Proprietary claims and unjust enrichment

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This thesis explains when an unjust enrichment gives rise to proprietary restitution. It argues that not all unjust enrichments lead to a proprietary response, and that this can be explained on the basis of autonomy. The original contribution of this thesis is it demonstrates that when a defendant is unjustly enriched by a claimant's mistaken payment, and from the outset the claimant's purpose for making the transfer is impossible to carry out, only then is proprietary restitution available. This is because when a claimant's purpose for transferring the enrichment can never be fulfilled, there is no reason to bind the claimant to the transfer, and at no point does the defendant have a reason to retain the enrichment. As there is no justification for upholding the transfer, the goal of autonomy protection justifies the imposition of a resulting trust. It is shown that once it is accepted that the foundations of proprietary restitution are based on the notion of impossibility, one can adequately reconcile the case law.

Keywords: Impossibility, Resulting trusts, Unjust enrichment.

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Table of Abbreviations

Law reports

AC	Appeal Cases
ACSR	Australian Corporations and Securities Reports
All ER	All England Reports
All ER Comm	All England Reports (Commercial)
App Cas	Appeal Cases
B & S	Best and Smith's Queen's Bench Reports
BCC	British Company Law Cases
Beav	Beavan's Rolls Court Reports
CCR	Crown Cases Reserved
Ch	Chancery
Ch App	Chancery Appeals
Ch D	Chancery Division
CLR	Commonwealth Law Reports
CPD	Common Pleas Division
East	East's King's Bench Reports
ER	English Reports
K & J	Kay and Johnson's Chancery Reports
KB	King's Bench
Lloyd's Rep	Lloyd's Law Reports
Lloyd's Rep Bank	Lloyd's Law Reports Banking
M & W	Meeson and Welsby's Exchequer Reports
OR	Ontario Reports
P & CR	Property, Planning and Compensation Reports
Pens LR	Pensions Law Reports
QB	Queen's Bench
QBD	Queen's Bench Division
STC	Simons Tax Cases
Swans	Swanston's Chancery Reports
Ves Jr	Vesey Junior's Chancery Reports
WLR	Weekly Law Reports
WN	Weekly Notes
WTLR	Wills and Trusts Law Reports

Journals

Alta Law Rev	Alberta Law Review
Can J L & Jurisprudence	Canadian Journal of Law and Jurisprudence
CLJ	Cambridge Law Journal
CLP	Current Legal Problems
Colum LR	Columbia Law Review
Conv	Conveyancer and Property Lawyer
CRI	Corporate Rescue and Insolvency Journal
Edin Law Rev	Edinburgh Law Review
Harv LR	Harvard Law Review
Insolv Int	Insolvency International
Insolv Lawyer	Insolvency Lawyer
JBL	Journal of Business Law
KCLJ	King's College Law Journal
LQR	Law Quarterly Review

LS	Legal Studies
NZL Rev	New Zealand Law Review
OJLS	Oxford Journal of Legal Studies
PCB	Private Client Business
RLR	Restitution Law Review
Sing JLS	Singapore Journal of Legal Studies
Tex LR	Texas Law Review
TLI	Trust Law International
UCL Jurisprudence Rev	University College London Jurisprudence Review
UQLJ	University of Queensland Law Journal
UWALR	University of Western Australia Law Review

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Chapter 1 Introduction

'Ever since the law of restitution began, about the middle of this century, to be studied in depth, the role of equitable proprietary claims in the law of restitution has been found to be a matter of great difficulty.'[1]

- Lord Goff

1 Background

Unjust enrichment is a cause of action.[2] It is satisfied when the defendant receives an enrichment at the expense of the claimant, and the receipt of the enrichment is unjust for the reason that one of the unjust factors is present.[3] The event of unjust enrichment gives rise to a restitutionary response. 'The law of restitution is the law of gains-based recovery',[4] and thus the effect of a restitutionary remedy is that it deprives the defendant of a gain which the law believes that the defendant ought not to be able to retain.

Historically, in terms of classification, the concept of unjust enrichment has been placed in the common law of obligations. Consequently, it was said to only trigger common law remedies. Although the common law recognises proprietary rights, it has no proprietary remedies.[5] It followed that when the claimant had a common law right to restitution for unjust enrichment, he only had a right *in personam* against the person who was enriched at his expense.

2 The classic example

The classic example of an unjust enrichment is the receipt of a mistaken payment. For instance, A transfers £1,000 to B in the belief that he is discharging a debt that he owes. However, if the debt does not exist then A's intentions to pay B were vitiated by mistake, since A believed that the money was owed when it was not. B's enrichment is at A's expense because immediately before B's receipt, the money was the absolute property of A. As B has been unjustly enriched by the fund, A has a right to restitution for the value of £1,000.

In order to recover money paid to a defendant by mistake, a claimant usually pursues a *personal* claim for restitution. But imagine that, if in the above example, the day after the receipt of the £1,000 B becomes insolvent and does not have enough assets to satisfy the debts of all his creditors. A's personal right to restitution against B now does not amount to much. This is because A is an unsecured

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[1] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL) 685 (Lord Goff).
[2] *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL).
[3] PJ Millett, 'Restitution and Constructive Trusts' (1998) 114 LQR 399, 408.
[4] P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 3.
[5] P Birks, 'Personal Property: Proprietary Rights and Remedies' (2000) 11 KCLJ 1, 4.

creditor, and the statutory insolvency regime does not allow A to be paid until B's secured creditors are paid off. But once B's secured creditors have been paid, usually there will not be many assets left in the insolvent estate so as to enable A to recover the entirety of the sum that he mistakenly paid to B.

Neither is a proprietary claim to recover common law title of any help to A. As Swadling has explained, legal title passes even when the transferor's intentions are vitiated by a 'fundamental mistake'.[6] Therefore, in all mistaken payment cases, at common law the claimant has no property rights to vindicate and is left with a right *in personam* against the defendant.[7] However, if equity intervenes to reverse the unjust enrichment, A's position is different. Equity does not deny that legal title passes but recognises that equitable title remains with the transferor. If equity recognises A as having an equitable interest, in the form of a trust of the £1,000, A can trace his money and recover it in priority to other creditors in B's insolvency. Therefore, whether the nature of the restitutionary response is personal or proprietary is significant, as it can determine whether a claimant is able to recover the entirety of the defendant's unjust enrichment, or only a fraction of it. This then raises the question: how should restitution be effected to strip the defendant of a gain that he has unjustly made at the claimant's expense?

3 Causative events and responses

According to Birks, '[a]ll rights which can be realized in court', personal and proprietary, 'arise from some event which happens in the world'.[8] There are four categories of causative events: wrongs, unjust enrichment, miscellaneous others and consent. Since unjust enrichment is an event, and property rights are legal responses, an unjust enrichment can in theory therefore give rise to proprietary rights.[9] Importantly, this theoretical position is supported by practice. The case law suggests that when a defendant is unjustly enriched, the obligation to make restitution to the claimant is, on occasions, supplemented with an equitable property right. However, it is not clear when restitutionary rights *in rem* arise in response to an unjust enrichment, and why they do so.

4 Research question

[6] W Swadling, 'Unjust Delivery' in A Burrows and A Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006); Cf D Fox, *Property Rights in Money* (OUP 2008) paras. 3.99-3.102, 4.116-4.146 and G Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2015) 574-576.
[7] See P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 64; P Birks, 'Property and Unjust Enrichment: Categorical Truths' [1997] NZL Rev 623, 645-646; P Birks, 'Personal Property: Proprietary Rights and Remedies' (2000) 11 KCLJ 1, 4-10, 12-14.
[8] P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 21.
[9] *Ibid* 28-38.

This thesis seeks to answer the question of when and why an unjust enrichment gives rise to proprietary restitution in the form of a resulting trust. It begins by focusing on proprietary restitution for mistaken payments, but then goes on to discuss the availability of a proprietary response for all unjust enrichments involving money. Whether a proprietary response is available in response to unjust enrichment is significant for a number of reasons. One of the main advantages of proprietary restitution is that it gives a claimant priority at insolvency against other creditors, but there are a number of other important advantages as well. For example, the claimant can make use of equity's more advantageous tracing rules, recover his property, assert personal claims against third party recipients who have received the trust property with the knowledge that it originated from a breach of trust or dishonestly assisted the trustee to breach his trust obligations to the beneficiary, and also take the benefit of increases in value of property that represents the traceable proceeds of his property. Since the availability of a proprietary response has practical implications, the content of this thesis is not just the subject matter of academic and theoretical debate. As illustrated above, it is of immense importance in the commercial world.

5 The case law

A trust arising in response to unjust enrichment is not at all uncommon, and notable examples are present in English law. Unfortunately, the cases present an inconsistent picture on the availability of a proprietary response. For instance, in the two leading cases on proprietary restitution- *Chase Manhattan v British-Israeli National Bank*[10] and *Neste Oy v Lloyds Bank Plc*[11] it was held that the claimants' payments, which were made under a unilateral mistake, gave rise to a trust of the money for the payers. In contrast, the spontaneous mistaken payments made in void swaps cases, such as in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, were held not to have given rise to a trust of the monies paid.[12] Similarly, there are occasions of fraudulently induced mistaken payments, such as in *Halley v Law Society*[13] and *Campden Hill Ltd v Chakrani,*[14] where the courts held that a trust of the money arose immediately when the defendant received the payment. These cases can be contrasted with *Re Goldcorp Exchange Ltd*,[15] where the court limited the claimants to personal restitution despite the fact that they were misled by the recipient.

[10] *Chase Manhattan v British-Israeli National Bank* [1981] Ch 105 (Ch). For more discussions of this case, see text to fn 53 below, and fns 80, 150 in ch 4.
[11] *Neste Oy v Lloyds Bank Plc* [1983] 2 Lloyd's Rep 658. For more discussions of this case, see text to fns 51-52 below, and fns 48-52, 98 in ch 4.
[12] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL). See ch 5 for more on the swaps cases.
[13] [2003] EWCA Civ 97, [2003] WTLR 845.
[14] *Campden Hill Ltd v Chakrani* [2005] EWHC 911 (Ch).
[15] *Re Goldcorp* [1995] 1 AC 74.

More recently, proprietary restitution was a live issue in *Angove's Pty Ltd v Bailey*.[16] In *Angove's*, the Supreme Court had to decide whether money paid by mistake to an agent in administration was held on trust for the payers, with the consequence that it would be recoverable in priority in the purported agent's liquidation. The next section will explore the *Angove's* case in more detail, as there are two notable aspects to the *Angove's* decision which make it essential to have this discussion. First, their Lordships allowed the claimant to succeed in obtaining the funds from the insolvent agent, yet at no point did the judgment indicate the basis of the claimant's success. Second, Lord Sumption appeared to call into question the status of *Nesté Oy v Lloyds Bank Plc*,[17] which had previously been regarded as an important authority on the availability of property claims in unjust enrichment.[18] Here it will be argued that Lord Sumption's judgment only provides criticism for the reasoning applied in *Nesté Oy*. On a careful reading of other parts of the judgment, strong support can be found for the outcome reached in the *Nesté Oy* case. This is because, as will be demonstrated in the next section, the Supreme Court's decision in *Angove's* is explicable on the basis that the mistaken payment to the agent gave rise to a trust. The decision, therefore, demonstrates support from the Supreme Court for the availability of proprietary restitutionary responses for unjust enrichment, and is thus a milestone for the law of proprietary restitution in English law.

Importantly, the fact that the *Angove's* case went up to the Supreme Court, and the Supreme Court did not provide a clear justification for the finding of a trust, illustrates that the law of proprietary restitution remains unsettled. Consequently, this thesis is timely as there is a pressing need to explain the circumstances in which an unjustly enriched defendant holds money received from a payer on trust.

6 Proprietary restitution in *Angove's Pty Ltd v Bailey*[19]

1 Facts

D&D Wines International Ltd was the agent and distributor for the Australian winemaker, Angove's Pty Ltd. Under Clause 36 of the Agency Distribution Agreement (ADA), the agency was terminable by notice with immediate effect in the event of an administrator or liquidator being appointed. On 21 April 2012, the agent entered into administration while having outstanding invoices from two customers totalling A$874,928.81. On 23 April 2012, the principal, Angove's, terminated the agency agreement in accordance with Clause 36 and expressly revoked D&D's authority to collect the outstanding payments. Angove's also stated that it would collect the price directly from the customers and account

[16] [2016] UKSC 47, [2016] 1 WLR 3179.
[17] [1983] 2 Lloyd's Rep 658 (QB).
[18] A Burrows, *The Law of Restitution* (3rd edn, OUP 2011) 172.
[19] A Shah, 'Proprietary Restitution and Receipt by Insolvent Agents: *Angove's Pty Ltd v Bailey*' (2017) 31 TLI 30.

to D&D for its commission. However, after termination of the ADA, the agent's liquidators collected on the outstanding invoices. After doing so, they paid A$302,773.86 of the A$874,928.81 to Angove's. Both parties subsequently placed the relevant funds into escrow accounts pending the resolution of the dispute.

2 Decision

The agent's liquidators argued that although the ADA had been terminated, their authority to collect from the two customers and deduct commission subsisted. This left Angove's with a personal claim against D&D for the balance. Angove's, however, argued that the disputed fund was held on trust.

As there was no express trust,[20] the Supreme Court was of the opinion that the outcome of the case was dependent on whether the agent's authority survived the termination of the ADA. Lord Sumption, giving the judgment of the Supreme Court and reversing the decision of the Court of Appeal, held that Angove's termination of the ADA successfully revoked D&D's authority to collect on the outstanding invoices.[21] Therefore, the question of whether a constructive trust arose in favour of Angove's was said to be 'strictly speaking unnecessary'.[22] The reason for this was not explicitly stated, but it seems that since D&D had no authority to collect the payments, Angove's could claim the funds via the alternative means of a resulting trust.[23] Since a resulting trust had arisen, there was no need to explore the availability of a constructive trust. The Supreme Court however did say that when an agent's authority has been successfully revoked by its principal, a constructive trust can, in some circumstances, be used to recover the sums received after termination.[24]

In obiter discussion, Lord Sumption noted that if the agent's authority had survived the revocation, any money received by D&D would become a part of its insolvent estate and be made available for distribution at insolvency.[25] Unless a trust had arisen by operation of law, the insolvency of D&D would have prevented the balance of the invoices from being paid to Angove's. However, the Supreme Court said that when the agent's authority survives, despite its insolvency being imminent, a contractual right to collect the sums is sufficient to preclude a constructive trust of the funds in favour of the principal. It was said that this would be true on both the unconscionability and the unjust enrichment analysis.[26]

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[20] *Angove's Pty Ltd v Bailey* [2013] EWHC 215 (Ch) [50]-[57]. The judge's finding that the ADA did not create an express trust was not appealed. See *Bailey v Angove's Pty Ltd* [2014] EWCA Civ 215, [2015] 1 All ER (Comm) 36 [16].
[21] *Angove's Pty Ltd v Bailey* [2016] UKSC 47, [2016] 1 WLR 3179 [17].
[22] *Ibid* [18].
[23] See text to fns 27-31 below.
[24] *Angove's Pty Ltd v Bailey* [2016] UKSC 47, [2016] 1 WLR 3179 [30]. Lord Sumption said that proprietary restitution is available for (i) fundamental mistake or rescission and (ii) fraud, theft, breach of trust or fiduciary duty.
[25] *Ibid* [30]-[32]. The Court of Appeal also took the same view, *Bailey v Angove's Pty Ltd* [2014] EWCA Civ 215, [2015] 1 All ER (Comm) 36 [40]-[41].
[26] *Angove's Pty Ltd v Bailey* [2016] UKSC 47, [2016] 1 WLR 3179 [30]-[32].

Therefore, according to the Supreme Court, Angove's could only obtain the funds in the escrow account if D&D had no authority to collect.

3 The basis of Angove's claim

1 Lack of reasoning

The Supreme Court concluded that 'the fund representing the proceeds of the invoices is payable to Angove's'.[27] However, the mechanism by which Angove's was entitled to the funds is not clear. One is left guessing as to whether Angove's (1) had a personal or proprietary claim and (2) whether the claim succeeded at law or in equity.

The success of Angove's cannot be explained on the basis of a personal claim. This is because, if the claim was in *personam*, the funds would have become available for pari passu distribution in the agent's insolvency. Angove's would then be unable to obtain the entirety of the funds in the escrow account. Neither could Angove's, nor the customers, have succeeded by pursuing a proprietary claim at law. The reason being that legal title passed to the agent upon receipt.[28] The customers' title was therefore lost, and at no point was it obtained by Angove's. Consequently, an equitable proprietary interest in the form of an implied trust must have been recognised; it was the only way that Angove's could acquire the proceeds of the invoices.

The likely analysis is that the payers had an interest under a resulting trust, and this rendered the constructive trust on behalf of Angove's irrelevant on the facts. That a resulting trust was recognised can be inferred from the judgment. The High Court had originally found a resulting trust for the payers and it seems that, in reversing the Court of Appeal's decision, the Supreme Court was reverting to the analysis of Judge Pelling QC.[29] It followed that the disputed fund, as decided at first instance, was held on trust for the customers and under a mandate the funds were 'payable to Angove's'.[30] This is because the payers had acquired the goods that they had contracted for from Angove's, but the latter had not received the customers' payments. As discussed later in this chapter,[31] the Supreme Court was correct to recognise a resulting trust. However, the Supreme Court, like the trial judge, did not explain why the resulting trust came into existence.

2 *Nesté Oy* and the unjust enrichment analysis

[27] *Ibid* [33].
[28] See text to fns 6-7 above.
[29] *Angove's Pty Ltd v Bailey* [2013] EWHC 215 (Ch) [6], [43]-[44], [59].
[30] *Ibid* [44] and [59]. *Angove's Pty Ltd v Bailey* [2016] UKSC 47, [2016] 1 WLR 3179 [33].
[31] See text to fns 37-46 below.

The next section begins by discussing Lord Sumption's dicta regarding *Nesté Oy*. In that case, a payment was received by an agent at a time when it had already decided to cease trading and so could not perform its contractual obligations. Bingham J recognised a constructive trust in favour of the transferor on the ground that the recipient could not retain the payment in good conscience. It is argued that, whilst Lord Sumption was correct to question the reasoning in *Nesté Oy*, his judgment should not be interpreted as undermining the continued application of this authority. The section then goes on to explain how *Angove's* and *Nesté Oy* can be explained on the basis of unjust enrichment.

4 Lord Sumption's view

Since the claimants in *Angove's* were successful in recovering their money under the aforementioned resulting trust analysis, the Supreme Court concluded that there was no need to rely on *Nesté Oy*. However, the Court then devoted a part of the judgment to explaining why *Nesté Oy* was wrongly decided. Lord Sumption said that Bingham J's unconscionability reasoning in *Nesté Oy* was 'not a sufficient statement of the test, because it begs the question of what good conscience requires'.[32] Nevertheless, his Lordship left open the possibility of *Nesté Oy* being explicable using unjust enrichment reasoning. He said it has been suggested 'that since the shipowners presumably paid the money in the belief that PSL was in a position to disburse it to the service-providers, mistake would have been a better basis for the decision' but 'whether that is correct is not a question which arises on this appeal'.[33]

In *Angove's*, since a resulting trust had arisen due to the agent's lack of authority to collect, it was Lord Sumption's view that the mistake analysis was only relevant on the hypothesis that D&D had a contractual right to the sums. On the premise that the agent had authority, his Lordship said that a constructive trust for mistake would be precluded on the unjust enrichment analysis. This is because the customers' 'belief that D&D was authorised to collect it, or at least that payment to them would discharge their liability for the price…was not mistaken'.[34] Therefore, although the mistake analysis was applied to hypothetical facts, Lord Sumption did not apply it to the actual facts before him nor reject its application to the facts unequivocally.

5 Criticisms of Lord Sumption's analysis

It is questionable whether Lord Sumption was right with respect to his treatment of the unjust enrichment approach. He did not explore the possibility that, in *Nesté Oy*, the cause of action of unjust

[32] *Angove's Pty Ltd v Bailey* [2016] UKSC 47, [2016] 1 WLR 3179 [28].
[33] *Ibid* [32].
[34] *Ibid*.

enrichment had been dressed up in the language of unconscionability; the trust in that case was an example of proprietary restitution. This led to Lord Sumption not recognising that the reasoning of unjust enrichment provided a clear explanation for the resulting trust in *Angove's*.

It is accepted that regardless of whether there was a resulting trust, as decided by Lord Sumption, or a constructive trust as decided by Bingham J in *Nesté Oy*, Angove's would get the money in the escrow account. However, it is argued that dealing with *Nesté Oy* correctly was important for the following reasons. *Angove's Pty Ltd* was the Supreme Court's opportunity to revisit the reasoning of Bingham J in *Nesté Oy*, and to reinterpret the case using unjust enrichment by approving the decision in favour of the transferor. It was also a chance to declare that, since proprietary restitution manifests itself in the form of the resulting trust,[35] the trust in *Nesté Oy* was resulting as opposed to constructive in nature. When the agent's receipt in *Nesté Oy* is recognised as an unjust enrichment, the case is consistent with *Angove's*. This is because, as elaborated on below, the receipt by the agent in *Angove's* was also an instance of unjust enrichment. Therefore, by not recognising that the unjust enrichment analysis was applicable on the facts, the effect of the judgment has been to create more confusion as to the state of the law in this area. This is evident from the reception of the decision amongst some commentators who have concluded that the Supreme Court has overruled *Nesté Oy*.[36] But in reality, the contrary is true. Not only does *Nesté Oy* remain as good authority for the availability of proprietary restitution for unjust enrichment, it can be readily reconciled with the decision in *Angove's*.

6 The unjust enrichment analysis

It is submitted that D&D Wines Ltd was unjustly enriched at the expense of the two customers. First, although the existence of an agency relationship can raise the issue as to whether the agent or the principal has been unjustly enriched,[37] this problem did not arise on the facts. This is because the agency relationship had already been terminated before the money was received by the liquidators. It is therefore clear that D&D was the one who had been enriched. Second, like *Nesté Oy*, the 'at the expense of' enquiry was straightforward as the money belonged to the customers immediately before D&D's receipt.[38] Third, the enrichment was unjust. D&D received the money at a time when it was no longer acting for its principal. Consequently, when the customers paid the purported agent, their liability for the price could not be discharged. This meant that the money paid to D&D in the belief that it was still acting in the capacity of agent and capable of discharging the intended liabilities was done so under a

[35] P Birks, 'Restitution and Resulting Trusts' in S Goldstein (ed), *Equity and Contemporary Legal Developments* (OUP 1992); R Chambers, *Resulting Trusts* (OUP 1997).
[36] P Watts, 'The Insolvency of Agents' (2017) 133 LQR 11; H Wong, 'Proprietary Restitution and Constructive Trusts in the Supreme Court' (2016) 6 Conv 480.
[37] See W Swadling, 'The Nature of Ministerial Receipt' in P Birks (ed), *Laundering and Tracing* (OUP 1995); G Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2015) 111 and 674-678.
[38] The 'at the expense of' requirement is easily satisfied when the recipient is an immediate enrichee. See P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 186.

mistake. Similarly, in *Nesté Oy*, the claimant shipowner's belief that when money was paid to the agent, the agent was capable of extinguishing the claimant's liabilities to third parties was also a mistake.[39] So, in both cases, the vitiating factor of mistake explains why the agents were unjustly enriched. Alternatively, in contrast to the unjust factor approach, D&D's unjust enrichment can be explained using the unjust enrichment analysis proposed in this thesis. The two customers paid the defendant agent after its authority to collect the sums had been terminated. Due to the termination of authority, the payments to the defendant did not discharge the customers' debts to the claimant principal, Angove's Pty Ltd. As the customers' intentions could not be fulfilled, the defendant was unjustly enriched at the customers' expense and the customers were entitled to restitution.

D&D's unjust enrichment led to a trust response. According to Professors Birks[40] and Chambers,[41] who adopt an analysis which is firmly rejected in this thesis, an unjust enrichment leads to a proprietary response when there is an initial failure of basis. This takes the form of a resulting trust.[42] It arises because the transferor's intention to benefit the recipient is absent at the moment of transfer,[43] and at no point has the defendant acquired 'unrestricted beneficial ownership of the enrichment' before the claimant's right to restitution arose.[44] Birks and Chambers were right to recognise that the trust arising for mistaken payments is a response to the event of unjust enrichment, and takes the form of a resulting trust. However, one may express doubt over whether their explanatory basis for proprietary restitution provides an appropriate distinction between cases which are deserving of proprietary responses and those which are not. As will be later demonstrated, the initial failure of basis theory does not reconcile the case law, since it does not account for cases of mistake which have not given rise to proprietary restitution. One such case is *Re Goldcorp Exchange Ltd*.[45] Neither does the initial failure of basis analysis provide a strong normative basis for proprietary restitution. As Lord Sumption in *Angove's* did not refer to the work of Birks, or even to Lord Browne-Wilkinson's orthodox resulting trust analysis in *Westdeutsche Landesbank v Islington Borough Council*,[46] it is not clear on what basis he was recognising the resulting trust in *Angove's*.

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[39] *Ibid* 187. Birks said that under the unjust factor approach, *Nesté Oy* could be explained on the mistake basis.
[40] *Ibid* 185-190.
[41] R Chambers, *Resulting Trusts* (OUP 1997).
[42] P Birks, 'Restitution and Resulting Trusts' in S Goldstein (ed), *Equity and Contemporary Legal Developments* (OUP 1992); R Chambers, *Resulting Trusts* (OUP 1997).
[43] P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 306 phrased this as 'a presumption against gift. It presumes that the transferor has no *animus donandi*- no gift-giving intent…'; P Birks, 'Trusts Raised to Reverse Unjust Enrichment: The *Westdeutsche* Case' [1996] RLR 3, 18; R Chambers, *Resulting Trusts* (OUP 1997); R Chambers, 'Resulting Trusts' in Andrew Burrows and Alan Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006); R Chambers, 'Resulting Trusts in Canada' (2000) 38 Alta Law Rev 378.
[44] R Chambers, 'Resulting Trusts' in Andrew Burrows and Alan Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006) 261.
[45] *Re Goldcorp* [1995] 1 AC 74. See text to fns 26-27 in ch 3, and fns 30, 78-83, 97-106 in ch 4.
[46] [1996] AC 669 (HL) 708.

7 The proprietary restitution analysis proposed in this thesis

This thesis argues that the principle of autonomy governs when an unjust enrichment gives rise to a proprietary response. The original contribution of this thesis is that it develops a framework for identifying when autonomy protection justifies proprietary restitution, by introducing the novel concept of impossibility. It proposes that, in cases of unjust enrichment, a proprietary claim should only be awarded when the claimant's purpose for the transfer is impossible at the time of the transferee's receipt. Under this analysis therefore, the distinction between initial and subsequent impossibility is essential, as only an impossibility at the moment of receipt leads to the creation of an equitable interest.

The proprietary response can be justified on the basis that, when a transfer is made in pursuit of a purpose which is initially impossible, equity must intervene for the reason that when there is no opportunity for the claimant's purpose to be fulfilled, the claimant's autonomy would be seriously undermined if they did not retain a property interest. To illustrate, where for example there is a failure of consideration at the moment the transferee receives payment, coupled with an initial impossibility due to the transferee being insolvent at the time of receiving the enrichment, equity intervenes as there is no possibility of the intended purpose being carried out.[47] Consequently, a proprietary response does not undermine any previous agreement or 'bargain' between the parties. Conversely, if from the outset a transfer is capable of fulfilling its intended purpose, the claimant's intentions with regards to the property being transferred are not defeated at the moment of the transferee's receipt. There is thus no justification for reversing the transfer in equity This constraint ensures that the 'general interest in upholding bargains' is not undermined.[48] Once it is accepted that the foundations of proprietary restitution are based on the notion of impossibility, one can adequately reconcile the case law.

The impossibility analysis differs from the 'pro-proprietary future' stance adopted by Peter Birks.[49] First, in contrast to Birks' approach, under the impossibility analysis not all mistaken payments, which are all instances of initial failures of basis, give rise to proprietary restitution. The impossibility analysis is therefore more restrictive when it comes to the availability of a proprietary response. Second, under the impossibility analysis a trust either arises immediately at the moment of the transferee's receipt, or not at all. For example, when a claimant mistakenly pays money under a contract, if there is an impossibility at the moment of the defendant's receipt a trust will arise immediately. In comparison, under Birks' initial failures of basis approach, the treatment of mistaken contractual payments is ambiguous.[50] This is because it is not clear under Birks' analysis whether a trust arises as soon as the recipient receives the payment, or whether the trust is only available after rescission. In contrast, the

[47] Doubt was however cast on this view in *Bailey and another v Angove's Pty Limited*, [2016] UKSC 47, [2016] 1 WLR 3179. This is further discussed at n 122.
[48] P Birks, 'Property and Unjust Enrichment: Categorical Truths' [1997] NZL Rev 623, 642.
[49] P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 192.
[50] See text to fns 78-84 in ch 4.

impossibility approach provides a clearer path to proprietary restitution. Importantly, it is submitted that it explains the outcomes in *Angove's Pty Ltd v Bailey* and *Nesté Oy v Lloyds Bank*. Therefore, when one accepts the impossibility analysis for proprietary restitution, the Supreme Court's decision in *Angove's*, rather than overruling *Nesté Oy,* can be seen to have implicitly accepted it.

8 Applying the impossibility analysis to *Angove's*

A proprietary response for transfers made pursuant to an impossible purpose reconciles the case law. In *Angove's*, a resulting trust for the payers arose in response to the unjust enrichment of the purported agent. The customers' payments were entirely conditional on the existence of an obligation to pay the sums to the defendant.[51] As the agency had been terminated, there was no such obligation and the purpose of the transfer was impossible. Therefore, the outcome in *Angove's* is consistent with the impossibility analysis of proprietary restitution. On this basis, it can be reconciled with *Neste Oy*. In *Nesté Oy*, the trust which arose can be explained on the ground that the agent received the payment at a time when it was impossible for it to perform its contractual obligations. So the decision in favour of the transferor, but not the reasoning in *Nesté Oy*, was correct. It is also possible to reconcile this decision with *Chase Manhattan NA v Israel-British Bank (London) Ltd*,[52] where the claimant paid with the intention of discharging an obligation which had already been discharged. As in *Angove's* and *Nesté Oy*, the claimant's purpose was wholly defeated from the outset and a trust arose. This allowed the claimant to take the traceable proceeds of its money out of the defendant's estate before pari passu distribution.

7 Concluding remarks

This thesis will begin by exploring the concept of autonomy and its relevance in the context of private property and property rights. This will be followed by demonstrating how a property owner's autonomy is protected specifically by the law of unjust enrichment, and how the autonomy concept determines when an unjust enrichment gives rise to proprietary restitutionary rights in the form of a trust. It will be argued that whether the law of unjust enrichment protects property indirectly via a personal right to restitution, or directly via a proprietary restitutionary right, depends on the extent to which the transferor's autonomy is compromised. The argument advanced in this thesis is that only when the claimant's purpose for transferring property is impossible from the outset does the goal of autonomy protection justify the continuation of the transferor's property rights in the transferred fund. The

[51] A Shah, 'Proprietary Restitution and Receipt by Insolvent Agents: *Angove's Pty Ltd v Bailey*' (2017) 31 TLI 30.
[52] [1981] Ch 105 (Ch).

majority of the thesis is devoted to applying this impossibility analysis for proprietary restitution to clusters of cases: those involving valid contracts,[53] void contracts,[54] cases where payers have attempted to recover mistaken payments made to insolvency officers in priority to other creditors in an insolvency,[55] and finally, cases where payments are made for specific purposes.[56]

[53] See ch 4.
[54] See ch 5.
[55] See ch 6.
[56] See ch 7.

Chapter 2 Autonomy and Property

1 Introduction

This chapter explores the concept of autonomy generally and in the property context. Autonomy is one's freedom to choose and have their choices fulfilled. It is argued that when man lives in a state of nature, he has absolute autonomy. This absolute freedom however gives rise to chaos, as no man's actions are restricted. To prevent this chaos and to achieve stability for all men, man developed the concept of organised society and a social contract that restricts the freedoms of the autonomous actor. The social contract recognises the legal concept of private property and property rights.

Property is a means through which individuals can exercise their autonomy, and rights to property are an invisible tie between a person and a thing which are binding on the rest of the world. Nevertheless, it is argued that property rights do not reflect absolute free will. The consequence is that one's will in relation to property is not always given effect by the proprietary rights recognised by the law. There is thus a divergence between the actual autonomy of an individual, and the intentions of the individual which are recognised and protected by property law. Nonetheless, it is argued that this does not undermine the view that the law of property protects autonomy.

This chapter discusses the relevance of autonomy generally in the property context. The next chapter focuses on how a property owner's autonomy is protected by the law of unjust enrichment. Specifically, it demonstrates that when property is the subject matter of the defendant's unjust enrichment, the concept of autonomy determines when an unjust enrichment gives rise to proprietary rights which protect the transferor's autonomy. Building on the discussions of freedom in this chapter, it argues that an unjust enrichment stemming from a lack of free choice alone can only give rise to personal restitution. In contrast, an unjust enrichment arising because one's choice in relation to a property transfer cannot be fulfilled has the potential to give rise to a proprietary response in equity.

2 Autonomy

An autonomous individual is one who has the ability to govern his own affairs. Autonomy refers to an individual's ability to make his own choices and pursue his ends. Individual autonomy is thus the emblem of freedom. Autonomy as freedom is encapsulated by Fuller's freedom concept.[1] He suggested that there are two elements to freedom: 'freedom to' and 'freedom from'. 'Freedom to' is defined as 'the opportunity to choose between alternatives or among a range of alternatives'.[2] It is integral to free

[1] L Fuller, 'Freedom- A Suggested Analysis' (1954) 68 Harv LR 1305.
[2] *Ibid* 1306-1307.

choice that an individual is 'free from' 'nullifying restraints'.[3] But when individuals have not freely chosen, or where their free choice cannot be fulfilled, they are not 'free from' the circumstances that undermine their 'freedom to' choose.[4]

'Freedom to' choose

There are three components of 'freedom to'. First, whether the individual has had 'an opportunity to choose' to act upon his will or not.[5] Second, whether he has a 'range of alternatives' to choose from.[6] The third element, which is implicit in Fuller's earlier works but more evident in his later writings, is whether the individual's choice can be fulfilled.[7] This is an important aspect of freedom, because 'freedom to' is about making choices and therefore about 'forming purposes and deciding upon courses of action'.[8] Since purposive actions are done with the intent of achieving a goal, intent fulfilment is thus integral to 'freedom to'. These three components of 'freedom to' are discussed below. It should, however, be noted that for the remainder of this thesis, components (1) and (2) will be merged under the heading of 'free choice', and component (3) will continue to be called 'intent fulfilment'.

1 Opportunity to choose

When an individual has a *free* choice as to what choice he pursues, he is said to have had the opportunity to choose. This can be illustrated using the following example. A points a gun towards B. He says that if B does not hand over his wallet, then he will shoot him. B has a choice in the sense that he can choose whether to part with his wallet or not. However, there is no real opportunity to choose.[9] The choice which B would prefer to pursue, not handing over his wallet to A, would result in his death. As Raz explains, 'a choice between survival or death is no choice' at all.[10] B therefore has no choice but to give up his wallet to A. Since B's choice was not '*free from* coercion'[11] which undermined his ability to make his own choices, his 'freedom to' choose is undermined.

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[3] *Ibid* 1305-1306, 1313.
[4] *Ibid* 1313.
[5] *Ibid* 1309.
[6] *Ibid*.
[7] L Fuller, *The Morality of Law* (Yale University Press 1964) 73-74.
[8] L Fuller, 'Freedom- A Suggested Analysis' (1954) 68 Harv LR 1305, 1314.
[9] For a discussion on how freedom to choose can be undermined, see J Waldron, *The Right to Private Property* (Clarendon Press, 1988) 304-306. He says that a threat leaves a victim with no choice: 'a threat affects my freedom by tying a decision, say, about whether to give money to a certain individual, to a motive or desire which I find it more or less impossible to resist and which I would not normally want to be moved by in decisions of that sort'.
[10] J Raz, *The Morality of Freedom* (OUP 1986) 376.
[11] *Ibid* 373 (emphasis added).

The relation between 'freedom to' have the 'opportunity to choose', and 'freedom from' factors that undermine choice, can be further exemplified by an example proffered by Fuller. He said that in the context of elections:

> '*freedom to* cast one's ballot loses its point where the voter is not also *free from* restraints that prevent him from voting as he decides he should. The ridiculous 'elections' held under the Nazi regime are an extreme case in point.'[12]

Since in an election, if by voting for your preferred party will lead to violence being perpetrated against you, then you have no real freedom to choose, as you are compelled to vote a certain way. This shows that ''freedom from' certain kinds of interference must, then, be presupposed in every 'freedom to''.[13]

Lastly, for a person to live an autonomous life 'he must have the mental abilities to form intentions of a sufficiently complex kind, and plan their execution. These include minimum rationality, the ability to comprehend the means required to realize his goals, the mental faculties necessary to plan actions'.[14] If an individual does not have this capacity to make proper choices, or an adequate understanding of the consequences of his choices, his freedom to choose is undermined since 'choice is meaningless without understanding'.[15]

2 Range of alternatives to choose from

The second aspect of 'freedom to' choose is that an individual must have a 'range of alternatives' to choose from. There are, however, no specified number of alternatives that one must have. It is the substance of the various options that matters, as opposed to their number.[16] As Fuller said, 'we do not necessarily increase the effective choice of the individual by increasing the range of choice open to him'.[17] So if an individual only has a few options, but they differ greatly in substance, his autonomy is not undermined since he had '*adequate* options available for him to choose from.'[18] Whereas if, for example, an individual has several options, but the consequence of pursuing each option is the same, then the fact that he has numerous options is meaningless. This was explained by Raz in the *Morality of Freedom*,

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[12] L Fuller, 'Freedom- A Suggested Analysis' (1954) 68 Harv LR 1305, 1313 (emphasis added).
[13] *Ibid*.
[14] J Raz, *The Morality of Freedom* (OUP 1986) 372. Also, see p.204 where Raz says that the individual must be of 'sound mind' and 'capable of rational thought and action'.
[15] L Fuller, 'Freedom- A Suggested Analysis' (1954) 68 Harv LR 1305, 1323.
[16] J Raz, *The Morality of Freedom* (OUP 1986) 375: 'Clearly not number but variety matters'.
[17] L Fuller, 'Freedom- A Suggested Analysis' (1954) 68 Harv LR 1305, 1311.
[18] J Raz, *The Morality of Freedom* (OUP 1986) 373 (emphasis added).

> 'autonomy is exercised through choice, and choice requires a variety of options to choose from. To satisfy the conditions of the adequacy of the range of options the options available must differ in respect which may rationally affect choice. If all the choices in a life are like the choice between two identical-looking cherries from a fruit bowl, then that life is not autonomous. Choices are guided by reasons and to present the chooser with an adequate variety there must be a difference between the reasons for the different options'.[19]

That it is the content of the available choices that matters can be illustrated with the following example:

> 'Imagine a person who can pursue an occupation of his choice but at the price of committing murder for each option he rejects. First he has to choose whether to become an electrician. He can refuse provided he kills one person. Then he is offered a career in dentistry, which again he is free to refuse if he kills another person, and so on … I think it will be generally agreed that in this case the life of the person in my example is not autonomous and that his choice and *the nature of his options are not enough* to show that he is not.'[20]

In this rather extreme example, although the individual can choose the career he wishes to pursue, it is not a real choice. This is because his options do not sufficiently differ in nature. Regardless of whether he chooses to become a doctor, dentist or even a nurse, the consequences of pursuing his preferred choice are the same; he must commit a murder for every option that he rejected before his ideal occupation was offered to him.

