
TOPIC IV: DEFENSES AND OBJECTIONS TO LIABILITY IN RESTITUTION

IS UNJUST ENRICHMENT LAW AN OFFICIOUS INTERMEDDLER?

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INTRODUCTION

“There’s hardly a greater Pest to Government, Conversation, the Peace of Societies, Relations and Families, than officious Tale-bearers, and busy Intermeddlers,” wrote Sir Roger L’Estrange in 1692.¹ Controlling this “pest” of officious intermeddlers, as we will call them for short, has been a traditional concern of the common law. For example, it is still a tort – and was a crime in England until 1967 – to support the litigation of a stranger without having a just cause to do so.²

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¹ SIR ROGER L’ESTRANGE, FABLES OF ÆSOP AND OTHER EMINENT MYTHOLOGISTS 431-32 (8th ed. 1738) (Fable 403, *The Eagle, Cat and Sow*).

² This is the tort of maintenance, as described by Lord Steyn in *Giles v. Thompson*,

Various other ways in which officious intermeddlers could upset governments, the peace, or families are found within the area of unjust enrichment law. Officious intermeddling is feared when somebody pays the debts of another person and then seeks to recover from the debtor. Whereas Continental laws will generally allow such recovery, the common law will do so only if the payor was not acting officiously, meaning that the payor had a good reason for this interference,³ reminiscent of the “just cause” requirement for the support of somebody else’s litigation. Similarly, while many other legal systems seek to encourage Good Samaritans, the common law will generally not allow them to recover for the expenses they have incurred in helping others. In the words of Lord Justice Bowen in *Falcke v. Scottish Imperial Insurance Co.*, “Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will.”⁴ Conferring benefits can amount to additional officious intermeddling if a service is provided in the expectation of remuneration.⁵ Whether, in the absence of a contract, the conferrer of the benefit can, at least in principle, claim quantum meruit on the ground of the recipient having accepted the benefit freely, is still subject to dispute.⁶ The traditionally hostile attitude of the common law against rewarding such intermeddling has been summed up by Baron of the Exchequer Pollock: “One cleans another’s shoes; what can the other do but put them on?”⁷ Dawson explained in 1974 that “asserting in

[1993] 3 All E.R. 321 (C.A.) at 321 (Eng.) (explaining that the tort of maintenance is “the support of litigation by a stranger without just cause”). Maintenance as a crime was abolished by section 13, paragraph (1)(a) of chapter 58 of the Criminal Law Act 1967.

³ For a full comparative analysis, see 2 PETER SCHLECHTRIEM, *RESTITUTION UND BEREICHERUNGS AUSGLEICH IN EUROPA* 359-95 (2001). For a shorter comparison of German and English law, see GERHARD DANNEMANN, *THE GERMAN LAW OF UNJUSTIFIED ENRICHMENT AND RESTITUTION* 116-21 (2009).

⁴ *Falcke v. Scottish Imperial Ins. Co.*, (1886) 34 Ch.D. 234 at 248 (Bowen L.J.) (Eng.). It is interesting to note from a comparative viewpoint that the Stuttgart higher regional court explicitly distinguished German law from this dictum. Oberlandesgericht [OLG] [Stuttgart Higher Regional Court] July 11, 1995, *NEUE JURISTISCHE WOCHENSCHRIFT – RECHTSPRECHUNGS-REPORT ZIVILRECHT [NJW-RR]* 1553, 1997; see also STEPHAN LORENZ, *J VON STAUDINGERS KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH*, §§ 812-822 (UNGERECHTFERTIGTE BEREICHERUNG) § 812 note 46 (Norbert Horn ed., 15th ed. 2007). For a full comparative analysis, see JEROEN KORTMANN, *ALTRUISM IN PRIVATE LAW* 39-44 (2005).

⁵ See, e.g., Geoffrey R. Watson, *In the Tribunal of Conscience: Mills v. Wyman Reconsidered*, 71 *TUL. L. REV.* 1749, 1795 (1997) (considering a situation in which some services were gratuitous while others were rendered with the expectation of payment).

⁶ CHARLES MITCHELL, PAUL MITCHELL & STEPHEN WATTERSON, *GOFF AND JONES, THE LAW OF UNJUST ENRICHMENT* 453-62 (8th ed. 2011).

⁷ *Id.* at 455 (citing *Taylor v. Laird*, (1856) 25 L.J. Ex. 329, 332 (Eng.)). Pollock’s dictum does not form part of the judgment, but it was said during argument with counsel. Moreover, Pollock limits his remark to situations where the “benefit of the service could not

ringing language a proposition that is made to seem vital to a free society” was one of the ways in which the common law expressed its antipathy towards “volunteers” or “officious intermeddlers” and also that “[t]his defensive proposition is often stated with more than the needed vigor.”⁸

I. FORCING CONTRACTS ONTO UNWILLING PARTIES

The example of forced contracts leads us to the topic of the present paper. Rather than looking at the person who must be discouraged from intermeddling with the affairs of others, this paper will examine the capacity of unjust enrichment law to intermeddle officiously with other areas of law. Contract law provides an obvious potential example. If contract law tells us that the recipient of the benefit never accepted any offer of the conferrer and should thus not be liable to pay, would an alternative claim for remuneration in unjust enrichment not force the effects of a contract onto a person who did not want to enter into a contract in the first place? Unjust enrichment could thus be used or abused to outflank and outmaneuver contract law. If we use the metaphor of unjust enrichment as an area of law which mops up what other areas have spilled, for instance by cleaning up behind failed contracts, does unjust enrichment also have the capacity to knock over buckets in other areas of law? Does unjust enrichment law intermeddle in an officious way with principles which those other areas of law seek to uphold?

In our contract law example, there appears to be general agreement that unjust enrichment law should not impose liabilities behind the back of contract law,⁹ although this naturally leaves much room for disagreement on the details. Unjust enrichment rules, however, have been less considerate of neighbouring areas of law. The following Parts will present some examples from contract law, insolvency law, conflict of laws, tax law, and family law. No claim is made that these examples are exhaustive or even representative. Questions relating to unjust enrichment as a tool of redistributive justice, which could also be understood as intermeddling with property law, are beyond the scope of this paper.

