubt was actually inconsistent with making a mistake. Contestants in quiz shows may have doubts about the answer (“it sounds like Haydn, but then it may be Mozart”) but if they then give the wrong answer, they have made a mistake. The real point is whether the person who made the payment took the risk that he might be wrong.⁸⁵

In line with that clarification, the fact that the payor had some doubt as to the facts or law is not incompatible with a mistake claim. The difficult question is what degree of doubt is compatible with a mistake claim. Clearly, at one extreme, if the payor knows the true facts or law, he is not mistaken at all and cannot recover. At the other extreme is the payor who has no suspicion that the facts or law may be other than he believes them to be, and he should be able to recover. In between are payors with varying degrees of suspicion and doubt. Professor Ewan McKendrick suggests that this can simply be resolved by causation.⁸⁶ But if one allows restitution whenever the claimant (who had doubts as to the facts) would not have paid had it known the truth, this would allow restitution despite a very high degree of doubt by the payor. Professor Graham Virgo goes to the opposite extreme and would rule out restitution whenever the payor was aware that there was a possibility that he or she was mistaken.⁸⁷ An attractive mid-position is to apply a balance-of-probabilities test. If the payor pays believing that the facts or law are *probably* what they in truth are (i.e., he is aware that he is probably making a mistake), he cannot recover for mistake: his belief precludes restitution for mistake either on the ground that he was not mistaken or that he took the risk of his mistake.⁸⁸

Extreme cases may exist where the claimant, while mistaken, so recklessly chooses not to investigate the true facts that he should be regarded as taking the risk of his mistake. Also, the concept of the claimant having taken the risk of being incorrect explains why a misprediction (a “mistake” as to the future) does not trigger restitution for mistake (although it may be that there is a

⁸⁴ *Deutsche Morgan Grenfell Grp. plc v. IRC*, [2006] UKHL 49, [2007] 1 A.C. 558 [65] (Lord Hope) (Eng.).

⁸⁵ *Id.* at [26] (Lord Hoffmann). Contrast this with Lord Brown, who thought that if the quiz contestant had been paying out money on the basis of that answer, he would clearly be taking the risk that he might be wrong and could not recover for mistake. *Id.* at [175] (Lord Brown).

⁸⁶ Ewan McKendrick, *Mistake of Law – Time for a Change?*, in *THE LIMITS OF RESTITUTIONARY CLAIMS: A COMPARATIVE ANALYSIS* 212, 232-33 (William Swadling ed., 1997).

⁸⁷ GRAHAM VIRGO, *THE PRINCIPLES OF THE LAW OF RESTITUTION* 163 (2d ed. 2006).

⁸⁸ This derives support from Justice Flaux in *Marine Trade SA v. Pioneer Freight Futures Co. Ltd. BVI*, [2009] EWHC (Comm) 2656, [76]-[77] (Eng.).

different ground for restitution in play, e.g., failure of consideration).⁸⁹ Say *C* pays *D* £100 in the belief that *D* is about to win the Booker Prize. *C* is not entitled to restitution for mistake when *D* does not win that prize. This is because *C* made a misprediction, which, by definition, involves taking the risk of being incorrect.

It can be objected that the idea that the claimant should be denied restitution because she has taken the risk that she might be mistaken is an elusive and conclusionary approach that does not explain the reasons why the claimant should be regarded as having taken the risk. That would be a valid objection if one were simply saying that risk taking rules out restitution without further explanation. But the analysis above has not simply relied on risk taking without more. Rather it has precisely explained that risk taking covers at least three circumstances where restitution should be denied: (1) paying despite a high degree of doubt as to whether the factual or legal basis on which one is paying is correct, (2) paying on the basis of a future event without making one's payment conditional, and (3) paying where one has recklessly failed to check the true facts. Clarified in this way, the language of risk taking is transparent and helpful.