Finally, 'a man might be said to be unfree because he does not have the alternative of living forever or being two places at once.'[21] This is because if one cannot choose to be immortal or alternatively have the choice of being possessed with the supernatural power of bilocation, the unavailability of these options must surely mean that man does not have the freedom to choose. However, an individual has free choice so long as he has real alternatives available to him. Furthermore, free choice 'does not require the presence of any particular option among them'.[22] So even when a particular option is not available to pursue, this does not necessarily mean that an individual does not have the freedom to choose. This can be illustrated using the following example. An individual goes into his local store to buy ice cream. Unfortunately, his preferred ice cream is out of stock and is not sold by any other retailer. He therefore does not have the option to buy this particular ice cream. It could be argued that the individual has been denied the freedom to choose. Nevertheless, as Raz explains 'denying someone a

[19] *Ibid* 398. Also, see pp.373-377.
[20] *Ibid* 379.
[21] L Fuller, 'Freedom- A Suggested Analysis' (1954) 68 Harv LR 1305, 1309.
[22] J Raz, *The Morality of Freedom* (OUP 1986) 410.

certain choice of ice-cream is generally admitted to be insignificant to the degree of autonomy enjoyed by that person'.[23] This is because a different type of ice cream, sweet treat, or even another type of food would be an adequate substitute. Therefore, not having the option to a buy a particular ice cream does not have any consequences on one's ability to live an autonomous life.

3 Fulfilment of choice

The third aspect of freedom is one's freedom to have their choice fulfilled. Since choices are made with the intention of achieving goals, free choice is meaningless if it cannot also be carried through. As Raz said, an autonomous person's life 'consists in the *successful* pursuits of self-chosen goals and relationships'.[24] Choice fulfilment is thus integral to freedom to choose. This can be illustrated using the following example. A father makes a choice to pay £500 to a singer for the purpose of having him sing at his daughter's wedding. After the payment is made, but just before the wedding, the singer loses his voice. He can no longer perform. As the father received none of what he had bargained for, he now wants to recover the monies paid. However, his payment to the singer was freely made; the father thus cannot claim that he did not have a free choice to pay. Imagine then that the father makes a claim to recover the money on the basis that his intentions were frustrated as his choice could not be fulfilled. In this example, the father's ability to self-govern his resources has been undermined. This is because when an individual makes a free choice and acts on his will, if his intended outcome does not come into fruition, the individual was not *free from* the circumstances which were required for the fulfilment of his choice. His freedom to choose is therefore compromised. Furthermore, in this instance the law would allow the father to recover the £500 from the recipient. As will be demonstrated in the next chapter, a property owner's freedom to have their goal for a property transfer fulfilled is protected by the law of unjust enrichment. It does this by protecting an individual's property rights when the purpose of the transfer fails, by giving him a personal claim for the value of the property or a proprietary right in the transferred funds.[25] The law of unjust enrichment therefore supports the view that, when it comes to autonomy protection, fulfilment of choice is just as significant as free choice.

As to what follows, the next section will discuss what happens in a community where every individual has the absolute freedom to choose and have their choices fulfilled.

3 State of nature

'There is nothing to which every man had not Right by Nature'.[26]

[23] *Ibid*.
[24] *Ibid* 370 (emphasis added).
[25] See text to fns 23-24 in ch 3.
[26] Thomas Hobbes, *Leviathan* (first published 1651, Penguin 2017) 107.

- Thomas Hobbes

When there is no organised society, man lives in a state of nature. Natural man is free; he has absolute freedom.[27] Unfortunately, natural man is savage and rampant.[28] In the free state, man believes that it is his natural right to have the *freedom to* choose and be *free from* things which undermine the choices that he has made; he believes that he is free to do and take as he pleases. Since every man believes that he is entitled to everything, the inevitable consequence of a man governed by nature is that it gives rise to a state of war.[29]

> 'To this warre… the notions of Right and Wrong, Justice and Injustice have there no place. Where there is no common Power, there is no Law: where no Law, no Injustice. Force, and Fraud, are in warre the two Cardinall vertues. Justice, and Injustice are none of the Faculties neither of the Body, nor Mind… They are Qualities that relate to men in Society, not in Solitude. It is consequent also to the same condition, that *there be no Propriety, no Dominion, no Mine and Thine distinct; but onely that to be every mans, that he can get; and for so long, as he can keep it*'.[30]

As every individual believes that he has the freedom to take anything away from another at any time, no individual can plan his affairs. Autonomy is thus undermined.

How man operates in a state of nature can be illustrated with the following example. Imagine a new land. It is uninhabited. It has no legal system, and hence no laws. The pioneers arrive. The land is aplenty, and they have a free choice as to where on the island they settle. Two individuals find an idyllic spot. The land is rich here. They each argue that they were the first to arrive at this particular plot of land, and each claims the land is his own. Since this country has no laws, the entitlement to the land that each asserts, and each's attempt to exclude the other- to be *free from* the other interfering in his enjoyment of the land- is not a legal right. It is a natural sense of entitlement that each party believes that it has to the land.

When man has this anarchic freedom, his freedom is absolute. There are no restrictions on what he can and cannot do. In this anarchic freedom there is chaos. This can be demonstrated with the following examples:

> (1) A wants to park his car. He decides to park on the side of a road, acts upon this decision and then parks his vehicle. However, A has parked on B's land without permission.

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[27] Jean-Jacques Rousseau, *A Discourse on Inequality* (Maurice Cranston tr, Penguin 1984) 31.
[28] Rousseau in *A Discourse on Inequality* (Penguin 1984) at various points in his book calls man savage.
[29] Thomas Hobbes, *Leviathan* (first published 1651, Penguin 2017) 100-105.
[30] *Ibid* 104-105 (emphasis added).

(2) C is late to work. He is stuck in traffic. He needs to get to the side road and has two options. Either to wait until the traffic moves, or to get to the side road by driving over the pavement. He chooses to do the latter, and acts upon his decision. Whilst making his way to the side road, he intentionally drives over D's stationary bicycle, crushing it in the process.

(3) E and F enter into an agreement. F wishes to buy a car from E for £5,000. E delivers the car to F and receives the cheque for the required amount. A month later, E goes to his bank to cash the cheque. It turns out that although F had sufficient funds in his account to satisfy the cheque at the time, F no longer has the funds. E hears that F is also having serious financial difficulties and is struggling to pay his debts. E is now left without his car and is unsure whether he will get the entire sum he is owed from F. Walking past F's house, E sees the purchased car parked on F's driveway. E has a spare set of keys for the car and uses them to retrieve the car from F's property.

In all of these instances, the individual made a free choice and followed it through. He believed that he had a 'right' to make this choice, act upon it, and achieve his intended goal. In (1), A believed that he had a right to park on B's land. In (2), C believed that he had a right to choose which route to take to the side road. He also believed that he was entitled to run over D's bicycle. In (3), E believed that as he had not been paid, he should be entitled to take the car back from F. The last thing he wanted was for the car to be sold and for F to use the proceeds to settle his debts with his creditors. The problem however is that concurrently, B, D and F believe that they should be free from A, C and E's interference. Since every individual believes that he should be *free to* do as he pleases and also be *free from* others interfering with his enjoyment, this gives rise to a conflict of freedoms. This is because it is not possible for A, C and E to pursue their desired actions while at the same time as B, D and F being free from interference, as the nature of the former's actions are such that they interfere with the freedoms of the latter. Consequently, in a state of anarchic freedom, freedom is meaningless.[31] For freedom to be meaningful, it must be restricted. This is explained in the next section, which argues that the problem of conflicting freedoms can only be resolved by limiting autonomy through a social contract.

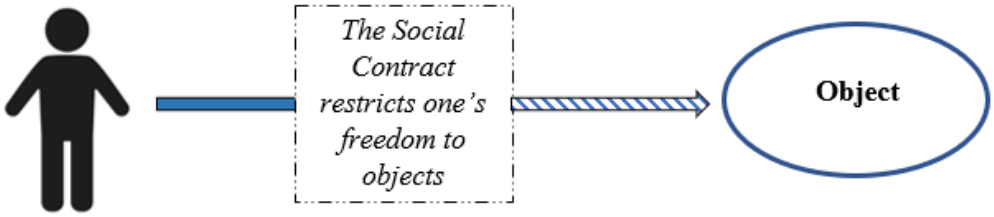
[31] See text to fns 70-76 below.

4 The recognition of private property in the social contract

To protect autonomy, man developed the concept of organised society and a social contract. The social contract, or what Hobbes called 'a common power',[32] imposes rules ('laws') that bind all men and restricts their freedom as autonomous actors. It makes individuals compromise absolute freedom for peace, by making men 'lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himselfe'.[33] This resolves the freedom conflict, since whenever one man's freedom conflicts with another's, the law gives a greater deference to one man's freedom, with the consequence of restricting the freedom of the other party. Deference is exercised by punishing individuals who act upon their free will in a manner which is seen by the social contract as encroaching on another's freedom, condoning actions that are incompatible with another's freedoms but accepted by the community and thus the social contract, conferring rights to individuals which enable them to use their freedom in a certain way, and imposing duties and obligations on individuals to respect the freedoms of other individuals.

One domain in which the social contract restricts freedom is man's freedom to objects. The social contract recognises that an individual's actions can establish a connection between himself and an object, and it states that this connection has the effect of conferring certain rights to the individual. It thus recognises the concept of private property and the idea of property ownership. In a system of private property, objects are assigned to particular individuals[34] who determine how that object can be used.[35] The assignee's right to the object is known as a property right and binds the rest of the world. It is argued in the following two sub-sections that private property is a means through which an individual can exercise his autonomy. The section after this will argue that although the social contract recognises rights to property, these property rights do not protect an individual's freedom to objects absolutely.

[32] Thomas Hobbes, *Leviathan* (first published 1651, Penguin 2017).
[33] *Ibid* 106-107.
[34] J Waldron, *The Right to Private Property* (Clarendon Press, 1988) 38.
[35] *Ibid* 39.



1 Private property as a facilitative institution

Hart states that there are two varieties of laws in a legal system. The first are 'orders backed by threats'. These laws order an individual to act in a certain way and impose a sanction when he does not.[36] The second are 'rules conferring private powers'. These do not impose duties or obligations on individuals with the power,[37] but provide individuals with '*facilities* for realizing their wishes',[38] by conferring powers upon individuals to alter their legal relations with others.[39] When an individual attempts to bring about a change in his legal relations, but has not complied with the relevant power-conferring laws, he is not said to have committed a 'breach' or 'offence'.[40] Rather, the consequence of non-compliance is that the legal relations the individual sought to create do not come about.[41] An example of such rules are those which give an individual the power to determine his relations 'within the sphere of his contracts, trusts, wills, and other structures of rights and duties'.[42] As Fuller said:

> 'The man who conveys property to another is exercising this power; so is the man who enters a contract. When a court enforces a promise it is merely arming with legal sanction a rule or *lex* previously established by the party himself'.[43]

Fuller illustrates perfectly how individuals can alter their legal relations in the context of contract. He explains:

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[36] HLA Hart, *The Concept of Law* (3rd edn, OUP 2012) ch 2.
[37] *Ibid* 27.
[38] *Ibid*.
[39] *Ibid* 27-28.
[40] *Ibid*.
[41] *Ibid* 28. He gives the example of the Wills Act 1837 which specifies the number of witnesses required to make a valid will. Raz explains that a lack of compliance with this requirement only results in the will not having legal effect; the failure to comply is not a 'breach' of any duty or obligation and neither is it an 'offence'.
[42] *Ibid* 41.
[43] L Fuller, 'Consideration and Form' (1941) 41 Colum LR 799, 806.

> 'A contracts to buy a ton of coal from B for eight dollars… Coal does not have to be bought and sold; it can be distributed by the decrees of a dictator, or of an elected rationing board. When we allow it to be bought and sold by private agreement, we are, within certain limits, allowing individuals to set their own legal relations with regard to coal'.[44]

Similarly, the laws on private property confer powers to individuals, and property is thus also a facility for one to realise their wishes.[45]

It should be noted that 'facility' means 'to provide a means or the resources to do something, to achieve a particular outcome', and to 'facilitate' means 'to make easier'. The subsection below goes into more detail as to what private property facilitates.

2 The underpinning of the property institution

The right to particular property is an invisible tie between a person and a thing and is binding on the rest of the world. It provides only the person tied and beneficially entitled to the property the power to decide how the object should be dealt with. The decision to use, continue to possess, and relinquish his possession and tie with the object lies with him.[46] This is because the property is his 'only by virtue of [his] having put [his] will into it'.[47] Therefore, the relationship between an individual and an object- such as the subsistence and extinguishment of one's property rights- is contingent on the property owner's intentions.

When an individual makes a decision to carry out a particular action in relation to his property, he is making a choice with the aim of fulfilling a goal. For instance, an individual A decides to do X, where X is to give his property to another with the intention of giving it away outright. This means that he has made a choice to pursue option X, as opposed to choosing options Y (e.g. retaining his property) or Z (e.g. exchanging his property for other property). A's transfer has a purpose. He is giving his property away absolutely with no intention of receiving anything in return; his purpose is thus to make a gift. Importantly, property is the mechanism through which A is expressing his intention to the world, as the property enables A to carry forth his intention of achieving his gift-making goal.

Since property is the subject matter of choice and can be used by individuals to advance their goals and achieve their ends,[48] private property therefore facilitates in the exercise of one's autonomy. The importance of property for self-governance is the reason why it is protected by the social contract. One instance in which the law protects property in order to protect the autonomy of individuals is through

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[44] *Ibid* 809.
[45] I Jackman, 'Restitution for Wrongs' (1989) 48 CLJ 302. Though note that Hart does not go as far as saying that property is a facility. HLA Hart, *The Concept of Law* (3rd edn, OUP 1961) 27.
[46] GWF Hegel, *Philosophy of Right* (SW Dyde tr, George Bell and Sons 1896) [53].
[47] *Ibid* [65].
[48] See text to fns 37-45 above, and fns 7-21 in ch 3.

the laws of unjust enrichment, where the rights of a property owner are protected when he transfers property to another, and in the circumstances, the conditions on which the owner intended to enrich the recipient with the property were not satisfied. In this situation, the law protects the owner's property rights, and thus his autonomy, by giving him a personal claim against the recipient for the value of the property transferred, or by creating a new property right which enables the transferor to recover the property itself. How this relates to the previous sub-section[49] is that in the process of exercising autonomy, in the form of making choices to achieve one's wishes in relation to property, an individual has the power to alter the legal relations between himself and the property's recipient. This can be illustrated using the following example. A agrees to purchase goods from B. To complete the purchase, A uses his property- namely, money- to pay B for the goods. A has therefore utilised property to accomplish his goal. In the course of achieving his desired outcome, A has altered the legal relationship between himself and B. When he paid B for the goods, A transferred his right to have exclusive possession of the money to B and thus lost his own right to exclude the world.

5 Protection of autonomy in the property context

This section further explores autonomy in the property context and explains how the social contract affects our autonomy in relation to objects. First, it argues that the social contract does not protect the tie between an individual and an object absolutely, and property rights thus do not provide absolute protection of a property right holder's autonomy. Second, it demonstrates that this divergence between rights to property protected by the law, and the natural rights of an individual to an object is justified, and that it does not undermine the view that the law of property protects autonomy.

1 Natural rights and legal rights

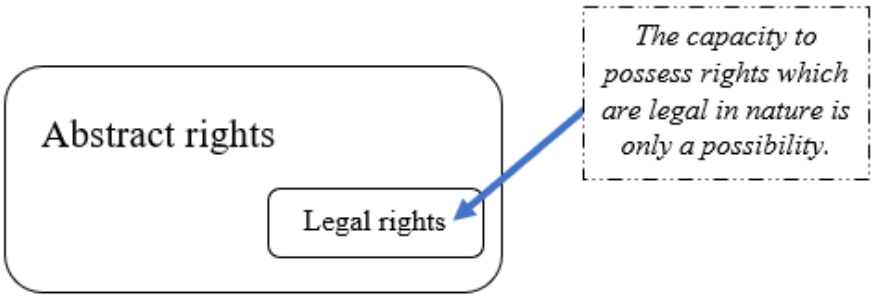
When an individual transfers his property to another in circumstances where his intentions for the transfer are fulfilled, as his purpose is achieved his personal autonomy is not violated.[50] However, sometimes the holder of a property right intends the transfer to achieve a certain outcome, but this outcome is not realised. The consequence may be that his property right in the *res* is extinguished, depleting his wealth in circumstances that he never intended that it should be depleted. In this instance, the individual would argue that his property right should subsist- so that the property would continue to belong to him- as opposed to his right to the *res* being extinguished. Personal autonomy is, after all, the complete freedom to pursue a certain course of action and to have that free choice fulfilled.[51] It ought

[49] Text to fns 36-45 above.
[50] Fulfilment of choice was discussed at text to fns 24-25 above.
[51] Text to fns 5-25 above.

to follow that when that choice is not fulfilled, as is the case here, an individual's autonomy is undermined, and his property rights should therefore be protected. However, as will be explained below, when an individual's freedoms in relation to property are compromised, the law does not always protect his property rights.

When an individual acts upon his will, the right he exercises is an abstract right. Abstract rights can be described as 'the rights of nature'; they are 'the liberty each man hath to use his own power as he will himself for the preservation of his own nature'.[52] In relation to freedom of choice, a property owner has an *abstract* right to give effect to his will by making any choice and pursuing it. In relation to his freedom to have his choice fulfilled, a property owner has an *abstract* right to have his *actual* will match with its corresponding intended *expression*. If the two do not correspond, the individual's abstract right is said to be violated, and his *actual* autonomy compromised. However, for every *abstract* right to an object, due to the problems which arise from the unfettered freedom man has in the state of nature,[53] there is only a possibility that one's abstract right will be recognised at law.

The social contract recognises that an individual's actions can establish a connection between himself and an object, and it states that this connection can have the effect of conferring certain legal rights to the individual. These rights to property- known as property rights- are a legal construct created by the social contract. What is important for our purposes is that the law of property does not recognise all of an individual's abstract rights to objects. The effect of this is that there is a divergence between the abstract rights (*actual autonomy*) of an individual, and the element of the transferor's *actual* autonomy which when undermined is protected by property law (*legal autonomy*). The social contract therefore places bounds on the freedom that an individual has in relation to things. In the words of Hegel, 'I, as a distinct being, am on all sides completely bounded and limited'.[54]



Although in reality an individual has a natural right to act in any way that he wishes to, the divergence between *legal* and *actual* autonomy means that the law does not respect and protect his absolute freedom

[52] Thomas Hobbes, *Leviathan* (first published 1651, Penguin 2017) 105.
[53] See the 'State of Nature' section, fns 26-31 above.
[54] GWF Hegel, *Philosophy of Right* (SW Dyde tr, George Bell and Sons 1896) [35].

to choose. Rather, there are occasions where the law is at odds with the intentions of the rights holder. For instance, a transferor of property may believe that his freedom to choose is undermined because, for example, his goal for the transfer was not fulfilled. However, if this abstract right of the transferor to have his goal realised is not recognised at law, the law will not protect the transferor's property rights. This is discussed further in the remaining chapters of this thesis, which advance the argument that when a claimant transfers property to a defendant in circumstances where the defendant is unjustly enriched, only when the claimant's goal is *impossible* to fulfil does the claimant 'retain' his property rights in the transferred object at law. If there is no impossibility, the law does not protect the claimant's property rights directly by recognising a continuation of his right to that particular property, but provides indirect protection by giving him a personal right to restitution.

In some cases, the difference between *actual* and *legal* autonomy can result in one retaining their property rights even though in the circumstances they intended to transfer all or part of their property rights to another. For instance, an individual who has an equitable proprietary interest in land might believe that he has effectively disposed of his equitable proprietary right. However, if the disposition is not made in writing as required by s.53(1)(c) of the Law of Property Act 1925, the consequence is that the transaction is ineffective, and the transferor retains his equitable interest.

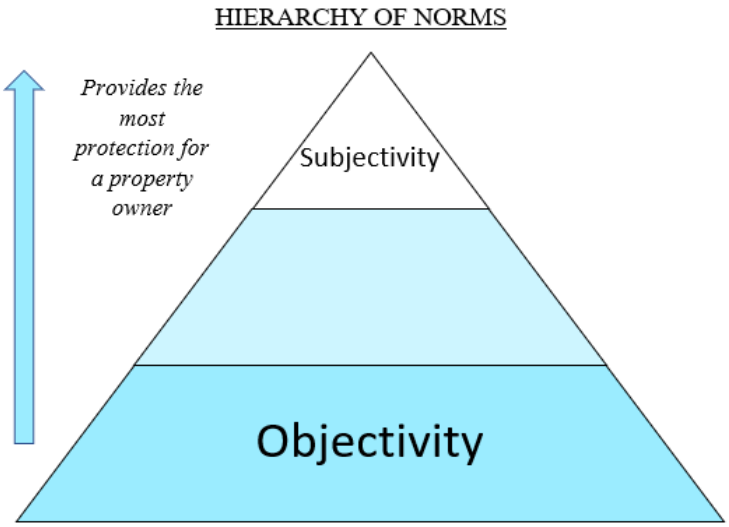
Furthermore, the distinction between actual autonomy, your actual rights, and autonomy at law, your legal rights, means that there is a difference between what you can actually do and what the law allows you to do. For example, there are some choices, which although an individual is free to make, would impinge on another individual's legal autonomy. If these choices are pursued, the law protects the autonomy of the individual whose legal autonomy has been infringed. This can be illustrated with the following two examples. I have a car. I have a right to choose whether I want to give my car away. This abstract right is recognised at law and thus falls within my legal autonomy. Imagine then that my car is parked on the drive. I have my keys in the ignition, and I go back into the house for a minute to get something. When I am inside the house, a passer-by gets into my car and drives off. My freedom to choose what to do with my car has been undermined; I was given no say in the matter of what happened to my property. The law protects my freedom to choose by protecting my property right in the car. It does this by preventing title from passing to the thief who is now in possession of the vehicle. Now, for the second example, imagine that I freely choose to sell the car. Absolute title to the car passes to the buyer. If I then later change my mind and want to undo my actions, I have an abstract right (an ability) to take the car back. But the law does not protect this natural right to choose to take back the property, as it infringes the buyer's legal autonomy. Consequently, if I take the property from the buyer without his consent, this will be insufficient to pass title to the car back to me. The law holds me to my original choice to pass title in the car. This demonstrates that the social contract restricts autonomy in the property context as only a fraction of one's intentions (i.e. actual autonomy) are recognised at law, with the effect that the law does not always recognise one's natural right to freely choose and have his choice

fulfilled. This divergence between legal autonomy and actual autonomy results in property rights not reflecting absolute free will.

2 The standard of autonomic protection in the property context

To determine which of a property owner's abstract rights- his actual intentions- are protected by property law, one must first know how the legal autonomy of an individual differs from his actual autonomy in the sphere of property. The variance between legal autonomy (and thus legal rights) and actual autonomy (abstract rights) in the property context depends on the norm from the hierarchy that the law selects for protecting the transferor's autonomy. Which norm is selected is contingent on how much of a property owner's intentions the law believes should be upheld and disregarded on a given set of facts.

The hierarchy of norms is a sliding scale; it consists of a spectrum of standards, ranging from extreme objectivity to subjectivity, that the law can adopt for interpreting an individual's intentions. At times, when protecting autonomy, the law applies an objective standard for interpreting intention. This may, for example, be because the objective standard is necessary to adequately protect the freedoms of all parties concerned. However, the more objective the standard of protection, the less likely it is that a property holder's abstract right will be recognised by law as having been infringed. A consequence of this is that less of the property holder's actual autonomy is protected. Therefore, the extent to which an individual's abstract rights are protected depends on whether an objective or subjective standard is adopted for autonomic protection. The remaining part of this section argues that, in the property context, the law adopts an objective approach to interpreting a property owner's intentions.



Individuals have a 'will'. This is made up of their 'specific interests' such as an 'appetite, want, impulse and random desire'.[55] It gives them the capacity to make choices that enables them to pursue their interests. In the law of property, autonomy is protected objectively. Under the objective approach, for a property owner's intentions to be recognised by the law, he 'must give to his freedom an external sphere'.[56] In other words, the property owner must direct his will upon an object in a way that externalises his intention. The objective approach therefore concentrates on 'outward appearances',[57] as 'you do not look into the actual intent in a man's mind. You look at what he said and did.'[58] This was explained by Hegel, though in the context of how one can become an owner of property which is ownerless:

> 'in order to fix property as the outward symbol of my personality, it is not enough that I represent it as name and internally will it to be mine; I must also take it over into my possession. The embodiment of my will can then be recognized by others as mine'.[59]

Since only a property owner's objective as opposed to subjective intent is recognised by the social contract, intentions hidden in the mind of a property owner are disregarded.[60] That hidden purposes for transferring property are not recognised at law can be illustrated by *Thomas v Brown*.[61] The facts are as follows. The claimant entered into a contract with an auctioneer on 10th May regarding the purchase of a ship. She paid a deposit of £70. On the 15th May, the abstract of title was received by the claimant's solicitors. From the abstract of title, the claimant discovered the name of the vendor. Upon doing so, the claimant then decided not to complete the purchase, and her solicitors commenced an action against the auctioneer for recovery of the deposit which had been paid upon the signing of the contract. It was held that the claimant could not recover her money, demonstrating that unexpressed intentions, in this case the unexpressed intent being the importance that the claimant attached to the identity of the vendor, are not recognised by the social contract.

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[55] *Ibid* [37]. Also, see [49].
[56] *Ibid* [41].
[57] *Lewis v Averay* [1972] 1 QB 198 (CA) 207 (Lord Denning MR).
[58] *Storer v Manchester City Council* (1974) 1 WLR 1403 (CA) 1408 (Lord Denning MR). Although note that this guidance on objectivity was given in the context of contract formation.
[59] GWF Hegel, *Philosophy of Right* (SW Dyde tr, George Bell and Sons 1896) [51].
[60] See sub-section 'Expressed intention to create a trust' at fns 81-86 in ch 7 where it is argued that an intent to create a trust assessed objectively.
[61] *Thomas v Brown* (1875-76) LR 1 QBD 714.

When an individual does externalise his intention, the law interprets his intention within the boundaries of what was expressed. In the words of Hegel, the individual's intentions are 'confined to this very content as the decisive feature of its nature and external actuality'.[62] Moreover, this objectively determined intent is said to represent his will even though it may or may not be his actual will. This is because although the subjective theory of intention states that 'nullity must always follow' when there is 'an essential variation between the will and expression', under the objective approach 'validity must be decreed, because the sole criterion as to what the will is, is that act or expression itself.'[63] In the context of property, this means that when for example an individual makes a mistaken payment, with the consequence that his intended goal for making the payment is not fulfilled, under the objective approach the payer's property right in the money may not subsist, even though he would have intended to retain his property right in these circumstances.[64] Therefore, when the objective approach is applied, there can be a gap between when a transferor of property intends to retain, and when he actually retains, his property rights.

3 The necessity of the intention-protection gap

Since the law of property does not protect the claimant's intentions absolutely, one may argue that it is not really protecting autonomy at all. Or worse still, that the law of property undermines one's autonomy. For example, imagine a settlor attempts to create a trust whereby he is to become a trustee of property for another. If he does not state with certainty which property will form the subject matter of the trust, the trust is not created.[65] It fails from the outset due to uncertainty of subject matter, and the settlor remains the absolute owner of the property. This will be so even if regardless of this uncertainty of subject matter in the eyes of the law, the settlor was indifferent on the matter of which property formed the subject matter of the trust and did not intend to retain absolute title to his property even in these circumstances. In this instance, the individual's choice to give away his property rights is not being upheld. The law is working against the property owner's wishes and appears to be undermining his intentions. It could thus be argued that what is being protected is not the claimant's freedom. This can be further illustrated by looking at the operation of formality requirements for the creation and dispositions of equitable interests in land.[66] If these formalities are not complied with,

[62] GWF Hegel, *Philosophy of Right* (SW Dyde tr, George Bell and Sons 1896) [14].
[63] Edwin C McKeag, 'Mistake in Contract: A Study in Comparative Jurisprudence' in The Faculty of Political Science of Columbia University (ed), *Studies in History Economics and Public Law*, vol 23 (The Columbia University Press 1905) 13-14. McKeag wrote about the 'will', 'act' and 'expression' as the three elements of mistake. He said the objective theory assumes that the 'act' or 'expression' represents the 'will' whereas the subjective theory looks at the 'will' of the transferor to see whether the 'act' or 'expression' corresponds with that 'will'.
[64] See cases discussed in 'Unjust enrichment and property rights' section at text to fns 25-36 in ch 3.
[65] *Knight v Knight* (1840) 3 Beav 148 (Ch).
[66] Law of Property Act 1925, s 53 (1) (b) and s 53 (1) (c).

although it may be clear that a property owner intended to create or dispose of his equitable interest in land, the law overlooks the property's owner's subjective intentions. The consequence is that an enforceable trust does not arise, nor does a disposition take place. Although these examples illustrate that there is an intention-protection gap whereby the subjective will of the transferor is not always upheld, it is argued that the objective legal framework through which intentions are channelled does not undermine the autonomy justification for the protection of property rights.[67]

Outside of property law, the objective theory is already adopted by the law in the area of contractual interpretation. The law utilises an objective approach to determine the intentions of parties to a contract, thereby overlooking the parties' actual subjective intentions, yet the contract is still seen as upholding party autonomy.[68] Fuller also takes the view that the law can be seen to protect autonomy despite it not protecting absolute free will:

> 'the fact that a principle of private autonomy is recognized it does not follow that this principle should be given an unlimited application'.[69]

Although the social contract restricts freedom and does not protect a property owner's free will absolutely, the divergence caused by the objective standard between actual autonomy (everything we can do) and legal autonomy (everything we are allowed to do and the intentions that are protected) is necessary for the adequate protection of every individual's autonomy. It is therefore justified. First, as Bentham explains, the 'conduct and language [of men] will be for the most part directed by their own interest.'[70] For instance, in the property context if Person A's freedom to do as he wished was protected absolutely, and Person B's was also protected absolutely, where both parties want to exercise their freedoms over the same *res*, this creates a dilemma. Since the law would place both parties' freedom to choose on an equal footing, so that neither's right would be regarded as deserving of higher protection, each party's freedom would become worthless. As Bentham explained,

> 'in most matters of property, what is every man's right is no man's right; so that the effect of this part of the oracle, if observed, would be, not to establish property, but to extinguish it—to render it impossible ever to be revived.'[71]

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[67] See for example, L Fuller, 'Freedom- A Suggested Analysis' (1954) 68 Harv LR 1305, 1312-1313 who says that formal frameworks are needed to make choice effective. Also, see J Raz, *The Morality of Freedom* (OUP 1986) 155: 'Autonomy is possible only within a framework of constraints. The completely autonomous person is an impossibility. The ideal of the perfect existentialist with no fixed biological and social nature who creates himself as he goes along is an incoherent dream. An autonomous personality can only develop and flourish against a background of biological and social constraints which fix some of its human needs'.
[68] L Fuller, 'Consideration and Form' (1941) 41 Colum LR 799, 807-808.
[69] *Ibid* 808-809.
[70] Jeremy Bentham, Anarchical Fallacies: Being an Examination of the Declarations of Rights Issues During the French Revolution, in *The Works of Jeremy Bentham* (John Bowring edition, volume 2 1843) 396.
[71] *Ibid* 503.

The conflict between Persons A and B would thus have to be resolved between themselves, with the outcome being determined by physical strength:

> 'if any two men desire the same thing, which nevertheless they cannot both enjoy, they become enemies; and in the way to their End… endeavour to destroy, or subdue one an other'.[72]

For this reason, at law 'no individual interest in autonomy is entirely recognised', and property is governed by a state framework which 'balances the otherwise overlapping and anarchic demands of individuals' autonomy, in order to prevent an outcome where 'might is right''.[73]

Second, as stated by Hobbes, if 'every man has a right to every thing… as long as this natural right of every man to every thing endureth, there can be no security to any man.'[74] In the context of property, it follows that if a transferor's subjective intentions were protected absolutely, no transferee would be able to rely on security of receipt.[75] For example, if an individual transfers property to another under a contract and has a secondary purpose for making the transfer which he does not express to the recipient, the secondary purpose is hidden and incapable of discovery by the recipient of the property. Imagine then that this purpose of the transfer cannot be carried out, and the transferor then claims that the property continues to belong to him and that he should be able to get it back. If the transferor's intention to retain his property rights was upheld, not only would this undermine the community's interest in upholding bargains, but also violate the recipient's autonomy. This is because 'autonomy involves not only freedom but also security'.[76] Therefore, the intention-protection gap created by the law recognising only objectively determined intent in the law of property is justified.

6 Conclusion

This chapter explored the concept of autonomy in the property context. It argued that autonomy consists of free choice and choice fulfilment, and a way in which individuals can exercise their autonomy is through the institution of property. This chapter also explained that although individuals have a natural right to make any choice and have their choice fulfilled, the effect of the social contract is that there are bounds on the freedom (i.e. autonomy) that an individual has in relation to things. The effect of this is

[72] Thomas Hobbes, *Leviathan* (first published 1651, Penguin 2017) 101.
[73] P Allam, 'A Conception of Rights' (2011) 17 UCL Jurisprudence Rev 19, 24.
[74] Thomas Hobbes, *Leviathan* (first published 1651, Penguin 2017) 106.
[75] See text to fns 134-136 in ch 7.
[76] Dennis Klimchuck, 'The Normative Foundations of Unjust Enrichment' in Robert Chambers, Charles Mitchell and James Penner (eds), *Philosophical Foundations of The Law of Unjust Enrichment* (OUP 2009) 94. Autonomy is also discussed Hanoch Dagan, 'Restitution's Realism' in in Robert Chambers, Charles Mitchell and James Penner (eds), *Philosophical Foundations of The Law of Unjust Enrichment* (OUP 2009) 62.

that when individuals make a transfer of their property, even if their choice to make the transfer was not freely made or their intentions in relation to the transfer were not fulfilled, the law does not necessarily protect their property rights. This is the case even if they intended to retain their property rights in these circumstances. The reason for this is that the law protects property objectively and overlooks a transferor's subjective intent. Objectivity is important, and as discussed in the next chapter, it shapes the concept of impossibility which determines the availability of proprietary restitution for unjust enrichment.

Chapter 3 Impossibility

1 Introduction

The previous chapter established that an individual's autonomy in relation to objects is protected by the law of property. This chapter demonstrates that when a defendant is unjustly enriched, and the subject matter of the defendant's enrichment is property, the concept of autonomy determines whether the unjust enrichment gives rise to proprietary rights to protect the transferor's autonomy. Admittedly, other writers have referenced the concept of autonomy to explain the unjust enrichment cause of action.[1] Nonetheless, its relevance in the context of proprietary restitution has never been fully explored.[2]

The approach proposed here may at first appear to be closely aligned to the view of the late Professor Birks who argued that a proprietary response should be available for all initial failures. On his analysis, all mistaken payments would give rise to proprietary restitution. In contrast to Birks' initial failures of basis approach, but in line with the case law, the analysis presented here advocates that not all spontaneous and induced mistaken payments, which are all instances of initial failures, give rise to proprietary restitution. The differences between Birks' approach and the analysis proposed in this thesis will be highlighted at various points in this chapter, as well as in other areas of this thesis.

The chapter is structured as follows. It begins by exploring generally in the law of unjust enrichment the relevance of autonomy as freedom to choose, defined in terms of free choice and intent fulfilment. This chapter then argues that when a recipient is unjustly enriched, and the transferor's objective *purpose* for the property transfer is impossible from the moment of the transferee's receipt, on the basis of autonomy the unjust enrichment gives rise to a trust. On this analysis, a lack of free choice by itself is insufficient to give rise to proprietary restitution. The essential element for a proprietary response is that it must be impossible for the claimant's choice in relation to the property transfer to be fulfilled. Therefore, it is the complete failure of one's purpose for the transfer, what is here called an impossibility, that leads to proprietary restitution. It will be demonstrated that this impossibility approach reconciles the case law. The chapter ends by distinguishing the impossibility concept that triggers a proprietary restitutionary response, from the impossibility doctrine in the law of contract.

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[1] H Dagan, 'Restitution's Realism' in R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 62; EJ Weinrib, *Corrective Justice* (OUP 2012).

[2] It has been touched upon by B Häcker, 'Proprietary Restitution after Impaired Consent Transfers: A Generalised Power Model' (2009) 68 CLJ 324, 355-356 and E Bant, 'Reconsidering the Role of Election in Rescission' (2012) 32 OJLS 467, 480-481; Chambers, for example, only briefly alludes to autonomy in his resulting trust works, as he makes reference to 'freedom of choice'. See R Chambers, 'Resulting Trusts in Canada' (2000) 38 Alta Law Rev 378; Although Craig Rotherham and Hanoch Dagan have argued that autonomy is the justification for proprietary restitution (see C Rotherham, *Proprietary Remedies in Context* (Hart 2002) 81 and H Dagan, *The Law and Ethics of Restitution* (Cambridge University Press 2004) 321), they believe that all mistaken payments should lead to a trust (see pp.151-152 and 324 respectively), whereas this article presents a more nuanced approach to the relationship between autonomy and proprietary claims.

2 The concept of autonomy in unjust enrichment

As discussed in the previous chapter, individuals are 'planning agents'[3] and use property as a planning tool to achieve their goals.[4] Since property is the subject matter of choice and can be used by individuals to advance their goals and achieve their ends, property is a means through which autonomy is exercised.[5] Thus for mistaken payments, as property is the subject matter of the defendant's unjust enrichment, the principle of autonomy is engaged. Fitzgerald also believes that autonomy is relevant in unjust enrichment due to the property-based nature of subtractive unjust enrichment claims. He states that:

> 'the law of unjust enrichment… is motivated by a concern for the individual's liberty, freedom and autonomy predominantly in the context of commercial transactions. A more specific way of expressing this is to say that unjust enrichment is all about the liberal institution of private property and the way it can be protected. Protection of this right to hold private property is fundamental (in liberal theory) to individual autonomy…'[6]

1 Free choice

As discussed in the last chapter, autonomy defined in terms of freedom to choose consists of free choice and intent fulfilment.[7] When a claimant transfers property under compulsion, duress or undue influence, he has not freely chosen to make the transfer. It is the *lack of free choice* that establishes the defendant's enrichment is unjust. Consequently, the law protects the claimant's autonomy via a claim for restitution. The absence of freely formed intent also explains why restitution is available for ignorance cases. The ignorance unjust factor comes into play when the claimant's property has been taken away from him without his consent, and thus autonomy is relevant as the claimant had no choice over what to do with his property. It will be discussed later in this chapter that a lack of free choice alone can only give rise to personal restitution and is thus not the underlying premise for proprietary restitution.[8]

Before proceeding further, one important point should be noted; although this thesis explains unjust enrichment in terms of free choice and choice fulfilment, it still refers to the unjust factors in many parts. There are two reasons for this. The first is for simplicity. Second, in many instances the unjust

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[3] M Bratman, *Intentions, Plans, and Practical Reason* (Cambridge: Harvard University Press 1987); D Sheehan, 'Mistake, Failure of Consideration and the Planning Theory of Intention' (2015) 28 Can J L & Jurisprudence 155.
[4] A Brudner, *The Unity of the Common Law* (2nd edn, OUP 2013) Ch 5.
[5] See text following fn 47 in ch 2.
[6] B Fitzgerald, 'Ownership as the Proximity or Privity Principle in Unjust Enrichment Law' (1994) 18 UQLJ 166, 170.
[7] See text to fn 8 in ch 2.
[8] See discussion of *Allcard v Skinner* at text to fn 36 below.

factors are a useful way of determining whether one's autonomy has been undermined. For example, as mentioned above, the unjust factor of undue influence establishes a lack of free choice. Also, cases which utilise the mistake unjust factor involve situations where the payer's intentions with regards to his property are not fulfilled, thus undermining the payer's autonomy and entitling him to restitution.