Most of these examples are derived from English, French, and German cases. We will then move briefly on to Canada and finally arrive in the United States by looking at the position the new *Restatement (Third) of Restitution and Unjust Enrichment* takes on such intermeddling.

be rejected without refusing the property itself.” Neither quote is reported in *Taylor v. Laird*, (1856) 156 Eng. Rep. 1203; 1 H&N 266.

⁸ John P. Dawson, *The Self-Serving Intermeddler*, 87 HARV. L. REV. 1409, 1409 (1974).

⁹ Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1285 (1989) (“[R]estitution should not undermine policies of tort or contract law that are served by denying recovery.”); see also DANNEMANN, *supra* note 3, at 137-38; SCHLECHTRIEM, *supra* note 3, at 4-5.

II. SHIFTING CONTRACTUAL INSOLVENCY RISKS

Unjust enrichment law can intermeddle with bankruptcy law in several ways. The first is situated on a joint border point of unjust enrichment law, contract law, and insolvency law. Whoever agrees to perform first under a contract is well advised to assess the insolvency risk involved and, if considered necessary, to obtain securities. The same is true for any party which, under a contract, grants to the other party access to or control over its funds. Every party thus negotiates the insolvency risks for its own assets, deciding from case to case whether it is worth entering into a contract which carries an insolvency risk, and with what kind of securities.

Unsecured creditors whose contractual partner has become bankrupt can sometimes use unjust enrichment law to shift their own insolvency risk onto another party, if they can show that this other party has in some way been enriched in this process. A famous example is the French case of *Boudier*.¹⁰ The claimant, the father-son merchant firm of Boudier, had sold manure worth 324 francs to a farmer who then became bankrupt.¹¹ Boudier sought to recover their unpaid bill from the owner of the farmland.¹² The owner had already terminated the lease with the farmer over outstanding debts of 15,000 francs.¹³ The owner accepted the standing crop in a part settlement, and the remaining unsecured debt amounted to 5,376 francs.¹⁴ Boudier had negotiated the risk of the farmer not being able to pay for the manure and had delivered in advance and without securities. The owner had negotiated the risk of the farmer not being able to pay the rent and had obtained some insufficient securities. By allowing Boudier's claim against the farmer as a claim *de in rem verso*, the *Cour de cassation* effectively shifted Boudier's contractual insolvency risk onto the owner. The *arrêt Boudier* was formulated widely enough to become a general principle of unjust enrichment liability in French law, which has subsequently proved to be rather unruly and required much hedging.¹⁵

While little authority can be found for allowing a *Boudier*-type claim in the common law, a leading English case also shifts contractual insolvency risks. In *Lipkin Gorman v. Karpnale*,¹⁶ the claimant was a firm of solicitors.¹⁷ One of the partners, a certain Cass, had abused his authority over the firm's clients' accounts by taking out cash and spending it freely for his own pleasure, in

¹⁰ Cour de cassation [Cass.] [supreme court for judicial matters] June 15, 1892, S. Jur. I, 281 (Fr.). For an English translation, see *CASES, MATERIALS & TEXTS ON UNJUSTIFIED ENRICHMENT* 39 (Jack Beatson & Eltjo Schrage eds., 2003).

¹¹ Cour de cassation [Cass.] June 15, 1892, S. Jur. I, 281, 283.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See BEATSON & SCHRAGE, *supra* note 10, at 38.

¹⁶ [1991] 2 A.C. 548 (H.L.).

¹⁷ *Id.* at 548.

particular on gambling.¹⁸ The defendant was a casino where Cass used to gamble.¹⁹ Lipkin Gorman claimed in unjust enrichment the net losses which Cass had incurred by gambling at the defendant's casino.²⁰ The defendant had negotiated and largely excluded its insolvency risk by using chips for which their clients had to pay in cash and in advance.²¹ In some exceptional cases, Karpnale had allowed Cass to pay by cheque.²² The only insolvency risk they had negotiated was that Cass would bounce those cheques. Lipkin Gorman, on the other hand, had decided to make Cass a partner and to give him access to the clients' accounts.²³ The risk that Cass would embezzle money without being able to pay it back was one which Lipkin Gorman had negotiated, not Karpnale. By allowing Lipkin Gorman's claim in unjust enrichment,²⁴ the House of Lords thus shifted the firm's insolvency risk onto Karpnale. The German *Bundesgerichtshof*, by contrast, refused to allow such a claim in a similar case.²⁵

III. JUMPING THE BANKRUPTCY QUEUE

Unjust enrichment law can also help creditors to jump the bankruptcy queue, with the effect that they shift their insolvency risk and potential bankruptcy losses onto the unsecured creditors by reducing their quota accordingly.²⁶ This can occur in at least two different situations.

The first situation resembles a variant of *Boudier*.²⁷ It typically involves a client, a main contractor who becomes bankrupt, and a sub-contractor with unpaid bills. The sub-contractor then sues the client, arguing that the client is unjustly enriched by the sub-contractor's work. Such a claim was allowed under the rules of *negotiorum gestio* in a similar, although more complicated, situation by the French *Cour de cassation* in the *arrêt Lemaire*, which

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 549.

²¹ *Id.* at 553-54 (explaining how the casino's use of chips mitigated the risk of insolvency).

²² *Id.* at 569.

²³ *Id.* at 548.

²⁴ *Id.* at 549.

²⁵ Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 25, 1967, Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 47, 393 (Ger.); see DANNEMANN, *supra* note 3, at 131.

²⁶ See generally Andrew Burrows, *Restitution of Mistaken Enrichments*, 92 B.U. L. REV. 767 (2012); Emily Sherwin, *Why Omegas Group Was Right: An Essay on the Legal Status of Equitable Rights*, 92 B.U. L. REV. 885 (2012); Robert Stevens, *When and Why Does Unjustified Enrichment Justify the Recognition of Proprietary Rights?*, 92 B.U. L. REV. 919 (2012).