The bearing of risk plays an important role in the approach of the *Restatement (Third)* to mistake. So in the general section 5 on mistake, a test of causation is combined with a test of risk bearing.⁹⁰ Restitution for a but-for mistake is to be given provided "the claimant does not bear the risk of the mistake."⁹¹ By section 5(3),

A claimant bears the risk of a mistake when (a) the risk is allocated to the claimant by agreement of the parties; (b) the claimant has consciously assumed the risk by deciding to act in the face of a recognized uncertainty; or (c) allocation to the claimant of the risk in question accords with the common understanding of the transaction concerned.⁹²

The commentary explains that section 5(3)(c) is principally designed to deal with mispredictions and errors of judgment,⁹³ while section 5(3)(a) and section 5(3)(b) are most obviously illustrated by valid contracts of compromise and settlement and by choosing not to investigate one's suspicions (as where an insurer pays out on a life insurance policy, choosing not to investigate the death).⁹⁴

⁸⁹ *Dextra Bank & Trust Co. Ltd. v. Bank of Jam.*, [2001] UKPC 50, [29] (appeal taken from Jam.). See also, although not using the language of misprediction, the denial of restitution for the first two gifts in *In re Griffiths*, [2008] EWHC (Ch) 118, [2009] Ch. 162 [28] (stating that the deceased mistakenly thought – mispredicted – that he would live for more than seven years).

⁹⁰ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 5 (2011).

⁹¹ *Id.* § 5(2).

⁹² *Id.* § 5(3).

⁹³ *Id.* § 5 cmt. b(3); see also *id.* § 6 cmts. d & e.

⁹⁴ *Id.* § 5 cmts. b(1) & (2).

The *Restatement of Restitution: Quasi Contracts and Constructive Trusts* had a black letter rule which directly stated, “A transferor is not precluded from restitution for mistake because, at the time of the transfer, he had some doubt as to the facts.”⁹⁵ There is no equivalent black letter rule in the *Restatement (Third)* nor is acceptance of that proposition to be found in the commentary. One might argue that it is an implication from section 5(3)(b) – restitution is to be denied where the transferor has consciously assumed the risk by deciding to act in the face of a recognised uncertainty – that doubt rules out restitution for mistake. As has been argued above, that is an extreme position.

C. *Should There Be a More Restrictive Approach than Causation to Mistaken Gifts?*

Does the but-for causation test apply to mistaken gifts? The language of the English equity cases on the rescission of gifts for mistake is that the mistake of fact must be serious or basic to the transaction.⁹⁶ However, it is not clear what the requirement of seriousness is meant to add to the but-for test. Consider the following two examples:

1. C makes a gift of £1000 to D on the occasion of D’s engagement to C’s daughter not realising that D is an evil and violent fraudster, intent on destroying the life of C’s daughter.⁹⁷
2. C makes a gift of £1000 to D mistakenly believing that D is impecunious whereas D is in fact a person of substantial wealth.

On one view, even though but-for causation is satisfied in those examples, there should be no right to restitution.⁹⁸ Rather, one needs in the context of gifts (not induced by misrepresentation) an extra element of seriousness lest it be too easy for donors to unwind gifts. It is very difficult, however, to articulate what that added element of seriousness is meant to be. It is also not

⁹⁵ RESTATEMENT OF RESTITUTION: QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS § 10(1) (1937).

⁹⁶ See *Pitt v. Holt*, [2011] EWCA (Civ) 197 (Eng.); *Lady Hood of Avalon v. Mackinnon*, [1909] 1 Ch. 476 (Eng.); *Ogilvie v. Littleboy*, (1897) 13 T.L.R. 399, *aff’d*, (1899) 15 T.L.R. 294 (H.L.). See also the obiter dicta of Lord Scott in *Deutsche Morgan Grenfell Group plc v. IRC*, [2006] UKHL 49, [2007] 1 A.C. 558 [87], referring to example 2 in Part II.C.