Some scholars believe that the law of unjust enrichment is concerned solely with protecting the claimant's right to freely choose.[9] Lionel Smith, for instance, says that a defendant is unjustly enriched at the claimant's expense when the claimant has not fully consented to the transfer.[10] Giving the example of a mistaken payment, Smith says that 'the claimant… did not fully assent to the transfer of wealth; the transfer was made on the basis of bad information. It was not a free expression of self-determining agency'.[11] Originally, Birks also fell into this camp.[12] This is because, as Brudner explains, Birks categorised mistaken enrichments as 'non-voluntary' transfers.[13]

2 Intent fulfilment

But as Brudner rightly argues, the lack of free choice does not explain the entirety of the law of unjust enrichment.[14] This is because sometimes the claimant's intent is freely formed. In such circumstances, the claimant has thus exercised free choice. Nevertheless, in the eyes of unjust enrichment law, his autonomy is undermined, and he is entitled to restitution. For instance, if unjust enrichment was solely concerned with the free exercise of will, restitution would not be available for mistaken payments and failures of consideration. This is because when a claimant makes a payment by mistake, or pays money pursuant to a consideration that fails, the claimant's choice to make the payment was freely made; he was not forced to make the transfer. A right to restitution is nonetheless still available.[15] The reason unjust enrichment law intervenes in these situations is because the claimant's free choice could not be fulfilled.[16] This supports the view that, in the law of unjust enrichment, fulfilment of choice is just as significant as free choice. It will now be briefly discussed what is meant by intent fulfilment.

Whenever one transfers property to another, he does so for a purpose.[17] This means he is parting with his property on the basis that the condition on which the transfer is made can be fulfilled. If the condition attached to the transfer is carried out, the transferor's purpose is achieved. On the other hand, if the

[9] A Brudner, *The Unity of the Common Law* (2nd edn, OUP 2013) 242.
[10] *Ibid*.
[11] L Smith, 'Restitution: The Heart of Corrective Justice' (2001) 79 Tex L Rev 2115, 2141.
[12] P Birks, *An Introduction to the Law of Restitution* (Oxford: Clarendon Press 1985) 140.
[13] A Brudner, *The Unity of the Common Law* (2nd edn, OUP 2013) 242n.12.
[14] *Ibid* 242-246.
[15] *Ibid*.
[16] For the importance of intent fulfilment in unjust enrichment, see A Brudner, *The Unity of the Common Law* (2nd edn, OUP 2013) 253; H Dagan, 'Mistakes' (2001) 79 Tex LR 1795, 1798: 'The law of restitution deals with cases in which the plaintiff's mistaken transfer of wealth to the defendant has frustrated the intended goal of the plaintiff's action'.
[17] See text to fn 24 in ch 2.

transfer of property does not result in the outcome that the transferor intended, then his purpose is not fulfilled. The conditional nature of transfers in the law of unjust enrichment has been explored by Webb.[18] He argues that when A pays B with the intention of discharging a debt, A's intention to pay is conditional on the money being due. If it turns out that A is mistaken and the money is not in fact due, the condition for the payment fails. A is entitled to restitution because in the event that the condition could not be fulfilled, A did not intend B to have the money.[19] The availability of restitution for mistakes and failures of consideration is therefore explicable on the basis that the law of unjust enrichment protects one's freedom to have choices in relation to property fulfilled,[20] as well as one's freedom to make choices. As Brudner explains,

> 'mistake frustrates the realization of the intended goal, but it does not implicate the claimant's capacity for goal-setting. Mistake and defeated expectations become relevant only if we are interested in the particular purpose the individual actually settled upon rather than in the bare capacity to formulate purposes.'[21]

The law of unjust enrichment's protection of one's freedom to have goals fulfilled can be illustrated using the following examples. You and I enter into a contract under which you are required to act in a short film that I am producing. Pursuant to this contract, I pay you £500. The action of me paying you is a consequence of my free choice. Imagine though that before you perform your contractual obligations, you contract a chronic illness. The contract is frustrated. Even though my choice to make the payment was freely made, my ability to self-govern my resources is undermined. This is because I gave away my property (£500) so that in return I could receive performance (in the form of you acting in my film). But instead, I am left with neither the performance nor the £500. My plan has failed as I never received the bargained-for performance. Since I lost my property in circumstances where my intentions for making the transfer could not be fulfilled, I did not make an autonomous decision to enrich you. The law of unjust enrichment thus steps in to protect my property. It gives me a right to recover the value of £500, which is achieved by imposing an obligation on you to repay me this sum. This analysis also explains why a claimant who pays to discharge a debt that he mistakenly believed to exist can recover the money from the recipient. Although the mistaken payer's choice to pay is freely made, his intended outcome for the transfer- to discharge the debt- cannot come about. The law thus

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[18] On the importance of conditions in unjust enrichment, see C Webb, *Reason and Restitution: A Theory of Unjust Enrichment* (OUP 2016) 128-129.

[19] *Ibid* 129. Bratman too views the law of unjust enrichment as being concerned with failed plans. See Bratman's 'planning theory' in M Bratman, *Intentions, Plans, and Practical Reason* (Cambridge: Harvard University Press 1987).

[20] As argued by Sheehan, for both failure of consideration and mistake, the transferor's intent is conditional; he intends the defendant to retain the enrichment subject to the conditions of transfer being satisfied. D Sheehan, 'Mistake, Failure of Consideration and the Planning Theory of Intention' (2015) 28 Can J L & Jurisprudence 155.

[21] A Brudner, *The Unity of the Common Law* (2nd edn, OUP 2013) 243.

protects his property right by giving him a right to restitution of the fund. The effect of restitution is it once again puts the claimant in control of his property. This gives him the chance to part with it in circumstances where his plans can this time hopefully be fulfilled.

It has so far been argued that when a transfer is made for a purpose that cannot be fulfilled, the condition for the transferee to obtain an absolute right to the enrichment has not been satisfied. The next section explores in more detail the types of conditions that underpin property transfers, and what their role is in property law.

3 Conditions underpinning property transfers

When a property owner transfers his property to another, three types of conditions attach to the transfer. All concern the value of the property transferred and the transferor's proprietary interest. To understand the law of failed transfers, it is essential to have some knowledge of these conditions. Therefore, this section will discuss each of the three types of conditions in turn, how they link to different aspects of a property owner's intentions, and how these conditions operate alongside each other in the unjust enrichment context.

1 The condition on which the defendant can obtain title

When an individual transfers his property, if he delivers the property to the recipient with the intention of transferring title, legal title passes. For example, I make a mistaken payment to you. Even though my intention to make the payment is vitiated, I authorised the transfer and intended for legal title to pass. As I have satisfied the criteria for the transfer of ownership, the law upholds my autonomous decision to transfer property, and this is reflected in the fact that title in the money passes to you.[22] In contrast, if my property is stolen, I am unaware of the transfer. At no point did I possess an intention to transfer ownership to the thief. The absence of an autonomous decision to transfer ownership prevents the passing of legal title.[23]

2 The condition on which the defendant can retain the value

In the unjust enrichment context, if a recipient receives property in conditions on which the claimant intended to enrich him, he can retain both the property itself and its value. But if the conditions on which he can retain the enrichment have not been satisfied, he must make restitution. For example, I

[22] *Miller v Race* (1758) 97 ER 398, *Chambers v Miller* (1862) 143 ER 50, *R v Prince* (1865-1872) LR1 CCR 150, *Ilich v R* [1987] HCA 1, (1987) 162 CLR 110.
[23] W Swadling, 'Ignorance and Unjust Enrichment: The Problem of Title' (2008) 28 OJLS 627.

pay money to you under a contract. Subsequent to payment, but before you perform your contractual obligations, the contract is frustrated. Despite the frustration, the conditions for the transfer of ownership mentioned in the preceding paragraph are satisfied. Title to the money therefore passes to you. However, I only intended to enrich you in the event that the purpose of the contractual payment could be carried out. Your right to retain the value of my enrichment was thus contingent on the purpose being fulfilled. As the purpose was not fulfilled, you are unjustly enriched at my expense. Consequently, the law intervenes to protect my autonomy, by giving me a claim for restitution of the value of what I paid you.

3 The condition on which the defendant can obtain the beneficial interest

When a recipient receives property in circumstances in which he is unjustly enriched, he may receive the legal but not the beneficial interest in the *res*. This thesis demonstrates that where the claimant's objective purpose[24] for transferring the enrichment was possible to carry out when the recipient received the property, the unjustly enriched recipient receives absolute title (i.e. both the legal and beneficial interest). He is only under an obligation to make restitution of the value received. If, on the other hand, the objective purpose of the transfer is impossible from the moment of receipt, the recipient will be required to make restitution of the property itself. This is known as 'proprietary restitution' and is discussed in more detail in the next section.

4 Unjust enrichment and property rights

Even amongst unjust enrichment scholars, it is broadly recognised that that the recipient's unjust enrichment by itself is not sufficient for a proprietary restitutionary response; something more is needed. The contribution this thesis makes to the current literature is it argues that when the defendant's receipt of an enrichment is unjust, and additionally the objectively determined purpose of the transfer to the defendant is impossible from the outset, the goal of autonomy protection justifies proprietary restitution. In contrast, when the claimant's payment unjustly enriches the defendant, but the objective purpose of the payment can be fulfilled at the time of the defendant's receipt, a trust cannot arise.[25] Instead, the defendant receives unrestricted beneficial ownership of the enrichment, and the claimant is limited to personal restitution. Under this analysis, impossibility is therefore a secondary requirement for the equitable proprietary claim; the primary requirement is that the defendant must be unjustly enriched.

[24] As discussed in the previous chapter, focusing on the objective as opposed to the subjective purpose is important in the law of property. See sub-section 'The necessity of the intention-protection gap' at text to fns 65-76 in ch 2.
[25] E.g. *Lady Hood of Avalon v MacKinnon* [1909] 1 Ch 476 (Ch). See text to fn 33 below.

Admittedly, the approach proposed here may at first appear to be closely aligned to the view of the late Professor Birks. He also argued that for there to be a proprietary response, the defendant must be unjustly enriched and cannot have unrestricted beneficial ownership of the enrichment. However, the problem with Birks' analysis is that it failed to explain cases such as *Re Goldcorp Exchange Ltd*,[26] which illustrates contrary to his claim that a trust is not available for all initial failures. In contrast to Birks' initial failures of basis approach, but in line with the case law, the analysis presented here advocates that not all spontaneous and induced mistaken payments, which are all instances of initial failures, give rise to proprietary restitution. This position is supported by demonstrating that the availability of the proprietary response is contingent on the impossibility of the purpose of the transfer at the moment of the defendant's receipt, rather than an enrichment which is initially unjust. It will be discussed later in the thesis that this reasoning explains why in *Re Goldcorp* there was a mistake and hence an initial failure of basis, yet the claimants were only entitled to personal restitution.[27]

Another example which illustrates the difference between Birks' approach and the impossibility analysis is *Roxborough v Rothmans of Pall Mall of Australia*[28] in which the recipient was unjustly enriched from the moment it received the payments, but where there was no impossibility of the claimant's purpose. In *Roxborough*, the appellant retailer had entered into a contract to purchase tobacco products from the respondent wholesaler. The wholesale contract price included the price of goods plus a tobacco licence fee. This licence fee was a tax that the wholesaler was under a statutory obligation to collect from the retailers and pay to the government. However, in *Ha v New South Wales* it was held that the New South Wales legislation that imposed the tax was invalid.[29] The retailer then sought to recover the element of the contract price that represented the unlawful tax. The court allowed recovery of the licence fee element of the contract price from the wholesaler on the basis that there was a total failure of consideration. This is because the part of the contract that imposed the licence fee could be severed from the rest of the agreement. Consequently, when the tax was found to be invalid the consideration totally failed for the payments which constituted the licence fee. The recipient wholesaler was therefore unjustly enriched by these payments from the time of receipt.[30] Under Birks' approach, there was an initial failure of basis. Proprietary restitution should therefore have been available. However, the impossibility analysis explains why, if the question of a trust arising had been directly relevant, one could not have arisen in response to the wholesaler's unjust enrichment. The reason is that when one looks at the aim of the transaction between the parties, it is evident that the retailer made payments to the wholesaler for the purpose of obtaining delivery of the contracted for tobacco

[26] *Re Goldcorp Exchange Ltd* (in receivership) [1995] 1 AC 74 (NZPC).
[27] See text to fns 99-106 in ch 4.
[28] *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68, (2001) 208 CLR 516.
[29] *Ha v New South Wales* (1997) 189 CLR 465 (HCA).
[30] There was an initial unjust enrichment because the law operates retrospectively. See discussion at fn 13 in ch 5.

products.[31] This was not affected at all by the absence or presence of the licence fee in the contract. The payment of the licence fee was therefore ancillary;[32] it was not the purpose of the transaction between the parties. Thus *Roxborough* is an instance of where the application of Birks' approach and the impossibility analysis lead to different outcomes.

The impossibility analysis also explains why in *Lady Hood of Avalon v Mackinnon*,[33] despite there being an initial failure of basis, if the question of proprietary restitution had arisen, it would nevertheless have been denied. In *Lady Hood*, to achieve equality between her two daughters the donor made a gift of £8600 to her elder daughter. A deed was used to execute the gift, in which the elder daughter was named as the beneficiary of the appointment. However, the donor made this gift having forgotten that she had already appointed property to this daughter. The second appointment was thus made by mistake, as it could not achieve the intended equality between her two children. Eve J rescinded the deed. It is submitted that the mistake could not give rise to proprietary restitution of the benefits transferred. This is because the purpose of the transfer, deduced from the deed, was to make a gift to the elder daughter. This was both achievable and achieved by the irrevocable appointment to the same. Although the mother had also intended for the gift to achieve equality between her two children, but as this was not stated in the deed, it could not be objectively determined from the transfer. So although the gift could not achieve the intended equality, and the elder daughter was unjustly enriched from the outset for this reason,[34] there was no impossibility.[35] In contrast, if in *Lady Hood of Avalon* the donor had specified in the deed that the disposition was to achieve equality between her two daughters, in terms of the value of gifts she had made to each of them, the law would recognise achievement of equality as a condition of transfer. Its impossibility would therefore have given rise to proprietary restitution of the benefits. Similarly, there is the case of *Allcard v Skinner*.[36] This involved a claimant who upon becoming a member of a sisterhood gifted her property to the defendant lady superior. The Court of Appeal held that the claimant made the property transfers whilst acting under the defendant's undue influence. But on the facts, the court held that her claim was barred by laches and acquiescence. She could therefore not set aside the gifts. It is argued that even if she had made a claim for proprietary restitution, it would

[31] See sub-section 'The condition on which the defendant can obtain the beneficial interest' at text to fn 24 above.
[32] See further discussions of main and ancillary elements of a transfer near text to fn 54 below.
[33] *Lady Hood of Avalon v MacKinnon* [1909] 1 Ch 476 (Ch).
[34] See discussions in section 'The condition on which the defendant can retain the value' near text following fn 23 above.
[35] This is because the objective purpose was still possible. Lusina Ho also advocates for an objective approach to intention for proprietary restitution. L Ho, 'Proprietary Remedies for Unjust Enrichment: Demystifying the Constructive Trust and Analysing Intentions' in Charles Mitchell and William Swadling (eds), *The Restatement Third, Restitution and Unjust Enrichment: Critical and Comparative Essays* (Hart 2014) 216-226. An objective approach to intention for the purposes of unjust enrichment is also adopted by Ernest J Weinrib, *Corrective Justice* (OUP 2012) 206-207: The plaintiff's intentions for transferring the benefit go 'beyond subjective intent to include situations in which, whatever the transferor's subjective intent, the background legal categories justify the imputation of an intention (…)' by 'drawing on the public meaning that the plaintiff's action has in the relationship between the parties.'
[36] *Allcard v Skinner* (1887) 36 Ch D 145 (CA).

not have been successful. This is because although undue influence rendered the lady superior's receipt of the enrichments unjust from the outset, the purpose of the transfer- to make a gift to the sisterhood- was possible, and on the facts achieved, when the lady superior received the gifted property.

As to what follows, this section will now explain the role of autonomy in determining proprietary responses for unjust enrichment, and why only an initial impossibility justifies proprietary restitution. Moreover, it will demonstrate that not only does the impossibility principle underpin the availability of the proprietary response, but that it can be used to draw a clear line between unjust enrichment cases where proprietary restitution is justified and cases where it is not.

1 Justifying impossibility

When the claimant's purpose for a transfer is impossible at the time the defendant receives the claimant's property, only then is proprietary restitution justified. This is because as there is no opportunity for the claimant's purpose to be fulfilled, if the claimant did not retain a property interest it would completely undermine his rights as a freely autonomous agent. The reason is that when a claimant makes a payment for a purpose, he is parting with his property on the condition that the purpose is capable of being achieved. So if the purpose is never capable of being fulfilled when the defendant receives the property, there is a deviation between the purpose that the payment was made for and the capacity in which the money is received by the defendant. The claimant's intentions with regards to his property are thus completely defeated.[37] The lack of congruency renders the property transfer defective in equity. In the eyes of equity, at no point in time does the defendant have a reason to retain the property beneficially, as his legal title was at all times overshadowed by the fact that the claimant's purpose for the transfer could never be fulfilled. There is thus no justification to strictly enforce the law of property and bind the claimant to the transfer.[38] The consequence is that the defendant holds the money received on trust for the payer. The trust protects the claimant's autonomy by putting him back in control of his property, but this time in equity. This gives the claimant the ability to once again plan his resources and try to achieve his goals.

How the impossibility analysis works can be illustrated using the following example. A wants to buy Christmas presents from X. Unaware that Company X is already in liquidation, A pays X for the goods. The consequence of the liquidation is that A's purpose for making the payment was never possible to carry out; the purpose was impossible from the outset. It follows that if A's proprietary interest in the money paid to X is not protected, then his ability to plan his resources will be compromised and his

[37] A similar approach to 'proprietary restitution' is taken by G Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2015) 170.

[38] Brudner, though discussing autonomy and property in the context of personal restitution, also argues that the courts 'suspend property when effectuating it would subvert the plaintiff's autonomy.' See A Brudner, *The Unity of the Common Law* (2nd edn, OUP 2013) 241.

autonomy completely undermined. For that reason, from the moment Company X receives the payments, equity intervenes in the form of the trust device. As beneficiary of the trust fund, A can demand a transfer of the legal title to the money to himself using the principle in *Saunders v Vautier*.[39] Once A has absolute ownership, he can use the property to fulfil his plans by using the money to buy the same gifts from another seller. In contrast, if Company X had entered into liquidation only after receiving A's payment, there would be a period of time between the receipt of monies and the liquidation, however short, where A's contracted-for goods could be delivered. As this would be a subsequent impossibility, proprietary restitution would be denied.[40] The reason is the money was transferred on the condition that the purpose was capable of being achieved. When the defendant received the money, the purpose was capable of being fulfilled; there was no deviation between the purpose that the payment was made for and the capacity in which it was received by the defendant. A trust thus cannot be recognised, since if one wants their purpose to be fulfilled, this can only happen if the other party has an opportunity to fulfil the purpose for which the money was given. Consequently, A would be confined to a personal claim for restitution against X.

2 Applying the impossibility concept

1 Impossibility

The cases support the view that, when a claimant's decision to make a transfer is nullified by the fact that there is no possibility of the claimant's conditions for transferring his property being fulfilled when the defendant receives the enrichment, equity intervenes to protect the claimant's autonomy. A common example of proprietary restitution for impossibility is when property is transferred for an unknown purpose; when 'the intention with which an act is done affects its legal consequences and the evidence does not disclose what was the actual intention with which [it was done],'[41] equity intervenes to protect the claimant's property using a resulting trust.[42] This can be explained on the basis that although the claimant may have freely chosen to make the transfer, the substance of his choice is missing. He may have intended to make a gift, or alternatively, intended the property transferred to be held on trust. As the purpose for the transfer is not known, it is not clear whether any element of the claimant's choice was fulfilled when the defendant received the property. 'Equity is cynical'[43] and presumes[44] that

[39] (1841) 4 Beav 115 (Ch).
[40] E.g. *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 (PC). See text to fns 99-106 in ch 4.
[41] *Pettitt v Pettitt* [1970] AC 777 (HL) 823 (Lord Diplock).
[42] E.g. See *The Venture* [1908] P 218 (CA); *Re Vinogradoff* (1935) WN 68 (Ch); *Seldon v Davidson* [1968] 1 WLR 1083 (CA).
[43] Graham Virgo, *The Principles of Equity and Trusts* (OUP 2012) 34.
[44] This legal presumption for property transfers is evident in the law of presumed resulting trusts which can only arise when the reason for the transfer is not known.

individuals do not part with property for no reason but rather to achieve a purpose.[45] As the claimant's purpose cannot be identified and the recipient has apparently received the property unconditionally, in order to protect the transferor's autonomy the law presumes that the claimant's intentions were not fulfilled, and the defendant is therefore unjustly enriched. Furthermore, equity takes the position that the purpose was impossible from the outset. It then intervenes to protect the claimant's autonomy, by safeguarding his property rights using the trust device from the moment the defendant receives the enrichment.

Alternatively, if the claimant's purpose for the transfer can be identified, but the conditions underpinning the transfer on which the defendant can obtain the beneficial interest are impossible to fulfil at the moment of the defendant's receipt, the basis for the payment falls away.[46] This causes the transfer to become unconditional and devoid of purpose, causing equity again to intervene. The decision in *Re Crown Holdings (London) Ltd* illustrates that equity intervenes when the transferor's intentions, with regards to the property transferred, are completely frustrated at the time of the defendant's receipt.[47] In this case, the object of the contracts was to provide foreign currency in exchange for English currency. For the customers' payments received by the insolvent Companies *after* Barclays Bank stopped all payments out of the Companies' accounts, thereby causing a cessation of trade, this could not be carried out at the time of their receipt. The cessation of trade rendered the purpose of these payments impossible to fulfil from the outset. Accordingly, this money was held on trust for the customers. But it was also held that the money received into the insolvent Companies' accounts *before* Barclays stopped outgoing account payments was not held on trust for the payers. This can be explained on the premise that when this money was received by the Companies the Companies were still trading, and so the contracts could still be carried out. Consequently, for these earlier payments, when the purpose later failed it was too late for a trust to arise.[48]

2 Purpose capable of being carried out

[45] The view that unjust enrichment is based around the idea that individuals do not transfer property for no reason is taken by Jacques du Plessis, 'Labels and Meaning: Unjust Factors and Failure of Purpose as Reasons for Reversing Enrichment by Transfer' (2014) 18 Edin Law Rev 416, 427: 'At the heart of this notion lies the idea that, as a general rule, people do not arbitrarily or aimlessly confer benefits on others, but do so for a purpose or reason (footnote omitted). This purpose often is shared between the transferor and recipient; the parties know what the transfer is for. The implication is that if the transfer failed to do what it was supposed to do, this failure of its purpose should trigger a potential duty of restitution. In this way, enrichment law could in turn protect fundamental legal values, such as the personal autonomy to dispose of or receive property (footnote omitted).'

[46] R Chambers, 'Resulting Trusts' in Andrew Burrows and Alan Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006) 261 also argues that the 'basis' for the payment falling away is the reason for equity's intervention but only if the right to restitution arises at the moment of the defendant's receipt.

[47] *Re Crown Holdings (London) Ltd* [2015] EWHC 1876 (Ch).

[48] Similarly, see *Re Farepak Food and Gifts Ltd* [2006] EWHC 3272, [2008] BCC 22.

In contrast, for the case of *Eldan Services Ltd v Chandag Motors Ltd*[49] the impossibility analysis explains why, even if the variation of the contract had been set aside, the unjust enrichment could not give rise to proprietary restitution. The claimant had paid the defendant by means of a post-dated cheque for the purchase of a business and stock. Subsequently, the claimant alleged that the stock was not worth the amount payable under the contract, and that the cheque therefore represented an overpayment. Millett J, on the assumption that grounds existed for setting aside the variation, said that 'the claimants' claim is a personal claim only',[50] as opposed to a proprietary claim for a trust. This can be explained on the basis that the object of the payment, which in *Eldan Services* was to purchase business and stock, could be carried out at the time of its receipt.

Two further examples can be used to illustrate that when a transferor's intentions are subsequently defeated, equity does not intervene to protect his autonomy. In *Mascall v Mascall*,[51] the claimant intended to make a gift of a house to the defendant. He executed the transfer document and handed it to the defendant along with the land certificate. At this point, 'he had done everything necessary to complete the transaction so far as he, the claimant, was concerned. The gift was in equity complete'.[52] The donor's original plan- to make a gift of the land to his son- was possible, and his intention had therefore not been defeated. When the claimant and defendant later fell out, the father attempted to revoke the gift. However, when the donor subsequently changed his mind it was too late for him to recoup the beneficial interest in the land. This is because the purpose was possible from the outset, and the donee was on track to receive the property in accordance with the donor's intent. The second example is *Fibrosa v Fairbairn Ltd*, where payment had been made for delivery of machines.[53] Before the machines were received by the claimant, the contract was frustrated due to war. As the claimant's intentions to have the goods delivered could no longer be fulfilled, the condition on which the payment was made failed. However, this only gave rise to a personal as opposed to proprietary claim for restitution. The reason is that at the moment the defendant received the payment, the contract was still possible to carry out. It was only later that the claimant's purpose failed. This prevented a trust from arising.

3 Difficult cases

In some cases, the proprietary analysis is not so straightforward. This is because when determining whether the purpose of a transfer is impossible, one must always distinguish aspects of the transaction that are central to the transfer, and thus constitute the purpose of the transfer, from those that are not.

[49] *Eldan Services Ltd v Chandag Motors Ltd* [1990] 3 All ER 459.
[50] *Ibid* 462.
[51] *Mascall v Mascall* (1985) 50 P & CR 119 (CA).
[52] *Ibid* 128 (Browne-Wilkinson LJ).
[53] *Fibrosa v Fairbairn Ltd* [1943] AC 32 (HL).

Parallels can be drawn with the law of contract which distinguishes between conditions, which go to the root of the transfer, in contrast with warranties which do not. It is argued here that aspects of a transaction that are not central to the transfer (i.e. not the purpose) are not a condition of the defendant's right to retain the enrichment absolutely. Consequently, their impossibility does not completely defeat the transferor's intentions, and thus cannot give rise to a trust of the property transferred.

There are no rigid principles for determining which part of a claimant's intentions are central or ancillary to the transfer. It must be determined on a case by case basis, by looking at the transaction between the claimant and defendant as a whole to identify the conditions on which the transfer was made. This can be illustrated using the case of *Pitt v Holt*.[54] In *Pitt*, the claimant created a discretionary trust and made a voluntary disposition to it. Although the trust was successfully created, the tax consequences were much higher than expected. The claimant then sought equitable relief in the form of rescission on the ground of mistake of law. In *Pitt*, it was also briefly discussed whether the mistake could give rise to proprietary claims against third parties. One of the arguments advanced by HMRC against the court granting the claimant relief for her mistake, in the form of setting aside the disposition, was that 'the court does not know what proprietary claim would vest in the estate against third parties.'[55] In response to this the claimant's solicitors wrote a letter dated 22 November 2011 to the Revenue which stated that if the settlement was set aside, Mrs Pitt would not bring any further claims against 'the recipients of distributions or other payments from the trustees. Our clients will be satisfied with the effect of section 150 IHTA 1984 (consequent on the order setting aside Mr Pitt's settlement).'[56] The Supreme Court also acknowledged that:

> 'until the solicitor's letter of 22 November 2011 there was at least a possibility of third party claims arising, and the Revenue placed reliance on that as a reason for refusing relief. But for the letter, the court might, if minded to grant relief, have required an undertaking to the same effect as the one that Mrs Pitt and Mr Shores have volunteered'.[57]

The availability of proprietary restitution was therefore relevant. Nevertheless, it is submitted that if the proprietary claim had been pursued it would not have been successful. This is because the claimant's purpose for the transfer was not defeated by the large unexpected tax consequences.

In *Pitt*, Lloyd J in the Court of Appeal said that 'the legal effect [of the disposition] was the creation of the Special Needs Trust, on its particular terms, and the fact that the lump sum and the annuity were

[54] *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108.
[55] *Ibid* [138].
[56] *Ibid.*
[57] *Ibid* [141].

settled upon those terms.'[58] It is submitted that Lloyd J's 'legal effect' is a reference to the purpose on which the transfer was made. As Lord Walker said in *Pitt*:

> 'it is generally agreed that 'effect' must mean legal effect (in the sense of the legal character or nature of a transaction). In *Dent v Dent* [1996] 1 WLR 683, 693 the deputy judge (David Young QC) understood as '*the purpose or object*' of a transaction.'[59]

As well as making the disposition for the purpose of creating a trust, the claimant intended that the trust property would be used to maintain herself and her husband, and that the trust would create minimum tax consequences. The creation of the trust for the claimant and her husband's benefit was the primary goal of the transaction, whereas achieving minimum tax consequences was an ancillary condition of transfer. This analysis can be supported by Lord Walker's judgment. He said that 'it has not been suggested that the primary purpose of the SNT was other than Mr P's welfare and benefit, and the maintenance of his wife as his carer.'[60] Therefore, when large inheritance tax liabilities arose, the purpose for the transfer had not been defeated. A resulting trust could thus not arise in response to the unjust enrichment. Neither could a trust arise for the first time upon HMRC's receipt of the tax monies. The claimant paid HMRC for the purpose of discharging a legal obligation. This legal obligation was imposed by tax legislation because the claimant had successfully created an express trust. Since the obligation to pay existed, and the tax debt was discharged when HMRC received the money, the claimant's purpose was possible.

5 Distinguishing the concept from the frustration doctrine

Legal doctrine already recognises that an impossibility can trigger a legal response. The concept of impossibility is for instance utilised in the law of frustration. A contract is said to be frustrated if its performance becomes impossible. The frustration brings the contract to an end, and the parties are discharged from performing any future obligations under it. Although it is submitted that 'impossibility' also explains the law of proprietary restitution, this section demonstrates that it is different from the concept utilised in the law of frustration. For example, what constitutes an impossibility for the purposes of frustration, and the effects of it in the frustration context, are different from the proprietary restitutionary context. For instance, when benefits are transferred under a contract that is subsequently frustrated by impossibility (i.e. in accordance with the doctrine of frustration), this does not necessarily give the claimant a right to proprietary restitution of the benefits. Further differences between the

[58] *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [218] (Lloyd J), cited by Lord Walker in *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108 [134].
[59] *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108 [119] (Lord Walker) (emphasis added).
[60] *Ibid* [134].

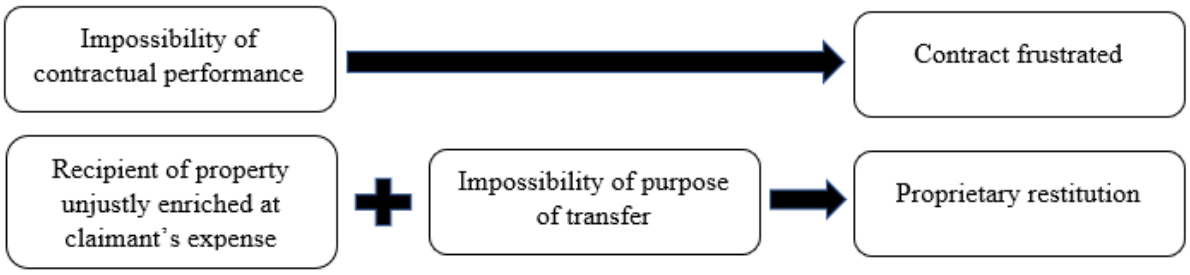
impossibility concept in the law of frustration and the law of proprietary restitution will now be explored.

1 Context

The impossibility concept in the law of frustration only applies to contractual situations, since a contract must be present for it to be frustrated. Whereas for proprietary restitution, a contract does not need to exist between the litigating parties.

2 Claim structure

To establish frustration, there is only one requirement. The claimant needs to establish that there was an impossibility of contractual performance. For proprietary restitution to be available, there are two pre-conditions. The primary requirement is that the recipient must be unjustly enriched at the claimant's expense from the moment he receives the property. The secondary requirement is there must be an impossibility. Once both have been established, only then does the claimant obtain an equitable proprietary right in the benefit he transferred to the defendant.



3 Fault

When it comes to the relevance of 'fault', the two impossibility doctrines again diverge. According to the case law, frustration must occur 'without blame or fault on either side. Reliance cannot be placed on self-induced frustration'.[61] Thus if the action of one of the contracting parties causes the contractual performance to become impossible, the parties cannot rely on the frustration doctrine. For example, in *Taylor v Caldwell*, a fire destroyed a music hall that the claimants had contracted to use for a performance. The fire was not caused by the fault of either party.[62] As the destruction of the premises

[61] *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435 (HL) 452 (Lord Sumner); also see Lord Justice Bingham in *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep 1 (CA) 10.
[62] *Taylor v Caldwell* (1863) 3 B & S 826 (KBD).

meant that the claimant could no longer obtain contractual performance, in the form of the use of the premises, the contract was frustrated by impossibility. In obiter, Blackburn J said that if the fire had been caused by the fault of the owner of the premises, then the contract would not have been frustrated.[63] This is because the impossibility would have been attributable to one of the parties. In contrast, fault does not preclude proprietary restitution. Even if the claimant is himself responsible for the impossibility of the purpose for which he made the transfer, there can nevertheless be a proprietary restitutionary response. For example, imagine a claimant mistakenly believes that he owes a defendant money.[64] He then pays the defendant so that the debt can be discharged. Since the debt does not exist, the purpose of the transfer is impossible. In this instance, the mistake could have been easily avoided; had the claimant been more careful and checked whether the money was due before paying, he would have realised that the obligation to pay the defendant did not exist. Nevertheless, there is a proprietary restitutionary response despite the impossibility being an event within the claimant's control.

4 Transferral of benefits

The frustration doctrine can frustrate a contract even when no benefits have been transferred from claimant to defendant. On the other hand, the impossibility doctrine which gives rise to proprietary restitution is applicable only if benefits have been transferred from one party to another. There are two reasons for this difference. The first is that for proprietary restitution to be available the claimant must show the defendant was unjustly enriched at his expense. This can only be established by showing that there was a transfer of benefits from the former to the latter. The second reason is that if the defendant has not received property from the claimant, then there is no property that can form the subject matter of the restitutionary trust. Consequently, even if a contract is frustrated and this is coupled with an impossibility causing event sufficient for proprietary restitution, if no property was transferred between the contracting parties, there can be no proprietary response. This is illustrated by the following example. Imagine A and B enter into a contract. Before A transfers any property to B as performance of his contractual obligations, a frustrating event occurs. This discharges both parties of their future contractual obligations. But since no property was transferred under the contract, there is no chance for B to have been unjustly enriched. The law of proprietary restitution is thus of no relevance.

5 The use of the language of initial and subsequent impossibility

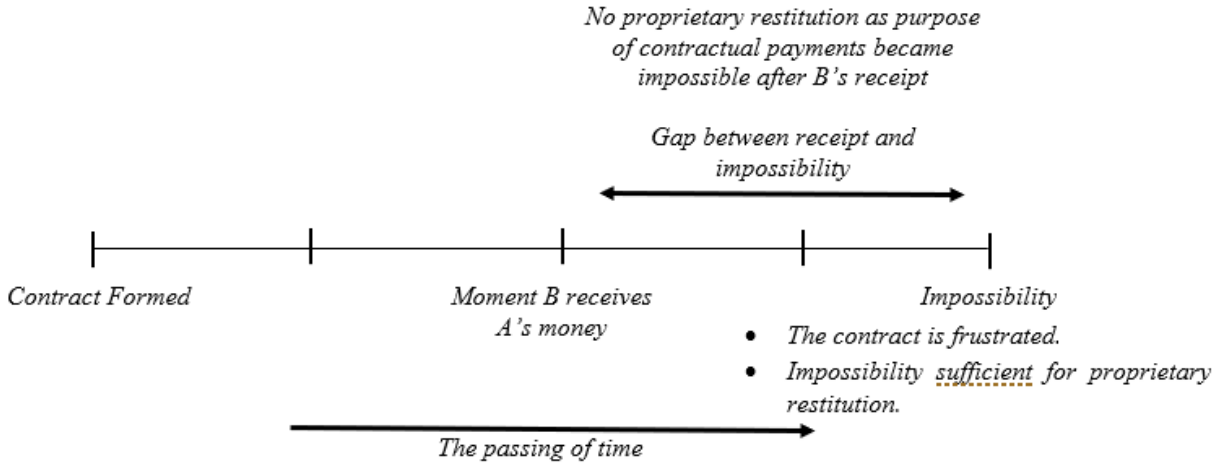
A further difference between the law of frustration and proprietary restitution is what is meant by 'initial' and 'subsequent' impossibility in these contexts. Frustration is regarded as a response to

[63] *Ibid* 837, 839-840 (Blackburn J).
[64] E.g. *Chase Manhattan v British-Israeli National Bank* [1981] Ch 105.

subsequent impossibility. This is because for an event to frustrate a contract, it must take place subsequent to a contract being formed. The calibration point is thus the moment of contract formation. In contrast, for proprietary restitution it is an initial impossibility that gives rise to the legal response. Furthermore, for the purposes of the proprietary response, the moment that the defendant receives the property that caused him to be unjustly enriched is the relevant point in time for determining whether the impossibility was initial or subsequent. Illustrating how this works for proprietary restitution, if when the defendant receives the claimant's property the purpose is already impossible to carry out, this is an initial impossibility. This is because the purpose is impossible from the outset. But where the property is received by the defendant, and the purpose becomes impossible after receipt, this is a subsequent impossibility. Therefore, subsequent impossibility in frustration means subsequent to contract formation. Whereas for proprietary restitution, 'subsequent' means that it occurred after the defendant received the property. This can be illustrated with the examples below:

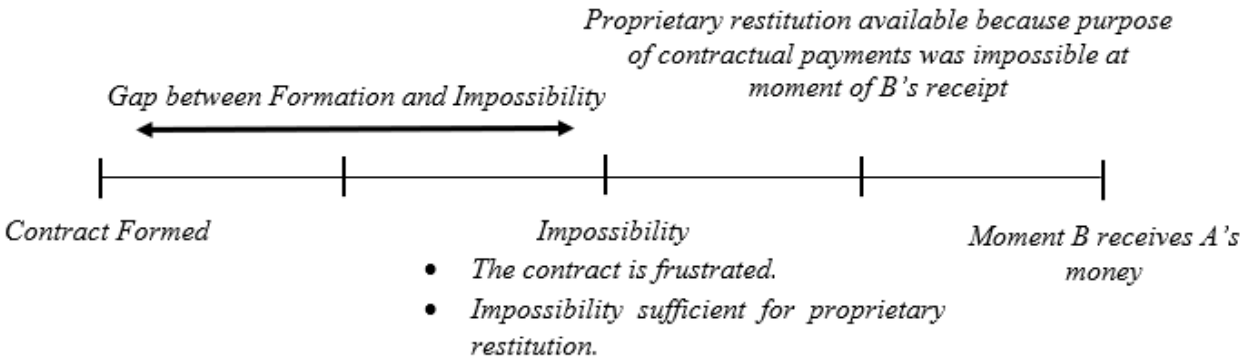
> Imagine A and B enter into a contract. A makes a contractual payment of £100 to B. A frustrating event then occurs. This frustrating event also renders A's purpose for the payment impossible for the purposes of proprietary restitution. However, since the impossibility occurred after B received the money, in proprietary restitutionary terms it is a subsequent impossibility. Proprietary restitution is thus precluded, as the purpose of the payment was possible to perform at the time of B's receipt. See **Figure 1** below:

Figure 1



Again, imagine that A and B enter into a contract. An event then occurs that causes the contract to be frustrated. This frustrating event also renders A's purpose for the payment impossible for the purposes of proprietary restitution. A is unaware of the impossibility causing event. Believing that he will receive the contracted-for performance, A begins performance of his contractual obligations. He makes a payment of £100 to B (see **Figure 2**). As was explained above, for proprietary restitution the impossibility must occur before or at the moment of B's receipt of the property. Here, the impossibility took place before B received the money. The purpose was thus impossible on B's receipt. A is therefore entitled to proprietary restitution.