²⁷ See Dawson, *supra* note 8, at 1447.

preceded *Boudier* by two years.²⁸ The German *Bundesgerichtshof*, by contrast, refused such a leapfrog claim in a leading case which prepared the shift to Germany's present performance-based system of unjustified enrichment.²⁹ We can take the more recent English case of *Actionstrength Ltd. v. International Glass Engineering* as an illustration that English law will also not allow the sub-contractor to sue the client directly in unjust enrichment.³⁰

Why would such a claim shift the sub-contractor's insolvency risk onto the other creditors of the bankrupt main contractor? Such a claim will typically only be feasible if the client still owes money to the main contractor, which arguably was the case in *Lemaire*.³¹ Otherwise, the client either was never enriched or no longer would be. On the other hand, if the client has not yet paid, and if the sub-contractor is allowed to claim directly from the client a quantum meruit for its work, the client cannot be expected to pay the same sum once again to the bankrupt main contractor. In this way, allowing a *Lemaire*-type claim reduces the assets of the bankrupt main contractor, meaning that there is less to distribute between the creditors.³²

A second situation involving jumping the bankruptcy queue with the help of unjust enrichment claims is illustrated by the English case of *Chase Manhattan Bank N.A. v. Israel-British Bank (London) Ltd.*³³ The claimant, a New York-based bank, had been instructed to pay some \$2 million to another bank in New York, to an account held by the defendant.³⁴ By a clerical mistake, the

²⁸ Cour de cassation [Cass.] [supreme court for judicial matters] July 16, 1890, D.P. I, 49. The defendant, Lemaire, leased land to a company which was to erect buildings on it. The company had an option to buy the land (including buildings) after three years; otherwise Lemaire was to keep both without compensation. Lemaire was to obtain credit from a bank for financing the works, which he did by accepting a mortgage on the land and buildings, but without mentioning the lease. The company then instructed the claimant, a builder, to commence work, which it did. When learning of the lease, the bank ceased payment of the credit. Consequently, the company went bankrupt. Slightly different accounts of the same case are given by Samuel J. Stoljar, *Negotiorum Gestio*, in 10 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 17-2, 17-40 (2007) (claiming that the bank ceased payments because the company had become insolvent), and by BEATSON & SCHRAGE, *supra* note 10, at 37 (omitting the bank and attributing to Lemaire the failure to continue with the advanced payments).

²⁹ BGH, Oct. 31, 1963, 40 BGHZ 272. For an English translation, see DANNEMANN, *supra* note 3, at 227.

³⁰ *Actionstrength v. Int'l Glass Eng'g*, [2003] UKHL 17, [2003] 2 A.C. 541 (appeal taken from Eng.).

³¹ See *supra* note 28.

³² RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 25 reporter's note cmt. f (2011); Dawson, *supra* note 8, at 1447. Due to some peculiarities in the complex situation of the original *Lemaire* case, *supra* note 28, it appears unlikely that unsecured creditors were disadvantaged.

³³ *Chase Manhattan Bank N.A. v. Israel-British Bank, (London) Ltd.*, [1981] Ch. 105.

³⁴ *Id.* at 107.

claimant transferred this sum twice.³⁵ One month later, the defendant applied for a compulsory winding-up.³⁶ The claimant sought a declaration that the defendant was holding the overpaid \$2 million as trustee for the claimant.³⁷ Justice Goulding held that “a person who pays money to another under a factual mistake retains an equitable property in it” as a matter of English law and that a similar proprietary right existed in New York law.³⁸ The effect of such a proprietary right was that the \$2 million, if still identifiable, would have to be paid in total to the claimant and would not form part of the assets to be distributed in the winding-up.³⁹

Formulated as widely as in *Chase Manhattan*, this would imply that any mistake-based unjust enrichment claim comes with its own proprietary security in the form of a constructive trust, thus bypassing claims based on, for example, contract, tort, or employment law, or unjust enrichment claims based on another unjust factor such as failure of consideration.⁴⁰

The paradigmatic English case on mistake is *Kelly v. Solari*.⁴¹ An insurance company had made a payment under a policy which, as the directors had failed to remember at the time of the payout, had already lapsed.⁴² Assume Ms. Solari becomes insolvent and, outside of bankruptcy proceedings, a judge declares that Ms. Solari holds the insurance payout on a constructive trust for the insurer. This flies in the face of the principle of equal treatment of creditors and amounts to heavy intermeddling of unjust enrichment rules with bankruptcy law. I would submit that in *Chase Manhattan*, Justice Goulding was not the right judge to sort the ranking between creditors of the Israel-British Bank. That task should have been left to the court which handled the bankruptcy case, which, unlike Justice Goulding, would have to take into account the perspective of the other creditors. Andrew Burrows, in his contribution to the present volume, argues that giving proprietary rights in failure of consideration cases “at a stroke, would destroy the established law on insolvency.”⁴³ I would argue that the same is true for proprietary rights being granted in all mistake cases.

In *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council*, Lords Goff and Browne-Wilkinson argued against such a generous use of constructive trusts, but they also thought it unnecessary to review *Chase*

³⁵ *Id.* at 114.

³⁶ *Id.* at 105.

³⁷ *Id.* at 108.

³⁸ *Id.* at 119-20.

³⁹ *Id.* at 106.

⁴⁰ *Chase Manhattan* preceded the abolition of the old mistake-of-law rule in *Kleinwort Benson Ltd. v. Lincoln City Council*, [1999] 2 A.C. 349 (H.L.), hence the limitation to “a factual mistake.”

⁴¹ (1841) 152 All E.R. 24 at 320, 321.

⁴² *Id.* at 321.

⁴³ Burrows, *supra* note 26, at 786.