⁹⁷ For a similar example, see ANDREW TETTENBORN, *THE LAW OF RESTITUTION IN ENGLAND AND IRELAND* 76 (3d ed. 2002).

⁹⁸ See, e.g., Sonja Meier, *Unjust Factors and Legal Grounds*, in *UNJUSTIFIED ENRICHMENT: KEY ISSUES IN COMPARATIVE PERSPECTIVE* 37, 37-75 (David Johnston & Reinhard Zimmermann eds., 2002); Sonja Meier & Reinhard Zimmermann, *Judicial Development of the Law, Error Iuris, and the Law of Unjustified Enrichment – A View from Germany*, 115 L. Q. REV. 556, 562 (1999).

clear why one should fear the unwinding of gifts given that the donor would need to satisfy a court that she has made a causative mistake and is not merely changing her mind and given that change of position protects the defendant against detrimental reliance on the gift. The alternative view, therefore, is that but-for causation should suffice.⁹⁹

Tang Hang Wu, in a wide-ranging analysis of the issue, has advocated a narrower test for restitution of mistaken gifts than proving a mistake but for which the gift would not have been made.¹⁰⁰ However, his proposed definition of the types of mistake that should count as sufficiently serious to merit restitution, namely double payments or mistakes as to identity, is artificial and will inevitably produce unacceptable results. His work also draws attention to a distinction between a tacit mistake and an active mistake.¹⁰¹ While he ultimately favours the view that tacit and active mistakes should count,¹⁰² it is worth noting that example 1 above illustrates a tacit, rather than an active, mistake.¹⁰³ The mistaken facts were not present in the father's mind when he made the gift (i.e., they did not actively induce the payment). But Tang Hang Wu is correct that any attempt to draw the line of recovery between active and tacit mistakes would be fraught with difficulty in practice.

An important recent development in relation to mistakes as to tax in the context of gifts is the decision of the Court of Appeal in *Pitt v. Holt*.¹⁰⁴ Picking up on a distinction drawn in an earlier case,¹⁰⁵ this decision laid down that a mistake of law as to the consequences, rather than the effect, of a gift does not count; and, although that distinction can be elusive, it was clearly laid down that a mistake as to the tax consequences of a gift does not give a right to restitution.¹⁰⁶ Although that was a decision in relation to the rescission of a voluntary settlement in equity, there is no reason why it should not apply to gifts generally.

What is the approach to restitution of mistaken gifts in the *Restatement (Third)*? The most relevant section is section 11, headed "Mistake in Gifts Inter Vivos." The commentary to that section explains that only gifts inter vivos are covered because, although in principle the same rules should apply to

⁹⁹ That latter view derives some support from *In re Griffiths*, [2008] EWHC (Ch) 118, [2009] Ch. 162 [26]-[27], although the decision in that case was subsequently criticised in *Pitt v. Holt*, [2011] EWCA (Civ) 197, [196]-[198].

¹⁰⁰ Tang Hang Wu, *Restitution for Mistaken Gifts*, 20 J. CONT. L. 1, 29-33 (2004).

¹⁰¹ *Id.* at 8-9.

¹⁰² He distinguishes both from ignorance. *Id.* But it is hard to see any meaningful line between ignorance in this context and a tacit mistaken belief.

¹⁰³ See *supra* Part II.C.

¹⁰⁴ [2011] EWCA (Civ) 197.

¹⁰⁵ *Gibbon v. Mitchell*, [1990] 1 W.L.R. 1304 (Ch.) at 1309 (Eng.).

¹⁰⁶ *Pitt*, [2011] EWCA (Civ) 197, [210].

testamentary gifts, wills (and settlement trusts) fall within a different Restatement.¹⁰⁷ By section 11,

(1) A donor who transfers something more than or different from the intended gift, or whose gift is made to someone other than the intended donee, has a claim in restitution as necessary to prevent the unintended enrichment of the recipient.