Figure 2



The key difference between **Figure 1** and **2** is that the transfer in **1** was made before the impossibility. And so when B received the property, the purpose could still be carried out. This precluded proprietary restitution.

6 Categories of impossibility

There is no exhaustive list of situations that cause an impossibility for the purposes of frustration.[65] Furthermore, those which do may or may not cause an impossibility sufficient for proprietary restitution. The differences come to light when one attempts to apply the impossibility doctrine for proprietary restitution to situations where a contract has been frustrated.

1 Destruction of the subject matter of the contract

In *Taylor v Caldwell*, the defendant let a concert hall and gardens to the claimant.[66] After the contract was entered into, but before the music hall was used by the claimant for the performances, the hall was destroyed in a fire which was not the fault of either party. As the music hall ceased to exist the claimant

[65] J Poole, *Textbook on Contract Law* (11th edn, OUP 2012) 457: 'It is… almost impossible to provide a comprehensive list of the circumstances in which a contract will be held to be frustrated. All that may be attempted is to outline some common categories of frustrating event.'
[66] *Taylor v Caldwell* (1863) 3 B & S 826 (KBD).

could no longer obtain contractual performance in the form of the use of the premises, and the contract was thus frustrated for impossibility.[67]

Similarly, destruction of the subject matter of the contract can cause an impossibility sufficient for proprietary restitution. For example, A enters into a contract with B for the purchase of unique property. The unique property is then destroyed. Subsequently, and unaware of the destruction of the property, A pays money to B under the contract. A's payment has been made pursuant to a purpose which is impossible. This is because at the time of B's receipt of the funds, there is no possibility of A receiving delivery of the unique property. This example can be contrasted with instances where fungible (as opposed to unique) goods form the subject matter of the contract. Imagine then the same facts, but where the contracted-for goods that are destroyed are fungible. Although this looks like an impossibility, the fact that the goods are generic means that B can obtain identical goods from another source to fulfil the contracts. Therefore, as the purpose can still be fulfilled, proprietary restitution of the contractual payments is not available.

Finally, it should be noted that for this category of impossibility for proprietary restitution, one needs to distinguish between the property which forms the subject matter of the contract (e.g. property that is being purchased under a contract of sale), from the property that is the subject matter of the defendant's unjust enrichment (i.e. the property the claimant transfers to the defendant). Proprietary restitution is only potentially available if the property that forms the subject matter of the contract is destroyed. The disappearance or destruction of the property that constitutes the defendant's unjust enrichment is not relevant to the availability of proprietary restitution.[68]

2 Death or illness

When a defendant can no longer perform his contractual obligations due to death or illness, the impossibility of performance frustrates the contract.[69] If the claimant had also paid the defendant, as he would not have received the contracted-for performance for the payments made, the defendant will be unjustly enriched. Moreover, the death or illness may be sufficient to cause an impossibility for the purposes of proprietary restitution. Since the proprietary response is only available for initial impossibilities, the death or illness rendering the claimant's purpose for the payments impossible to carry out must be the state of affairs in existence at the time that the defendant receives the monetary enrichment from the claimant. If the impossibility caused by death or illness takes place after the

[67] *Ibid* 839-840 (Blackburn J).
[68] However, it is of relevance at the tracing stage. This is because if the claimant has satisfied the requirements for the proprietary response, in order for the claimant to have property rights in the property he transferred to the defendant, the original property or its traceable proceeds must still exist be in the hands of the defendant or a third party. If it does not, the claimant cannot make a claim to his property, as there would be no subject matter for the property right to attach to.
[69] *Poussard v Spiers & Pond* (1876) 1 QBD 410 (QBD).

defendant receives the claimant's money, it is a subsequent impossibility. As a result, proprietary restitution would be precluded.

6 Conclusion

This chapter has argued that when an individual transfers his property in circumstances where his intention to transfer was not freely formed, or pursuant to a purpose that fails, his autonomy is compromised. The law of unjust enrichment intervenes to protect his property rights by giving him a personal claim for the value of property transferred, or a property right in the transferred fund. How the law of unjust enrichment protects property, indirectly via a personal right to restitution or directly via a proprietary restitutionary right, depends on the extent to which the transferor's autonomy is compromised. The argument advanced in this chapter was that when the receipt of an enrichment is unjust, and additionally the purpose of the transfer to the recipient is impossible from the outset, the goal of autonomy protection justifies the continuation of the transferor's property rights in the transferred fund. The defendant receives the legal title to the property on receipt but does not obtain unrestricted beneficial ownership of it; as an equitable property right arises immediately in favour of the transferor. This is because the recipient receiving absolute title is contingent on the transferor's purpose being possible. Conversely, if the transferor's property unjustly enriches the recipient, but there is a possibility at the time of receipt that the purpose of the transfer can be fulfilled, the recipient receives unrestricted beneficial ownership of the enrichment. There is no trust. Instead, the transferor's property rights are protected obliquely by a claim for personal restitution.

Chapter 4 Contracts and Proprietary Restitution

'As a matter of legal analysis, the complex interaction of contract law, property law and equitable doctrines can sometimes be puzzling'.[1]

1 Introduction

This chapter explores the availability of an immediate trust interest for induced[2] and non-induced[3] mistaken payments made under a voidable contract. There is a pressing need for a coherent explanation to make sense of the case law in this area, as the law is not clear as to when and why a trust of such contractual payments can arise. In some cases, a trust arises from the outset under a contract. In others, the trust is only available after rescission, and on other occasions, the trust is not available even after the contract is set aside. The advantage to the claimant of establishing a trust is that he can recover the traceable proceeds of his contractual payment in priority to the insolvent defendant's other unsecured creditors. He can also take advantage of personal claims in equity against third parties who have received his money or assisted the original recipient of the fund to breach his trust obligations to the claimant.

The impossibility concept proposed in this thesis sheds light on when and why some unjust enrichments transferred under a contract, but not others, are held on trust. Under the impossibility analysis, the *validity* of the contract does not determine the availability of a proprietary claim. The approach proposed here therefore does not distinguish between enrichments transferred under void and voidable contracts.[4] It is argued that since whether the contract is void or voidable is irrelevant and makes no different to the availability of proprietary restitution,[5] the distinction between the two only serves to detract from the key issue of impossibility,

It is argued that when the purpose of a contractual payment is impossible to fulfil when the defendant receives the money pursuant to a voidable contract, to protect the payer's autonomy the money is held on trust from the moment of receipt. Therefore, the contract does not need to be first set aside before the trust comes into existence. So under this analysis, although the presence of a contract does not preclude a trust, the contract remains relevant for the reason that its *performability* has a bearing on

[1] *Halley v Law Society* [2003] EWCA Civ 97, [2003] WTLR 845 [93].
[2] E.g. *Halley v Law Society* [2003] EWCA Civ 97, [2003] WTLR 845.
[3] E.g. *Neste Oy v Lloyds Bank Plc* [1983] 2 Lloyd's Rep 658 (QBD); *Eldan Services Ltd v Chandag Motors Ltd* [1990] 3 All E.R. 459 (Ch).
[4] S Worthington, 'Reviewing Rescission: Real Rights or Mere Possibilities' (2003) 1 Insolv Lawyer 14, 21 states that 'the current distinction between the proprietary effects of void and voidable contracts is surprising'.
[5] It should be noted that this chapter does not discuss cases involving payments made under contracts that are void *ab initio*. They are instead discussed in chapter seven. The chapters have been separated in this way for ease, and to more easily demonstrate that a trust does not arise for all unjust enrichments made under void contracts, and neither does a trust always arise for payments made under voidable contracts.

whether a trust can arise. Furthermore, when impossibility gives rise to a trust of a contractual payment, the trust is subject to the contractual mandate. The effect of this is that if adequate substitute performance under the contract can be or is subsequently rendered, then the contract restricts the payer's right to access the trust, by preventing the payer from demanding a transfer of the trust property to himself. Conversely, if the defendant is unjustly enriched at the moment it receives a contractual payment, but the contract is possible to fulfil in the eyes of equity, the money is not held on trust. Instead, the claimant has a power to rescind the contract and, following rescission, a right to personal restitution from the defendant. Hence rescission is still of relevance, but only for the availability of personal restitution. Nothing in this chapter therefore challenges the view that a contract entered into under vitiated intent is 'voidable not void'.[6] Nevertheless, the approach advocated in this chapter is admittedly controversial; the aim is to challenge orthodox views of the law of trusts arising under voidable contracts by demonstrating how a trust can come into existence before a contract is avoided.

2 The case law

Before delving into the case law, it is important to explain the relationship between voidable contracts and the law of unjust enrichment. The general consensus amongst unjust enrichment lawyers is that fraudulently induced mistakes are part of the law of unjust enrichment.[7] So, for example, when a claimant makes a fraudulently induced payment pursuant to a voidable contract, as the claimant's intentions to enter into the contract are vitiated, it is said that this renders the defendant's receipt of the monies unjust from the moment of receipt. In response to the vitiation, the law confers a power on the claimant to set the contract aside. Birks said that the 'power is something new. It is generated by the unjust enrichment of the alienee in order to effect restitution'[8] of a 'contractual right exigible against the claimant'.[9] This chapter proposes that when a payment made under a voidable contract gives rise to proprietary consequences, it is an instance of a proprietary response to unjust enrichment.

The case law is not clear as to when equity intervenes for mistaken payments made under a contract. This is illustrated by *London Allied Holdings v Lee* where the claimant argued for a trust on three grounds currently recognised at law. First, the claimant argued that the defendant had obtained the property by fraud and this gave rise to an immediate constructive trust of the money.[10] Second, the claimant argued that, as the mistake had been fraudulently induced by the defendant's misrepresentations, that 'it was at all times against conscience for them to retain any part of that

[6] *Bristol & West Building Society v Mothew* [1998] Ch 1 (CA) 22 (Millett J).
[7] R Chambers, *Resulting Trusts* (OUP 2007) ch 7; A Burrows, *The Law of Restitution* (3rd edn, OUP 2011) 243; also see Birks' view at text to fn 82 below.
[8] P Birks, 'Establishing a Proprietary Base (*Re Goldcorp*)' [1995] RLR 83, 92.
[9] P Birks, 'Unjust Factors and Wrongs: Pecuniary Rescission for Undue Influence' (1997) 5 RLR 72, 79; E Bant, 'Reconsidering the Role of Election in Rescission' (2012) 32 OJLS 467, 468-469.
[10] *London Allied Holdings Ltd v Lee* [2007] EWHC 2061 (Ch) [266]-[267].

payment'.[11] It was contended that this caused a trust to arise at the moment that the defendant received the property.[12] Finally, it was argued that since the transfer to the defendant was induced by fraudulent misrepresentations, it was voidable in equity. Consequently, upon rescission the equitable interest in the money became vested in the claimant.[13] It is notable that the fraudulently induced mistaken payment, and therefore an unjust enrichment, was an ingredient of every trust argument advanced by the claimant. The fact that the claimant pursued many different lines of reasoning to argue for a trust shows the need for more clarity in determining when an unjust enrichment gives rise to a proprietary restitutionary response.

This section will now explore in more detail the different viewpoints on trusts arising under voidable contracts. The section proceeds as follows. First, it rejects the view that when a claimant makes an induced mistaken contractual payment, the unjust enrichment can never give rise to a trust either before or after the contract is set aside. Second, it argues that the power model, which states that a payment is held on trust only after the claimant has successfully rescinded the transaction, cannot be justified. Finally, it is argued that the preferable approach is that an unjust enrichment can only give rise to an immediate trust, and that this trust exists alongside the contract.

1 No trust

Swadling believes that 'the right to rescind and thereby revest title is clearly anomalous' because it is the only instance in which the common law generates proprietary rather than personal rights in response to an unjust enrichment.[14] He explains that the right to rescind and revest originates from *Load v Green,*[15] and that it came about because Parke B incorrectly assumed that property can only pass under a valid contract. Proceeding from this assumption, Parke B said that if the contract was set aside, since the instrument that is responsible for passing title is removed, the claimant's title to the transferred property revests in the claimant. Swadling demonstrates that Parke B's judgment disregards the principle of abstraction. This doctrine states that 'a contract of sale is separate from the actual conveyance of the subject-matter of the sale, and that a defect in the former does not infect the latter'.[16] As title can pass independently of a contract, whether title to property transferred under a contract passes to the recipient is therefore not determined by the contract's validity.

[11] *Ibid* [268].
[12] *Ibid* [268]-[274].
[13] *Ibid* [275]-[276].
[14] W Swadling, 'Rescission, Property and the Common Law' (2005) 121 LQR 123, 125.
[15] *Load v Green* (1846) 15 M & W 216.
[16] W Swadling, 'Rescission, Property and the Common Law' (2005) 121 LQR 123, 139.

Swadling argues that the abstractionist approach was adopted by the House of Lords in *Westdeutsche Landesbank v Islington LBC*, a case involving mistaken payments made under a void contract.[17] In that case, Lord Goff stated that:

> 'there is no general rule that the property in money paid under a void contract does not pass to the payee.'[18]

According to this dictum a defect in the contract does not necessarily affect the passing of property, and this is illustrated by the fact that legal title to money can pass even under a void contract.

However, it is submitted that Swadling and their Lordships in *Westdeutsche* are working on an error. They assume that when a contract is invalid property can pass, and that when a contract is valid property always passes. But by taking this view, they have conflated the issue of the validity of the contract with the passing of title. The true position must be that if it is accepted that impaired intent never affects the passing of legal title to property,[19] and nor does the contract's validity, when a claimant makes a mistaken payment under a contract that is voidable and therefore valid, this does not necessarily mean that the legal and beneficial interest in the property has passed.

Since under the principle of abstraction the contract does not have any bearing on whether title to property transferred under it passes, if title has passed, the contract's 'non-existence or subsequent rescission can therefore have no bearing on third parties.'[20] Although Swadling confines his attack to rescission at law in sale of goods cases which involve the claimant having parted with an asset, equitable rescission cases involving money can also be attacked on the same basis.[21] So when the defendant is unjustly enriched by a *payment* made to him under a voidable contract, where property in the money has passed to the defendant, rescinding the contract cannot have any effect on the title to the money; it cannot divest the recipient of his title and cause the property in the money to vest in the transferor either in law or in equity. However, it is submitted when for example a payer makes a fraudulently induced transfer pursuant to a contract, even though title may have passed independently of the contract and therefore cannot be revested by rescission, this 'does not preclude a new equitable title from coming into existence in response to other factors'[22] from the moment of the fraudster's receipt of the money.

2 Trust after rescission

[17] *Ibid* 140.
[18] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) 689-690.
[19] Swadling argues that even a fundamental mistake does not prevent title passing, see W Swadling, 'Unjust Delivery' in A Burrows and A Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006).
[20] W Swadling, 'Rescission, property, and the common law' (2005) 121 LQR 123, 123.
[21] *Ibid*.
[22] D Salmons, 'The Availability of Proprietary Restitution in Cases of Mistaken Payments' (2015) 74 CLJ 534, 538.

The power model is the prevalent analysis for explaining how a trust arises of money paid under a contract. Under the power model, when a contract is for example induced by fraud, the contract is valid but voidable.[23] As Earl Cairns LC said in *Tennent v City of Glasgow Bank*,

> 'a contract induced by fraud is not void, but only voidable at the option of the party defrauded; secondly, this does not mean that the contract is void till ratified, but it means that the contract is valid till rescinded'.[24]

When a contract is voidable, the claimant has a power to rescind the contract. The power to rescind is known as a 'mere equity' and arises due to the vitiation of the transferor's consent. When the power is successfully exercised, according to this analysis the mere equity crystallises and revests the title to the transferred property in the claimant. In the context of voidable transfers, there are two types of power: a legal power and an equitable power. An equitable power gives the claimant the right to set the transaction aside and have vested in himself the equitable interest in the property transferred. The important point to note is that, as Millett J explained in *Lonrho v Fayed*, 'the representee may elect to avoid [the contract], but until he does so the representor is not a constructive trustee of the property transferred pursuant to the contract.'[25] Until the equitable right to rescind is exercised, 'the beneficial interest in any property transferred in reliance on the representation remains vested in the transferee.'[26] The equitable rescission analysis has been applied in many cases, some of the most notable include *El Ajou v Dollar Land Holdings,*[27] *London Allied Holdings v Lee*[28] and *Shalson v Russo*.[29] But despite judicial support for the rescission analysis, there are problems with this model of proprietary restitution. It is submitted that the issues, discussed below, provide a further impetus for adopting the immediate trust model.

First, in some cases where the claimant's intention was vitiated by mistake, the courts said that even if the contract was avoided this could not give rise to a trust. For example, in *Re Goldcorp Exchange Ltd* the Privy Council stated that even if the customers had rescinded their contracts with the defendant before the bank's floating charge crystallised, this would not give the customers property rights in the

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[23] *Reese River Silver Mining Co. Ltd v Smith* (1869-70) LR 4 HL 64 (HL) 74 (Hatherley LC).
[24] *Tennent v City of Glasgow Bank* (1879) 4 App Cas 615 (HL) 620 (Earl Cairns LC); also see *Lonrho Plc v Fayed (No 2)* [1992] 1 WLR 1 (Ch) 11-12 (Millett J); *Bristol & West Building Society v Mothew* [1998] Ch 1 (CA) 22 (Millett J); *London Allied Holdings Ltd v Lee* [2007] EWHC 2061 (Ch) [276]; *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281 [108]; S Worthington, 'Reviewing Rescission: Real Rights or Mere Possibilities' (2003) 1 Insolv Lawyer 14.
[25] *Lonrho Plc v Fayed (No 2)* [1992] 1 WLR 1 (Ch) 11-12 (Millett J); *Twinsectra Ltd v Yardley* [1999] Lloyd's Rep Bank 438 (CA) 461 (Potter LJ).
[26] *Bristol & West Building Society v Mothew* [1998] Ch 1 (CA) 22 (Millett LJ).
[27] *El-Ajou v Dollar Land Holdings Plc (No.1)* [1993] 3 All ER 717 (Ch) 734 (Millett J).
[28] *London Allied Holdings Ltd v Lee* [2007] EWHC 2061 (Ch) [276].
[29] *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281.

purchase monies paid to the defendant.[30] The second example is *Eldan Services v Chandag Motors*, where Millett J said in obiter that even if the variation agreement was set aside, which would render the claimant's payments as having been made under mistake, it would not give rise to a proprietary claim, but only a personal claim for money had and received.[31] Therefore, rescission does not always give rise to a trust in response to the defendant's unjust enrichment, and neither is it clear when and why it does.

Häcker, who is a strong advocate of the power model for proprietary responses for impaired consent transfers, contends that 'one advantage of the power model is that it does not present a black-or-white choice in the matter of proprietary restitution'.[32] This is because it is 'sufficiently sensitive to the reasons for restitution to allow for finetuning at the margins and for the judicial development of morally significant distinctions which neither of the two other models can accommodate'.[33] But Häcker does not go so far as to provide an answer to the question of when rescission should and should not give rise to a proprietary response. Consequently, Salmons has argued that 'given the importance of establishing a clear set of rules for the availability of proprietary restitution in cases of mistaken transfers, it is questionable whether the lack of a clear answer to the main issue where there continues to be disagreement can, in fact, be regarded as beneficial'.[34]

Second, it is argued that the rescission analysis appears to conceal what is actually an immediate trust interest. Two arguments will be used to illustrate this: (1) the implied rescission analysis adopted in *Shalson v Russo*,[35] and (2) the at times proprietary characteristics of the 'mere equity'. In *Shalson v Russo*, the claimant was fraudulently induced to lend £20m to the defendant on the basis that the money would be used for joint ventures. However, the defendant never intended nor used the loan for joint ventures. He instead applied the money for his own purposes which included the purchase of assets. The victim of the fraud then brought a Part 20 claim to trace his money and bring a restitutionary claim against the defendant. Rimer J said that a contract induced by fraud must be set aside before a trust can arise,[36] but that the claimant does not have to expressly rescind the contract. Rather, there can be 'implied rescission':[37]

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[30] *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 (PC) 102-103. Cf *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281 [124]-[126]; Cf, B Häcker, 'Proprietary Restitution after Impaired Consent Transfers: A Generalised Power Model' (2009) 68 CLJ 324, 337 who argues that *Re Goldcorp* may 'decide no more than that an unexercised power in rem is defeated by the creation of a vested security interest'.

[31] *Eldan Services Ltd v Chandag Motors Ltd* [1990] 3 All ER 459 (Ch) 462; also see *Lonrho Plc v Fayed (No 2)* [1992] 1 WLR 1 (Ch) 12 where Millett J said that even if rescission was available to the claimant in Lonrho there would be no trust.

[32] B Häcker, 'Proprietary Restitution after Impaired Consent Transfers: A Generalised Power Model' (2009) 68 CLJ 324, 326.

[33] *Ibid*.

[34] D Salmons, 'The Availability of Proprietary Restitution in Cases of Mistaken Payments' (2015) 74 CLJ 534, 542.

[35] *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281.

[36] *Ibid* [119].

[37] *Ibid* [124] and [117], [120], 127].

> 'there was no evidence satisfying me that Mr Mimran had unequivocally affirmed the loan contracts since discovering the frauds, and I accept that his issue of the Part 20 claims (the proprietary claims in which are consistent only with an implied rescission) did evince a sufficient intention to rescind them'.[38]

Therefore, according to Rimer J, 'upon the implied rescission of the loan contracts effected by the bringing of his Part 20 claim, Mr Mimran had revested in him the property in the money he advanced to Westland entitling him at least to trace it into assets into which it was subsequently applied'.[39] It is argued here that it was too readily 'implied' that the claimant had set aside the transaction, to the degree that the rescission requirement became meaningless. *Shalson* can thus be used to demonstrate that the contract does not need to be removed before a trust can arise, hence rescission should not be necessary when arguing for a trust of money mistakenly paid under a contract. When viewed in this way, it can be argued that Rimer J's dicta in fact supports the view that a fraudulently induced contractual payment can lead to an immediate trust.

In some cases, the nature of the 'equity' prior to rescission provides further support for the immediate trust model. It is accepted that the power to rescind is 'a personal right against the fraudster'.[40] However, there is ample support 'that the language of rescission in equity in fact conceals an application of the immediate interest model',[41] as the courts are recognising a trust in some cases but concealing it with the 'mere equity' which is only a personal right to set the contract aside. One example of this is the aforementioned case *London Allied Holdings v Lee* where the claimant made a £1m contractual payment to the defendant. Before the agreement was rescinded, the defendant fraudster used some of the funds to purchase a Land Rover. A sum of £644,730 was also paid by the fraudster into an account belonging to a Mr Dolan that already contained £100. Out of this mixed fund, Mr Dolan purchased a Mercedes car. The court held that when the claimant subsequently exercised his equitable power, the rescission led to a trust of the traceable proceeds of the claimant's £1m, and consequently there was a trust of the Land Rover, the Mercedes car, and any part of the £1m still retained by the fraudster and Mr Dolan. However, the issue is:

> 'the overall consensus, both judicial and academic, is that where a transaction is not void but is voidable for fraud, the fraudster acquires legal and beneficial title to the victim's property and

[38] *Ibid* [120].
[39] *Ibid* [127].
[40] *Re Crown Holdings (London) Ltd* [2015] EWHC 1876 (Ch) [38].
[41] P Birks, 'Property and Unjust Enrichment: Categorical Truths' [1997] NZL Rev 623, 643. Also, see p.638: 'In the meantime, before the reconveyance or cancellation of the conveyance equity, seeing that as done which ought to be done, raises an equitable interest in the res in favour of the party entitled to rescission. In other words, so long as the obligation to reverse the legal effects of the transaction remains in place, equity regards the transferee as a trustee for the transferor'.

> when the transaction is rescinded or set aside, but not before then, the equitable title to that property re-vests in the victim.'[42]

In *London Allied Holdings*, the transfers and purchases happened prior to rescission. According to the current line of thinking, the claimant had no equitable property right to the money at the time when it was mixed with other monies in the banking system, and also when these mixed funds were used to purchase the cars. Rather, as soon as the fraudster received the £1m into his account, the claimant's title to the sums passed absolutely to the fraudster. Therefore, any of the £1m that was used by the fraudster to purchase the Land Rover, or paid to Mr Dolan, was the fraudster's money both legally and beneficially, not that of the claimant's. It must then be asked, in the period between the claimant's transfer of the money to the fraudster and the moment of rescission, how it was possible to trace the claimant's £1m to the cars and identify the remains of the funds in the fraudster's and Mr Dolan's accounts. As Worthington states,

> 'If the classical model is correct… then the [property] does *not* belong to the claimant at the time the substitutions are made; they belong to the defendant, and the claimant has a mere equity only. Can a 'mere equity' be traced into substitutes? An extension to the tracing rules would be necessary…'[43]

Giving the claimant the right to trace his money through transactions that took place prior to rescission means allowing funds to be traced in equity at a time where the claimant has no equitable proprietary base from which the tracing exercise can begin. To get around this, in *El-Ajou v Dollar Land Holdings*, Millett J said that victims of fraud 'are entitled to rescind the transaction and revest the equitable title to the purchase money in themselves, at least to the extent necessary to support an equitable tracing claim'.[44] But the problem with this is that if, as the courts say, the claimant has no property right before rescission, then the trust recognised after rescission is being imposed

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[42] *National Crime Agency v Robb* [2014] EWHC 4384 (Ch), [2015] Ch 520 [43] (Etherton J).

[43] See S Worthington, 'The Proprietary Consequences of Rescission' [2002] RLR 28, 59. Also see p.67: 'It remains a moot point whether the preferred status associated with proprietary interests can be preserved in traceable substitutes, especially where the substitution took place before the contract was rescinded. Some cases assume this possibility, but convincing doctrinal analysis is difficult…'

[44] *El-Ajou v Dollar Land Holdings Plc (No.1)* [1993] 3 All ER 717 (Ch) 734. Similarly, but more tentatively, in his earlier judgment in *Lonrho Plc v Fayed (No 2)* [1992] 1 WLR 1 (Ch) 12 (Millett J): 'It may well be that if the representee elects to avoid the contract and set aside a transfer of property made pursuant to it the beneficial interest in the property will be treated as having remained vested in him throughout, at least to the extent necessary to support any tracing claim'. Also, *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281 [122] and *Daly v Sydney Stock Exchange* (1986) 160 CLR 371 (Brennan J): 'had the contract of loan been avoided, Mrs. Daly's rights as against Patrick Partners might have been determined as though the firm had from the beginning held the money lent on a constructive trust for Dr. Daly and then for Mrs. Daly' and 'in the absence of evidence of avoidance of the contracts of loan, there is nothing to show that Dr. Daly or Mrs. Daly has the equitable interest in the moneys lent by Dr. Daly to Patrick Partners which might have arisen by relation back'.

'retrospectively once the election to rescind the contract is made'.[45] It could be labelled as a remedial trust as the property belonged to the defendant for a period of time before the trust was imposed. However, it must be noted that Mummery LJ in *Re Polly Peck International Plc (No.2)* stated that the remedial constructive trust is 'not seriously arguable in English law'.[46] Therefore, tracing in this interim period can only be justified if the claimant has an equitable interest as soon as the money is paid to the defendant, as opposed to only after rescission. It is thus submitted that the preferable analysis of *El-Ajou* and *London Allied Holdings* is they support the view that a claimant has a full equitable interest even prior to rescission. This explains why the claimant can trace in the intermediate period (between the transfer and the setting aside of the transaction).[47]

3 Immediate trust

This section explores and rejects the unconscionability analysis that is used by the courts to explain why a mistaken payment, and hence an unjust enrichment, conferred under a contract can give rise to proprietary restitution while the contract is still in place. Although this chapter rejects conscience reasoning to justify the immediate trust response, it argues that the immediate trust model should be adopted to reconcile the case law on trusts arising for mistaken contractual payments. It is proposed that the immediate trust can be justified in the contractual context on the basis of the impossibility concept.

The case of *Neste Oy v Lloyds Bank Plc* is the leading example of unconscionability causing a trust to arise while the contract is still intact.[48] In *Neste Oy*, when the agent PSL received the claimant's payment it was unable to perform its contractual obligations, as it had already decided to cease trading and appoint a receiver. Bingham J said that:

> 'at the time of its receipt PSL could not in good conscience retain this payment and that accordingly a constructive trust is to be inferred'.[49]

On the basis of conscience, from the moment that the agent received the payment it held the money on trust for the transferor principal. A trust arose despite the fact that there was a contract between the claimant and agent which had not been set aside or terminated.

The unconscionability analysis in *Neste Oy* is supported by *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, although surprisingly the *Neste Oy* case was not cited by their

[45] *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195, [2013] Ch 91 [53].
[46] *Re Polly Peck International Plc (No.2)* [1998] 3 All ER 812, 823.
[47] Chambers also has previously argued that a trust can arise prior to rescission, see R Chambers, *Resulting Trusts* (OUP 2007) ch 7.
[48] *Neste Oy v Lloyds Bank Plc* [1983] 2 Lloyd's Rep 658 (QBD).
[49] *Ibid* 666.

Lordships.[50] In *Westdeutsche*, Lord Browne-Wilkinson said that a mistaken payment can give rise to a constructive trust if it is unconscionable for the defendant to retain the money. This is established by showing that (a) the claimant made a mistake and (b) the conscience of the defendant was affected with knowledge of the mistake while the property was still in its hands.[51] Even though Bingham J in *Neste Oy* based his decision on a 'failure of consideration', Mann J in *Re Farepak Food and Gifts Ltd* said that the decision in *Neste Oy* was also explicable on the basis of mistake.

> 'One might categorise the payment in *Neste Oy* as having been made under a mistake (as to whether the recipient intended to fulfil the contract), so that at the moment of receipt the recipient, himself knowing that he would not fulfil the contract and obviously appreciating that the payer must understand otherwise, could not in good conscience keep the money. (It seems from the report of *Neste Oy* that the claimant sought to amend to take a mistake point but was not allowed to do so.)'[52]

The unconscionability analysis therefore explains why a trust arose immediately in *Neste Oy*.

It is the orthodox view that constructive trusts are imposed to prevent a defendant retaining property in circumstances where retention would be unconscionable. Therefore, when a constructive trust is imposed, it serves to prevent unconscionable behaviour even if this is not expressly stated by the courts. Conscience reasoning explains why trusts can arise for property obtained by fraud, since the fraudster's conscience is affected from the moment he receives the property from the victim. That fraud can give rise to an immediate constructive trust response has the support of Lord Browne-Wilkinson in *Westdeutsche Landesbank v Islington LBC*:

> 'Although it is difficult to find clear authority for the proposition, when property is obtained by fraud equity imposes a constructive trust on the fraudulent recipient: the property is recoverable and traceable in equity.'[53]

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[50] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL). Cf *London Allied Holdings Ltd v Lee* [2007] EWHC 2061 (Ch) [272] where Etherton J was reluctant to express a view on unconscionability giving rise to a trust.

[51] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL) 705-706 (Lord Browne-Wilkinson). Lord Browne-Wilkinson's reasoning was approved by Judge Chambers QC in *Papamichael v National Westminster Bank (No.2)* [2003] EWHC 164 (Comm), [2003] 1 Lloyd's Rep 341 [221]-[231] and has been adopted in Australia in *Wambo Coal Pty Ltd v Ariff* [2007] NSWSC 589, (2007) 63 ACSR 429.

[52] *Re Farepak Food and Gifts Ltd* [2006] EWHC 3272, [2008] BCC 22 [39]-[40] mentioned in *Re Crown Holdings (London) Ltd* [2015] EWHC 1876 (Ch) [53].

[53] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL) 716.

This dictum was cited and applied without discussion by both Justice Moore-Bick to find a trust in *Niru Battery Manufacturing Co v Mileston Trading Ltd (No.1)*,[54] and by Justice Collins in *Commerzbank Aktiengesellschaft v IMB Morgan Plc and others*.[55] A clear example of a trust arising for property obtained by fraud is *Halley v The Law Society*.[56] In *Halley*, the payer's mistake was fraudulently induced by the recipient. Carnwath LJ said that 'from the fraudster's point of view there is nothing to rescind'[57] and that the case could 'be regarded as a simple case of 'property obtained by fraud' in Lord Browne-Wilkinson's terms'.[58] The decision can be explained on the basis of conscience. When the fraudster obtained the property, he was aware of the payer's mistake as it was fraudulently induced by none other than the fraudster himself. Therefore, the fraudster's conscience was affected, and the mistaken contractual payment was held on trust despite the contract not having been set aside.

Halley was applied in *Campden Hill Ltd v Chakrani.*[59] In *Chakrani*, the claimant company had made a loan to the defendant in return for a large facility fee and a charge on the property as security for the loan. Justice Hart said that:

> 'I have no doubt that the requirement [in *Halley*] is satisfied here, where the claimant has advanced money on the basis of forged documentation and where it has done so by paying it to a solicitor to hold against production of genuine documents'.[60]

Further support for the analysis can be found in the more recent case of *Bank of Ireland v Pexxnet*, where the defendant presented two cheques and a bankers' draft to the Bank.[61] All three were forgeries. The bank paid the money into Pexxnet's account. It was then paid out into other accounts by Pexxnet Ltd's authorised signatory Mr Brendel. Lord Browne-Wilkinson's dicta, that money obtained by fraud is held on constructive trust for the victim, was cited with approval and applied by the court.[62] Accordingly, the court held that Pexxnet received the money as trustee for the Bank, and the money could therefore be traced into the various accounts.

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[54] *Niru Battery Manufacturing Co v Mileston Trading Ltd (No.1)* [2002] EWHC 1425 (Comm); But see Judge Chambers QC at [242] of *Papamichael v National Westminster Bank (No.2)* [2003] EWHC 164 (Comm), [2003] 1 Lloyd's Rep 341 where he criticised the 'unqualified acceptance of the dictum by Moore-Bick J in *Niru*'.
[55] *Commerzbank Aktiengesellschaft v IMB Morgan Plc* [2004] EWHC 2271 (Ch), [2005] 2 All ER (Comm). Lord Browne-Wilkinson's dicta also seems to have been applied in *Campden Hill Ltd v Chakrani* [2005] EWHC 911 (Ch) [74]. Cf see dictum of Rimer J in *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281 [111] where he disagrees with Lord Browne-Wilkinson's view that money obtained under a voidable contract induced by fraud gives rise to an immediate constructive trust; also see *London Allied Holdings Ltd v Lee* [2007] EWHC 2061 (Ch) [267] where Etherton J was reluctant to express a view on Lord Browne-Wilkinson's argument that all fraud gives rise to a constructive trust.
[56] *Halley v Law Society* [2003] EWCA Civ 97, [2003] WTLR 845.
[57] *Ibid* [48].
[58] *Ibid.*
[59] *Campden Hill Ltd v Chakrani* [2005] EWHC 911 (Ch).
[60] *Ibid.*
[61] *Bank of Ireland v Pexxnet* [2010] EWHC 1872 (Comm).
[62] *Ibid* [55]-[57].

Nevertheless, there are problems with the conscience reasoning. As Birks and Virgo have suggested, Lord Browne-Wilkinson's unconscionability analysis does not explain why a trust was not possible in *Re Goldcorp Exchange Ltd*,[63] where due to its fraudulent misrepresentations the defendant's conscience was affected from the moment it received the money.[64] Another issue is that if the unconscionability approach is adopted, it would lead to uncertainty as to when a proprietary response is available. Lord Browne-Wilkinson did not state what level of knowledge is required for the defendant's conscience to be affected. In *Chase Manhattan*, the defendant had actual knowledge of the facts that rendered its enrichment unjust. That actual knowledge is required was also the view of Judge Chambers QC in *Papamichael v National Westminster Bank (No.2)*.[65] But there is no general consensus. In *Fitzalan-Howard v Hibbert*, Tomlinson J said that it "would not necessarily be the point at which the recipient suspected, or even learned of, the mistaken payment, but might be the point at which he could *reasonably be required to have acted*".[66] Although an actual knowledge requirement for unconscionability can be applied with ease, any other degree of knowledge is difficult to apply in practice. This may lead to inconsistency in the application of the unconscionability analysis.

Another problem that should be noted is that, under conscience reasoning, all fraudulently induced transfers would give rise to a trust. For example, a claimant would be entitled to a trust even when the defendant has made only a minor fraudulent misrepresentation which did not have a causal effect on the claimant's decision to transfer property to the defendant. The unconscionability analysis thus does not differentiate between the more serious fraudulently induced mistake cases, where the claimant's purpose was impossible to fulfil from the outset, from the less serious cases, where for example the fraud deceived the claimant about the recipient's assets, capabilities, resources, or the extent of investment returns the claimant would receive if the claimant invested in the fraudster's schemes. Conscience reasoning is therefore a blunt tool for dealing with the question of proprietary restitution for unjust enrichment, whereas as will be demonstrated, the impossibility analysis provides a more nuanced approach to the issue.