Manhattan, as the specific circumstances of this case might have justified a constructive trust under a narrower understanding.⁴⁴

The historic pedigree of this corner of unjust enrichment law appears to dictate a solution in another area of law, namely bankruptcy law, which might take quite a different view on which, if any, priority unjust enrichment claims should have. So this can be seen as another instance of unjust enrichment law intermeddling with other areas of law.

Others might see *Chase Manhattan* also as an instance of an English judge intermeddling with New York law. In *Westdeutsche Landesbank*, Lord Browne-Wilkinson criticized *Chase Manhattan* on this ground and explained in some detail that an institutional constructive trust under English law, where proprietary effects are automatic, should not be confused with a remedial constructive trust under New York law, where it is up to the judges to define the precise effects towards third parties.⁴⁵

IV. INTERMEDDLING WITH FOREIGN LAWS

Unjust enrichment claims based on constructive trusts can become guilty of even greater intermeddling with foreign laws if these claims are not based on the common law and have nothing remotely similar to a constructive trust. A case in point is *El Ajou v. Dollar Land Holdings*.⁴⁶ The claimant was a victim in an elaborate fraudulent share selling scheme operated by three Canadians, who were using two Dutch companies.⁴⁷ The proceeds of this fraud were channeled from Amsterdam to Geneva, Gibraltar, Panama, and then back to Geneva.⁴⁸ From there, some of the funds were transferred for an investment in a London property development project under the auspices of the defendant, who was not connected with the fraud.⁴⁹ The Court of Appeal held that these funds were held by the defendant in a constructive trust.⁵⁰

One requirement for this trust was that the claimant could trace his property all the way to the London investment in a continuous line of equitable proprietary rights.⁵¹ This tracing began in the Netherlands, a country which is generally known for not recognizing trusts, let alone constructive ones, and passed on two occasions through Switzerland, for which the same is true.⁵²

⁴⁴ *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council*, [1996] A.C. 669 (H.L.) 674, 690 (Lord Goff) (Eng.); *id.* at 704 (Lord Browne-Wilkinson).

⁴⁵ *Id.* at 714-15.

⁴⁶ *El Ajou v. Dollar Land Holdings*, [1994] 2 All E.R. 685 (C.A.) (Eng.).

⁴⁷ *Id.* at 686.

⁴⁸ *Id.* at 685.

⁴⁹ *Id.* at 685-86.

⁵⁰ *Id.* at 685.

⁵¹ *Id.*

⁵² See Adair Dyer, *International Adaptation of Trusts: The Influence of the Hague Convention*, 32 VAND. J. TRANSNAT'L L. 989, 992, 1003 (1999) (writing that a leading Switzerland case on trust treatment was issued by a non-trust country).

Panama, while allowing for express trusts, is on the doubtful side as far as constructive trusts are concerned.⁵³ And unlike in *Chase Manhattan* and in the discussion of this case in *Westdeutsche Landesbank*, where great attention was given to whether a constructive trust existed in New York as the place where tracing began, we do not find any similar discussion in *El Ajou*. Admittedly, the question of which law should apply at which time to which aspect of *El Ajou* is a complex one, and answers are far from straightforward.⁵⁴ Nevertheless, I suggest that allowing a process of tracing to start in the Netherlands amounts to grave intermeddling with Dutch law as the *lex rei sitae*.⁵⁵

V. RESCUING FAILED TAX EVADERS

We will now move back to the relative safety of a purely common-law setting. The Channel Island of Jersey is known as a tax haven and is presumably a good place for interesting judgments relating to tax law. A recent case from Jersey illustrates how unjust enrichment law can come to the rescue if tax evasion plans have failed.⁵⁶ This case relates to a trust which the claimant (or “representor,” in Jersey legal parlance) had created for the benefit of her children and grandchildren.⁵⁷ The assets of this trust consisted of shares in a family business.⁵⁸ The claimant had been advised by a well-known London-based firm of solicitors that a transfer of the shares to such a Jersey based trust would be exempt from U.K. inheritance tax.⁵⁹ That advice was wrong. The claimant received a tax bill of almost £2 million.⁶⁰ Moreover, the beneficiaries were domiciled in the United States, where, as we are told in the judgment, they might be subjected to an income tax of up to 100% of the value of distributions made under the trust.⁶¹ So, this advice was disastrously wrong. This looks like a straightforward case of professional liability. For reasons not

⁵³ Panama caters to express trusts under the Panamanian trust law of 1984 which, however, makes no mention of constructive trusts. Ley No. 1, 5 Jan. 1984, art. 35, G.O., 10 Jan. 1984 (Pan.).

⁵⁴ See J.J. FAWCETT & J.M. CARRUTHERS, *CHESHIRE, NORTH & FAWCETT, PRIVATE INTERNATIONAL LAW* 823-24 (Sir Peter North ed., 14th ed. 2008).

⁵⁵ Tracing twice through Switzerland might be less problematic in view of exceptions to the *lex rei sitae* rule for *res in transitu*.

⁵⁶ In the Matter of the Representation of R and in the Matter of the S Trust Established on 3 April 1997 and in the Matter of Article 51 of the Trusts (Jersey) Law 1984 (as amended), [2011] JRC 117 (Jer.), available at http://www.jerseylaw.je/judgments/unreportedjudgments/documents/display.aspx?url=2011/11-0621_In_the_matter_of_the_Representation_of_R_117.htm.

⁵⁷ *Id.* [2].

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* [3].

⁶¹ *Id.* [4].

mentioned in the judgment, however, the claimant was unable to obtain relief from the solicitors.

The claimant then sought to rescind the transfer of the shares to the trust on the ground of her having been mistaken about tax law, and she claimed back the shares.⁶² Following English law, Jersey law allows recovery of trust funds if the transfer has been caused by a mistake, provided this mistake is “of so serious a character as to render it unjust on the part of the [recipient] donee to retain the property.”⁶³ That requirement places this case at the heart of unjust enrichment law.