(2) A donor whose gift is induced by invalidating mistake has a claim in restitution as necessary to prevent the unintended enrichment of the recipient.¹⁰⁸

The relationship between these two provisions is unclear because one would have thought that section 11(2) would swallow up section 11(1). More importantly, it is not entirely clear from these provisions whether a but-for causative test is applied to gifts, although it would appear that the words “invalidating mistake” in section 11(2) are intended to be a reference back to section 5, which provides that an “invalidating mistake” is one but for which the transaction would not have taken place.¹⁰⁹ The commentary indicates that a gift made in the mistaken belief that the payee is impecunious will trigger restitution.¹¹⁰ So the example given is of a son paying his father’s final medical expenses in the belief that the father had no resources, but in fact the father left a substantial estate.¹¹¹ The son would have a claim in restitution against the father’s estate to recover the amount of the mistaken expenditure. This tends to support the view that the normal but-for causation test for mistake applies to gifts. On the other hand, a great deal of weight is placed on there being a distinction between “errors of judgment,” which do not count, and mistakes; and it would appear that “errors of judgment” go beyond disappointed expectations and miscalculations.¹¹² It may well be, therefore, that in the first hypothetical illustration given above,¹¹³ there would be no right to restitution for mistake under section 11 because this would be regarded as an error of judgment.

As regards a mistake as to the tax consequences of a gift, very little is said. While a decision allowing restitution where the tax regime was changed subsequent to the gift is criticised,¹¹⁴ it is then mysteriously said that “[m]isapprehension of existing tax law might perhaps be treated as invalidating mistake, though it is difficult to characterize even such a case as presenting a

¹⁰⁷ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 11 cmt. a (2011).

¹⁰⁸ *Id.* § 11(1)-(2).

¹⁰⁹ *Id.* § 5(2)(a).

¹¹⁰ *Id.* § 11 cmt. c., illus. 14.

¹¹¹ *Id.*

¹¹² *Id.* § 11 cmt. c.

¹¹³ *See supra* Part II.C.

¹¹⁴ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 11 reporter’s note supplemental note (criticizing *Stone v. Stone*, 29 N.W.2d 271, 273 (Mich. 1947)).

problem in unjust enrichment.”¹¹⁵ Plainly this is an issue that falls within the scope of the law on restitution of an unjust enrichment so that presumably what is in mind is that it is normally clear that there should be no restitution where the only mistake is as to the tax consequences of a gift. The precise explanation for that is not given, but perhaps such a “mistake” is regarded as falling within the somewhat vague notion of an “error of judgment.” In any event, the implication is that restitution for a mistake as to the tax consequences of a gift should not be granted, and in that respect the *Restatement (Third)* supports the recent English approach in *Pitt v. Holt*.

D. *Proprietary Restitution for Mistake*

The right to restitution of an unjust enrichment may, most obviously, be a personal right to the value of the enrichment received by the defendant (irrespective of whether the defendant still has that enrichment, although this may go to the defence of change of position). As a personal right, this is enforceable only against a particular person or his representatives.

Historically, various “remedies” have enforced the personal right to restitution of the value of an unjust enrichment received. That list includes the award of money had and received to the claimant’s use, money paid to the defendant’s use, a quantum meruit, a quantum valebat, recoupment or contribution, a money award consequent on rescission, and an account of money received. That long list reflects the scattered history of the subject by which different remedies (both common-law and equitable) have evolved for different situations of restitution. It would make the law easier to understand, and pleading more straightforward, if one replaced that long list by a single modern term such as “a monetary restitutionary award” or even just “monetary restitution.” For the moment, English law is stuck with the old labels.

Some commentators on English law would confine restitution of an unjust enrichment to that personal right and the remedies enforcing it, which we can loosely refer to as “personal restitution.”¹¹⁶ However, that restriction would seriously limit the explanatory force of unjust enrichment. Beyond such a personal right to value received there are other rights to restitution which, on the best analysis, are created by unjust enrichment. In very general terms, these other rights are “rights in property” (including rights in tangible and intangible property). We can, therefore, loosely refer to this area of rights to restitution as “proprietary restitution.” In England, it is probably the most complex and controversial aspect of the law of unjust enrichment.