3 Autonomy and payments made under voidable contracts

This section proposes a new analysis, one that focuses on protecting the claimant's autonomy, for determining when a payment made under a voidable contract should be held on trust for the payer. How this analysis works in practice can be illustrated using the following example:

[63] *Re Goldcorp* [1995] 1 AC 74 is explored below- see text to fns 99-106.
[64] P Birks, "Property and Unjust Enrichment: Categorical Truths" [1997] NZL Rev 623, 664-665; G Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2015) 600.
[65] *Papamichael v National Westminster Bank (No.2)* [2003] EWHC 164 (Comm), [2003] 1 Lloyd's Rep 341 at [230]; G Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2015) 601.
[66] *Fitzalan-Howard v Hibbert* [2009] EWHC 2855 (QB) at [49] (emphasis added).

> A is fraudulently induced by B to enter into a contract with B. While A's intentions are vitiated by B's fraudulently induced mistake, he makes payments to B under the contract.

From the moment that the contract is entered into, it is voidable for the defendant's fraud. The voidability, which gives A the power to set aside the contract, is a restitutionary response.[67] When B receives payments pursuant to this contract, as A's intentions were vitiated when he made the payments, B is unjustly enriched from the moment he receives the money. If at the point of receipt the purpose that the payment was made for could never be fulfilled, then the cause of action for the proprietary restitutionary response is complete. There has been an unjust enrichment in circumstances where the purpose was impossible to fulfil from the outset. In this situation, the goal of autonomy protection justifies a resulting trust.[68] Conversely, if A's contractual payment unjustly enriches B, and the purpose of the payment can be fulfilled at the time of B's receipt, a resulting trust cannot arise. Instead, B receives unrestricted beneficial ownership of the enrichment, and A only has a right to rescind the contract and obtain personal restitution.

1 Professor Birks' approach

Admittedly, at first sight, the way that the impossibility analysis operates in the contractual context appears to share similarities with Professor Birks' approach. Birks recognised that the trust arising under a voidable contract is a response to the event of unjust enrichment, and that it takes the form of a resulting trust. However, there are significant differences between the approach proposed in this thesis and Birks' analysis. Birks' approach was not justified on the grounds of autonomy. In his earlier works, where Birks took the view that an immediate trust arises before rescission, he justified the immediate trust by drawing on the equitable maxim in *Walsh v Lonsdale*:[69]

> 'Before the reconveyance or cancellation of the conveyance equity, seeing that as done which ought to be done… equity regards the transferee as a trustee for the transferor'.[70]

In Birks' view, when the claimant has a right to rescission, in equity what ought to be done is that the transaction should be set aside, and the claimant ought to have a beneficial interest from the outset in the asset that he transferred to the defendant. Originally, Chambers also believed that when property is transferred under a voidable contract a trust should arise immediately. He supported his hypothesis

[67] P Birks, 'Unjust Factors and Wrongs: Pecuniary Rescission for Undue Influence' (1997) 5 RLR 72, 78-79.
[68] Support for the view that a contract voidable for fraud gives rise to a resulting trust, as opposed to a constructive trust, *El-Ajou v Dollar Land Holdings Plc (No.1)* [1993] 3 All ER 717 (Ch) 734.
[69] *Walsh v Lonsdale* (1882) 21 Ch D 9.
[70] P Birks, 'Property and Unjust Enrichment: Categorical Truths' [1997] NZL Rev 623, 638. Also see p.641.

by making analogies with the equitable interest which arises (a) as soon as a claimant enters into a specifically enforceable sale contract, and (b) from the moment a bribe is received in breach of one's fiduciary duty.[71] He argued that since a trust arises immediately in these circumstances, 'it would certainly be anomalous if an equitable interest did not arise in favour of a former owner of property who became entitled to rectify or rescind a transaction and compel the re-transfer of the property to himself or herself'.[72]

However, these justifications for immediate trust interests arising under voidable contracts are questionable. Worthington has argued that the 'analogies with the constructive trust which arises on entry into a specifically enforceable contract… are not as straight-forward as is often assumed'.[73] Firstly, unlike for specifically enforceable contracts where the 'core assumption is… the contract *must* be performed according to its terms', 'there is no general rule that a voidable contract *must* be unwound'.[74] Until the claimant elects to rescind, 'the law assumes that the contract is valid and binding, *not* that it should be unwound. It follows that that if any analogies are to be drawn, and equity is presumed to treat as done that which ought to be done, then the claimant should *not* have the benefit of a trust at the outset…'[75] This argument can also be used to reject Birks' belief that the immediate trust can be justified on the basis of the equitable maxim in *Walsh v Lonsdale*, for the reason that it is not clear why recognising an immediate trust for the claimant is what 'ought' to be done. Secondly, the specific performance analogy to justify immediate trust interests is flawed in cases where the transferred property is money. Specific performance is only available where the subject matter of the contract is unique property. This is because in this instance only a return of the property itself, as opposed to a money judgment, would be an adequate remedy.[76] However, money is fungible and therefore not unique. Consequently, when money is transferred under a contract, the specific performance analogy fails to explain why an immediate trust of the contractual payment can arise.

Focusing now on the approach taken by Birks in his later works, Birks argued that when there is no explanatory basis for the defendant's receipt, the defendant is unjustly enriched at the claimant's expense.[77] Furthermore, he argued that the resulting trust also arises when 'the transferee is enriched *sine causa*'.[78] But additionally, it must be shown that the enrichment was never freely at the disposition of the recipient before the claimant's right to restitution arose.[79] An example illustrating this is *Chase Manhattan*, where the payment was made to discharge an obligation. As the obligation did not exist,

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[71] R Chambers, *Resulting Trusts* (OUP 2007) 174-176; R Chambers, 'Resulting Trusts in Canada' (2000) 38 Alta Law Rev 378, 409-410.
[72] R Chambers, *Resulting Trusts* (OUP 2007) 175-176.
[73] S Worthington, 'Reviewing Rescission: Real Rights or Mere Possibilities' (2003) 1 Insolv Lawyer 14, 20.
[74] *Ibid*.
[75] *Ibid*.
[76] PJ Millett, 'Restitution and Constructive Trusts' (1998) 114 LQR 399, 416.
[77] P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) ch 6.
[78] P Birks, 'Restitution and Resulting Trusts' in S. Goldstein (ed), *Equity and Contemporary Legal Developments* (Jerusalem 1992); P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 306.
[79] P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 194.

the basis of the payment failed from the outset. Moreover, as the right to restitution arose on receipt, the enrichment was never at the defendant's free disposal. Therefore, a trust arose.[80] Under this analysis, the combination of absence of basis and the defendant not having the enrichment at his free disposal should always give rise to a resulting trust.[81] However, Birks' reasoning presents a problem. This is because in some cases that satisfy the requirements of an absence of basis and restricted beneficial ownership, Birks concluded that a trust could not arise. For example, in *Re Goldcorp,* the claimants were induced to enter into sale contracts with the defendant company on the basis of fraudulent misrepresentations. The Privy Council held that no trust of the claimants' purchase monies arose. But in his book *Unjust Enrichment* Birks stated that when a claimant's intentions to enter into a contract are deficient, due to misrepresentation for example, this immediately invalidates the contract by rendering it voidable. The effect of the invalidity is that when any benefits are transferred pursuant to this voidable contract, the claimant has an unjust enrichment claim against the defendant from the outset.[82] If one utilises this reasoning, the contracts between the claimants and defendant in *Goldcorp* were not valid because of the defendant's misrepresentations. As there was no basis for the payments the defendant was unjustly enriched as soon as it received the money, and so did not receive the enrichment freely. Consequently, under Birks' approach to proprietary restitution a trust should have arisen immediately at the moment of the defendant's receipt of the contractual payments. Nevertheless, Birks explains the outcome in *Goldcorp* by saying that the basis of the payments failed after receipt. It was therefore a subsequent rather than initial failure of basis. Since there was a period of time where the money was at the recipient's free disposal, Birks said this precluded a trust.[83] So not only does Birks' absence of basis analysis fail to explain why a trust did not arise in *Goldcorp*, his application of the approach is inconsistent with the principle underlying absence of basis, which is that a payment made under a voidable contract has no basis. For these reasons, Birks' approach must be rejected. Having said this, there is no need to reject an unjust enrichment analysis for proprietary restitution. This is explained in the next section which develops the argument that an unjust enrichment approach that focuses on autonomy, as opposed to failure of basis, better explains the case law on voidable contracts. As will be explained later in this chapter, the proposed approach explains why in *Re Goldcorp* there was a fraudulently induced mistaken payment under the contract, and hence an initial failure of basis, yet the customers were only entitled to personal restitution.

2 Autonomy and the Impossibility Analysis

[80] *Ibid* 186-187.
[81] *Ibid* 185-198.
[82] *Ibid* 126-127, 135-136, 173-174.
[83] *Ibid* 195-196; P Birks, 'Retrieving Tied Money' in W Swadling (ed), *The Quistclose Trust: Critical Essays* (Hart 2004) 131; P Birks, 'Establishing a Proprietary Base (*Re Goldcorp*)' [1995] RLR 83.

This section begins by defining autonomy in the contractual context. It goes on to argue that when money is paid under a voidable contract, and the contract is impossible to perform when the recipient receives the contractual payment, the autonomy of the paying party who has not received the contracted for performance is undermined to the extent that justifies an immediate proprietary restitutionary response.

Autonomy is exercised by channelling property through goal-orientated activities and institutions. One such institution is contract.[84] A contract is a legally enforceable and binding agreement, usually between two parties. The aim of the contract is to state, in the form of contractual terms, what the parties want from the contractual relationship. Payments made under a contract therefore have the goal of securing contracted-for performance. As contractual payments are made to achieve a certain purpose, to obtain what you have paid for, the payments are conditional on this purpose being achieved. It follows that when the conditions for retaining the value of the property received are not fulfilled, the payer's autonomy is undermined, and the defendant must make restitution.[85] This is explained by Webb:

> 'For to make, say, your performance a condition of your right to retain the benefit of my performance can only be to make that benefit recoverable in the event that this condition is not fulfilled…'[86]

The case of *Rowland v Divall* can be used to illustrate this.[87] The claimant and defendant entered into a contract under which the claimant purchased a car from the defendant, took possession of it and used it for several months. Unbeknown to the claimant, it was a stolen car. In ignorance, the claimant sold the car on. The car was later seized by the police. Consequently, the claimant refunded the purchaser the amount that the purchaser had paid for the car. He then sought to recover the price of the motor vehicle from the defendant on the grounds of total failure of consideration. Atkin LJ explained that:

> 'The whole object of a sale is to transfer property from one person to another[88]… the buyer has not received any part of that which he contracted to receive - namely, the property and right to possession - and, that being so, there has been a total failure of consideration. The claimant is entitled to recover the 334l. which he paid'.[89]

[84] See text at fns 42-44 in ch 2.
[85] See T Baloch, *Unjust Enrichment and Contract* (Hart 2009), where Baloch argues that unjust enrichment is all about conditional transfers.
[86] C Webb, *Reason and Restitution: A Theory of Unjust Enrichment* (OUP 2016) 166-167.
[87] *Rowland v Divall* [1923] 2 KB 500 (CA).
[88] *Ibid* 506-507.
[89] *Ibid* 507.

In the language of autonomy, the claimant paid the defendant on the condition that he would obtain legal title to the car. As the car was stolen, the claimant could not obtain legal title. His condition for making the payment therefore failed,[90] and his autonomy was undermined. In these circumstances, the law says that following rescission the claimant is entitled to restitution of the purchase price. This is because he did not intend the defendant to retain the money in the event that the sale did not pass property in the car to him.

When the condition for making a contractual payment fails, sometimes this justifies the claimant retaining a property right in the money transferred. In the unjust enrichment context, a failure of a condition therefore has one of two consequences; the payer has either only a personal claim for value after the contract is set aside, or the law also creates an immediate property right in the money. The law's response to a failure of condition is determined by the degree to which the payer's autonomy has been compromised. When a claimant makes a contractual payment, and the condition on which the claimant intended to enrich the defendant with the payment is not fulfilled, then the claimant's purpose for the payment has failed. Since the defendant retaining the value of the payment was conditional, when the condition fails the claimant's autonomy is compromised. If the claimant successfully rescinds the contract, then the defendant must return the value received. The reason is that the claimant did not intend the defendant to retain the value received in the event that the purpose was not achieved.[91] But when the failure of condition compromises the claimant's autonomy to a higher degree, the law intervenes more strongly to protect the claimant's autonomy by recognising a trust of the monies paid.

Since contracts protect autonomy by upholding parties' intentions,[92] one may be concerned that an immediate trust arising in the claimant's favour is inconsistent with the obligation-based relationship created by the contract. It could therefore be seen to undermine the parties' contractual autonomy as it goes against the parties' intentions. The law of contract upholds parties' expressed or implied intentions, and it is submitted that the law of unjust enrichment, which is the cause of action that gives rise to the proprietary restitutionary response, works parallel to the laws of contract. This is because when an event occurs, and the parties have not provided for this contingency in the contract, the law of unjust enrichment governs the parties' rights. The law of unjust enrichment therefore governs situations that are outside the remit of the law on consensual arrangements. For instance, if a claimant makes a contractual payment, and his intention when making the payment was vitiated by the defendant's fraudulently induced mistake, as the parties would not have agreed in the contract as to what should happen if the payer's intention was vitiated, a dispute between the parties is determined by the principles

[90] E.g. *Fibrosa v Fairbairn Ltd* [1943] AC 32 (HL) 65 (Lord Wright) where on facts the court said payment was conditional on 'eventual performance. Accordingly, when that condition fails, the right to retain the money must simultaneously fail'. Also see F Wilmot-Smith, 'Reconsidering 'total' failure' (2013) 72 CLJ 414.
[91] See sub-section 'The condition on which the defendant can retain the value' following text at fn 23 in ch 3.
[92] See *Tailby v Official Receiver* (1888) 13 App Cas 523 (HL) 545 (Lord Macnaghten); L Fuller, 'Consideration and Form' (1941) 41 Colum LR 799, 806-809; L Fuller, 'Freedom- A Suggested Analysis' (1954) 68 Harv LR 1305, 1312-1315; Also see GWF Hegel, *Philosophy of Right* (SW Dyde tr, London, 1896), para. 71.

of unjust enrichment. Therefore, when equity intervenes in response to an unjust enrichment, it works in harmony with the law of contract, by supplementing the law of contract in protecting autonomy.

Despite this, one could still argue that as the parties have entered into a contract on the assumption that their relationship is a consensual one that gives rise to obligations, when an unplanned-for event occurs, the claimant's autonomy should only be protected by imposing an obligation on the defendant to make restitution of the value of the gain. Nevertheless, it is submitted that an immediate trust is justified in the contractual context. This is because the aim of a contractual payment is to obtain what you have paid for, through performance of the other contracting party. If the recipient of the payment is unable to perform the contract from the moment he receives the payment, the payer's intentions of attaining what was paid for is unattainable. As the property was only transferred on the condition that the purpose was *capable* of being achieved, when the defendant receives the property and the purpose is never capable of being fulfilled, there is a deviation between the purpose that the payment was made for and the capacity in which it was received by the defendant. The claimant's intentions with regards to his property are thus completely defeated.[93] The lack of congruency renders the property transfer defective in equity. In the eyes of equity, at no point in time does the defendant have a reason to retain the property beneficially, as his legal title was at all times overshadowed by the fact that he could not fulfil the conditions on which he received the property under the contract. There is thus no justification to strictly enforce the law of property and bind the claimant to the transfer.[94] This is because as there is no opportunity for the claimant's purpose to be fulfilled, if the claimant did not retain a property interest it would completely undermine his rights as a freely autonomous agent. The consequence is that the defendant holds the money he has received on trust for the payer. The trust protects the claimant's autonomy by putting him back in control of his property, but this time in equity. This gives the claimant the ability to once again plan his resources and try to achieve his goals.

How the impossibility concept works in practice can be illustrated using the following example. A payer makes a payment to purchase unique property from the defendant. But at the time that the contract is entered into, and at the time that payment is made for the goods, the contract cannot be carried out as the defendant is not the owner of the property which forms the subject matter of the contract. Since it was a sale of unique property, there is no other source from which the defendant can obtain the property that he needs to fulfil his contractual obligations. The transaction is defective because the payer's condition for transferring the money was to obtain delivery of the unique property, but there was no possibility of this being achieved. This deviation between the purpose that the payment was made for and the capacity in which the money was received by the defendant causes the payer's autonomy to be compromised. Importantly, the payer's purpose is impossible to fulfil from the outset. There is thus no

[93] A similar approach to 'proprietary restitution' is taken by G Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2015) 170.

[94] Brudner, though discussing autonomy and property in the context of personal restitution, also argues that the courts 'suspend property when effectuating it would subvert the plaintiff's autonomy.' See A Brudner, *The Unity of the Common Law* (2nd edn, OUP 2013) 241.

point in time whatsoever that the defendant can retain the claimant's money for the purpose it was given for, and so the payer is recognised as having an equitable beneficial interest in the money paid from the moment this money is received by the defendant. This example can be contrasted with *Re Goldcorp*, which did not involve a sale of unique property. In *Goldcorp*, at the time the customers would make payments to the defendant company for gold, the defendant did not always have sufficient stock in its vaults to meet the customers' orders. At first sight, this looks like an impossibility. However, the purpose could still be fulfilled. This is because the contracts in *Goldcorp* involved the sale of 'generic goods'.[95] As the goods were fungible, the defendant could obtain the relevant stock of gold bullion from another source in order to fulfil the contracts. Therefore, even though the defendant company did not have enough stock to satisfy the customers' orders at the time these customers paid for their gold, a proprietary response would not be available to the customers on this basis.[96]

4 Applying the impossibility analysis to the cases

Support for the proposition, that when the contract is not possible to perform an act of rescission by the claimant is not necessary for proprietary restitution, has been advocated by Salmons. He explains that:

> 'the appropriate solution to this issue can be found in the significance of the contract and the circumstances surrounding the transfer. Whilst the contract is capable of being performed, there is no possibility of proprietary restitution. This reflects what could be labelled the 'subsidiarity' of claims for restitution… One can demonstrate this by comparing *Re Goldcorp* to cases such as *Halley v Law Society* and *Campden Hill Ltd. v Chakrani,* where the contracts were never capable of being performed. In the latter two cases, proprietary restitution was available before the claimants attempted to terminate the contracts'.[97]

This thesis can be supported by the decision in *Neste Oy v Lloyds Bank Plc*, where proprietary restitution was available for an unjust enrichment transferred under a contract.[98] In *Neste Oy*, when the

[95] *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 (PC) 89G.
[96] A further example illustrating this in the context of generic goods can be found in *Re Goldcorp*, in relation to the Walker and Hall claimants. For these claimants, the company had initially ensured that it had sufficient stocks of gold bullion to meet these customers' orders. Furthermore, the bullion purchased by these customers was stored and recorded separately. It was later, however, stored in masse. Like the main claimants in Goldcorp, the Walker and Hall claimants could not get the benefit of a trust.
[97] D Salmons, 'The Availability of Proprietary Restitution in Cases of Mistaken Payments' (2015) 74 CLJ 534, 545; Also see discussion by P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 184; P Birks, 'Property and Unjust Enrichment: Categorical Truths' [1997] NZL Rev 623, 638 and 641; R Chambers, *Resulting Trusts* (OUP 2007) 171.
[98] [1983] 2 Lloyd's Rep 658 (QBD). Cf obiter comments in *Angove's Pty Ltd v Bailey* [2016] UKSC 47, [2016] 1 WLR 3179 [30]-[31]. This misunderstanding has unfortunately led some commentators to erroneously believe that *Angove's* overruled *Neste Oy*. See H Wong, 'Proprietary Restitution and Constructive Trusts in the Supreme Court' (2016) 6 Conv 480; P Watts, 'The Insolvency of Agents' (2017) 133 LQR 11, 13.

agent received the money, it had already decided to cease trading and appoint a receiver. So the entire purpose of the contractual payment, which was for the agent to discharge the claimant's debts to third-party service providers, was defeated as the company was no longer trading. As the purpose of the payment was impossible to fulfil when the agent received the money, this rendered the property transfer defective in equity. To protect the claimant's autonomy, there was a trust response and the agent was thus not beneficially entitled to the money.

In contrast to Bingham J's decision in *Neste Oy*, in *Re Goldcorp* the availability of proprietary restitution was rejected on the facts. The defendant company had fraudulently misrepresented to its customers that sufficient stocks of gold would always be held in its vaults, and that the customers had title to the non-allocated metal.[99] On the basis of the representations, the claimants entered into sale contracts with the defendant company for the purchase of gold bullion and paid the purchase price. Subsequently, due to the commencement of the receivership, the defendant was unable to carry out delivery. The claimants argued that a vitiating factor was present at the moment the purchase price was paid, and that a proprietary restitutionary interest in the form of a trust of the purchase moneys had arisen.[100] Although the claimants' intentions in *Goldcorp* were vitiated by the defendant's fraudulently induced mistake,[101] and hence under Birks' approach there was an initial failure of basis which should give rise to a trust,[102] the impossibility analysis explains why there could be no proprietary response. As Lord Mustill stated:

> '[Until the time] when delivery was demanded and not made… the claimants had the benefit of what they had bargained for, a contract for the sale of unascertained goods'.[103]

Lord Mustill's dicta indicates that the condition of payment was to obtain delivery of gold at a later date. The company's promise to retain a separate stock sufficient to cover all orders, and which the customers would obtain title to, was ancillary to the transaction.[104] Hence Lord Mustill described it as a 'collateral promise'.[105] So even though the defendant company failed to abide by its promise to maintain a separate stock, this did not completely defeat the claimants' intentions from the outset. Rather, when the purchase price was paid, as delivery was possible the substance of the contracts were

[99] *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 (PC) 87-89, 102.
[100] *Ibid* 101-104.
[101] *Ibid* 103.
[102] See text following fn 81 above.
[103] *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 (PC) 103. Also, see p.103: The mistake argument, 'as in the case of the argument based on misrepresentation, this version conceals the true nature of the customers' complaint: not that they paid the money, but that the goods which they ordered and paid for have not been delivered'.
[104] For further discussions of main and ancillary purposes, see sub-section 'Difficult cases' at fns 54-60 in ch 3.
[105] *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 (PC) 102.

still capable of being fulfilled. In equity, the defendant was therefore entitled to the payment and no trust could arise.[106]

Contrary to Lord Browne-Wilkinson's assertion in *Westdeutsche* that property obtained by fraud is always held on trust,[107] *Goldcorp* exemplifies that equity does not always impose a trust for fraud. The dictum of Ferris J in *Box v Barclays Bank Plc* is consistent with the view that not all fraudulently induced mistakes lead to a trust response.[108] In *Box*, Ferris J said that he did 'not think that Lord Browne-Wilkinson can be taken to have been laying down a principle applicable to all cases of fraud'. He stated that even if the claimants in the case before him had been fraudulently induced to part with their money, this would not render the recipient a trustee. This is because when the claimants' money was received, even if the recipient had been trading fraudulently or fraudulently misrepresented that it was carrying on a lawful deposit-taking business, the money could still be invested on the money market and the claimants paid the more advantageous rates of interest in accordance with the contracts.[109] As Ferris J stated, the case was 'not one where the suggested specific purpose (namely investment in the Bank on the money market) cannot be fulfilled'.[110]

In contrast, in *Halley v Law Society* the payer's mistake was fraudulently induced by the recipient.[111] There was an immediate trust, in the payer's favour, of the money paid under the contract.[112] This is because the money was paid in order to obtain bank instruments. These would enable the payer to access the funds of the Account Holder; funds which could then hopefully be used to make profits in investment programmes.[113] However, the contract was an 'instrument of fraud, and nothing else',[114] as it was not possible for the funds to be released by delivery of the bank instruments. As Lloyd J explained in the High Court,

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[106] See *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164 [74] (Lord Millett); R Chambers, *Resulting Trusts* (OUP 2007) 162; P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 191, 194-198; P Birks, 'Establishing a Proprietary Base (*Re Goldcorp*)' [1995] RLR 83; A Burrows, 'Proprietary Restitution: Unmasking Unjust Enrichment' (2001) 117 LQR 412, 426n.66.

[107] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) 716.

[108] *Box v Barclays Bank Plc* (Ch, 30 April 1998); Also see *Papamichael v National Westminster Bank (No.2)* [2003] EWHC 164 (Comm), [2003] 1 Lloyd's Rep 341 [232]-[237] (Judge Chambers QC); *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281 [111] (Rimer J).

[109] *Box v Barclays Bank Plc* (Ch, 30 April 1998): 'the relationship between the plaintiffs and Sylcon was contractual only… Under their contracts with Sylcon the plaintiffs were fully entitled to recover the amounts they had deposited and any interest which Sylcon had agreed to pay them'.

[110] *Box v Barclays Bank Plc* (Ch, 30 April 1998); Also see e.g. *Nolan v Minerva Trust Company Ltd* [2014] JRC 078A (Jersey Royal Court) and W Redgrave, '*Nolan v Minerva*- a Jersey Perspective on Dishonest Assistance' [2015] PCB 8, 9-10, 14-15.

[111] *Halley v Law Society* [2003] EWCA Civ 97, [2003] WTLR 845.

[112] Also see *Papamichael v National Westminster Bank (No.2)* [2003] EWHC 164 (Comm), [2003] 1 Lloyd's Rep 341 at [221]-[245]. Though note that the trust is a resulting trust, as opposed to a constructive trust, see *El-Ajou v Dollar Land Holdings Plc (No.1)* [1993] 3 All E.R. 717, 734 and *Halley v Law Society* [2003] EWCA Civ 97, [2003] WTLR 845 at [105] per Mummery LJ.

[113] *Halley v Law Society* [2002] EWHC 139 (Ch) at [75].

[114] *Halley v Law Society* [2003] EWCA Civ 97, [2003] WTLR 845 [47]. In contrast, in *Lonrho Plc v Fayed (No 2)* [1992] 1 WLR 1 (Ch), a case concerning the sale of shares, there was no impossibility. This is because 'the alleged fraud may have induced the vendors to sell, but the shares themselves were bought and sold under ordinary contracts' (*Halley* [51]).

> '[the fraudsters] knew that it had never happened before in any case of which either of them was aware and that there were such obstacles to it happening in future that it could be ruled out as a practical possibility. The representation was therefore dishonest and fraudulent. There was and could be no point for the Applicant in entering into the agreement, which was no more than a vehicle for obtaining money from him by false pretences'.[115]

Therefore, unlike in *Box* and *Goldcorp*, as the payer's purpose for the transfer was impossible from the outset,[116] the recipient was not entitled to the payment in equity from the moment of receipt.

Campden Hill v Chakrani is another instance in which a contractual payment made by mistake was held on trust for the payer before the contract was set aside. In that case, the claimant company made a loan to 'the defendant'. In return, the defendant Mr Chakrani was to repay the loan, and in the meantime pay a large facility fee and allow a charge on his property as security for the loan. However, this goal could never be fulfilled. This is because the defendant had never authorised the transaction and was not bound by the agreement to repay the loan to the claimant, as it had been carried out by his solicitor without his authorisation. Consequently, as in *Halley*,[117] the claimant lender's money was held on trust from the moment it was received by the defendant's solicitor. Similarly, returning to *London Allied Holdings v Lee*,[118] the claimant was fraudulently induced to transfer a sum of £1m to the defendant Mr Lee.[119] The payment was made pursuant to a contractual agreement that the latter would facilitate London Allied Holdings in the purchase of the Ritz hotel, and that the £1m would secure delivery of the contracts and all documents to complete the purchase. Furthermore, in the event that the contract and paperwork was not forwarded to the claimant within a reasonable time, the £1m would be repaid.[120] The agreement was voidable for fraud. Etherton J held that following rescission the traceable proceeds of the £1m were held on trust for the claimant. It is suggested here that when the fraudster received the money it was held immediately on a resulting trust, as opposed to being held on trust only after the agreement was set aside. This is because the purpose the payment was made for was impossible from the outset; the defendant was not in a position to sell the Ritz hotel to the claimant, as the owners of the Ritz had never agreed to sell.[121]

The impossibility analysis is also consistent with the judgment in *Nolan v Minerva*,[122] a decision of the Jersey Royal Court. In *Minerva*, the claimants were fraudulently induced to invest their money in

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[115] *Halley v Law Society* [2002] EWHC 139 (Ch) [119].
[116] See D Salmons, 'The Availability of Proprietary Restitution in Cases of Mistaken Payments' (2015) 74 CLJ 534, 545, 545n.86.
[117] *Campden Hill Ltd v Chakrani* [2005] EWHC 911 (Ch).
[118] *London Allied Holdings Ltd v Lee* [2007] EWHC 2061 (Ch).
[119] *Ibid* [226].
[120] *Ibid* [183].
[121] *Ibid* [246].
[122] *Nolan v Minerva Trust Company Ltd* [2014] JRC 078A (Jersey Royal Court).

various schemes, all of which failed. The claimants were unsuccessful in their attempt to recover their money from the fraudster. Claims were then made against various defendants for dishonestly assisting the fraudster to breach the trusts which the claimants argued had arisen in their favour from the fraud. The court recognised that a trust of the claimants' money had arisen for some of the claimants' investments, but not others. Importantly, the court's reasoning behind their decision was in line with the impossibility approach. This is exemplified by the way that the court applied the law to the following two disputed investments in that case. In the first, a trust was rejected. In the second, a trust was recognised. The first investment consisted of the claimants paying 4.25m Euros to Minerva so that two German nursing homes could be purchased by a company incorporated by Minerva called ARIL. The claimants then paid further monies for another investment in German nursing homes. It was agreed that when the claimants paid this money, they would be given shares in ARIL which reflected the size of their investment. As promised, ARIL's wholly-owned subsidiary acquired the two German nursing homes. The problem, however, was that the investment failed to produce the expected returns. One of the reasons for this was that the nursing homes were purchased with 103% bank borrowings, as opposed to the 80% that had been agreed. The court accepted that the nursing homes were 'purchased on different terms from those agreed' between the claimant and fraudster. It was also held that the fraudster's 'objective was indeed, as the Nolans claimed, simply to get hold of their money'.[123] Nevertheless, the court rejected a trust for the reason that 'we do not see how this state of affairs can establish that the first German nursing homes scheme was an instrument of fraud and nothing else'.[124] This is consistent with the impossibility analysis. The claimants paid the defendant for the purpose of acquiring shares in the nursing homes. The nursing homes existed and were acquired by the relevant company. Therefore, when the claimant paid the monies, the purpose of the payments was possible to carry out and a trust could not arise despite the fraud.

The second investment in *Minerva* consisted of the Nolans paying just over £1m to the fraudster for 144,446 shares from BSL in a company called Elision. This money was paid by the Nolans into the account of BHL. In contrast to the nursing home investment, this money was held on trust for the payers. The court's reasoning was that at the time of the Nolan's purchase, BSL had charged these shares to the Bank of Scotland. Clause 2.2 of the BSL charge in favour of the Bank of Scotland prevented BSL from disposing of this shareholding.[125] As 'BSL had nothing with which it could satisfy its obligation to transfer 144,446 unencumbered shares to the Nolans',[126] the money paid to BSL was held on trust.

The case law therefore demonstrates that a defendant does not obtain the beneficial interest in a contractual payment when there is no possibility of the payer's purpose being fulfilled at the time that the defendant receives the money.

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[123] *Ibid* [351].
[124] *Ibid.*
[125] *Ibid* [436].
[126] *Ibid* [437].

5 Effect of adequate substitute contractual performance on the trust

When a payment made under a voidable contract gives rise to a trust, an issue that needs to be addressed is what role the contract plays while the contract and trust co-exist. This is because when a trust arises, a claimant who is the trust beneficiary can usually exercise their *Saunders v Vautier* right and demand that the legal title to the trust property is transferred to them.[127]

In the context of proprietary restitution, since the trust arises because the contract is impossible to perform, the trust does not undermine the contract in this situation. However, when a trust arises in response to an unjust enrichment, and subsequently circumstances change so that adequate substitute performance is possible (and maybe even is rendered by the defendant), this appears to create a problem. Equity is supposed to work in harmony with the law of contract and supplement the contract in protecting autonomy, but the existence of a trust while adequate substitute performance under the contract can be or is rendered appears to undermine the agreement between the parties. This section demonstrates that in this scenario, the contract plays a role which prevents the co-existing trust from undermining the contract. It will now be discussed what is meant by adequate substitute performance in the proprietary restitutionary context, and what the claimant's rights are in the situation where a trust has arisen but where adequate substitute performance under the contract has become capable of being rendered or is rendered; whether the claimant (i) can vindicate his property rights under the trust, (ii) is left only with his contractual rights, or (iii) has both. The argument which will be advanced is that when a trust arises in response to an unjust enrichment, and subsequently the defendant provides or is willing to provide adequate substitute performance, the claimant is barred from recovering the trust from the defendant. A trust being restricted by a contract is not a new phenomenon; it is already a concept utilised in the context of unincorporated associations.[128]

1 Performance

The following example illustrates how a change of circumstances can lead to adequate substitute performance capable of being rendered:

> X pays £10, 000 to a company under a contract for the sale of goods. Unbeknown to X, the company had decided to cease trading and appointed an administrator shortly before it received the payment. X's plan to receive delivery of the contracted-for goods is impossible to carry out. Consequently, when the company receives the payment, it becomes a trustee of the money and

[127] *Saunders v Vautier* (1841) 4 Beav 115 (Ch).
[128] See the contract holding theory of unincorporated associations in *Re Recher's Will Trusts* [1972] Ch 526.

holds it on trust for X. X then demands that the money be returned on the basis that it remains X's property in equity.

Contracts do not terminate automatically when a company enters administration. The administrator can choose whether to perform, terminate or renegotiate the contracts that the company has. Imagine then, in the above example, the company's administrator chooses to affirm the contract it has with X and notifies X that it aims to fulfil the contract by providing the relevant performance. After the affirmation of the contract, the defendant company delivers to X the goods that X contracted for. At this point, X's purpose for the payments has been completely fulfilled by the defendant company. If the claimant X was then able to exercise his *Saunders v Vautier* rights and recover the property held on the trust which arose in response to the unjust enrichment, the claimant would get the contracted-for performance and would also have a property right in the purchase monies. This was a concern expressed by Lord Mustill:

> 'even in respect of those contracts which the company ultimately fulfilled by delivery the moneys were pro tempore subject to a trust which would have prevented the company from lawfully treating them as its own. This cannot be right'.[129]

Under the trust analysis proposed in this thesis, this problem does not arise. Since the claim for proprietary restitution, in the form of a trust, is based on unjust enrichment, the claimant therefore cannot recover the enrichment held on trust by the defendant if the claimant himself has been enriched. For instance, if the claimant transferred £x for y purpose and y purpose is fulfilled, his plan has been carried out. He has obtained the very thing that he contracted for. Consequently, the defendant is no longer unjustly enriched by the claimant's payment and there is no longer a reason for the payer's autonomy to be protected. The claimant is thus barred from exercising his *Saunders v Vautier* right to recover the trust property from the defendant.

Now it will be explained what adequate substitute performance means in the proprietary restitutionary context. When a payment is made under a contract and the objective purpose the payment is made for is impossible to fulfil from the outset, any performance that is then subsequently rendered under the contract might, but will not always, constitute adequate substitute performance. The reason why this performance is substitute rather than original performance is because when the original purpose is impossible, original performance thus cannot be rendered by the defendant. What constitutes adequate substitute performance can be illustrated using the void swaps cases from the 90s. In these cases, the purpose of the payments made under the void swaps was impossible when the defendant

[129] *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 (PC) 102 (Lord Mustill).

received the money. Consequently, a trust arose to protect the autonomy of the claimants.[130] In the swaps cases where money had been paid in both directions, at first glance it seems that the defendant provided adequate substitute performance for his side of the agreement. Let us take the *Kleinwort v Sandwell*[131] and *Guinness Mahon v Kensington*[132] cases as an example. The swaps were 'completed'. In these cases, it appears that the claimants' purpose was fulfilled by complete substitute performance. However, it is submitted that despite the defendants being under the impression that they had completely performed their side of the agreement, their performance was incapable of constituting adequate substitute performance. This is because the claimants paid the monies pursuant to a gamble with the opportunity of making a profit from the transactions, but there was never an opportunity to profit. The courts were always going to unwind the transactions for public policy reasons; to protect public money and the parties who had contracted with the defendant local authorities.[133] Since making a profit from the transactions was never a possibility, the performance that the defendant rendered could not constitute adequate substitute performance of the claimant's purpose. Therefore, the claimants would not be barred from recovering the money that was held on trust for them, subject to making counter-restitution for any benefits received from the defendants.

2 Period of time between substitute performance possible but before performance rendered

Returning to the example given earlier above,[134] even though the administrator of the defendant company decided to fulfil its contract with X, X may nevertheless prefer to have the trust property as opposed to the contractual performance. For instance, say that X's co-operation is required for performance to take place. This is because the defendant company is delivering personalised goods to X and therefore needs X's input before any of the work can be carried out. If X refuses to cooperate, the defendant cannot deliver and perform his side of the contract. X's refusal to cooperate could be for a number of reasons. For example, imagine the £10,000 that is subject to the trust was used by the company to purchase an asset which has increased in value. Most likely, X would want the asset rather than the value paid. Or if, for example, the trust money has been invested by the defendant, and X wants to trace into the investment as there is a potential of high investment returns. Admittedly, this is a highly unlikely scenario given that the money will usually be spent immediately on discharging debts owed by the company to its creditors. Nonetheless, addressing this hypothetical scenario, the defendant would need to know whether X can go after the traceable proceeds of the trust property even though performance is being offered. This is because if the defendant is bound to transfer the trust property,

[130] See discussions of the swaps cases at text to fns 53-70 in ch 5.
[131] *Kleinwort Benson Ltd v Sandwell Borough Council* [1994] 4 All ER 890 (QBD).
[132] *Guinness Mahon & Co Ltd v Kensington and Chelsea Royal London Borough Council* [1999] QB 215 (CA).
[133] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1994] 1 WLR 938 (CA) 951 (Leggatt LJ).
[134] See text following fn 128 above.

the defendant might make a loss from X's breach. The loss could arise if, for instance, the trust property being claimed from the defendant is higher in value than the combined amount X paid under the contract plus the profits that the defendant made from the contract with X.

It is submitted that, in the interim period where adequate substitute performance is capable of being rendered but performance has not yet taken place, the claimant X cannot get a court order which orders the defendant to transfer the trust property to him. The claimant's *Saunders v Vautier* right is restricted. This is because although the trust in the claimant's favour remains in existence, the reason for its creation by equity no longer stands. The trust arose to protect the claimant's autonomy when the contract was impossible to carry out. When adequate substitute performance under the contract becomes capable of being carried out, applying the autonomy reasoning set out earlier in this chapter, the existence of a trust undermines the contract as opposed to supplementing it. Therefore, the contractual rights of the parties to have the contract performed must take priority over the trust.[135] The effect of this is that the claimant cannot recover the trust property and refuse performance. This issue of whether, while adequate substitute performance is capable of being rendered, a payer can demand that the defendant returns the contractual payment which is held on trust for him, was touched upon by Lord Millett in *Twinsectra v Yardley*.[136] In *Twinsectra*, a contract and trust co-existed between a lender and borrower. Lord Millett said that 'whether the lender can countermand the borrower's mandate while it is still capable of being carried out, must depend on the circumstances of the particular case'.[137] Although Millett indicated that this was a resulting trust, it was explained in chapter 7 that the trust in *Twinsectra* was an instance of an express trust. It is submitted that in the case of an express trust created by contract, whether revocation of a payment held on trust is possible depends on what the parties have agreed in the contract, hence it depends on 'the circumstances of the particular case' (i.e. what the parties have agreed in the contract in that particular case).[138] In contrast, when an unjust enrichment gives rise to a trust, the trust arises *by operation of law* in response to an impossibility of the purpose. As the unjust enrichment trust arises to protect autonomy, when circumstances change and adequate substitute performance becomes possible, there will never be a justification for giving priority to the trust over the contract. Therefore, the dicta of Lord Millett from *Twinsectra*, that it depends on the circumstances of the particular case whether the payer can revoke his mandate and demand the trust property when performance is still available, is inapplicable in the unjust enrichment context.