It was not difficult to find a causative mistake, and the mistake was doubtlessly serious. Mention was also made of the fact that the beneficiaries did not object to the petition.⁶⁴ The decision, however, loses no word about what exactly would make it unjust for the *donees* to retain the property.⁶⁵ Some might sympathize with the view that it was unjust for U.K. Inland Revenue to keep £2 million in tax or for the U.S. Internal Revenue Service and its state counterparts to claim large proportions. But the question of whether a tax is just is usually for the legislator to decide, not for the judge. And although this looks like an extreme case, it should nevertheless be questioned whether a mistake about tax burdens as secondary consequences of a transaction should be a good reason for rescinding or revoking a gift, a trust, a transfer of property, or even a contract. This could indeed be officious intermeddling of unjust enrichment law with tax law, which can be so notoriously complicated that any halfway complex transaction is likely to be affected by at least one mistake about tax law. The decision mentions that it is at odds with the recent decision of the English Court of Appeal in *Pitt v. Holt*,⁶⁶ against which leave to appeal has just been granted by the Supreme Court.⁶⁷

VI. UPSETTING FAMILY LAW

Unjust enrichment claims have been used in a family law context for sorting out property issues after a divorce or after the separation of an unmarried couple. German courts have used the *condictio causa data causa non secuta* and occasionally the *condictio ob causam finitam* when one partner invested money or services in property owned by the other partner.⁶⁸ The results have

⁶² *Id.* [1].

⁶³ *Ogilvie v. Littleboy*, [1897], 13 T.L.R. 399 at 400 (C.A.) (Eng.).

⁶⁴ *In the Matter of Representation of R*, [2011] JRC 117, [49].

⁶⁵ *Id.* [40].

⁶⁶ *Pitt v. Holt*, [2011] EWCA Civ. 197 (Eng.).

⁶⁷ Leave to appeal was granted on August 1, 2011. See *Applications for Permission to Appeal Results*, THE SUPREME COURT (U.K.), available at <http://www.supremecourt.gov.uk/docs/PTA-1108.pdf>.

⁶⁸ See, e.g., Bundesgerichtshof [BGH] [Federal Court of Justice] Sept. 7, 2008, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3277, 2008 (Ger.); Bundesgerichtshof [BGH] [Federal

not always been convincing.⁶⁹ The Canadian approach of unjust enrichment claims' being based on a lack of "juristic reason" was developed in a case of division of non-marital property, *Pettkus v. Becker*,⁷⁰ and again, not all of the results of this approach are beyond criticism.⁷¹ In many cases, unjust enrichment is used where there appears to be no other area of law that can cater to the specific situation.

Unjust enrichment, however, is also used to outfox existing legislation, thus intermeddling with statutory family law. A case in point is *Rawluk v. Rawluk*.⁷² Under the Ontario Family Law Act 1986, family assets were to be valued and divided equally on divorce.⁷³ The date on which the valuation was to be made was defined in section 4 as the earliest date within a list of five dates.⁷⁴ In the case of *Rawluk v. Rawluk*, this was the date of separation.⁷⁵ During the divorce proceedings, however, the value of real property held in the name of one of the spouses increased dramatically.⁷⁶ The Supreme Court of Canada approved, in a four-to-three decision, the use of a constructive trust for allowing the other spouse to participate in this increase in spite of the fact that it occurred after the valuation date.⁷⁷ The majority held that the legislative intention, namely to value no later than when the marriage has effectively ceased to function, was not expressed with the "irresistible clearness" which would have been required for excluding its circumvention by way of a remedial constructive trust.⁷⁸ In line with the reasoning of the dissenting minority,⁷⁹ I would see this as a case of unjust enrichment law intermeddling rather officiously with the express wording and intention of a statute.⁸⁰

Court of Justice] May 10, 1967, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 245, 1968 (Ger.) (*condictio ob causam finitam*); DANNEMANN, *supra* note 3, at 290-96 (reproducing [BGH] Sept. 7, 2008 in English).

⁶⁹ DANNEMANN, *supra* note 3, at 48; LORENZ, *supra* note 4, § 812 note 100.

⁷⁰ See *Pettkus v. Becker*, [1980] 2 S.C.R. 824, 824 (detailing the circumstances of an unmarried couple living as husband and wife for nineteen years, who both contributed labour and earnings towards developing a beekeeping business).

⁷¹ See Lionel Smith, *Demystifying Juristic Reasons*, 45 CAN. BUS. L.J. 281, 284-85 (2007) (criticizing *Pettkus* using the juristic reasoning framework).

⁷² [1990] 103 N.R. 321 (S.C.C.). I am grateful to Lionel Smith for having pointed me to this case and its discussion.

⁷³ *Id.* at 326.

⁷⁴ Family Law Act, R.S.O. 1990, c. F.3 § 4 (Can.).

⁷⁵ *Rawluk*, 103 N.R. at 350. The date of separation is defined as "[t]he date the spouses separate and there is no reasonable prospect that they will resume cohabitation." Family Law Act, R.S.O. 1990, c. F.3 § 4.

⁷⁶ *Rawluk*, 103 N.R. at 322.

⁷⁷ *Id.*

⁷⁸ *Id.* at 339 (per Dickson, C.J., and Wilson, L'Heureux-Dubé & Cory, JJ.).

⁷⁹ See *id.* at 366 (La Forest, Sopinka & McLachlin, JJ., dissenting).

⁸⁰ Some attempts were made to reform the statute, but apparently without result. See

VII. RESTATEMENT (THIRD) AND OFFICIOUS INTERMEDDLING

The *Restatement (Third) of Restitution and Unjust Enrichment* will be warmly welcomed by comparative lawyers for making the present U.S. law (and quite generally the common law) of restitution and unjust enrichment accessible in a systematic fashion which facilitates comparative research. But what is the *Restatement (Third)*'s own record on officious intermeddling?