Although none of this can be regarded as straightforward, four different types of proprietary rights or remedies may be said to be involved in affecting restitution of an unjust enrichment: equitable liens, subrogation to a discharged security, rescission or rectification revesting proprietary rights, and trusts imposed by law (namely resulting and constructive trusts). Isolating the means

¹¹⁵ *Id.*

¹¹⁶ VIRGO, *supra* note 87, at 9, 11-18.

of achieving proprietary restitution may be thought problematic enough but just as difficult is clarifying *when* such proprietary restitution will arise. Arguably the best view is that, assuming the defendant retains rights in property that comprise, or are directly connected to, the unjust enrichment, proprietary restitution should always arise (subject to defences), with the major exception being where the ground for restitution is failure of consideration constituted by the failure of a promised performance. That exception is most obviously needed to deal with the straightforward example of an unsecured lender. Say, for example, *C* pays *D* £10,000 for building work which *D* fails to carry out. *D* still has that £10,000 or its traceable substitute. Although, as an alternative to suing on the contract, *C* has a personal right to restitution of £10,000 for failure of consideration, there should surely be no question of *C*'s having an equitable lien over the £10,000 or of *D* holding the £10,000 on constructive trust for *C*. To grant proprietary restitution in that situation would immediately turn most unsecured creditors into secured creditors and, at a stroke, would destroy the established law on insolvency.

If we now focus on mistaken enrichments, we can see that each of the four rights in property may arise as a means of effecting restitution for mistake.

Equitable liens are used to secure a personal monetary restitutionary award. A standard example, outside the context of mistake, is where an asset has been traced into its substitute and the equitable lien is seen as an alternative "remedy" to a trust.¹¹⁷ In the context of mistaken enrichments, probably the best example of the use of a lien was in *Cooper v. Phibbs*, in which the claimant had mistakenly improved another's land and was granted an equitable lien over the land to secure restitution of the value of the improvement.¹¹⁸ Although there is insufficient case law, it may be that an equitable lien can always be given for mistake provided the enrichment is directly linked to a right in property retained by the defendant.

Subrogation to a discharged security is directly analogous to an equitable lien and can achieve the same effect in securing a monetary restitutionary award. An example of this in respect of mistake – although ultimately no proprietary right was needed – was *Banque Financière de la Cité v. Parc (Battersea) Ltd.*¹¹⁹ Here subrogation was given to a mistaken lender so as to give it the priority it wanted as against a subsequent lender, albeit not against all creditors.¹²⁰ Again, although there is insufficient case law, it may be that where a secured debt is mistakenly paid off, the payor is always entitled to be subrogated to the security so as to secure the monetary restitutionary award for discharging the debt.

Rescission of a contract or gift reverses an enrichment and effects proprietary restitution where it reverts rights in property retained by the

¹¹⁷ See *In re Hallett's Estate*, (1880) 13 Ch. 696 (Eng.).

¹¹⁸ *Cooper v. Phibbs*, (1867) L.R. 2 H.L. 149 (H.L.) (appeal taken from Ir.).

¹¹⁹ [1999] 1 A.C. 221 (H.L.) (Eng.).