3 The position partway through performance

[135] A similar approach is evident in the contract-holding theory in the context of unincorporated associations, where it is said that the trust beneficiaries' rights to the trust property are restricted by their contract.
[136] *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164.
[137] *Ibid* [100].
[138] See discussions in the context of the *Quistclose* trust at fns 131-146 in ch 7.

Let us once again return to the earlier example. Imagine now if *partway* through the defendant company's substitute performance X notifies the defendant that he no longer wants performance and demands a transfer to himself of the trust property that remains in the defendant's hands. He is not entitled to do this, as the contract continues to restrict his right to access the trust.

6 Clarifying the role of rescission in the law of proprietary restitution

1 Trust

Finally, it is important to clarify the role of rescission in the law of proprietary restitution. It is argued that since the proprietary response is not contingent on the avoidance of the transaction, it should follow that when the claimant loses his right to rescind, this should not affect the trust that has arisen in response to the unjust enrichment. Therefore, even when rescission is barred, this should not prevent the claimant from recovering the trust property.

2 Relationship between personal and proprietary restitution

When a payment made under a voidable contract is held on trust for the payer, the payer has a potential personal restitutionary claim against the original recipient.[139] The claim is a potential one as it is only available once the voidable contract is set aside.[140] The reason that the claimant has to rescind to obtain restitution in personam is that the law of unjust enrichment is a 'subsidiary doctrine'.[141]

> 'Subsidiarity describes the relationship between two claims or doctrines where the scope and operation of one claim are constrained by another claim, even where all the elements of the former claim are made out'.[142]

Imposing an obligation on the recipient to make personal restitution, while the contract imposes an obligation on the recipient to perform, results in the restitutionary obligation undermining the contractual obligations. For this reason, personal restitution must be contingent on successful rescission.

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[139] Cf *Banque Belge pour l'Etranger v Hambrouck* [1921] 1 KB 321 (CA) 333.
[140] *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 (PC) 103; P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 174: 'A rescinding party who has paid money has in principle always had the normal personal claim for restitution of that sum…one who has paid money under a voidable contract which has been rescinded is in exactly the same position as one who has paid under a void contract or otherwise without explanatory basis'. But note that at p.174, in contrast to the view adopted in this thesis, Birks takes the view that the bars to rescission do not affect the availability of personal restitution after rescission.
[141] R Grantham and C Rickett, 'On the subsidiarity of unjust enrichment' (2001) 117 LQR 273.
[142] *Ibid* 273.

It follows that if rescission is barred, the mere equity is defeated, and the restitutionary claim in personam against the defendant is also lost.[143]

The position advocated here has support in the case law. In *Stone v City & County Bank*,[144] the claimant was fraudulently induced to purchase worthless shares in the defendant bank. The nature of the fraud was the defendant had misrepresented that the bank was active and trading very profitably, whereas in fact it was heavily in debt. Consequently, the contract was voidable for fraud and the claimant attempted to rescind the contract and recover the amount paid. The Court of Appeal held that as the company had been wound up before rescission, rescission had therefore come too late. So the claimant did not have a personal right to restitution against the defendant and could not recover the money that he had paid for the shares.

7 Conclusion

This chapter has argued that when a contractual payment is made in circumstances in which the recipient is unjustly enriched from the moment of receipt, a trust can arise immediately under the voidable contract.[145] Although the immediate trust model was rejected by the House of Lords in *Westdeutsche Landesbank*,[146] and later fell out of favour with Birks,[147] it is submitted that it should be the preferred analysis for proprietary restitution involving contractual payments. As Swadling has explained, the principle of abstraction dictates that 'the passing of title is independent of the validity of the contract, and its non-existence or subsequent rescission can therefore have no bearing on third parties'.[148] It follows that as rescission cannot have the effect of revesting title in the transferor either in law or in equity,[149] rescinding the contract should not be a requirement for proprietary restitution. Furthermore, the immediate trust model irons out the inconsistencies between spontaneous mistakes, which give rise to an immediate trust,[150] and fraudulently induced mistaken payments which are said to require the

[143] R Chambers, *Resulting Trusts* (OUP 2007) 172: 'these rights are mere equities only when they do not lead to the recovery of property'. Cf: P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 174, 176. At p.176: 'The personal claim to the unjust enrichment is better contemplated simply as distinct from the power to revest, capable of surviving supervening events which destroy the latter power. The voidability of the contract sufficiently destroys the basis of the transfer even when, as events turn out, one response, namely the power to rescind and revest, is barred'. Also see N Nahan, 'Rescission: A Case for Rejecting the Classical Model' (1997) 27 UWA LR 66 who says that personal money remedy should be available against immediate recipient even if a third party has acquired a right to the property transferred under the contract; B Häcker, 'Rescission and Third-Party Rights' [2006] RLR 21.

[144] *Stone v City & County Bank* (1877) 3 CPD 282.

[145] *Neste Oy v Lloyds Bank Plc* [1983] 2 Lloyd's Rep 658; *Halley v Law Society* [2003] EWCA Civ 97, [2003] WTLR 845; *Re Crown Holdings (London) Ltd* [2015] EWHC 1876 (Ch); R Chambers, *Resulting Trusts* (OUP 2007), pp.171-184; P Birks, 'Property and Unjust Enrichment: Categorical Truths' [1997] NZL Rev 623, 637-638 and 641.

[146] *Westdeutsche v Islington LBC* [1996] AC 669 (HL).

[147] P Birks, *Unjust Enrichment*, (2nd edn, OUP 2005) 299-300.

[148] W Swadling, 'Rescission, Property, and the Common Law' (2005) 121 LQR 123, 123.

[149] *Ibid.*

[150] E.g. *Chase Manhattan v British-Israeli National Bank* [1981] Ch 105.

setting aside of the transaction before a trust can arise.[151] This ironing out is imperative, for the reason that it is 'slightly odd to be forced to the conclusion that equity's proprietary response to mistake is structurally different from its response to misrepresentation (induced mistake)'.[152]

It has been proposed in this chapter that the immediate trust can be justified on the basis of autonomy protection. This is because when an enrichment is transferred under a contract which is impossible to perform from the outset, as there is no possibility of contractual performance, there is no reason for the defendant to retain the claimant's property. Consequently, there appears to be no justification to strictly enforce the law of property and bind the claimant to the transfer. The defendant accordingly holds the money he has received on trust for the payer. The trust protects the claimant's autonomy by putting the payer back in control of his property, but this time in equity. This gives the claimant the ability to once again plan his resources and try to achieve his goals.

[151] *El-Ajou v Dollar Land Holdings Plc (No.1)* [1993] 3 All E.R. 717 at 734 per Millett J; *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch. 281 at [122] per Rimer J; *London Allied Holdings Ltd v Lee* [2007] EWHC 2061 (Ch) at [276] per Etherton J.
[152] P Birks, 'Property and Unjust Enrichment: Categorical Truths' [1997] NZL Rev 623, 641.

Chapter 5 The Swaps Cases

1 Introduction

This chapter focuses on the swaps cases from the 1980s and 90s, in particular the House of Lords' decision in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*.[1] The House of Lords in the *Westdeutsche* case stated that when money is paid under a void contract, a trust of the monies cannot arise for the payer. This is significant, as it means that the payer does not have the benefits associated with having an equitable interest in the fund. However, it is submitted that their Lordships' view, that there is an absolute bar to a proprietary claim in these circumstances, was misconceived.

In contrast to their Lordships' dicta in *Westdeutsche*, this chapter argues that money paid under a void contract can give rise to an immediate trust for the transferor. Furthermore, it is proposed that in all cases where payments were made pursuant to void interest rate swaps agreements, to protect the transferor's autonomy, a resulting trust arose to reverse the defendant's unjust enrichment. Although at first sight this appears to be inconsistent with the House of Lords' judgment in *Westdeutsche*, it is submitted that their Lordships' discussions on the unavailability of a trust were obiter. The case can therefore be reconciled with the analysis presented in this chapter.

Admittedly, Professor Peter Birks also argued that when money is paid under a void contract, the recipient holds the money on trust for the provider of the funds. This is because the recipient would be unjustly enriched from the outset, and under Birks' thesis all initial failures of basis give rise to proprietary restitution. However, Birks' account presented too wide an approach towards equitable proprietary claims, and was an obvious reason why the House of Lords rejected his position. The impossibility analysis is more restrictive when it comes to the availability of the proprietary response, and explains why some but not all enrichments transferred under void contracts give rise to a resulting trust. As it is a narrower approach, it is thus more likely to be accepted as a suitable basis for deciding which unjust enrichments are deserving of a proprietary response.

This chapter is structured as follows. First, it outlines the facts and decision of the *Westdeutsche v Islington LBC* case. Second, it demonstrates that the defendant in *Westdeutsche* was unjustly enriched by the void swaps payments from the moment it received the monies. Finally, by drawing on case law, it is shown that payments made under void contracts can give rise to a trust, and that in *Westdeutsche*, a trust should have been available in response to the defendant local authority's unjust enrichment.

[1] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL).

2 The *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* case

In the 1980s, many local authorities entered into swaps agreements with banks:

> 'Under such a transaction, one party (the fixed rate payer) agrees to pay the other over a certain period interest at a fixed rate on a notional capital sum; and the other party (the floating rate payer) agrees to pay to the former over the same period interest on the same notional sum at a market rate determined in accordance with a certain formula'.[2]

Islington London Borough Council was one such local authority. It entered into swaps with Westdeutsche Landesbank, which became the subject matter of the dispute in the *Westdeutsche* case. The facts are as follows. The bank and local authority entered into a swaps agreement. The agreement was for a 10-year period starting from 18 June 1987, with interest to be calculated on a notional sum of £25m. The fixed rate payer was the bank, paying a 7.5% interest rate per annum calculated on the notional sum. The local authority was the floating rate payer, and was paying interest at the LIBOR rate. As part of the agreement, the bank made an upfront payment of £2.5m to the local authority. The practical effect of the transaction was that it achieved 'a form of borrowing'[3] whereby the floating rate payer, which was the local authority, 'had the use of the bank's money over a period of years' at lower interest rates than would have been possible if it had entered into actual borrowing contracts from elsewhere.[4] It was 'this feature which, in particular, attracted local authorities to enter into transactions of this kind, since they enabled local authorities subject to rate-capping to obtain upfront payments uninhibited by the relevant statutory controls'.[5]

Between the start date of the parties' agreement and June 1989, Islington London Borough Council made four interest payments to the bank totalling £1,354,474. Then on 1 November 1989, the swaps saga started with the Divisional Court's decision in *Hazell v Hammersmith & Fulham London Borough Council*.[6] The facts were as follows. The Audit Commission of Local Authorities had appointed an auditor to audit the accounts of Hammersmith and Fulham Borough Council. On inspection of the accounts, the auditor discovered that the council had entered into swaps transactions. The auditor was of the view that these transactions were illegal. Under section 19 of the Local Government Finance Act 1982 he applied to the court for a declaration that the transactions in the account were unlawful, and also an order for rectification of the accounts. The declaration was granted by Woolf LJ and French J

[2] *Ibid* 680 (Lord Goff).
[3] *Ibid.*
[4] *Ibid* 691 (Lord Goff).
[5] *Ibid* 680 (Lord Goff).
[6] *Hazell v Hammersmith and Fulham London Borough Council* [1990] 2 WLR 17 (QBD).

in the Queen's Bench Division. They held that the swaps activities were ultra vires the local authority according to section 111 of the Local Government Act 1972 and were therefore unlawful. This first instance decision was upheld by the House of Lords.[7]

After the decision in *Hazell* was passed down, Islington Council made no more interest payments to the bank. Westdeutsche Landesbank then bought an action to recover the balance of £1,145,526, which was the difference between its upfront payment of £2.5m and the amount it had received from the local authority, and additionally it tried to claim the interest from the date that the local authority received the upfront payment. At first instance, Hobhouse J held that the bank was entitled to restitution of the £1,145,526 balance and awarded *compound interest* from 1 April 1990. The bank appealed the decision on the basis that compound interest should run from 18 June 1987, which was the date that the local authority received the £2.5m upfront payment under the swaps agreement. The Court of Appeal awarded the bank *compound interest* from 18 June 1987, as this was the date from which the local authority had the use of the bank's money. Islington then appealed to the House of Lords. Their Lordships allowed the local authority's appeal, and held that the bank was only entitled to *simple interest* from 18 June 1987.

Lord Browne-Wilkinson, with whom the majority of their Lordships agreed, justified this decision on the following basis:

> 'in the absence of fraud equity only awards compound (as opposed to simple) interest against a defendant who is a trustee or otherwise in a fiduciary position by way of recouping from such a defendant an improper profit made by him'.[8]

Thus according to the House of Lords, the bank was not entitled to compound interest for the following reason: the transactions did not cause Islington LBC to become a trustee or fiduciary of the sums it received pursuant to the void swaps agreement. There was therefore no trust or fiducial relationship capable of being breached. Since compound interest is only available in the event of such a breach, and there was none, the bank was limited to simple interest.

3 Unjust enrichment

In *Hazell v Hammersmith*, the court was solely concerned with deciding whether swaps transactions were ultra vires the local authorities. The consequences of the swaps being declared void were not dealt with.[9] After it was held in *Hazell* that the swaps were ultra vires and void, *Westdeutsche* was selected

[7] *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1 (HL).
[8] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) 702 (Lord Browne-Wilkinson).
[9] *Hazell v Hammersmith and Fulham London Borough Council* [1990] 2 QB 697 (CA) 763 (Sir Stephen Brown P).

as one of two test cases for deciding what restitutionary rights banks and other financial institutions had against the local authorities they had entered into swaps transactions with.[10] Therefore, much of the discussions in the Queen's Bench Division and Court of Appeal judgments of *Westdeutsche* were devoted to discussing the unjust factor giving rise to the bank's restitutionary right.

As to what follows, in agreement with the House of Lords in *Westdeutsche*, it is argued that the bank's consideration for the payments failed at the time of Islington's receipt of the sums. Alternatively, since *Kleinwort Benson Ltd v Lincoln County Council* ,[11] the ground of mistake can be used to reach the same conclusion. The section ends by demonstrating that the autonomy analysis of unjust enrichment proposed in this thesis also explains why the local authorities were unjustly enriched, and why this approach to unjust enrichment should be favoured over the unjust factors. The important point to note is that, irrespective of which of the three aforementioned grounds are used to explain why the local authority's enrichment in the *Westdeutsche* case was unjust, the local authority was unjustly enriched from the moment it received the payments pursuant to the swaps agreements. This is significant, because for the cause of action for proprietary restitution to be complete the defendant must be unjustly enriched at the claimant's expense in circumstances where the purpose of the transfer is impossible from the outset. An initial unjust enrichment is therefore a necessary requirement for proprietary restitution, but by itself not sufficient.

1 Failure of consideration

Although the parties in *Westdeutsche* entered into the swap before the decision in *Hazell v Hammersmith*, the *Hazell* decision retrospectively rendered the Westdeutsche swap void ab initio.[12] The apparent retrospective effect of the decision in *Hazell* can be explained using the declaratory theory of law.[13] This is because the judges in *Hazell* were not creating new law; they were only discovering and declaring the law as it had always been. So even before the decision in *Hazell* was handed down, the legal position was that swaps were ultra vires the local authorities and void. Since the swaps were always void ab initio, at no point was there a valid contract between Westdeutsche and Islington Council.

[10] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) 680 (Lord Goff).
[11] *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349 (HL).
[12] On the retrospective nature of judicial decision-making, see *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349 (HL) 357-362 (Lord Browne-Wilkinson) 377-380 (Lord Goff) 393-394 (Lord Lloyd) 399-401 (Lord Hoffmann) 410-411 (Lord Hope); *Deutsche Morgan Grenfell Group Plc v Inland Revenue Commissioners* [2006] UKHL 49, [2007] 1 AC 558 [23] (Lord Hoffmann).
[13] See *R v Governor of Brockhill Prison* [2001] 2 AC 19 (HL) 37 (Lord Hope) 43, 48 (Lord Hobhouse); W Blackstone, *Commentaries on the Laws of England* (1st edn, 1765) vol 1, 69-70; HLA Hart, *The Concept of Law* (3rd edn, OUP 1961) 5; A Burrows, *The Law of Restitution* (3rd edn, OUP 2011) 224; G Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2015) 186.

At first instance, Hobhouse J in *Westdeutsche* stated that failure of consideration refers to 'failure of performance on the part of the opposite party',[14] and 'presupposes that there has been at some stage a valid contract'.[15] For Hobhouse J, the failure of consideration doctrine was thus inapplicable.[16] As the claimant bank received no consideration for the £2.5m it paid under the void contract to Islington, Hobhouse J said that the bank could instead recover the money on the ground of 'absence of consideration'.[17] On this ground, the swap being void was the trigger for the restitutionary response.

In the Court of Appeal, Leggatt LJ also utilised absence of consideration. According to Leggatt LJ, there is 'no consideration under a contract void ab initio'.[18] In contrast, Dillon LJ said that payments made under the void swap could be recovered on the basis that there was a total failure of consideration. Kennedy LJ expressed no personal opinion on the matter, and agreed with the judgments of both his fellow Lord Justices.[19]

When the case reached the House of Lords, the only live issue was the level of interest that should be awarded. As there was 'no appeal from the decision that the bank was entitled to recover the balance of the payments so made in a personal claim in restitution, the precise identification of the ground of recovery was not explored in argument before the Appellate Committee'.[20] Nevertheless, in obiter their Lordships expressed a view on the unjust factor entitling the claimant bank to restitution of monies paid under the void swap. Regarding Hobhouse J's decision at first instance, Lord Goff stated that his approach:

> 'may have found its origin in the idea, to be derived from a well known passage in the speech of Viscount Simon LC in *Fibrosa*… that a failure of consideration only occurs where there has been a failure of performance by the other party of his obligation under a contract which was initially binding. But the concept of failure of consideration need not be so narrowly defined…'[21]

Applying the failure of consideration doctrine to the facts of *Westdeutsche*, Lord Goff said that 'the contract under which the payment is made is void ab initio and the consideration for the payment therefore fails at the time of payment'.[22] Lord Browne-Wilkinson concurred. He stated that a 'claimant for restitution of moneys paid under an ultra vires, and therefore void, contract has a personal action at law to recover the moneys paid as on a total failure of consideration'.[23]

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[14] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1994] 4 All ER 890 (QBD) 925 (Hobhouse J).
[15] *Ibid* 924 (Hobhouse J).
[16] *Ibid* 929 (Hobhouse J).
[17] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1994] 4 All ER 890 (QBD).
[18] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1994] 1 WLR 938 (CA) 953 (Leggatt LJ).
[19] *Ibid* 956.
[20] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) 683 (Lord Goff).
[21] *Ibid.*
[22] *Ibid* 690.
[23] *Ibid* 714 (Lord Browne-Wilkinson).

The important point to note is that regardless of whether absence or failure of consideration is adopted, the swaps cases demonstrate that the consideration for void contracts fails from the outset. The recipient is therefore unjustly enriched from the moment it receives payments pursuant to it. Since the cause of action is complete on receipt, it explains why in the swaps cases there could be recovery even where there had been apparent partial performance. This is further illustrated by *Guinness Mahon & Co Ltd v Kensington and Chelsea Royal London Borough Council*[24] and *Kleinwort Benson Ltd v Sandwell Borough Council*[25] where the swaps were completely performed, yet the claimant could still obtain restitution for failure of consideration.[26] Importantly, as the defendants in the swaps cases were unjustly enriched from the moment of receipt, there was a possibility of proprietary restitution.

2 Mistake

In *Westdeutsche*, the claimant bank made a mistake of law as opposed to one of fact. This is because 'lack of knowledge of a statutory provision and its legal effect is an error of law'.[27] But at the time of *Westdeutsche*, mistake of law was not a ground for restitution, and so the bank was unable to recover on the basis of mistake.[28] This bar was criticised by Lord Goff in the House of Lords who noted that the 'doctrine will fall to be reconsidered when an appropriate case occurs'.[29] The reconsideration happened in *Kleinwort Benson Ltd v Lincoln CC*, which abolished the mistake of law bar to recovery.[30]

In *Kleinwort Benson*, the claimant bank made payments to four local authorities under interest rate swap agreements. The swaps were on the face of it completely performed. Over the term of the agreement, the bank had paid a greater sum to the local authority than it had received from the same. After the decision in *Hazell* that swaps entered into by local authorities were void and ultra vires their powers, the bank now sought to recover the balance.

As the *Kleinwort* swaps were void ab initio, the consideration for the payments failed from the moment the local authority received the sums under the agreement. The problem faced by Kleinwort Benson was that it commenced the action to recover the monies paid to Lincoln County Council more than six years after the date that the majority of the payments were made (i.e. the date the cause of action accrued). For the payments which were made more than six years prior to the commencement of the action, section 5 of the Limitation Act 1980 prevented their recovery.

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[24] *Guinness Mahon & Co Ltd v Kensington and Chelsea Royal London Borough Council* [1999] QB 215 (CA).
[25] *Kleinwort Benson Ltd v Sandwell Borough Council* [1994] 4 All ER 890 (QBD).
[26] Cf: see A Burrows, *The Law of Restitution* (3rd edn, OUP 2011) 102, 397 who takes the view that for failure of consideration, consideration means performance. Therefore, he argues that for closed swaps, money paid is recoverable only using mistake of law as Waller LJ said in *Guinness Mahon*. It follows that if there was no mistake in the closed swaps, there would be no restitution. Whereas for open swaps, money paid is recoverable on the ground of failure of consideration or mistake of law.
[27] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1994] 4 All ER 890 (QBD) 931 (Hobhouse J).
[28] *Bilbie v Lumley* (1802) 2 East 469 (Court of King's Bench).
[29] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) 690 (Lord Goff).
[30] *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349 (HL).

This is because for common law restitution claims, section 5 imposes a six-year limitation period:[31]

> '**Limitation Act 1980**
>
> **Section 5 Time limit for actions founded on simple contract.**
>
> An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued'.[32]

However, the law provides a more advantageous limitation period for recovery of mistaken payments. Section 32(1)(c) of the Limitation Act states that where:

> 'the action is for relief from the consequences of a mistake; the period of limitation shall not begin to run until the claimant has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.'

Applying this to *Kleinwort*, the date of the *Hazell* decision was the time from which the mistake was reasonably discoverable by the claimant. So if the claimant was able to establish that it made the payments by mistake, this was the date from which the limitation period would begin to run. As Kleinwort had not made a mistake of fact, the only way it could obtain the limitation advantage contained in s.32(1)(c) of the 1980 Act was by establishing that restitution was available for mistakes of *law*.

The House in *Kleinwort* addressed the mistake of law issue, and abolished the old rule that money paid under a mistake of law cannot be recovered. It followed that if the claimant could establish that the payments were made under the mistaken belief that the swaps agreements were intra vires the local authorities and that the contracts were therefore valid and binding, it would be able to recover all the monies it paid to Lincoln Council, as opposed to recovering only the payments made in the six years prior to the writs being issued. The question then was whether the claimant had made a mistake. As discussed earlier, the retrospective effect of judicial decision-making means that the swaps were void at the time they were entered into.[33] The problem facing their Lordships in *Kleinwort* was whether a subsequent declaration as to what the law is could have the effect of making the claimant mistaken at the time it made the payments under the swaps, even though there was no statute or judgment at that

[31] Even though section 5 of the Limitation Act 1980 deals with limitation periods for contractual claims, the courts apply have used it for restitutionary claims where there is no contract. As Burrows explains, the House of Lords in *Kleinwort* implicitly accepted the six-year limitation period for common law restitutionary claims (with the exception of mistake): see A Burrows, *The Law of Restitution* (3rd edn, OUP 2011) 606-609.
[32] Limitation Act 1980, section 5.
[33] See text to fns 12-13 above.

time which stated that swaps were ultra vires the local authorities and void. The majority held that the claimant bank had made a mistake of law, though they gave different reasons as to why that was so. Lord Goff said that the payer was mistaken because he 'believed, when he paid the money, that he was bound in law to pay it. He is now told that, on the law as held to be applicable at the date of the payment, he was not bound to pay it'.[34] Lord Hoffmann's view was that due to the retrospective nature of judicial decision-making, the claimant was mistaken at the time of payment because the state of affairs was not what it had thought them to be,[35] whereas Lord Hope said that the payer makes a mistake if, had he 'known what he is now being told was the law', he would not have made the payment.[36] Furthermore, Lord Hope said that one can be mistaken even if it was not possible at the time of payment to discover whether the payer was making a mistake. This is because a 'mistake of fact may take some time to discover. If there is a dispute about this, the question whether there was a mistake may remain in doubt until the issue has been resolved by a judge. Why should this not be so where the mistake is one of law?'[37] Therefore, one can utilise evidence that came to light after the payments were made to show that the payer made a mistake.

Finally, it is essential to deal with the relevance of performance in the recovery of mistaken payments. Birks argued that when the claimants in the swaps cases made a mistake as to the incapacity of local authorities, if 'after that mistake was made, the contract, invalid as it was, was fully performed and the disappointment latent in the mistake never eventuated. Like a bomb safely defused, the mistake was spent'.[38] However, Lord Goff in *Kleinwort* rejected Birks' argument. He said that when money is paid under mistake of law pursuant to a void agreement, the cause of action for recovering the money paid accrues on the date the payment is made,[39] and even where the 'performance of the supposed contract is completed, it will be as true of the final payment as it will have been of all the previous payments'.[40] Thus attempted performance cannot divest the payer of his accrued right to recover all the money.[41]

The mistake of law ground can therefore also be used to explain why the local authority's enrichment in *Westdeutsche* was unjust.[42] Most importantly though, irrespective of which unjust factor is adopted, as the swaps contract in *Westdeutsche* was void, the defendant in *Westdeutsche* was unjustly enriched from the moment it received payments pursuant to the agreement.

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[34] *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349 (HL) 379G.
[35] *Ibid* 399G (Lord Hoffmann).
[36] *Ibid* 411 (Lord Hope).
[37] *Ibid*.
[38] P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 259; P Birks, 'No Consideration: Restitution after Void Contracts' (1993) 23 UWALR 195, 230-231n.137.
[39] *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349 (HL) 386.
[40] *Ibid*.
[41] *Ibid*.
[42] It is submitted that mistake of law is 'the best explanation', see A Burrows, 'Swaps and the Friction between Common Law and Equity' [1995] RLR 15, 26-27; *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349 (HL).

3 'Freedom to' undermined

The autonomy analysis of the unjust enrichment cause of action proposed in this thesis should be the favoured approach to unjust enrichment. There are two reasons for this. First, the terminology of failure of consideration causes unnecessary confusion. This is because it appears to suggest that the doctrine only applies to valid contracts which are not performed, even though it also applies to void contracts.[43] One should thus 'steer altogether clear of the word 'consideration''.[44] Second, as discussed above,[45] it is not clear what a mistake of law is. This makes it difficult to identify the basis underpinning restitution for this unjust factor.

The autonomy analysis based on free choice and intent fulfilment is the most preferable approach, since it goes to the root of the issue by identifying the true reason for restitution for mistake and failure of consideration, which is that the payer's intentions were not fulfilled. That is not to say that the unjust factors should be completely abandoned. They still have a role to play under the scheme proposed here, as they are a useful way for determining whether one's autonomy has been undermined.[46]

An unjust enrichment approach based on autonomy can explain why local authorities were unjustly enriched by swaps payments. In all the swaps cases, the claimants freely chose to make payments to the local authorities. However, although the payers exercised free choice, their freedom was undermined as their intentions were not fulfilled. Taking the *Westdeutsche* case as an example, Westdeutsche only intended to enrich Islington London Borough Council in the event that the condition the swaps payments were made for was carried out. Islington's right to retain the amounts received was thus contingent on the condition being fulfilled. Westdeutsche parted with its money on the condition that it would receive all the bargained-for performance under a valid agreement. As the swaps agreements turned out to be void, this condition was never capable of being met. The claimant had not intended to enrich Islington in these circumstances. Consequently, the paying bank's autonomy was undermined.[47] This explains why the cause of action accrued from the moment of receipt, even in the closed swaps cases. Importantly, as there was an initial unjust enrichment, there was a potential for the unjust enrichment to give rise to a trust response.

The next section argues that payments made under void contracts can, but do not always, give rise to proprietary restitution. Furthermore, it is demonstrated that not only were the local authorities in the swaps cases unjustly enriched from the outset by the payments, but the claimants' payments were made in pursuit of a purpose that was impossible from the outset. Consequently, the money was held on trust for the payers.

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[43] See discussion at text to fns 14-19 above.
[44] P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 119.
[45] See discussion at text to fns. 34-37 above.
[46] See text following fn 8 in ch 3.
[47] See discussions in sub-section 'The condition on which the defendant can retain the value' following text at fn 23 in ch 3.

4 Availability of proprietary restitution

When a transferor pays money under a void contract, if the recipient receives the money in circumstances where he is unjustly enriched, and additionally the *condition on which he can retain the beneficial interest* is impossible to fulfil, the transferor can recover the money under a trust.[48] This is because the condition for obtaining the beneficial interest is not satisfied if the transferor's purpose was impossible to carry out when the recipient received the property. In contrast, if the transferor's purpose is possible to fulfil at the time of the transferee's receipt, the transferee attains an absolute property right to the enrichment and does not hold the property on trust.

This section demonstrates that under the impossibility analysis, the absence of a legal basis is not determinative of proprietary restitution. It goes on to apply the impossibility analysis for proprietary restitution to the swaps cases, and other cases involving void contracts, and demonstrates that payments made under the void swaps were immediately held on trust for the transferor.

1 Purposes

Birks argued that when there is no legal basis for a defendant's enrichment, the initial failure of basis should give rise to a trust. Applying this analysis to the swaps cases, he said the claimants had made payments to discharge a contractual obligation owed to the defendant local authorities. However, the contracts were void. Consequently, the money was not due. As there was no explanatory basis for the payments,[49] Birks said that a trust should have arisen.[50]

Although the impossibility analysis also leads to the conclusion that a trust arose in the swaps cases, contrary to Birks, it is submitted that it was not the void contract that caused the trust to arise. This is because for proprietary restitution, the purpose of a transfer that equity recognises as being relevant for proprietary restitution is not necessarily the same as the legal basis of the transaction. It follows that when a transfer is made pursuant to a legal basis which is impossible, for example because the contract is void, this does not provide a conclusive answer on the nature of the restitutionary response; since the payer's purpose for a payment may be possible to fulfil despite the contract being void. A payment made under a void contract therefore can, but does not always, give rise to proprietary restitution. The difference between 'basis' under Birks' approach to proprietary restitution, which refers to the legal

[48] See discussion in sub-section 'The condition on which the defendant can obtain the beneficial interest' at text to fn 24 in ch 3.
[49] P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 113, 131-132.
[50] *Ibid* 192.

purpose of a transfer, and 'purposes' as defined by the impossibility analysis, will be illustrated using the case of *Rover International Ltd v Cannon Film Sales Ltd*.[51]

In *Rover*, the defendant's receipt of the payments was unjust from the outset. Yet it is submitted that if the defendant in *Rover* was insolvent and the claimant had argued for a trust, the initial failure could not give rise to a trust response. This demonstrates that contrary to Birks' view, when a contract is void and the legal purpose for the transfer has thus failed, this will not necessarily give rise to proprietary restitution. The facts of the case are as follows. The claimant and defendant entered into a contract. The claimant was to dub and distribute films for the defendant in return for a share of the gross receipts. As part of the arrangement, the defendant provided the films and other necessary materials, and the claimant made five advance payments to the defendant. However, at the time that the contract was signed the claimant company had not been incorporated. As a result, its contract with the defendant was void ab initio. On the basis of unjust enrichment, the claimant succeeded in recovering the advance payments from the defendant.

The claimant Rover's advance payments to the defendant were made so that the claimant could make a profit. That this was the purpose of the payments is supported by the dicta of Kerr LJ. He stated that:

> 'delivery and possession were not what Rover had bargained for. The relevant bargain at any rate for present purposes, *was the opportunity to earn a substantial share of the gross receipts* pursuant to clause 6 of the schedule, with the certainty of at least breaking even by recouping their advance'.[52]

As events turned out, the claimant's aim of making a profit did not come into fruition. Nonetheless, making a profit was possible at the time that the advance payments were made. Therefore, applying the impossibility analysis there could be no trust of the monies paid under the void contract. This is because even though the transactions were unwound, the undoing of the transactions and the order for restitution was a choice of the parties. If the claimant and defendant had not litigated and chosen to fulfil the void contract and keep the profits, they could have done so. The courts would not have compelled the parties to make restitution. *Rover* can be distinguished from the void swaps cases on this ground. It is argued that for example in the *Westdeutsche Landesbank* swaps case, discussed in further detail below, despite their Lordships' dicta to the contrary a trust should have been available. But one should note that although this article rejects the House of Lords' discussions on the unavailability of a proprietary claim in *Westdeutsche*, it does not question their Lordships' decision regarding the availability of personal restitution.

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[51] *Rover International Ltd v Cannon Film Sales Ltd* [1989] 1 WLR 912 (CA). For further discussions on the difference between Birks' approach to proprietary restitution and the analysis advocated, see text to fns 28-32 in ch 3, and fns 77-83 in ch 4.

[52] *Ibid* 924-925 (Kerr LJ) (emphasis added).

In *Westdeutsche Landesbank v Islington LBC*, the claimant bank had entered into an interest rate swaps agreement with the defendant council. A few years after the swap was entered into, it was declared in *Hazell v Hammersmith* that swaps agreements were void as they were ultra vires the local authorities.[53] Not only was the defendant in *Westdeutsche* unjustly enriched from the outset by the payments,[54] the claimant's purpose was also initially impossible.[55] The payments were made in pursuit of a gamble. Both parties were taking a risk. The plan was that one of them would make a loss, but that the other party would profit from the arrangement. This would be achieved in the following way: the fixed and floating rates of interest over the term of the agreement determined how much each party needed to pay the other over the course of the swaps arrangement. When the swaps period came to an end, one party would have received more than it paid out and would therefore profit from the transaction. However, when the payments were made there was no possibility of the claimant making a profit. Even if the parties had completely performed, regardless of the parties' wishes, the court was going to unwind the transaction due to policy reasons and not let either party retain any benefits from the swap.[56] This is evident from the closed swaps cases of *Guinness Mahon & Co. Ltd v Kensington and Chelsea Royal LBC*[57] and *Kleinwort Benson Ltd v Sandwell BC*[58] where, despite both parties having completely performed the swap, restitution was awarded.

2 Reconciling impossibility with *Westdeutsche*

It must be conceded that the dicta of the House in *Westdeutsche* is inconsistent with the impossibility analysis, as proprietary restitution should have been available in principle subject to the claimant making counter-restitution of any benefits received from the defendant. Nevertheless, for the reasons explained below, it is submitted that the discussions of proprietary restitution in *Westdeutsche* were obiter and that the case can be reconciled with the analysis presented in this article.

First, the claimant bank's money was paid into an account that 'became overdrawn overnight on several dates'.[59] Applying the rule in *James Roscoe Ltd v Winder*, the lowest intermediate balance in the account was zero.[60] Accordingly, the subsequent replenishment of the account after it became overdrawn did not represent the claimant's property. For this reason, the replenished account could not form the subject matter of a trust. Furthermore, the claimant's money was 'used by the local authority

[53] *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1 (HL).
[54] See text at fns 12-47 above.
[55] Birks said that if there was a mistake of law in *Westdeutsche*, then a resulting trust should have arisen. See P Birks, 'Trusts Raised to Reverse Unjust Enrichment: The *Westdeutsche* Case' [1996] RLR 3, 24.
[56] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1994] 1 WLR 938 (CA) 951 (Leggatt LJ); see also *Guinness Mahon & Co Ltd v Kensington and Chelsea Royal London Borough Council* [1999] QB 215 (CA) 233 (Waller LJ) who says that Leggatt LJ in *Westdeutsche* was being guided by policy considerations.
[57] *Guinness Mahon & Co Ltd v Kensington and Chelsea Royal London Borough Council* [1999] QB 215 (CA).
[58] *Kleinwort Benson Ltd v Sandwell Borough Council* [1994] 4 All ER 890 (QBD).
[59] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) 700 (Lord Browne-Wilkinson).
[60] *James Roscoe Ltd v Winder* [1915] 1 Ch 62 (Ch).

for its general expenditure',[61] and so there were no identifiable assets representing the proceeds. Consequently, at the time of the claim, there was no property that the claimant bank's equitable right could attach to. And so whether a trust had arisen in response to the defendant's unjust enrichment was therefore only relevant for the purpose of establishing the appropriate level of interest.

Second, the local authority in *Westdeutsche* appealed 'only against the award of compound interest'.[62] The reason that the claimant bank wanted compound interest on the money it paid to the defendant was because, had the defendant not had the benefit of using the claimant's money, it would have needed to borrow from elsewhere at market rates. Therefore, it was argued that the defendant's gain was not simply the amount it received from the claimant, but the value received plus compound interest. With regards to compound interest, Lord Browne-Wilkinson stated that:

> 'it is common ground that in the absence of agreement or custom the court had no jurisdiction to award compound interest either at law or under section 35A of the Supreme Court Act 1981 … [63] [Moreover,] in the absence of fraud courts of equity have never awarded compound interest except against a trustee or other person owing fiduciary duties who is accountable for profits made from his position'.[64]

As there was no fraud or breach of fiduciary duty in *Westdeutsche*, in order to obtain compound interest, it had to be shown that a trust had arisen and that the defendant local authority was accountable for profits made from a breach of trust. On the question of whether a trust had arisen, Lord Browne-Wilkinson stated that:

> 'since the equitable jurisdiction to enforce trusts depends upon the conscience of the holder of the legal interest being affected, he cannot be a trustee of the property if and so long as he is ignorant of the facts alleged to affect his conscience'.[65]

Applying Lord Browne-Wilkinson's analysis, from the moment a defendant's conscience is affected by knowledge of the mistake, a trust arises.[66] From this point onwards, the defendant must account to the beneficiaries for any profits that he receives from the trust.[67] Since at no point did the local authority have knowledge while the bank's money was still in its hands, a trust did not arise under Lord Browne-Wilkinson's analysis. As there was no trust, there could be no breach of trust. However, as argued by

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[61] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) 700 (Lord Browne-Wilkinson).
[62] *Ibid.*
[63] *Ibid* 700-701 (Lord Browne-Wilkinson).
[64] *Ibid* 701 (Lord Browne-Wilkinson).
[65] *Ibid* 705.
[66] For a more detailed discussion of Lord Browne-Wilkinson's unconscionability approach, see text to fns 50-62 in ch 4.
[67] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) 706 (Lord Browne-Wilkinson).