A. *The Officious Intermeddler in Restatement (Third)*

The *Restatement (Third) of Restitution and Unjust Enrichment* pays great attention to situations in which officious intermeddling could be an issue. It devotes the entirety of chapter 3 to the issue of "Unrequested Intervention," totaling eleven sections.⁸¹ So while the *Restatement (Third)* cannot be accused of treating the issue lightly, it is certainly less concerned about officious intermeddling than classical English law. For example, while comment b(3) to section 22 confirms the traditional view of the common law that a person who pays "another's debt without being requested to do so, having no interest in the matter other than a desire to become the other's creditor," will not be granted restitution, it goes on to note that "such cases are mostly hypothetical,"⁸² which should also render hypothetical the damage to government, peace, family, etc., which worried Sir Roger L'Estrange.⁸³ Section 22, subsection (1), provides that restitution will be granted only "if the circumstances justify the decision to intervene without request," but such justification exists under subsection (2)(a) "if there is no prejudice to the obligor in substituting a liability in restitution for the original obligation," which should indeed cover most cases.⁸⁴

Section 20 on "Protection of Another's Life or Health" covers the Good Samaritan and allows, in particular, medical professionals to charge their usual fee if they come to the rescue of a person who is unable to enter into a contract.⁸⁵ Section 21 provides restitutionary relief in cases of "Protection of Another's Property," subject to a justification test.⁸⁶

Five sections (26 through 30) are devoted to the issue of "Self-Interested Intervention." The most relevant in the present context appears to be section 30. This is a residual rule which allows an unrequested intervener to recover an unjust enrichment if (a) the intervention was justified (which appears

John D. McCamus, *Family Law Reform in Ontario*, in SPECIAL LECTURES OF THE LAW SOCIETY OF UPPER CANADA 451, 477-78 (1993).

⁸¹ See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 20-30 (2011).

⁸² *Id.* § 22 cmt. b(3).

⁸³ See *supra* note 1 and accompanying text.

⁸⁴ *Id.* § 22(1), (2)(a).

⁸⁵ *Id.* § 20 cmt. b.

⁸⁶ *Id.* § 21.

sufficient to exclude officious behavior) and (b) such a claim will not force the defendant to trade money for services or non-money assets.⁸⁷

It can therefore be said that the *Restatement (Third)*'s attitude towards officious intermeddlers is more relaxed than that of either Sir Roger L'Estrange or the classical English law. But what about the *Restatement (Third)*'s own record of intermeddling with other areas of law?

B. *Restatement (Third) and Contract Law*

We can safely say that the *Restatement (Third)* will not have the effect of forcing contracts onto unwilling people. Section 2, subsection (4), states this explicitly.⁸⁸ Section 25, subsection (2)(a), elaborates on this principle in a way which leaves some room to maneuver, but probably not more than other systems of unjust enrichment rules.⁸⁹

C. *Restatement (Third) and Insolvency Law*

Do the rules in the *Restatement (Third)* offer potential for shifting insolvency risks? Section 25 has been written precisely with *Lemaire*- and *Boudier*-type situations in mind.⁹⁰ We are reassuringly told that a general *Lemaire*-type liability of the owner for the unpaid bills of the subcontractor is excluded if the owner has either paid or is still liable towards the insolvent main contractor.⁹¹ Illustration 2 then shows us that this still leaves some application for section 25 if, for example, extra work was commissioned on-site which was not covered by the owner's agreement with the main contractor.⁹² In my view, this does not amount to shifting insolvency risks. Moreover, illustration 10 varies the facts in *Lemaire* in such a way that the situation allows for recovery without exposing the owner to additional insolvency risks.⁹³

As concerns *Boudier*-type cases, we find a variation of the original case in illustration 8.⁹⁴ The reporter's note confirms that it is not coincidental that this case also concerns fertilizer ordered by a tenant who then leaves the property.⁹⁵ This illustration, however, varies the case: the owner re-lets the property, sells the crop, and makes an overall profit. Allowing *Boudier* to recover in this situation does not amount to shifting insolvency risks, as the owner's financial

⁸⁷ *Id.* § 30.

⁸⁸ *Id.* § 2(4) ("Liability in restitution may not subject an innocent to a forced exchange.").

⁸⁹ *Id.* § 25(2)(a).

⁹⁰ *See id.* § 25 cmt. a.

⁹¹ *Id.* § 25 cmt. b, illus. 1.

⁹² *Id.* § 25, illus. 2.

⁹³ *Id.* § 25 reporter's note cmt. c (informing us that this illustration is based on *Frank M. Hall & Co. v. Sw. Props. Venture*, 747 P.2d 688 (Colo. Ct. App. 1987)).

⁹⁴ *Id.* § 25, illus. 8.

⁹⁵ *Id.* § 25 reporter's note cmt. c.

exposure towards the insolvent tenant is not increased. We can thus conclude that the *Restatement (Third)* painstakingly tries to avoid insolvency risk shifting in *Lemaire* and *Boudier* types of cases.

On the other hand, the *Restatement (Third)* leaves some room for bankruptcy queue jumping with the help of a constructive trust. Illustration 1 to section 55 resembles the facts in *Chase Manhattan*. We are told that in the case of the recipient's insolvency, "the availability of constructive trust will become the central issue in determining the relief" to which the claimant is entitled.⁹⁶ Unfortunately, we are not informed about the outcome – perhaps for good reason, because many other illustrations show how many variations such a simple case can take. The comments to section 55, as well as the priority rules in sections 60, 66, and 67, give the impression that constructive trust and other proprietary rights are being used for a careful bankruptcy queue realignment which takes bankruptcy law principles into account, rather than for the bold bankruptcy queue jumping which the wide rule in *Chase Manhattan* would have entailed.⁹⁷

D. Restatement (Third) and Tax Law

As the *Restatement (Third) of Restitution and Unjust Enrichment* does not deal with conflict of law issues, we can move on to tax law.

In the Jersey trust case,⁹⁸ would the *Restatement (Third)* rules allow the settlor to rescind the transfer of shares to the trust on the ground that she was mistaken about the inheritance tax due on both the transfer and the distributions?