¹²⁰ *Id.*

defendant. The process of rescission includes a consequential order necessary to re-vest rights, such as rectification of the land register or rectification of a register of shares or intellectual property. The leading example of proprietary rescission in the context of mistake is *Car & Universal Finance Co. Ltd. v. Caldwell*, in which a fraudulent misrepresentation induced the sale of a car.¹²¹ By rescinding the contract, the claimant had the rights in the car re-vested in him.¹²² Unjust enrichment therefore created a right to rescind (by re-vesting rights in property) rather than merely creating a personal right to value received. Where a contract has been rescinded, there will also, of course, be a personal right to restitution of value received by the defendant enforceable by a monetary award consequent on rescission. *Rectification* of a transaction also effects proprietary restitution where it re-vests rights in property retained by the defendant (if necessary with a consequential order such as rectification of a register). As regards mistake, the most obvious examples have been the rectification of contracts for the sale of land where the incorrect area of land has been conveyed.¹²³ The rules as to when there can be rescission or rectification of a contract with consequent personal and proprietary restitution are well established and find a place in all contract textbooks. As regards the rescission (or rectification) of gifts, we have seen above that there is a dispute as to whether a causative mistake test is sufficient; but whatever the test for gifts, there is no reason to think that proprietary restitution is subject to a more restrictive test, or applies in more limited circumstances, than personal restitution.

Instead of re-vesting rights in property retained by the defendant through rescission or rectification, the rights in property retained by the defendant may sometimes be made the subject-matter of a *trust* (whether constructive or resulting) with the claimant as beneficiary. The imposition of that trust is restitutionary and, on the best analysis, reverses the unjust enrichment of the defendant (who is enriched by retaining the rights in property) at the claimant's expense. Unjust enrichment is here creating a trust under which the claimant has a beneficiary's right to the rights in property retained by the defendant. In the context of mistake, the best-known example of the imposition of a trust was that imposed for a mistake, where there had been double payment by a bank, in *Chase Manhattan Bank N.A. v. Israel-British Bank (London) Ltd.*¹²⁴ This is regarded, however, as a controversial decision and, perhaps unfortunately, it must now be read in the light of the explanation given in *Westdeutsche Landesbank Girozentrale v. Islington London BC*, which appears

¹²¹ See *Car & Universal Fin. Co. Ltd. v. Caldwell*, [1965] 1 Q.B. 525 at 526-28 (Eng.). See also, as regards the rescission of gifts, *Lady Hood of Avalon v. Mackinnon*, [1909] 1 Ch. 476 at 483-84 (Eng.), and *In re Griffiths*, [2008] EWHC (Ch) 118, 169-72.

¹²² *Car & Universal Fin. Co. Ltd.*, [1965] 1 Q.B. 525.

¹²³ See, e.g., *Blacklocks v. J.B. Devs. (Godalming) Ltd.*, [1982] 1 Ch. 183 (Eng.); *Beale v. Kyte*, [1907] 1 Ch. 564 (Eng.).

¹²⁴ [1981] 1 Ch. 105 at 120 (Eng.).

to require, for the trust to be imposed, that the defendant had knowledge of the mistake.¹²⁵

So much for the somewhat tangled English position on proprietary restitution for mistake. What insights, if any, can be gleaned from the *Restatement (Third)*?

The most important general point is that the *Restatement (Third)*, following on the tradition established by the original *Restatement*, firmly accepts that proprietary restitution can be triggered by unjust enrichment. Contrary to the wishes of some English commentators, it does not confine unjust enrichment to the creation of personal rights only. So under chapter 7 on “Remedies,” we see the fundamental division that has been explained above between personal restitution and proprietary restitution.

The precise labelling is also informative. The remedies for personal restitution are the subject matter of topic 1 and are referred to as “Restitution via Money Judgment”¹²⁶ – which is very similar to the suggested label above of “monetary restitutionary award” – while topic 2 is headed “Restitution via Rights in Identifiable Property.”¹²⁷ The introductory note to topic 1 explains, “A claimant who has established an entitlement to restitution by demonstrating the unjust enrichment of the defendant at the claimant’s expense is ordinarily entitled to a judgment against the defendant for the amount of the enrichment in money.”¹²⁸

The introductory note to topic 2 reads as follows:

Important remedies for unjust enrichment give the claimant rights in specific property in the hands of a defendant, as opposed to a money judgment in the amount of the defendant’s unjust enrichment. There are several such remedies, each with its own name, rules, and reach. These forms of relief from specific property are variously referred to in this Restatement – depending on the context – as the “asset-based” or “property-based” remedies in restitution, as “specific relief,” or as “restitution from property.”¹²⁹

Four main “remedies” are then looked at in separate sections: rescission (although the discussion includes rectification), constructive trust, equitable lien, and subrogation as a remedy.¹³⁰ These correspond directly to the main examples set out above of the proprietary rights/remedies in the English law of unjust enrichment. The role of each is also the same as, or very similar to, that applied in English law. So, for example, section 56 on the equitable lien

¹²⁵ See *Westdeutsche Landesbank Girozentrale v. Islington LBC*, [1996] A.C. 669 (H.L.) 706 (Eng.).

¹²⁶ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT pt. III, ch. 7, topic 1 (2011).

¹²⁷ *Id.* pt. III, ch. 7, topic 2.

¹²⁸ *Id.* pt. III, ch. 7, topic 1, introductory note.

¹²⁹ *Id.* pt. III, ch. 7, topic 2, introductory note.

¹³⁰ *Id.* §§ 54-57.

explains that where the recipient is unjustly enriched by the claimant enhancing the value of its property or, more generally, “the connection between unjust enrichment and the defendant’s ownership of particular property makes it equitable that the claimant have recourse to that property for the satisfaction of the defendant’s liability in restitution, the claimant may be granted an equitable lien on the property in question”;¹³¹ and by section 56(2), “An equitable lien secures the obligation of the defendant to pay the claimant the amount of the defendant’s unjust enrichment as separately determined.”¹³² The role of a constructive trust is explained in section 55(1): “If a defendant is unjustly enriched by the acquisition of title to identifiable property at the expense of the claimant . . . the defendant may be declared a constructive trustee, for the benefit of the claimant, of the property in question . . .”¹³³

Turning to the application of these “property-based” remedies in the context of mistake, numerous examples of this are given either in chapter 7 on remedies or in chapter 2 on mistake. So, for example, an equitable lien is mentioned as one of the remedies available to a mistaken improver of land.¹³⁴ Section 8(1) precisely recognises that a person who pays to discharge a lien (e.g., a tax lien) on property that it mistakenly believes it owns is entitled to be subrogated to the discharged lien to reverse the unjust enrichment of the owner.¹³⁵ Much of the discussion, and many of the examples given, on rescission for misrepresentation¹³⁶ and on rectification for mistake (especially where an incorrect area of land has been mistakenly sold or conveyed as a gift),¹³⁷ involve restitution by revesting rights in property. Similarly there are examples given of constructive trusts being imposed in respect of mistaken enrichments, and the commentary makes clear that there can be a constructive trust in the standard case where a double payment has been made and the recipient then becomes insolvent.¹³⁸ The decision of *In re Berry* is therefore strongly supported,¹³⁹ and later decisions taking a different view¹⁴⁰ are firmly rejected.¹⁴¹

¹³¹ *Id.* § 56(1)(b).

¹³² *Id.* § 56(2).

¹³³ *Id.* § 55(1).

¹³⁴ *Id.* § 10 cmt. g; *id.* § 56 cmt. d.

¹³⁵ *Id.* § 8(1); *id.* § 57 cmts. d & e.

¹³⁶ *See id.* § 54 cmt. a (“Rescission as a remedy for unjust enrichment usually allows the claimant to recover property that has been transferred to the defendant pursuant to contract.”). *See generally id.* § 54 (providing further commentary and examples).

¹³⁷ *See id.* § 11 cmt. b; *id.* § 12 cmt. c; *id.* § 12 reporter’s note cmts. a, b & c.

¹³⁸ *See id.* § 55 cmt. c, illus. 1; *id.* § 55 reporter’s note cmts. c & d; *id.* § 60 cmt. c, illus. 1; *id.* § 60 reporter’s note cmts. c & f.