Lord Justice Millett, Lord Browne-Wilkinson erred in his belief that the recipient's conscience must be affected for a trust to arise.[68] This analysis is supported by Lord Justice Walker in the Court of Appeal in *Allan v Nolan* in recognising a resulting trust in circumstances where the trustee was unaware of the basis for the trust. Importantly, it was recognised in *Allan v Nolan* that a trustee of a resulting trust is only personally liable for breach if he has knowledge of the trust at the time that he commits the breach.[69] So although the impossibility analysis indicates that a trust arose from the outset in *Westdeutsche*, the defendant local authority could not be held accountable in the absence of knowledge. The local authority did not commit a breach of trust; since it dissipated the trust property without the authorisation of the beneficiary bank before it knew of the trust's existence. It follows that as the property was no longer in the hands of the local authority, and neither did the local authority commit a breach, the House of Lords' discussions on the availability of a proprietary claim were unnecessary and therefore obiter.

It is also notable that, although Lord Browne-Wilkinson was seeking to limit the availability of compound interest, it is arguably easier for compound interest to be available under his analysis. If one accepted Lord Browne-Wilkinson's approach in *Westdeutsche* for instance, had the money in *Westdeutsche* still been traceable, Birks said that 'the bank would seemingly have been entitled to a proprietary claim and thus compound interest, on the basis that conscience-affecting knowledge supervened while the money received was still traceable'.[70] Therefore, the reasons for rejecting the trust analysis in *Westdeutsche* are not as compelling as they first might appear.

2 Other void contract cases

This section explores other cases where a contract was void ab initio, and discusses whether proprietary restitution would be available in these cases under the impossibility analysis.

1 *Solle v Butcher*

In *Solle v Butcher*,[71] under the mistaken belief that statutory rent control did not apply, the claimant rented a flat for £250 per annum from the defendant. As the defendant had not complied with the necessary statutory formalities, he was not entitled to charge more than an annual rent of £140. Upon discovering that the lease was subject to the rent control rates in the Rent Restrictions Acts, the claimant sought to recover the rent overpayments. As the lease contract was void,[72] this raises the question of

[68] PJ Millett, 'Restitution and Constructive Trusts' (1998) 114 LQR 399, 401, 412-413; also see A Burrows, *The Law of Restitution* (3rd edn, OUP 2011) 180.
[69] *Allan v Nolan* [2002] EWCA Civ 85; [2002] Pens LR 169.
[70] P Birks, 'Trusts Raised to Reverse Unjust Enrichment: The *Westdeutsche* Case' [1996] RLR 3, 21.
[71] *Solle v Butcher* [1950] 1 KB 671 (CA).
[72] *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407, [2003] QB 679.

whether the payments made under the void rent contract were held on trust by the landlord. Although this is a hypothetical question, since the defendant was solvent and a proprietary claim was not in issue, the trust issue would have been important if the defendant had, for example, been bankrupt when the claim was made. To determine whether a trust would have arisen, the first step is to objectively identify the claimant's purpose for making the payments. The claimant's payments under the purported lease were made to secure possession of the flat for the agreed period. This purpose was possible from the outset, as when the defendant received the payments, the claimant could take possession of the flat. Furthermore, he did in fact do so and lived in the flat for a period of time. It follows that if the landlord was insolvent at the time of the claim, and the claimant had attempted to recover the overpayments by arguing that they were held on trust by the landlord, a trust would not have been available.

2 Deutsche Morgan Grenfell v Inland Revenue Commissioner

Deutsche Morgan Grenfell v Inland Revenue Commissioner[73] is another case where the claimant mistakenly paid money pursuant to an invalid legal basis, yet the unjust enrichment could not give rise to a trust of the monies. The facts of *Deutsche Morgan* are as follows. The Income and Corporation Taxes Act 1988 required certain companies resident in the UK to pay advance corporation tax. The Act allowed UK companies to make a 'group income' election with the effect that when a subsidiary company paid dividends to its parent company, if an election had been made, Advance Corporation Tax (ACT) did not have to be paid *unless the parent company was resident outside of the UK*. Where ACT was payable and paid, it could be set-off against future Mainstream Corporation Tax (MCT). Deutsche Morgan was a company that had made ACT payments. But after it had done so, the European Court of Justice handed down its judgment in *Metallgesellschaft Ltd v Inland Revenue Commissioners*,[74] where it held that these sections of the Income and Corporation Taxes Act 1988 were contrary to EU law. The reason was that only UK resident parent companies could receive dividends without having to pay ACT, and so the UK legislation undermined freedom of establishment by favouring UK resident parent companies over those that were non-UK resident. After the ECJ's judgment in *Metallgesellschaft*, Deutsche Morgan commenced an action against the Revenue. It argued that paying Advance Corporation Tax had caused it to suffer a disadvantage. The House of Lords in *Deutsche Morgan* ordered the Revenue to make restitution of interest, as this was the extent of the Revenue's gain. This is because the Revenue unjustly benefitted from the claimant's mistake of law, by having the use of the money between the time the Advance Corporation Tax was paid to when it was set-off against Mainstream Corporation Tax owed by the claimant.

[73] *Deutsche Morgan Grenfell Group Plc v Inland Revenue Commissioners* [2006] UKHL 49, [2007] 1 AC 558.
[74] *Metallgesellschaft Ltd v Inland Revenue Commissioners* (Joined cases C-397 and 410/98) [2001] Ch 620 (ECJ).

Applying the autonomy analysis of unjust enrichment, as the claimant was not under a legal obligation to pay the ACT, the money was paid to the Revenue in pursuit of a plan which in part failed from the outset. Nonetheless, it is submitted the unjust enrichment could not give rise to a trust. The claimant's purpose for the payments was to discharge a tax liability to the Revenue- owed because the claimant had received dividends. Despite the claimant having made tax payments earlier than it needed to have done (i.e. in advance), the purpose of the transfers (to pay money that was owed to the Revenue) was capable of being, and was, fulfilled when the Revenue received the claimant's payments. This is because the obligation to pay the tax existed irrespective of whether ACT was valid. So although the tax was paid early by mistake, this did not prevent the tax obligation from being discharged. Therefore, there was no impossibility and no proprietary response.

3 *Woolwich Equitable Building Society v IRC*

In contrast, *Woolwich Equitable Building Society v Inland Revenue Commissioners*[75] is an example of a case where the claimant's purpose was impossible from the outset. In *Woolwich*, pursuant to the Income Tax (Building Societies) Regulations 1986, the Inland Revenue demanded tax payments from the claimant Woolwich Building Society. The claimant conformed to the demands but paid the monies 'under protest'. The Regulations were later held to be void. Woolwich then sought to recover the payments from the Revenue, along with interest from the date the Revenue received the payments, on the ground that the tax was demanded ultra vires. The House of Lords held that, on the basis of unjust enrichment,[76] the claimant could recover all of the payments made to the defendant, as well as interest.

Whether the unjust enrichment could give rise to a trust was discussed in passing by Ralph Gibson LJ in the Court of Appeal, though he added that the matter 'was introduced into the case but not, in this court, relied on by either side. *Woolwich* did not rely on constructive trust before Nolan J'.[77] He then continued by saying:

> 'In my judgment, Woolwich cannot in this case recover on the ground of constructive trust the interest which it claims. If the primary submission for Woolwich succeeds, no question of trust arises. If that submission fails, then, in my judgment again, no question of trust arises'.[78]

It is submitted that Ralph Gibson LJ was incorrect on the trust issue. The claimant paid the defendant for the purposes of paying off a tax liability that was supposedly owed under the Regulations. Nolan J

[75] *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 (HL).
[76] *Ibid* 197 (Lord Browne-Wilkinson).
[77] *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1991] 3 WLR 790 (CA) 117 (Ralph Gibson LJ).
[78] *Ibid* 833 (Ralph Gibson LJ).

held that the relevant sections of the Regulations were ultra vires and therefore void.[79] Applying the declaratory theory of law, or the version of the theory adopted by their Lordships in *Kleinwort Benson v Lincoln*, the Regs were always void.[80] So at the time Woolwich Building Society made the payments, the obligation to pay the Revenue was non-existent; the money was not due. Consequently, the claimant's purpose of discharging the tax obligation was impossible when the Revenue received the payments. The Revenue therefore held the money on trust for Woolwich.

5 Conclusion

In this chapter, it was demonstrated that when a recipient receives money pursuant to a void contract, he is unjustly enriched from the moment of receipt. Furthermore, by drawing on case law it was shown that payments made under void contracts can, but do not always, give rise to a proprietary restitutionary response in the form of a trust. Whether a trust arises in response to an unjust enrichment depends on whether the claimant's purpose for transferring their money is impossible at the time it is received by the recipient. It was argued that in the leading swaps case of *Westdeutsche Landesbank v Islington LBC*, the purpose was impossible from the outset. Therefore, despite their Lordships' dicta to the contrary, a trust should have been available.

[79] *R v Inland Revenue Commissioners, ex parte Woolwich Equitable Building Society* [1987] STC 654 (QBD).
[80] See text at fns 12-13 above.

Chapter 6 *Ex parte James*

1 Introduction

This chapter focuses on the rule in *Ex parte James*.[1] The rule is important for the reason that, when it is successfully invoked, a claimant is conferred priority in the debtor's insolvency. This allows the claimant to recover his money from the insolvent recipient ahead of other unsecured creditors. However, the rule is controversial for the reason that it is not clear why, in the cases where it is applied, a claimant who has a non-provable debt is not only treated as if his debt is provable, but is able to recover his money in priority.[2] In contrast to the reasoning adopted in the case law, this chapter argues that the rule cannot be justified on the basis of honesty, fairness and high-mindedness, but can be explained using the cause of action of unjust enrichment.

Admittedly, Dawson has previously argued that the cases should be 'subsumed' into the law of restitution.[3] However, his thesis fails to explain the contentious aspect of the rule; the reason for giving the payer priority.[4] By adopting the unjust enrichment analysis proposed in this chapter, the 'issue of priorities'[5] can be explained, and the doctrine no longer appears 'anomalous'.[6] On the contrary, the *Ex parte James* body of cases fit within the existing law. More importantly, the proposed analysis eradicates the 'danger' of the *Ex parte James* principle becoming a 'catch-all to cover complaints where the law has already provided a remedy'.[7] It follows that the phrase 'the doctrine in *Ex parte James*' has only concealed what the courts have been doing- applying the law of unjust enrichment- and has delayed vital discussions on what the principle is actually about. Another difference between Dawson's argument and the approach proposed in this chapter, is here it is argued that the restitutionary analysis can also explain some of the *Ex parte James* cases where the insolvency officer is demanding payment, and the payee is relying on the principle to resist the demand.[8] In contrast, Dawson's view is that it is impossible to fit these cases into the law of unjust enrichment.[9]

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[1] *Re Condon, ex parte James* (1874) 9 Ch App 609 (Court of Appeal in Chancery).
[2] In *Re Condon, ex parte James* (1874) 9 Ch App 609 and *Re Carnac, ex parte Simmonds* (1885) 16 QBD 308, the payers made a payment under mistake of law. Payments made under mistakes of law could not be recovered at the time and so the payers did not have an enforceable claim to recover the sums.
[3] I Dawson, 'The Administrator, Morality and the Court' (1996) JBL 437. But now see his position in I Dawson, 'Corporate Rescue by the Upright Rescuer- a trap for the unwary' (2016) 29 Insolv Int 81 where he argues that the principle should be overruled.
[4] TE Chan, 'Revisiting *Ex Parte James*' (2003) Sing JLS 557, 579.
[5] *Ibid*.
[6] As it was described in *Re TH Knitwear (Wholesale) Ltd* [1988] Ch 275 (CA) 289; G McCormack, 'Equitable influences and insolvency law' (2014) 7 CRI 103, 105.
[7] *Heis v Financial Services Compensation Scheme Ltd* [2018] EWHC 1372 (Ch) [143(7)] (Hildyard J).
[8] This group of cases is discussed at text to fns 146-156 at the end of this chapter.
[9] I Dawson, 'The Administrator, Morality and the Court' (1996) JBL 437, 457.

2 Scope of chapter

This chapter proposes that cases applying the *Ex parte James* principle fit into two categories. The first category, and which is the focus of this chapter, consists of those cases where the *insolvent estate was unjustly enriched*. The unjust enrichment was reversed via proprietary restitution, in the form of a trust. The trust enabled the payer to recover his money in priority in the insolvency. The second group of cases, which are not the focus of this chapter for the reason that there is no proprietary restitution, are those where an enrichment was conferred *by the bankrupt or company in winding up to another*, and the *Ex parte James* principle was utilised by the recipient of the property against the insolvent estate in order to prevent the latter from recovering the money. These cases will be discussed briefly at the end of the chapter.[10]

3 The rule in *Ex parte James*

The facts of the *Ex parte James* case are as follows. A creditor levied execution over the debtor's goods. Consequently, the Sheriff of Middlesex seized some of the goods and sold them. The Sheriff then paid the proceeds of sale to the execution creditor in satisfaction of the debtor's debt. Soon after, another of the debtor's creditors filed a petition for bankruptcy which resulted in the debtor being declared bankrupt. A trustee in bankruptcy was then appointed for the debtor's estate. The debtor's trustee in bankruptcy Mr James, an officer of the court, demanded the sale proceeds from the execution creditor on the basis that he (the trustee) was legally entitled to the sums. The execution creditor, under the mistaken belief that the trustee in bankruptcy was legally entitled to the money, paid the sale proceeds to the trustee. He then sought to recover the sums demanded and received. The court held that the trustee had to refund the money mistakenly paid to him. The effect of the ruling was that the payer recovered the money in priority to the other unsecured creditors of the bankrupt. However, it is not clear from the judgment whether the execution creditor recovered the sums on the basis of a personal right against the bankrupt estate, or whether he had a proprietary interest in the monies received by the trustee. This is because the court, instead of addressing the issues separately, conflated the question of whether the payer had a cause of action to recover the payment made by mistake of law, for which at the time recovery was barred,[11] with the level of priority it ought to receive.[12] The mechanism used to achieve priority, and which is capable of explaining the *Ex parte James* body of cases, will be revisited later in the chapter.[13] This section will now focus instead on the court's reasoning.

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[10] See text at fns 146-156 below.
[11] *Bilbie v Lumley* (1802) 102 ER 448 (Court of King's Bench). Although now see *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL) which abolished the mistake of law bar.
[12] TE Chan, 'Revisiting *Ex Parte James*' (2003) Sing JLS 557, 565.
[13] See section 'Response' following fn 71 below.

In *Ex parte James*, Sir James LJ explained that the transferor was able to recover the sums from the trustee because:

> '*a trustee in bankruptcy is an officer of the Court*. He has inquisitorial powers given him by the Court, and the Court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among the creditors. The Court, then, finding that he has in his hands money which in equity belongs to someone else, ought to set an example to the world by paying it to the person really entitled to it. In my opinion the Court of Bankruptcy *ought to be as honest as other people*'.[14]

This section will now demonstrate the need for a new analysis to explain the cases, by exploring the difficulties with the reasoning employed by the courts applying the *Ex parte James* principle. First, it rejects the arbitrary requirement that the recipient must be an officer of the court. Second, the courts' view that recovery is justified on the basis that it would be dishonest for the officer to insist on his strict legal right and retain the sums is not only too subjective a criterion in this context to be administered, but undermines the officer of the court requirement. Moreover, such recovery would constitute a preference under s.239 of the Insolvency Act 1986.[15] The orthodox account should, therefore, be discarded.

1 Officer of the Court

The majority of the cases suggest that the rule from *Ex parte James* is applicable only against a recipient who is an 'officer of the court'.[16] These 'are persons who are subject to its general supervisory or inherent jurisdiction'.[17] In *Re TH Knitwear (Wholesale) Ltd*, the Customs and Excise Commissioner sought to argue that the liquidator of a voluntary liquidation was a court officer and, consequently, that the principle in *Ex parte James* was applicable.[18] However, Slade LJ stated that:

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[14] *Re Condon, ex parte James* (1874) 9 Ch App 609 (Court of Appeal in Chancery) 614 (emphasis added).
[15] See text at fns 99-103 below.
[16] E.g. *Re Carnac, ex parte Simmonds* (1885) 16 QBD 308 (CA); *Re Brown* (1886) 32 Ch D 597 (Ch); *Re Tyler, ex parte Official Receiver* [1907] 1 KB 865 (CA); *Re Hall, ex parte Official Receiver* [1907] 1 KB 875 (CA) 879 (Farwell LJ); *Re Thellusson, ex parte Abdy* [1919] 2 KB 735 (CA); *Scranton's Trustee v Pearse* [1922] 2 Ch 87 (CA); *Re Gozzett, ex parte Messenger & Co Ltd* [1936] 1 All ER 79 (CA) 88 (Romer LJ); *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 A.C. 349 (HL) 417 (Lord Hope); *Re Japan Leasing (Europe) Plc* (Ch, 30 July 1999) [44]; *Triffit Nurseries v Salads Etcetera Ltd* [2000] 1 All ER (Comm) 737 (CA); *Re T&N Ltd* [2004] EWHC 1680 (Ch); [2004] Pens LR 351 [16]-[17]; *Dubey v Revenue & Customs Commissioners* [2006] EWHC 3272 (Ch); [2008] BCC 22 [5], [53]; *Expandable Ltd v Rubin* [2007] EWHC 2463, [2009] BCC 443.
[17] *Glasgow v ELS Law Ltd* [2017] EWHC 3004 (Ch); [2018] 1 WLR 1564.
[18] [1988] Ch 275 (CA); *TH Knitwear* was cited by David Richards J in *Lehman Bros (In Admin) also known as Lomas v Burlington Loan Management* (2015) EWHC 2270 (Ch); Also, note that David Richards J's judgment in *Lehman Bros* was described by Mr Registrar Baister in *Re Young (A Bankrupt)* (Ch, 27 March 2017) at [42] as 'the most comprehensive consideration of the rule and the authorities relating to it'.

> 'a liquidator in a voluntary winding up is not an officer of the court within the principle… he is not appointed by the court and the exercise of his powers is not subject to the control of the court'.[19]

The position of company administrators though, whether appointed by a court order, creditor, or the company itself, is that they are court officers.[20] There is a compelling argument, therefore, that they should still fall within the courts' equitable jurisdiction and be subject to the rule in *Ex parte James*.

Although the general judicial consensus is that *Ex parte James* applies only to court officers, it is argued that this requirement draws an 'artificial distinction between the different forms of insolvency proceedings'.[21] First, admittedly, equity can operate on different principles from the common law.[22] Nevertheless, limiting equity's jurisdiction under *Ex parte James* to court officers is unjustified. As the Chancery Division of the High Court recognised in *Re T&N Ltd*, 'liquidators in a voluntary winding-up… are not officers of the court but perform much the same function as a liquidator in a compulsory winding-up'.[23] In both instances, the liquidator's role is to realise and distribute assets to the company's creditors. Therefore, there appears to be no convincing reason for excluding voluntary liquidators from the ambit of the *Ex parte James* principle,[24] yet continuing to allow compulsory liquidators to fall within its jurisdiction.

Second, there is a concern that the arbitrary distinction between insolvency practitioners who are officers of the court, and those who are not, may lead to claimants 'shopping between regimes in order to invoke the rule'.[25] The reason is that a creditor will seek the appointment of an insolvency officer who serves his ends. As Dawson explains,

> 'One can imagine a court being put in an impossible position where one creditor seeks either the appointment of an administrator or a compulsory liquidation in order to enable it to mount an argument based on *Ex parte James*, whilst another creditor seeks the appointment of an

[19] *Re TH Knitwear (Wholesale) Ltd* [1988] Ch 275 (CA) 288. Also see *Glasgow v ELS Law Ltd* [2017] EWHC 3004 (Ch); [2018] 1 WLR 1564 [82] and *Re John Bateson & Co Ltd* (1985) 1 BCC 99378 (Ch) 99382-99383.
[20] Insolvency Act 1986, Schedule B1 Para 5; *Re Atlantic Computer Systems* [1992] Ch 505, 529 (Nicholls LJ); *Re Farepak Food and Gifts Ltd* [2006] EWHC 3272, [2008] BCC 22 [53]; *Lehman Bros (In Admin) also known as Lomas v Burlington Loan Management* (2015) EWHC 2270 (Ch) [174]; *Glasgow v ELS Law Ltd* [2017] EWHC 3004 (Ch); [2018] 1 WLR 1564 [82].
[21] TE Chan, 'Revisiting *Ex Parte James*' (2003) Sing JLS 557, 580.
[22] The view of this author is that common law and equity should be fused as far as is possible. For a fusionist approach, see A Burrows, 'We do this at Common Law but that in Equity' (2002) 22 OJLS 1.
[23] *Re T&N Ltd* [2004] EWHC 1680 (Ch); [2004] Pens LR 351 [16].
[24] I Dawson, 'Corporate Rescue by the Upright Rescuer- a trap for the unwary' (2016) 29 Insolv Int 81, 84. The distinction between compulsory and voluntary winding ups was also criticised, though in a different context, in *Re Art Reproduction Co Ltd* [1952] Ch 89 (Ch) 94-95 (Wynn-Parry J).
[25] TE Chan, 'Revisiting *Ex Parte James*' (2003) Sing JLS 557, 580.

> administrative receiver or a voluntary liquidation so that the assets available to the latter creditor will not be depleted by the success of the former'.[26]

Third, but most importantly, there are cases which suggest that the rule is not confined to those who fit within the definition. For instance, in *Sebel Products v Customs and Excise Commissioners*, the principle was applied to Revenue and Customs authorities.[27] Also, in the House of Lords in *R v Tower Hamlets London Borough Council ex parte Chetnik Developments Ltd*, the applicant successfully invoked the principle against a local authority.[28] It is then somewhat surprising that the courts refuse to apply the *Ex parte James* principle against those whose position is analogous to an officer of the court. In *TH Knitwear*, for example, it was said that an insolvency practitioner who is not an officer of the court does not fall within the principle even if he has applied to the court for directions.[29] This position was affirmed more recently in *Glasgow v ELS*.[30] It again demonstrates that the officer of the court requirement imposes artificial limitations on the scope of the *Ex parte James* rule.[31]

Last of all, the requirement is further undermined by the fact that even when one *is* an officer of the court, the *Ex parte James* principle may not be applicable. In *Caldwell v Sumpters*, the claimant argued that the rule applied to a solicitor, since solicitors are court officers. Yet the court refused to apply the principle for the reason that a solicitor 'acts on behalf of his client' rather than on the court's behalf.[32] Regarding this contradiction, Dawson rightly points out that it is not clear 'why the court should not impose that requirement- to act to the highest standards- on its officers, regardless of the precise role which they should fulfil'.[33]

2 Dishonesty

The second requirement from the *Ex parte James* case is that the doctrine is only applicable against officers of the court whose behaviour could be regarded as dishonest.[34] It should be noted however, as Lord Justice Lawton explained in *In the Matter of Multi Guarantee Co Ltd v In the Matter of the Companies Act 1948*:

> 'various words have been used in the cases to indicate the kind of conduct to which the principle of *Ex parte James* may apply, such as 'a point of moral justice', 'dishonest', 'dishonourable',

[26] I Dawson, 'The Administrator, Morality and the Court' (1996) JBL 437, 454.
[27] [1949] Ch 409 (Ch).
[28] [1988] AC 858 (HL).
[29] *Re TH Knitwear (Wholesale) Ltd* [1988] Ch 275 (CA) 289.
[30] *Glasgow v ELS Law Ltd* [2017] EWHC 3004 (Ch); [2018] 1 WLR 1564 [82].
[31] I Dawson, 'Corporate Rescue by the Upright Rescuer- a trap for the unwary' (2016) 29 Insolv Int 81, 83-84.
[32] [1972] Ch 478 (CA) (Megarry J).
[33] I Dawson, 'The Administrator, Morality and the Court' (1996) JBL 437, 443.
[34] *Re Condon, ex parte James* (1874) 9 Ch App 609 (Court of Appeal in Chancery) 614 (James LJ).

> 'unworthy', 'unfair' and 'shabby'… The concept behind them is, as I understand the cases, that an officer of the court, such as a trustee in bankruptcy or a liquidator, should not behave in a way which a reasonable member of the public, knowing all the facts, would regard as either dishonest, unfair or dishonourable'.[35]

For simplicity, this chapter will only use the language of 'dishonesty'.

In *Re Thellusson*, Warrington LJ explained that the honest line of conduct can be one that the officer is 'not compellable thereto by legal process'.[36] The issue is therefore 'one of ethics, not of law'.[37] Since 'ethical propriety'[38] underpins the rule, the doctrine in *Ex parte James* has been described as 'a moral principle'.[39] How this morality manifests itself in practice can be illustrated by the *Ex parte James* case. In *James*, the court said that the honest course of action for the trustee in bankruptcy to pursue was to not insist on his strict legal right to retain the money received by mistake of law. This is because the court 'has never intimated that it is a high-minded thing to keep money obtained in this way'.[40] Consequently, the trustee was ordered to return the sums.[41]

It should be noted however that a finding of dishonesty is 'not limited to the particular case'[42] of an insolvency officer attempting to retain money paid by mistake of law.[43] The principle also applies when an insolvency officer receives money in circumstances where a payer's intention has been vitiated by a mistake of fact,[44] and to any other instances where 'an honest man would on ascertaining the facts at once repay the money'.[45] In all cases though, as explained by Farwell LJ in *Re Hall*, 'the principle rests on the act or omission of the trustee in bankruptcy as the officer of the Court, and not on any mere

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[35] (CA, 17 April 1986).
[36] *Re Thellusson, ex parte Abdy* [1919] 2 KB 735 (CA) 743.
[37] *Re Wigzell, ex parte Hart* [1921] 2 KB 835 (KBD) 845 (Salter J); *Re Wigzell, ex parte Hart* [1921] 2 KB 835 (CA) 857 (Scrutton LJ).
[38] *Re Wigzell, ex parte Hart* [1921] 2 KB 835 (KBD) 845 (Salter J).
[39] *Re Tyler, ex parte Official Receiver* [1907] 1 KB 865 (CA) 869 (Williams LJ).
[40] *Re Carnac, ex parte Simmonds* (1885) 16 QBD 308 (CA) 312 (Lord Esher).
[41] Similarly, *Re Carnac, ex parte Simmonds* (1885) 16 QBD 308 (CA).
[42] *Re Tyler, ex parte Official Receiver* [1907] 1 KB 865 (CA) 870 (Vaughan Williams LJ).
[43] *Ibid* 868-870 (Vaughan Williams LJ) 872 (Farwell LJ); *Re Thellusson, ex parte Abdy* [1919] 2 KB 735 (CA) 760 (Atkin LJ); TE Chan, 'Revisiting *Ex Parte James*' (2003) Sing JLS 557, 561.
[44] E.g. *Re Thellusson, ex parte Abdy* [1919] 2 KB 735 (CA). As a side note, the distinction between mistakes of fact and law is not clear-cut. Furthermore, that the distinction between the two should be overlooked, though in the context of whether the mistake of law bar to restitution should be overlooked was explained by the House of Lords in *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349 (HL) 372 (Lord Goff): 'the distinction drawn between mistakes of fact (which can ground recovery) and mistakes of law (which cannot) produces results which appear to be capricious… as a result of the difficulty in some cases of drawing the distinction between mistakes of fact and law, and the temptation for judges to manipulate that distinction in order to achieve practical justice in particular cases, the rule became uncertain and unpredictable in its application'; Virgo also criticised the mistake of law bar and said that 'the distinction between mistakes of law and fact was notoriously difficult to draw, and this created much scope for manipulation of restitutionary claims to ensure that they were founded on a mistake of fact'- see G Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2015) 161-162; also, Burrows said that 'in several cases, the courts treated what was more obviously a mistake of law as a mistake of fact thereby circumventing the bar on recovery'. See A Burrows, *The Law of Restitution* (3rd edn, OUP 2011) 221.
[45] *Re Thellusson, ex parte Abdy* [1919] 2 KB 735 (CA) 751 (Warrington LJ).

mistake made by a third person with whom the officer has nothing to do'.[46] Therefore, the officer's act must have caused the payment in question,[47] for example by inducing the payment.[48] Or there must be an omission on the part of the insolvency practitioner, such as having knowledge that the payments are being made in circumstances in which an honest man would repay the money received yet failing to prevent the payments from being made in the first instance. An example is *Re Tyler*, where a trustee had knowledge that the wife was paying the premiums of her husband's life insurance policy under the incorrect belief that she would receive the policy proceeds, but he acquiesced and failed to tell the wife to stop making the payments.[49]

It is usually the retention (and where applicable, subsequent distribution) of the sums in the circumstances which is dishonest, as opposed to simply receiving the money. This was explained in *Re Thellusson* where, discussing the case of *Ex parte Villars*,[50] Atkin LJ said that:

> 'it would be perverse to suppose that in acting as [the trustee in bankruptcy] did in claiming and receiving the money under such circumstances the trustee was in any way tainted with any kind of dishonour. If it is said that he must by a fiction be supposed to have known the law as subsequently laid down by the full Court, the answer is by the same fiction so must the creditor. In truth the only act or omission by the trustee capable of complaint was holding the money after the rights of the parties were ascertained'.[51]

So on this analysis, an insolvency officer can be said to act unconscionably if, for example, he becomes aware of a payer's claim and then subsequently retains or distributes the money in question.

However, there are some problems with the dishonesty requirement. First, the 'unexceptionable principle does not seem to give much help when one has to apply it to a particular case'.[52] This is because, as Salter J observed in *Re Wigzell*, although 'legal rights can be determined with precision by authority… questions of ethical propriety have always been, and will always be, the subject of honest difference amongst honest men'.[53] So when applying the principle to a given set of facts, the outcome may well depend on the judge adjudicating in the particular case, as 'perfectly honest and honourable persons may take entirely different views'.[54] This is illustrated by *Re Stokes* where a bankrupt assisted

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[46] *Re Hall, ex parte Official Receiver* [1907] 1 KB 875 (CA) 879.
[47] Cf *Re Thellusson, ex parte Abdy* [1919] 2 KB 735 (CA) 764 where Atkin LJ said it did not matter whether it was the bankrupt who acquired the property by unworthy means or the trustee in bankruptcy; *Re Wigzell, ex parte Hart* [1921] 2 KB 835 (CA) 869 (Younger LJ).
[48] E.g. *Re Condon, ex parte James* (1874) 9 Ch App 609 (Court of Appeal in Chancery) where the trustee demanded the sums from the payer; Cf *Re Hall, ex parte Official Receiver* [1907] 1 KB 875 (CA).
[49] *Re Tyler, ex parte Official Receiver* [1907] 1 KB 865 (CA). See text following fn 129 below.
[50] *Ex parte Villars* (1874) 9 Ch App 432.
[51] *Re Thellusson, ex parte Abdy* [1919] 2 KB 735 (CA) 759-760 (Atkin LJ). Also see pp.747-748 (Warrington LJ).
[52] *Re Wigzell, ex parte Hart* [1921] 2 KB 835 (CA) 851 (Lord Sterndale).
[53] *Re Wigzell, ex parte Hart* [1921] 2 KB 835 (KBD) 845 (Salter J).
[54] *Re Wigzell, ex parte Hart* [1921] 2 KB 835 (CA) 859 (Scrutton LJ); also see *Re Wigzell, ex parte Hart* [1921] 2 KB 835 (KBD) 846 (Salter J) who said that on the facts before him the decision could go either way.

his trustee in bankruptcy in the winding up of his (the bankrupt's) estate.[55] The trustee paid the bankrupt a salary for providing these services, who then effected a life insurance policy and paid the premiums from his salary. After the bankrupt's death, for the first time the trustee in bankruptcy became aware of the policy and that the debtor had been paying the premiums. As the policy was effected during the bankruptcy, it 'belonged to the trustee'.[56] Horridge J held that the applicant could not prevent the official receiver from claiming the funds from the insurance company. This is because it was not dishonest for the trustee to insist on his strict legal right to the policy proceeds. However, in the later case of *Re Wigzell*, Younger LJ was strongly of the opinion that *Re Stokes* could not be justified. The debtor, rather than applying the salary in 'junketing or extravagance',[57] had used it to pay into a policy in the hope that the proceeds would become available to his widow after his death.[58] In the circumstances, Younger LJ could see no reason why an honest man would divest the debtor's estate of the fruits of the policy. Rather, in his view the application of *Ex parte James* to the facts would have been 'most salutary'.[59] The conflicting views of Horridge J and Younger LJ, on whether the insolvency officer in *Stokes* was being dishonest by insisting on his strict legal right, only goes to demonstrate the difficulty the courts face when applying the rule.

Second, it is questionable as to whether the *Ex parte James* doctrine is really about preventing dishonesty and encouraging the pursuit of an honest course of action. In *Re Tyler*, it was stated that an officer of the court 'is bound to be even more straightforward and honest than an ordinary person in the affairs of every-day life'.[60] But if an individual receives money in circumstances where the 'right' thing to do is to make repayment, if the justification for the *Ex parte James* principle is to ensure that one acts conscionably, the individual ought to be regarded as dishonest if he refuses to repay the sums regardless of whether he is an officer of the court or an ordinary litigant. It is not clear why officers of the court should be held to a different standard of honesty. As Dawson argues, when applying the rule all individuals should be held to the same standard of righteousness.[61]

The dishonesty requirement is further undermined by the decision in *Glasgow v ELS*.[62] In *Glasgow*, the trustee in bankruptcy was appointed in an overseas jurisdiction. The court stated that because 'the applicant is not an officer of this court having been appointed bankruptcy trustee by the High Court in St Vincent and the Grenadines, the principle in *Ex p James LR 9 Ch App 609* does not apply to him'.[63] But if, as the courts say, the *Ex parte James* rule rests on promoting honest conduct of court officers,

[55] *Re Stokes* [1919] 2 KB 256 (KBD).
[56] *Ibid* 261 (Horridge J).
[57] *Re Wigzell, ex parte Hart* [1921] 2 KB 835 (CA) 870 (Younger LJ).
[58] *Ibid* 870-871 (Younger LJ).
[59] *Ibid* 871 (Younger LJ).
[60] *Re Tyler, ex parte Official Receiver* [1907] 1 KB 865 (CA) 871 (Farwell LJ); also see *Re Carnac, ex parte Simmonds* (1885) 16 QBD 308 (CA) 312 (Lord Esher MR).
[61] I Dawson, 'The Administrator, Morality and the Court' (1996) JBL 437, 450-451; I Dawson, 'Corporate Rescue by the Upright Rescuer- a trap for the unwary' (2016) 29 Insolv Int 81, 84.
[62] *Glasgow v ELS Law Ltd* [2017] EWHC 3004 (Ch); [2018] 1 WLR 1564.
[63] *Ibid* [83].

then it does not explain why an officer of the court who is appointed by a foreign jurisdiction is sanctioned to act in an unconscionable manner. Arguably, this seems to indicate that the basis for recovery is not dishonesty. Therefore, for the reasons given, the dishonesty requirement should be rejected. Having said this, the cases can be reconciled on other grounds. This is explained in the next section, which argues that the case law can be explained using the cause of action of unjust enrichment.

4 The unjust enrichment analysis: cause of action

It is contended that the cause of action of unjust enrichment can explain the *Ex parte James* case,[64] as the payer made a payment by mistake and the bankrupt's estate was unjustly enriched by the receipt of the money. Since the body of cases can be explained using the law of unjust enrichment, they can be 'subsumed within the law of restitution'.[65] A consequence of this analysis is that, contrary to Walton J's dicta in *Re Clark,* a claimant can invoke the *James* rule to recover an enrichment even when he is in a position to submit a proof of debt.[66] This is because non-provability is not a requirement in the law of restitution. Another consequence of the restitutionary analysis is that 'the principle' is no longer confined to certain insolvency officers, but is applicable to all insolvency office-holders.[67] Neither is dishonesty a requirement in the law of unjust enrichment.

The unjust enrichment analysis of the cases is supported by *India v Taylor*, where it was stated that the *Ex parte James* rule applies:

> 'where there has been some form of enrichment of the assets of a bankrupt or insolvent company at the expense of the person seeking recoupment'.[68]

Furthermore, Walton J in *Re Clark (a bankrupt)* stated that *Ex parte James* applies to strip the defendant of their gain.[69] Therefore, the rule has a restitutionary effect, as it applies only to 'nullify the enrichment of the estate; it by no means necessarily restores the claimant to the status quo ante'.[70] In the more recent case of *Lehman Brothers*, Richards J explicitly supported the unjust enrichment analysis. He stated that:

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[64] I Dawson, 'The Administrator, Morality and the Court' (1996) JBL 437, 460-461.
[65] *Ibid* 460.
[66] *Re Clark (a bankrupt)* [1975] 1 WLR 559 (Ch) 564.
[67] I Dawson, 'The Administrator, Morality and the Court' (1996) JBL 437, 455-456, 461; G McCormack, 'Equitable influences and insolvency law' (2014) 7 CRI 103, 105.
[68] *India v Taylor* [1955] AC 491 (HL) 513.
[69] *Re Clark (a bankrupt)* [1975] 1 WLR 559 (Ch) 458; *Re Treacy* [1997] 32 OR (3d) 717 (Ontario CA) [8].
[70] *Re Clark (a bankrupt)* [1975] 1 WLR 559 (Ch) 459.

> 'the rationale for the principle [in *Ex parte James*] was that… the officer of the court could not in all conscience retain the money, given the circumstances in which it had been paid. It would amount to an unjust enrichment of the estate'.[71]

This demonstrates that the unjust enrichment analysis of the *Ex parte James* line of cases has already been accepted by the judiciary.

5 Response

When a creditor mistakenly pays an insolvency officer and then successfully invokes 'the *Ex parte James* rule' against him, the creditor recovers his money in priority to the insolvent's other unsecured creditors. However, the mechanism by which the payer achieves priority is not clear: whether he has a personal right against the insolvent estate, or a proprietary interest in the monies paid. This is important for the following reason; a personal right cannot afford one priority.[72] Leaving aside a personal claim, priority can be achieved if at the time the insolvent recipient receives the money, the payer has a property right in the fund which survives the insolvent estate's receipt or arises for the first time when the sums are received, and the money can still be identified in the recipient's hands using the rules of tracing.

This chapter therefore proposes the following explanation for the decision in cases where the *Ex parte James* rule was successfully applied. The recipient was unjustly enriched. The unjust enrichment gave rise to a proprietary, as opposed to personal, restitutionary response in the form of a trust. This enabled the payer to recover his money from the insolvent in priority, and so it is submitted that some of the *Ex parte James* line of cases are a classic example of a trust arising in response to an unjust enrichment. Accordingly, the rule from *James* is not a unique concept confined to insolvency law.[73]

1 Personal claim does not explain the case law

Before delving into the proprietary analysis of *Ex parte James*, it is important to first outline the position of creditors who bring a claim against an insolvent. In order for a creditor to claim in a bankruptcy, liquidation, or administration, he must have a provable debt. A provable debt is one that is enforceable

[71] *Lehman Bros (In Admin) also known as Lomas v Burlington Loan Management* [2015] EWHC 2270 (Ch) [174]; also see *Lehman Brothers Australia Ltd (In Liquidation) v Lomas* [2018] EWHC 2783 (Ch) [61(9)] (Hildyard J); *Re Wigzell, ex parte Hart* [1921] 2 KB 835 (CA) 853 (Lord Sterndale MR); *Re Treacy* [1997] 32 OR (3d) 717 (Ontario CA) [8]; *Re T&N Ltd* [2004] EWHC 1680 (Ch); [2004] Pens LR 351 [18]; I Fletcher, *The Law of Insolvency* (4th edn, Sweet & Maxwell 2009) para 8.033.