The *Restatement (Third)*'s provisions on "Mistake in Gift Inter Vivos" in section 11 were not written for trusts, but they "are potentially applicable to mistakes affecting other modes of donative transfer."⁹⁹ In this case, subsection (2) would apply, requiring that the mistake must have induced the gift.¹⁰⁰ In our present context, the reporter's note cites to three U.S. judgments.¹⁰¹ They

⁹⁶ *Id.* § 55 illus. 1.

⁹⁷ *Id.* §§ 55, 60, 66, 67.

⁹⁸ In the Matter of the Representation of R and in the Matter of the S Trust Established on 3 April 1997 and in the Matter of Article 51 of the Trusts (Jersey) Law 1984 (as amended), [2011] JRC 117 (Jer.) available at http://www.jerseylaw.je/judgments/unreportedjudgments/documents/display.aspx?url=2011/11-06-21_In_the_matter_of_the_Representation_of_R_117.htm.

⁹⁹ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 11 cmt. a.

¹⁰⁰ *Id.* § 11(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.")

¹⁰¹ *Id.* § 11 reporter's note cmt. c. Namely, the reporter's note cites to *duPont v. Southern National Bank of Houston*, 575 F. Supp. 849 (S.D. Tex. 1983) (holding, however, that the primary purpose of the trust was to prevent the claimant's then-wife from obtaining the property in the case of a divorce), *Lowry v. Kavanagh*, 34 N.W.2d 60 (1948), and *Walton v. Bank of California*, 32 Cal. Rptr. 856 (Cal. Ct. App. 1963).

concern trusts set up for the execution of a gift inter vivos and indicate that such a rescission will not be easily allowed under U.S. law. Rescission will usually be refused on the ground that the donative intent which found its expression in the creation of the trust was not induced by the mistaken belief in a particularly low tax. However, in the first of the three cases on this list, *duPont v. Southern National Bank of Houston*,¹⁰² the court held that the claimant's primary motivation for the trust was to prevent his then-wife from obtaining the property in the case of a divorce.¹⁰³ The "not induced by mistake" argument would not work if the claimant, without the mistake, had simply not created the trust but instead transferred the shares in the family enterprise on her death and under a will, which might well have occurred in the Jersey trust case.

Alternatively, this could be an invalidating mistake under section 5.¹⁰⁴ It is certainly a causative mistake. It is irrelevant that this is a mistake of law, rather than of fact.¹⁰⁵ Could this be a mistake that, according to section 5, subsection (3), the claimant has to bear?¹⁰⁶ It would be difficult to argue in the context of transfer to a trust that this risk was allocated to the claimant by agreement between the parties. Moreover, as the claimant had sought and obtained legal advice that this was the most tax-efficient solution, one could hardly say that "the claimant has consciously assumed the risk by deciding to act in the face of a recognized uncertainty" under subsection (3)(b). The most realistic argument against allowing rescission and restitution arises from subsection (3)(c), according to which "allocation to the claimant of the risk in question accords with the common understanding of the transaction concerned."¹⁰⁷ The comments use the phrase "[r]isk assigned as a matter of law" as a shorthand for the reason for denying an invalidating mistake.¹⁰⁸ One could argue that tax law assigns the risks of being taxed. Illustration 9 demonstrates that the *Restatement (Third)* uses this rule to avoid intermeddling of unjust enrichment with contract law rules: a person who sells a painting for \$60 not knowing that it is a piece of fine art worth \$1 million cannot claim back the painting in restitution because contract law would not allow such a rescission.¹⁰⁹ Would the same reasoning extend to tax law? The answer is not obvious. Unlike contract law, tax law has no rules on rescission for mistake. On the other hand, allowing a general right to rescind transactions on the ground that they saved less tax than expected would undermine not only taxation but also legal certainty for a multitude of commercial transactions,

¹⁰² 575 F. Supp. 849 (S.D. Tex. 1983).

¹⁰³ *Id.* at 854.

¹⁰⁴ See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 5(2).

¹⁰⁵ *Id.*; see also *id.* § 5 cmt. g; *id.* § 5 reporter's note cmt. g.

¹⁰⁶ *Id.* § 5(3).

¹⁰⁷ *Id.* § 5(3)(c).

¹⁰⁸ *Id.* § 5 cmt. b(3).

¹⁰⁹ *Id.* § 5 illus. 9.

many of which are so complex that not even the most diligent experts can safely predict all tax law consequences. Could a line be drawn between irrelevant mistakes about taxation and fundamental mistakes, as in the Jersey trust case? The wording of section 5 does not lend itself easily to such a distinction.

E. Restatement (Third) and Family Law

The *Restatement (Third)* also makes use of constructive trusts in a family related context. Section 28 covers "Unmarried Cohabitants" and, in particular, uncompensated contributions which one partner has made to assets owned by the other.¹¹⁰ This includes situations of "non-marital property" which, as we have seen, German and Canadian law have also attempted to resolve, with mixed success, by using unjust enrichment claims. What makes section 28 particularly interesting in the present context is that it contains a provision in subsection (2) which can and should be used to avoid any intermeddling with family law. This provision states that subsection (1) "may be displaced, modified, or supplemented by local domestic relations law."¹¹¹ The comment notes briefly that where a jurisdiction has a law of domestic relations which defines legal duties on the dissolution of a partnership, as well as the parties who owe those duties, then these statutory rules simply replace the common-law rule in subsection (1).¹¹² This unassuming approach towards the legislator compares favourably with the diehard attitude of the majority in *Rawluk v. Rawluk*.¹¹³ It also explains why the *Restatement (Third)* makes no attempt to improve on existing marital property law.

CONCLUSIONS

The above survey reveals that the worst cases of unjust enrichment law intermeddling with other areas of law are caused by a combination of two factors: (1) a wide general clause in which (2) notions of equity or justice play an important role. This is true for *Boudier*-type liability, which with apparent ease can reverse any enrichment of the defendant somehow connected to an impoverishment of the claimant, provided that it seems somehow right to the judge that the enrichment should be redirected to the claimant.