¹³⁹ *See id.* § 60 reporter’s note cmt. c (noting that illustration 1, imposing a constructive trust, is based on *In re Berry*, 147 F. 208, 210 (2d Cir. 1906)).

¹⁴⁰ *See, e.g., In re Dow Corning Corp.*, 192 B.R. 428, 441 (E.D. Mich. 1996) (denying a constructive trust). For a criticism of the latter case, see an excellent article by Andrew

Despite these helpful, clear similarities, the overall impression given, which represents an unwelcome contrast with the English approach, is that the precise form of proprietary restitution and its availability are flexible and open to be moulded to the facts of a case at the discretion of the court. So, for example, it is said that “[n]either the underlying theory of liability, the availability of defenses, nor the outcome of a particular case should depend on the language used to describe the remedy.”¹⁴² But, with respect, one does need to know which of the four remedies isolated above one is dealing with because they significantly differ. Similarly, there is no attempt to clarify precisely when proprietary restitution will be given and instead the rules are formulated in permissive terms (e.g., the unjustly enriched recipient “may be declared a constructive trustee”¹⁴³ or “may be granted an equitable lien”¹⁴⁴). This would suggest that it is open to a court to impose an equitable lien or a constructive trust in the building work example posited above.¹⁴⁵ My view is that, given the wide-ranging consequences of creating rights in property, we need to strive for a greater degree of clarity as to when proprietary restitution is appropriate.

CONCLUSION

The publication of the *Restatement (Third)* is as exciting an event for those of us working on the law of restitution of unjust enrichment on the other side of the Atlantic as it is for American scholars and lawyers. We add our voices to those expressing a huge debt of gratitude to Andrew Kull and to those who have helped him. It remains deeply puzzling as to how it can be that the dynamic interest in England in the subject could be matched by the equally dramatic decline in interest in the United States. Whatever the true explanation for that fascinating phenomenon, it is very much hoped that the *Restatement (Third)* will serve as a catalyst for a revival of interest in the United States and for comparative work on our respective laws of restitution.

Kull, *Restitution in Bankruptcy*, 72 AM. BANKR. L.J. 265, 275-76 (1998).

¹⁴¹ See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 60 reporter’s note cmt. f.

¹⁴² *Id.* § 54 cmt. a; see also *id.* pt. III, ch. 7, topic 2, introductory note (“[T]he remedies permitting restitution from property are to be flexibly applied, in the interests of justice, and in the sound discretion of the court.”).

¹⁴³ *Id.* § 55(1). On the long-standing question as to the point in time at which a constructive trust arises, the *Restatement (Third)* takes the view that it arises from the date of the unjust enrichment or from when the court makes its judgment backdated to the time of the unjust enrichment. See *id.* § 55 cmt. e. But there is a major difference between those two approaches in that the latter, but not the former, makes it possible to protect third-party creditors. The latter is analogous to the power to rescind for misrepresentation where the rescission is also backdated. See *Dir. of the Reese Silver Mining Co. v. Smith*, (1869) L.R. 4 H.L. 64 (H.L.) (Eng.).

¹⁴⁴ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 56(1).

¹⁴⁵ See *supra* Part II.D.

With that in mind, this paper has sought to show that, while the English approach is more conceptual than that adopted in the *Restatement (Third)*, there are valuable insights to be gained in understanding the law of mistaken enrichments by looking across to the United States. Of the four hot topics, we have seen that in the *Restatement (Third)* the problem of a payor's obligation to pay appears to be dealt with by the very wide "recipient not unjustly enriched" defence and the bona fide payee defence; that risk-taking is of central significance in the law of mistake; that gifts are probably susceptible to the same causal test that is applied to other mistaken payments, albeit that there is heavy reliance on "errors of judgment" not counting; and that, while proprietary restitution for unjust enrichment is well established, the precise proprietary rights/remedies and what triggers them are treated in a more flexible and discretionary manner than is thought appropriate in England.