Dawson warned that a *Boudier*-type generalization "has the peculiar faculty of inducing quite sober citizens to jump right off the dock."¹¹⁴ He may, however, have underestimated the damage which a strong appeal to equitable principles or notions of justice can cause, in his belief that "these ideals themselves suggest their own relativity and the complexity of the factors that

¹¹⁰ *Id.* § 28.

¹¹¹ *Id.* § 28(2).

¹¹² *Id.* § 28 cmt. a.

¹¹³ [1990] 1 S.C.R. 70 (Can.).

¹¹⁴ JOHN P. DAWSON, UNJUST ENRICHMENT: A COMPARATIVE ANALYSIS 8 (1951).

must enter into judgment.”¹¹⁵ Principles of other areas of law should indeed figure prominently among those factors, but as we have seen, they are sometimes pushed aside when a court imposes a constructive trust.

Next to a very wide general clause of unjust enrichment, the constructive trust is the other main sinner when it comes to intermeddling. Given the history of trust law, this should not be too surprising. Trust law started its life as judicial intermeddling with the Statute of Uses 1535,¹¹⁶ which sought to exclude any separation of ownership and use by treating any transfer of use as a transfer of ownership.¹¹⁷

Like French law under *Boudier*, the constructive trust also employs a very broad general clause, certainly when using the famous definition given by Justice Cardozo: “When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest equity converts him into a trustee.”¹¹⁸ Unsurprisingly, such a general construct can be used, in a slight variation of Lord Ellesmere’s dictum about equity, to soften and mollify the extremity of parliamentary legislation.¹¹⁹ Others may be forgiven for calling this officious intermeddling.

The more comforting message we can take from the above survey is that neither Continental general clauses nor constructive trusts will invariably lead to officious intermeddling. We have seen that the *Restatement (Third)*, in a careful development on the basis of existing case law, has avoided most pitfalls and hardly intermeddles with other areas of law because it systematically takes them into account and does not generally place unjust enrichment principles above the principles of other areas of law.

If I say the same about German law and its general clause of liability in unjustified enrichment, I may of course be biased by the fact that this is the legal system in which I was first trained. It is nevertheless not coincidental that the controlling element in the German general clause has nothing to do with equity and all to do with whether the defendant’s enrichment is supported by a legal cause – a cause which is not defined by unjust enrichment law standards but instead provided by other areas of law, such as contract law, property law, family law, or tax law. This largely avoids conflicts between unjust enrichment principles and principles of other areas of law.¹²⁰ When

¹¹⁵ *Id.*

¹¹⁶ 27 Hen. 8, c. 10 (Eng.).

¹¹⁷ JAMES E. PENNER, *THE LAW OF TRUSTS* § 1.24 (6th ed. 2008).

¹¹⁸ *Beatty v. Guggenheim Exploration Co.*, 122 N.E. 378, 380 (N.Y. 1919). The *RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT* § 55 cmt. a. (2011) refers to this definition.

¹¹⁹ *Earl of Oxford’s Case*, [1615] 21 Eng. Rep. 485 (Ch.) 486 (“The Office of the Chancellor is to correct Men’s Consciences for Frauds, Breach of Trusts, Wrongs and Oppressions, of what Nature soever they be, and to soften and mollify the Extremity of the Law. . .”).

¹²⁰ *See* DANNEMANN, *supra* note 3, at 35-44. Section 812, paragraph 1, sentence 1 of the

combined with the present performance-based approach, this implies that both Boudier's claim and the claim in *Lemaire* must fail because in neither case was the claimant performing toward the defendant, and the defendant's contract with the farmer or the main contractor provided a legal cause for the defendant's enrichment.¹²¹ And being limited to claims in personam, German law of unjust enrichment avoids all pitfalls of proprietary remedies. Nevertheless, some intermeddling issues remain in Germany, where courts occasionally jump over valid contracts by resorting to the *condictio causa data causa non secuta*.¹²²

Additionally, French and English law have done much to reduce the potential scope of intermeddling. French law eventually adopted various limiting factors in order to get *Boudier*-type liability under control, including, in particular, the absence of a legal cause.¹²³ *Westdeutsche Landesbank* reduced the potential impact of *Chase Manhattan*.¹²⁴ *Lipkin Gorman* would have to be decided differently today, because gambling contracts have become enforceable under the Gambling Act 2005.¹²⁵ And the U.K. Supreme Court is still to give the final word as concerns intermeddling with tax law.¹²⁶

So is unjust enrichment law an officious intermeddler? Undoubtedly, it has a certain propensity for interfering with other areas of law and for imposing its standards on their principles. This propensity is linked to its chief task, expressed in the metaphor of having to mop up what other areas of law have spilled. This brings unjust enrichment necessarily into close contact with these other areas of law, placing many metaphorical buckets within its reach, which unjust enrichment rules can knock over. The *Restatement (Third) of Restitution and Unjust Enrichment* shows one way in which such officious intermeddling with other areas of law can be reduced and, if its rules are applied with similar care, perhaps even avoided.

German Civil Code reads as follows (in my translation): "A person who obtains something by performance by another person or in another way at the expense of this person without legal ground is bound to give it up to him." *Id.*

¹²¹ See DANNEMANN, *supra* note 3, at 21-25 (also observing some disadvantages of this approach).

¹²² See *id.* at 45-49.

¹²³ See BEATSON & SCHRAGE, *supra* note 10, at 332-43.

¹²⁴ See *supra* notes 44-45 and accompanying text.

¹²⁵ Gambling Act, 2005, c. 19, § 335(1) (Eng.); *Lipkin Gorman v. Karpnale Ltd.*, [1991] 2 A.C. 548 (H.L.) 549 (appeal taken from Eng.).

¹²⁶ This concerns the appeal against the judgment in *Pitt v. Holt*, [2011] EWCA (Civ) 197. See *supra* note 67.