[72] Except on the basis of the expenses principle which for the purposes of this chapter is assumed not to explain the cases.

[73] I Dawson, 'The Administrator, Morality and the Court' (1996) JBL 437.

and has been incurred before the relevant statutory cut-off date. In an administration, a provable debt is one that arises before the administration.[74] For bankruptcies, the cut-off date is the date of the receiving order (i.e. the commencement of the bankruptcy).[75] For a creditor claiming against a company being wound up by the court, it is the date on which the winding-up order is made (i.e. the date the company enters liquidation),[76] unless the liquidation is preceded by an administration. In this latter situation, the cut-off date for a claim in the liquidation is the time that the administration commences.[77] When there is a voluntary winding up, the statutory cut-off date is the date that the company passes a resolution for winding up,[78] unless, as above, the liquidation is preceded by an administration.

If a debt is incurred after the relevant statutory cut-off date or is unenforceable,[79] it is 'non-provable'. The consequence is that, in a bankruptcy, the creditor in question has no claim in the present bankruptcy proceedings. To recover the debt he must 'present another petition. The result would be a second adjudication, in which the trustee would be entitled to distribute all the assets of the debtor to which the trustee in the first bankruptcy was not entitled'.[80] However, although a creditor may have this 'theoretical remedy against the bankrupt by making him bankrupt a second time', it may be 'a wholly unreal remedy'.[81] There will usually be insufficient assets to meet the debts of creditors in the first bankruptcy, and so no surplus to carry forward to the second one.[82] Moreover, there will not be much that the second trustee is entitled to distribute solely to creditors in the second bankruptcy. A creditor's right in the subsequent bankruptcy is usually therefore, as described by Younger LJ, 'a shadowy right if ever there was one'.[83]

When a company is in liquidation, creditors with provable claims are paid out of the company's assets in accordance with the statutory order of distribution. For a voluntary winding up, this is as follows: (1) Fixed charge creditors; (2) Expenses of the insolvency proceedings; (3) Preferential creditors; (4) Floating charge creditors; (5) Unsecured provable debts; (6) Statutory interest; (7) Non-provable liabilities; and (8) Shareholders.[84] Debts which are not provable are classified either as expenses, which are payable out of the company's assets in priority to all except the claims of secured creditors,[85] or as non-provable liabilities.[86] It is a disadvantage for a creditor if his liability is an unsecured provable debt

[74] *Bloom v Pensions Regulator* [2013] UKSC 52, [2014] AC 209 [35].
[75] Insolvency Act 1986, s 278.
[76] Insolvency Act 1986, s 129.
[77] This is discussed in *Bloom v Pensions Regulator* [2013] UKSC 52, [2014] AC 209 [35]-[37].
[78] Insolvency Act 1986, s 86.
[79] E.g. In *Re Condon, ex parte James* (1874) 9 Ch App 609 and *Re Carnac, ex parte Simmonds* (1885) 16 QBD 308, the payers made a payment under mistake of law. Payments made under mistakes of law could not be recovered at the time and so the payers did not have an enforceable claim to recover the sums.
[80] *Re Thellusson, ex parte Abdy* [1919] 2 KB 735 (CA) 758 (Atkin LJ).
[81] *Re Clark (a bankrupt)* [1975] 1 WLR 559 (Ch) 562.
[82] *Re Wigzell, ex parte Hart* [1921] 2 KB 835 (CA) 868-869.
[83] *Ibid* 869 (Younger LJ).
[84] *Bloom v Pensions Regulator* [2013] UKSC 52, [2014] AC 209 [39].
[85] Insolvency Act 1986, s 115 and 176ZA.
[86] *Bloom v Pensions Regulator* [2013] UKSC 52, [2014] AC 209 [57], [97].

or a non-provable liability. This is because, at each stage of the statutory ranking, the insolvent company's assets are distributed pari passu amongst the members of that particular class of creditors.[87] At each stage, as distribution takes place, there is a reduction in the amount of assets left for creditors who are lower down in the statutory ranking. Companies in liquidation rarely have enough assets to fully satisfy creditors with unsecured provable debts (stage (5) in the statutory ranking above), and so there are usually no assets left to pay non-provable liabilities (stage (7) in the statutory ranking above). Hence the *Ex parte James* doctrine is attractive to a creditor who otherwise has an unsecured provable or non-provable liability against a bankrupt or company in liquidation, since when the rule is successfully invoked, it allows this creditor to recover his debt in priority to the insolvent's other unsecured creditors. It therefore works to provide a claimant with an effective remedy where otherwise there may be none.

2 The effect of the Supreme Court's judgment in *Bloom v Pensions Regulator*

Before introducing the trust analysis of the *Ex parte James* case law, it is also essential to address the judgment of the Supreme Court in *Bloom v Pensions Regulator*.[88] In *Bloom*, after the target companies entered into administration, the Pensions Regulator issued a Financial Support Direction (FSD) on the target companies. Subsequently, Contribution Notices (CNs) were served on the companies by the Regulator. The administrators of the companies then applied to the court for directions on how the companies' liabilities under the FSD should be discharged. The High Court and Court of Appeal both held that the companies' liabilities under the FSD constituted an expense of the administration. The administrators then appealed to the Supreme Court, where it was held that the liabilities under the FSD were provable debts. Lord Neuberger said it was therefore 'strictly unnecessary' to consider whether the FSD liability was a liquidation expense.[89] This is because a liability cannot be both an expense and a provable debt.[90] Furthermore, his Lordship said that even if the liability had not been a provable debt, it could not be regarded as an expense of the administration.[91] On the hypothetical basis that the debt was non-provable, Lord Neuberger discussed whether the court had a 'residual discretion' to:

> 'direct the administrator of a target company to accord to the potential liability under the FSD regime a higher ranking than it would be given under the 1986 Act and the Insolvency Rules.

[87] In terms of distribution of property in a voluntary winding up, see Insolvency Act 1986, s 107. For compulsory liquidations, see s 143 and the discussion in *A & J Fabrications (Batley) Ltd v Grant Thornton (a firm) & Anor* [1999] BCC 807 (Ch) 807: "The Act needs to be more precise about distribution than getting money in because of the question of priorities and the like".
[88] *Bloom v Pensions Regulator* [2013] UKSC 52, [2014] AC 209.
[89] *Ibid* [97] (Lord Neuberger).
[90] *Ibid* [57].
[91] *Ibid* [114] (Lord Neuberger).

> In other words, that the court could order the administrator to treat the potential FSD liability as a provable debt… even though the effect of the legislation is that it should rank lower'.[92]

It was at this point that he explored the equitable doctrine from *Ex parte James*, as the traditional understanding of the rule is that when it is invoked, it allows a non-provable debt to be accorded a higher ranking than it would otherwise be given under the statutory regime. However, Lord Neuberger stated that:

> 'if the effect of the Insolvency Rules is that the liabilities are not provable debts, there is no basis for the court deciding that they are. It would be wrong for the courts to override the statutory ranking, especially given that it would cause significant prejudice to others (in this case the creditors with provable debts)'.[93]

Moreover, he noted the 'cases provide no assistance to the argument that the court can direct a FSD regime liability to be 'promoted' ahead of its statutory ranking'.[94]

Willson argues that Lord Neuberger's dicta implies *Ex parte James* is inapplicable if it would be detrimental to the unsecured creditors with provable debts.[95] The result, he argues, is that the rule in *Ex parte James* is rendered 'completely toothless'.[96] This is because when the *Ex parte James* rule is invoked, as the applicant is able to recover in priority, this always results in a reduction of assets available to other unsecured creditors. It follows that an application of *Ex parte James* will always harm the interests of unsecured creditors with provable debts. However, despite Lord Neuberger's dicta in *Bloom*, Willson is incorrect to conclude that the rule is now empty. First, this element of Lord Neuberger's judgment was obiter. The target companies had not been enriched by the Regulator. Neither was the rule being used as a shield to prevent the insolvent companies from being unjustly enriched at the Regulator's expense.[97] Therefore, the *Ex parte James* rule was inapplicable on the facts. As Justice Hildyard explained in *Lehman Brothers Australia Ltd (In Liquidation) v Lomas*, even though the *Ex parte James* rule was referred to in *Bloom*, it was 'only to conclude that the rule had no application whatever in that case'.[98]

Second, it is important to note that Lord Neuberger at no point said that *Ex parte James*, or any of the cases applying it, were incorrectly decided. He only stated that the cases cannot be justified on the basis that the ranking of a particular debt can be changed 'because the statutory ranking appears

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[92] *Ibid* [115] (Lord Neuberger).
[93] *Ibid* [125] (Lord Neuberger).
[94] *Ibid* [124] (Lord Neuberger).
[95] W Willson, 'The Rule in Ex p James: what's left?' (2014) 27 Insolv Int 12, 13.
[96] W Willson, 'The Rule in Ex p James: what's left?' (2014) 27 Insolv Int 12.
[97] The cases where *Ex parte James* is used as a shield are discussed at the end of this chapter. See text to fns 146-156 below.
[98] *Lehman Brothers Australia Ltd (In Liquidation) v Lomas* [2018] EWHC 2783 (Ch) [54].

unattractive'.[99] Altering the statutory ranking of the FSD liability to favour the Pensions Regulator on the ground that the current ranking appears unattractive would have constituted a preference according to s.239 of the Insolvency Act 1986. This is because the alteration would have taken place during the administration,[100] changed the ranking of a liability owed to a creditor of the company,[101] and would have the effect of putting the creditor 'into a position which, in the event of the company going into insolvent liquidation, will be better than the position he would have been in if that thing had not been done'.[102] Importantly, s.239(7) of the Insolvency Act states 'the fact that something has been done in pursuance of the order of a court does not, without more, prevent the doing or suffering of that thing from constituting the giving of a preference'. So even if the Supreme Court in *Bloom* had decided that the FSD liability should be given a higher statutory ranking, this would not preclude it from being a preference. In this instance, an application could be made for an order which restored the company to 'the position to what it would have been if the company had not given that preference'.[103]

Lord Neuberger's dicta does not rule out the possibility that the *Ex parte James* cases are correct but explicable on another basis- namely, proprietary restitution for unjust enrichment. When a trust arises under *Ex parte James*, the beneficiary recovering the trust property in priority does not constitute a preference, and so priority is not inconsistent with the pari passu principle. This is because trust property does not belong beneficially to the holder of the legal title. Therefore, in a bankruptcy or winding up, trust property held by an insolvent estate is not available for distribution according to the statutory insolvency regime, as only property belonging beneficially to the insolvent can be distributed. It follows that Lord Neuberger's view, that the *Ex parte James* rule cannot apply because it would prejudice other creditors with provable debts, should not be followed. There is no detriment to other creditors, as the enrichment never formed part of the assets of the recipient.

3 The trust response

In the *Ex parte James* cases where the payer recovered his money from the insolvent in priority, the only explanation is that an equitable proprietary interest in the form of a trust for the payer arose at the moment of the trustee's receipt. Consequently, the payer was able to demand a transfer of the traceable proceeds of the money to himself using the rule in *Saunders v Vautier*, as the insolvent estate held the payment on trust for the mistaken payer.[104] A trust for the payer is supported by the dicta in the *Ex parte James* case itself where James LJ said that:

[99] *Bloom v Pensions Regulator* [2013] UKSC 52, [2014] AC 209 [123] (Lord Neuberger).
[100] Insolvency Act 1986, s 240(3).
[101] Insolvency Act 1986, s 239(4)(a).
[102] Insolvency Act 1986, s 239(4)(b).
[103] Insolvency Act 1986, s 239(3).
[104] *Saunders v Vautier* (1841) 4 Beav 115 (Ch).

> 'a trustee in bankruptcy is an officer of the Court. He has inquisitorial powers given him by the Court, and the Court regards him as its officer, and *he is to hold money in his hands upon trust for its equitable distribution among the creditors*. The Court, then, finding that he has in his hands *money which in equity belongs to someone else*, ought to set an example to the world by paying it to *the person really entitled to it*.'[105]

Admittedly, in *Re Tyler*,[106] it was said that when James LJ in *Ex parte James* referred to 'money which in equity belongs to someone else',[107] he was 'not referring to an equity which is capable of forensic enforcement in a suit or action',[108] 'in the sense of money which in a Court of Equity would belong to someone else'.[109] Rather, it was said in *Tyler* that James LJ was alluding to 'a moral principle'.[110] But this was an obiter comment in *Re Tyler*,[111] as the trust analysis is the only coherent explanation for the decision in *Ex parte James*.

The cases arguably support a trust analysis. For example, in *Re Thellusson*, on the basis of *Ex parte James* Warrington LJ ordered the trustee in bankruptcy to repay the balance of the mistaken payment remaining in his hands to the payer. As Warrington LJ said the sums belonged to the trustee at law, the decision is only explicable on the ground that the lender had a proprietary interest in the sums in equity.[112] The Canadian case law on *Ex parte James* also supports the trust analysis. In *Re Treacy*, Zurich issued a cheque by mistake to Treacy Ltd, instead of SWB Insurance Brokers.[113] When Zurich discovered the mistake, it attempted to stop the cheque. However, by this time, the cheque had already been cashed by Treacy. SWB obtained a court order to the effect that the net proceeds from the sale of the bankrupts' home, the bankrupts being the principal owners directors and shareholders of Treacy, were to be held in a trust account by the solicitors of the bankrupts until a further court order was made. On appeal by the trustee in bankruptcy, it was held that the sale proceeds had to be paid to the bankruptcy trustee, as opposed to SWB. As Houlden JA explained, Zurich's mistaken payment could not be traced to the house, as the house was not purchased with this fund, and so the proceeds of sale from the family home were not derived from the mistaken payment.[114] *Ex parte James* could therefore not be invoked by SWB as a means of obtaining the funds from the sale. This outcome is consistent with the view that, when *Ex parte James* is successfully relied upon, the claimant is able to recover his money on the basis of a trust. On the facts, the only reason why the sums could not be recovered is that Treacy was no longer in possession of the traceable proceeds of the mistaken payment, and so there was

[105] *Re Condon, ex parte James* (1874) 9 Ch App 609 (Court of Appeal in Chancery) 614 (emphasis added).
[106] *Re Tyler, ex parte Official Receiver* [1907] 1 KB 865 (CA) 869 (Vaughan Williams LJ).
[107] *Re Condon, ex parte James* (1874) 9 Ch App 609 (Court of Appeal in Chancery) 614 (James LJ).
[108] *Re Tyler, ex parte Official Receiver* [1907] 1 KB 865 (CA) 869 (Vaughan Williams LJ).
[109] *Ibid* 873 (Buckley LJ); also see *Re Opera Ltd* [1891] 2 Ch 154 (Ch) 160 (Kekewich J).
[110] *Re Tyler, ex parte Official Receiver* [1907] 1 KB 865 (CA) 869 (Vaughan Williams LJ).
[111] See further discussions of the *Re Tyler* case at fns 129-137 below.
[112] For further discussions of *Re Thellusson*, see text to fns 140-143 below.
[113] *Re Treacy* [1997] 32 OR (3d) 717 (Ontario CA).
[114] *Ibid* [9].

no property which the trust could attach to. Support for the proposition that an identifiable fund is required for money to be recoverable using the rule in *Ex parte James* can be found in *Re Rhoades*. In *Rhoades*, Lindley MR stated that '*Ex parte James* and *Ex parte Simmonds* are distinct authorities to shew that mistakes of this kind… can and will be set right by the Court so long as the officer of the Court still has the money in his hands'.[115]

In *Ex parte Simmonds*, a case where the *James* rule was applied,[116] although it is accepted that a trust of the monies arose by operation of law at the moment of the insolvency officer's receipt, the decision is nonetheless questionable. In *Simmonds*, the trustees of a settlement mistakenly paid money to a trustee in bankruptcy, who used it to pay the bankrupt's creditors. The court held that the money could be recovered from the bankruptcy trustee. However, as the trust money was no longer in the hands of the insolvency officer, since it had been paid to the bankrupt's other creditors, the settlement trustees had no proprietary claim against the insolvent estate. Furthermore, even if the trust money or its traceable proceeds had remained identifiable in the creditors' hands, the settlement trustees would not be able to recover the trust funds from them using the rule in *Saunders v Vautier*.[117] This is because the creditors, in exchange for receiving the money, discharged debts owed to them by the bankrupt. The creditors were therefore bona fide purchasers for value, and this defeated the mistaken payers' proprietary claim.[118] But if the recipients of the money had been donees as opposed to creditors, or if the creditors had known that the original payment was made under vitiated intent, then a proprietary claim would have been available.

With regards to a personal claim against the insolvent estate in *Simmonds*, in his book *Unjust Enrichment* Birks explained that when a trust arises to reverse an unjust enrichment of the defendant, the claimant has an election between a personal and proprietary claim.[119] The claimant can therefore either choose to make a personal claim in unjust enrichment against the original recipient,[120] or recover his property from the person(s) who now have the legal title to it. Birks makes an analogy with the law of conversion to support his election theory. He gives the example of a claimant who loses his money, and the money is found by the defendant. The claimant can bring one of two possible actions: either a claim based on the wrong (i.e. conversion) which 'supposes that the asset did not become part of D's

[115] *Re Rhoades* [1899] 2 QB 347 (CA) 355 (Lindley MR); Cf *Re Clark (a bankrupt)* [1975] 1 WLR 559 (Ch) 564.
[116] *Re Carnac, ex parte Simmonds* (1885) 16 QBD 308 (CA).
[117] *Saunders v Vautier* (1841) 4 Beav 115 (Ch).
[118] See dicta in *Angove's Pty Ltd v Bailey* [2016] UKSC 47, [2016] 1 WLR 3179 [25], though note that this was not a discussion of the *Ex parte Simmonds* case: "If, therefore, a … trust came into being… The money would thereafter be traceable for as long as it remained identifiable in the hands of any third party other than a bona fide purchaser for value without notice".
[119] P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 68-69.
[120] *Ibid* 156-157. Birks takes the view that a personal claim in unjust enrichment would also be available against a subsequent recipient. However, note that adopting Birks' view would involve abolishing the 'knowing receipt' claim and replacing it with strict liability. It is argued here that a strict liability claim is not the way forward, as it would undermine the security of receipt of a recipient of trust property, and would thus undermine the recipient's autonomy.

estate',[121] or a claim in unjust enrichment (using the ignorance unjust factor). Birks explained that these are alternatives since 'no doubt it is necessary to say that the latter claim supposes a waiver of the claimant's title'.[122] Applying this to *Simmonds*, even though there was no possibility of a proprietary claim, the claimants could pursue a personal claim in unjust enrichment against the insolvent estate. Nevertheless, for the reason explained below, on the facts it is submitted the court was wrong to hold that the payers could succeed in obtaining redress.

The bankrupt estate used the settlement trust money received from the payers to discharge the bankrupt's debts. Admittedly though, the insolvent estate could not resist the mistaken payers' claim by relying on change of position, a defence available for all personal claims in unjust enrichment. Change of position was first recognised by the House of Lords in *Lipkin Gorman v Karpnale Ltd* where Lord Goff proclaimed that:[123]

> 'the defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full. I wish to stress however that the mere fact that the defendant has spent the money, in whole or in part, does not of itself render it inequitable that he should be called upon to repay, because the expenditure might in any event have been incurred by him in the ordinary course of things'.

Applying this dicta to the facts of the *Simmonds* case, the insolvent estate remained enriched despite using the money to pay the creditors, as its overall wealth was not reduced by making the payments. This is because the money was used to discharge existing debts of the insolvent estate. So even if the estate had not received these monies, it would still have had to meet the liabilities from other assets. Lord Esher MR's words in *Simmonds* support the proposition that the estate remained enriched. He said that 'it has not been shewn that any injury will be done to any one by ordering the trustee to apply this money which is coming to him to replace the other money which was paid to him in error'.[124] This is because the trustee in bankruptcy repaying the money would only have nullified the insolvent estate's enrichment; it would not have caused a loss to the estate. But even though the insolvent estate was unjustly enriched, it must be remembered that a personal non-provable claim does not have the effect of allowing a payer to recover his money in priority to other unsecured creditors. The payers in *Simmonds* therefore only had a right against the estate in a second bankruptcy, if there had been one, whereby the insolvent estate would be under an obligation to make restitution. As discussed earlier, a

[121] P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 66.
[122] P Birks, 'Personal Property: Proprietary Rights and Remedies' (2000) 11 KLJ 1, 12; also see P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 66-68.
[123] *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL).
[124] *Re Carnac, ex parte Simmonds* (1885) 16 QBD 308 (CA) 313 (Lord Esher MR).

creditor's right in a second bankruptcy is an ineffective remedy, as it rarely results in the recovery of the entirety of what is owed.[125]

In *Simmonds*, neither could the payers, the trustees of the settlement, recover the sums from the insolvency officer by bringing a personal claim against him for breach of trust. As discussed in chapter 5, a resulting trustee is only personally liable for breach if he has knowledge of the trust at the time that he commits the breach.[126] So although the proprietary analysis proposed in this thesis indicates that a trust arose from the outset in *Simmonds*, the insolvency practitioner was not under a duty to account for the loss of the funds which were subject to the restitutionary trust. At no point did the trustee in bankruptcy, while the money was still in his hands, have knowledge that these funds were subject to an implied trust. Therefore, as he paid away the trust money to the bankrupt's creditors without notice, there could be no personal liability for breach. It follows that the court erred when it ordered the trustee in bankruptcy pay the mistaken payers out of money from the insolvent estate.

4 Applying the impossibility analysis

An unjust enrichment does not always lead to a proprietary response. This leads to the question of why, in the cases where the *Ex parte James* rule is applied, the law responds by recognising that the transferor has a property right in the money transferred, hence allowing the transferor to recover the disputed sums in priority, as opposed to leaving him with a personal claim. This thesis has rejected Birks' proprietary restitutionary analysis, which contends that the resulting trust comes into being when 'the transferee is enriched *sine causa*'[127] and additionally the enrichment is never freely at the disposition of the recipient before the claimant's right to restitution arises.[128] Instead it has been proposed that an unjust enrichment analysis, centred on impossibility rather than an initial failure of basis, should be adopted. To restate the position developed in the earlier chapters, when the defendant's receipt of an enrichment is unjust, and the purpose of the transfer to the defendant is impossible from the outset, this justifies proprietary restitution. Conversely, if the claimant's payment unjustly enriches the defendant, and the purpose of the payment can be fulfilled at the time of receipt, a trust cannot arise. The impossibility analysis provides the best explanation for the *Ex parte James* line of case law. As to what follows, it will be shown how this analysis can be applied to these cases.

The impossibility analysis explains the *Ex parte James* case. The creditor paid money to the debtor's trustee in bankruptcy under the mistaken belief that he was under an obligation to make the payment. The money was not due. The insolvent estate was not only unjustly enriched, but the purpose of the

[125] See text to fns 80-83 above.
[126] See text at fn 69 in ch 5.
[127] P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 306.
[128] *Ibid* 194.

transfer was also initially impossible. Consequently, a trust arose and the creditor was able to recover the sums in priority to other creditors in the debtor's bankruptcy.[129]

The approach proposed in this thesis indicates that a trust did not arise in *Re Tyler*. In *Tyler*, after the husband's bankruptcy the wife continued to pay the premiums of her husband's life insurance policy. After the husband's death, the mortgagees (who the policy had been assigned to by the bankrupt) received the insurance policy payouts. They retained the amount due on the mortgage and paid the balance to the official receiver. The wife made a claim against the receiver to recover the amount that she had paid into the policy plus interest. But the receiver argued that he should be able to retain the balance for distribution to the bankrupt's creditors. Buckley J said that the wife:

> 'may not have an enforceable claim, but as a matter of justice it cannot be right, when the time comes for the payment of the moneys due on the policy, to allow the trustee to turn round and say 'I knew you were keeping down the premiums, but I shall take the policy moneys, and you shall go without the money you have paid''.[130]

He therefore ordered the receiver to pay, out of the balance in his hands, the sums the wife had paid in premiums plus interest. The problem, however, is that when the wife paid the insurance premiums, she was not vitiating under a mistaken belief that she would receive the policy proceeds. This is because she was aware that neither the policy nor the proceeds belonged to her. The bankrupt had only:

> 'requested his wife to make these payments for him in order to prevent the premiums being paid by the mortgagees or the policies being sold or lapsing, and he stated that if his wife was prepared to do this he would repay her the amount expended by her as soon as he got his financial affairs straight'.[131]

At the time of making the payments, the wife therefore knew that her husband might not be able to sort out his finances and repay her. When this unfortunate possibility then materialised, it turned out that the wife had made 'a mistake as to the future, a misprediction'[132] that her expenditure would be reimbursed by her husband before his death.[133] The important distinction between mistakes and mispredictions was explained in *Dextra Bank*, where the Privy Council cited with approval a passage from Birks' *Introduction to the Law of Restitution*:[134]

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[129] *Re Brown* (1886) 32 Ch D 597 (Ch).
[130] *Re Tyler, ex parte Official Receiver* [1907] 1 KB 865 (CA) 874 (Buckley LJ); also see p.870 (Vaughan Williams LJ).
[131] *Ibid* 866.
[132] *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2001] UKPC 50, [2002] 1 All ER (Comm) 193 [29].
[133] Cf *Patel v Jones* [2001] EWCA Civ 779, [2001] Pens LR 217. See text following fn 138 below.
[134] *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2001] UKPC 50, [2002] 1 All ER (Comm) 193 [29].

> 'A mistake as to the future, a misprediction, does not show that the claimant's judgment was vitiated, only that as things turned out it was incorrectly exercised. A prediction is an exercise of judgment. To act on the basis of a prediction is to accept the risk of disappointment. If you then complain of having been mistaken you are merely asking to be relieved of a risk knowingly run …'[135]

Importantly, 'a misprediction does not… provide the basis for a claim to recover money as having been paid under a mistake of fact'.[136] As the wife made a misprediction, the husband's estate was not unjustly enriched. There was therefore no possibility of proprietary restitution, and the wife should not have been able to recover her expenditure plus interest in priority to the bankrupt's other creditors.[137]

This analysis distinguishes *Re Tyler* from the more recent case of *Patel v Jones*.[138] In *Patel*, the Court of Appeal held that the claimant's trustee in bankruptcy was not entitled to the amount of the pension attributable to the claimant's post-bankruptcy service and contributions. Mummery LJ justified this decision on the following basis: after the bankruptcy, the claimant's contributions to the pension fund were made in the 'mistaken belief that the pension rights remained vested in him, whereas they had already vested in the trustee'.[139] Due to the vitiation of intent, as opposed to a misprediction, the trustee in bankruptcy would be unjustly enriched if he received and retained the pension benefits attributable to the post-bankruptcy contributions. Moreover, the claimant's purpose for making these contributions to the pension fund was impossible to fulfil from the outset. This is because for these contributions, as the rights to the pension had vested in the trustee, the claimant was never legally entitled to receive the corresponding pension benefits. Consequently, to protect the claimant's autonomy, these pension rights were held on trust for the claimant. The claimant was therefore entitled to the benefits arising from these contributions.

The impossibility approach also explains *Re Thellusson*, where after a receiving order was made against the debtor, the lender lent the debtor £900. When lending the money,

> 'he believed the bankrupt to be subject to no disability which would prevent him from making binding arrangements with his creditor or from disposing of assets to which he had become or might become entitled. In this he was mistaken'.[140]

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[135] P Birks, *An Introduction to the Law of Restitution* (Oxford: Clarendon Press, 1985) 147-148.
[136] *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2001] UKPC 50, [2002] 1 All ER (Comm) 193 [29].
[137] Dawson argues that the case can be explained using estoppel, see I Dawson, 'Corporate Rescue by the Upright Rescuer- a trap for the unwary' (2016) 29 Insolv Int 81, 85.
[138] *Patel v Jones* [2001] EWCA Civ 779, [2001] Pens LR 217.
[139] *Ibid* [43].
[140] *Re Thellusson, ex parte Abdy* [1919] 2 KB 735 (CA) 753 (Duke LJ).

Due to the lender's mistake, the insolvent estate was unjustly enriched at the lender's expense by the £764 balance which remained in the hands of the official receiver. Moreover, it is submitted that from the moment of his receipt, the debtor held the money on trust for the lender. This is because the basis of the payment was a loan. But the effect of the receiving order, which preceded the debtor's receipt of the loan, was that 'the whole transaction was frustrated'[141] from the moment the debtor received the monies. As explained by Atkin LJ, the consequence of the receiving order was that:

> 'the loan transaction between the two officers became nugatory. The 900l instead of a loan to the debtor was a gift to the creditors. The covenant to repay in six months' time might have been written in water'.[142]

As the purpose of the transfer was defeated from the outset, the balance was held by the insolvency officer on trust for the lender. This enabled the lender to recover the loan money in priority to the bankrupt's other creditors. It is significant that the purpose was defeated from the moment of receipt; in other words, that it was an initial rather than subsequent impossibility. The importance of this was noted by Walton J in *Re Clarke*. Discussing the *Thellusson* case, he said that 'had [the loan] been made even slightly before the bankruptcy, of course, the situation would have been different'.[143] This is because if the loan had been made before the borrower became bankrupt then the loan to the debtor would have been effective, precluding the intervention of equity. This is consistent with the impossibility approach. If the debtor received the money before he became bankrupt, he would not have been unjustly enriched on receipt. Therefore, there would be no possibility of a trust arising.

In contrast, in *Re Farepak Food and Gifts Ltd,* customers had made advance contractual payments to Farepak for goods or vouchers.[144] However, before delivery, the recipient company ceased trading and entered into administration. The customers sought to rely on 'the principle in *Ex parte James*' to recover the sums received by the company *before* the cessation of trade. It was held that the rule could not be used to recover this money. As Mann J explained, although contractual reciprocation for these payments on the part of the company did not in fact eventuate, the rule 'does not go so far as to justify repayment of moneys which the company had received in a relevant sense before the decision to cease trading'.[145] At the same time, the court held that the money received by the company *after* it ceased trading was held on trust. This can be explained using the impossibility analysis. When the company was operating, the contracts could still be carried out. Any money received from customers during this time did not constitute an unjust enrichment of the company. Therefore, there was a period of time where this money was at the company's free disposal. This precluded a trust. In contrast, for any money received by the

[141] *Ibid* 765 (Atkin LJ).
[142] *Ibid* 758.
[143] *Re Clark (a bankrupt)* [1975] 1 WLR 559 (Ch) 566 (Walton J).
[144] *Re Farepak Food and Gifts Ltd* [2009] EWHC 2580 (Ch), [2010] BCC 735.
[145] *Re Farepak Food and Gifts Ltd* [2006] EWHC 3272, [2008] BCC 22 [55] (Mann J).

company after it had stopped trading and for which it had not yet performed its corresponding obligation of delivery, the company was unjustly enriched from the time of receipt. This is because the customers made these payments whilst under the mistaken belief that when the company received the money, it was still trading and could therefore perform its contractual obligations. But not only was the company unjustly enriched by these monies, the impossibility of performance gave rise to a trust on behalf of the customers.

6 The second group of *Ex parte James* cases

At the beginning of the chapter, it was mentioned that the cases applying the *Ex parte James* principle fall into two categories. The first category formed the subject matter of this chapter. In this group of cases, payment was made to an insolvent recipient in circumstances where the recipient was unjustly enriched. The unjust enrichment gave rise to a proprietary right in the form of a trust, which enabled the payer to recover its money in priority to other creditors in the recipient's insolvency. In the second group of cases, which are discussed in this section, there is no proprietary restitution. The cases involve situations where an enrichment was conferred *by the bankrupt or company in winding up to another*, and the *Ex parte James* principle was utilised by the recipient of the property against the insolvent estate in order to prevent the latter from recovering the money. In these cases, as the insolvent estate is not the party receiving the enrichment, the insolvent estate has not been unjustly enriched. Yet it is submitted that the cases can be explained on the basis of unjust enrichment for the following reason.

When an insolvent estate disposes of property after the commencement of a winding up or bankruptcy,[146] the position is that ss.127 and 284 respectively of the Insolvency Act 1986 render the disposition void unless the court orders otherwise.[147] When the court holds that the disposition is void, it does so because the recipient of the property has been unjustly enriched at the expense of the insolvent estate;[148] the enrichment being unjust as the transfer has undermined the pari passu principle of distribution.[149] Consequently, the recipient has to make restitution.[150] It follows that if the court validates

[146] Section 129(2) IA 1986 says commencement of winding up is the date from the presentation of the petition. Winding up order backdates to that time.
[147] Insolvency Act 1986, ss 127(1) and 284(1).
[148] *Officeserve Technologies Ltd (in Liquidation) v Annabel's (Berkeley Square) Ltd* [2018] EWHC 2168 (Ch) [32]; Cf *Re D'Eye* (Ch, 22 April 2016) [49]; *Clark v Meerson* [2018] EWHC 142 (Ch) [47].
[149] For support that this policy underpins recovery see *Re J Leslie Engineers Co Ltd (In Liquidation)* [1976] 1 WLR 292 (Ch) 304B-D cited with approval in *Rose v AIB Group* (UK) Plc [2003] EWHC 1737 (Ch); [2003] 1 WLR 2791 [14]; *Re Gray's Inn Construction Co Ltd* [1980] 1 WLR 711 (CA) 717G; In *Re D'Eye* (Ch, 22 April 2016) [52], [54], on the assumption that he may be wrong to reject the unjust enrichment approach, Judge Baister applied an unjust enrichment analysis using this policy as the reason for restitution. He said that if the case did in fact fall 'in the realms of Goff and Jones' then restitution would be awarded because 'it seems plain to me that it would be wholly unjust to allow any of the parties who has been paid by the bankrupt or on his behalf out of his estate to retain the sums they have received to the detriment of other creditors'.
[150] *Hollicourt (Contracts) Ltd (In Liquidation) v Bank of Ireland* [2001] Ch 555 (CA) [22]; *Rose v AIB Group* (UK) Plc [2003] EWHC 1737 (Ch); [2003] 1 WLR 2791 [30]; *Re D'Eye* (Ch, 22 April 2016) [49].

the disposition, the disposition was 'for the benefit of the general body of unsecured creditors'.[151] The pari passu principle is not undermined; the recipient has therefore not been unjustly enriched at the insolvent estate's expense. Hence the insolvent estate is not entitled to recover the value of the property transferred. It is argued that the jurisdiction of *Ex parte James* and the validation of dispositions under ss.127 and 284 overlap. Where the *Ex parte James* principle is used by an enrichee to prevent an insolvent estate from recovering an enrichment conferred to him, the doctrine is being used by the recipient to say that he has not been unjustly enriched by the receipt of the insolvent estate's property.[152] It follows that when the recipient successfully invokes the *James* principle in instances where either s.127 or s.284 are applicable, the court is validating the disposition and allowing the recipient to keep the property on the basis that the recipient is not unjustly enriched. By allowing the recipient to retain the property, this prevents an unjust enrichment of the insolvent estate's creditors which would occur if the insolvent estate recovered the enrichment. In this context, therefore, the *Ex parte James* rule is used as a defence or 'shield' as opposed to a sword.

Lastly, it is submitted that the *Ex parte James* cases which do not fit into the aforementioned categories must be overruled, unless they can be explained using other causes of action. For example, in *Re Wyvern Developments Ltd*, the official receiver promised to execute a conveyance. Templeman J said that he could 'see no reason why *Ex parte James* should not apply or be extended if necessary to allow the Official Receiver to comply with an express promise made by him in the circumstances in which he was placed'.[153] However, Templeman J proposed that alternatively the ground of estoppel explained the case. The receiver could be estopped from denying that he was bound by his promise.[154] It is submitted that the estoppel ground is the only explanation for the decision in *Wyvern*. More recently, in *Expandable Ltd v Rubin* an appellant put forward the argument that the court should exercise its discretion under *Ex parte James* to order the supervisor of a failed individual voluntary arrangement (IVA) to disclose a document, which was protected by legal privilege, that he received from his solicitor.[155] Patten J held that, on the facts, the principle was inapplicable. But he went on to say 'no doubt that in a proper case the court has the power to order one of its own officers to put all relevant material before the parties in order to enable the court properly to determine relevant issues in a liquidation or bankruptcy. This might in certain- probably rather rare- cases include what would otherwise be privileged material'.[156] However, it is submitted that as there was no question of unjust enrichment in this case, the outcome cannot be explained by the law of restitution.

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[151] *Express Electrical Distributors Ltd v Beavis* [2016] EWCA Civ 765; [2016] 1 WLR 4783 [56] cited and applied in *Officeserve Technologies Ltd (in Liquidation) v Annabel's (Berkeley Square) Ltd* [2018] EWHC 2168 (Ch) [19]; *Rose v AIB Group* (UK) Plc [2003] EWHC 1737 (Ch); [2003] 1 WLR 2791 [29].
[152] E.g. *Re Clifton Place Garage Ltd* [1970] Ch 477 (CA) 492 (Sachs LJ); *Re Clark (a bankrupt)* [1975] 1 WLR 559 (Ch); *Re Young (A Bankrupt)* (Ch, 27 March 2017).
[153] *Re Wyvern Developments Ltd* [1974] 1 WLR 1097, 1105.
[154] *Ibid* 1106.
[155] *Expandable Ltd v Rubin* [2007] EWHC 2463, [2009] BCC 443.
[156] *Ibid* [41].

7 Conclusion

The principle in *Ex parte James* has been used by claimants to recover post-insolvency payments in priority to other unsecured creditors in a recipient's insolvency. Priority is awarded by the courts on the basis that, in this instance, it would be dishonest for an officer of the court to retain the sums. The analysis presented in this chapter demonstrates that conferring priority for this reason was unjustified. First, limiting the use of the principle against recipients who are officers of the court is arbitrary. Second, the courts said that the principle was only applicable where the recipient was dishonest, yet the way the doctrine was applied suggests that it is not about dishonesty at all. Moreover, allowing priority on such grounds constitutes a preference under s.239 of the Insolvency Act 1986.

This chapter has argued that the cause of action of unjust enrichment explains the *Ex parte James* body of cases. In *Ex parte James* the transferor made a payment by mistake. The bankrupt's estate was unjustly enriched by receipt of the money. The transferor was therefore entitled to restitution. Importantly, the restitutionary response was proprietary, as opposed to personal, and took the form of a trust. The trust enabled the payer to bypass the statutory order of distribution at insolvency and recover his money from the insolvent estate in priority.

Chapter 7 Trusts for specific purposes

1 Introduction

This chapter focuses on trusts for specific purposes. These trusts arise when A transfers property to B for a specific purpose. When the money is applied for the purpose, the trust is extinguished. If the particular purpose cannot or is not carried out, A can enforce his rights as beneficiary of the trust and demand repayment.

The main focus of this chapter is the specific purpose trust known as the '*Quistclose* trust', which originates from the case of *Barclays Bank Ltd v Quistclose Investments Ltd*.[1] It typically arises when money is transferred as a loan, and is controversial as it is not clear why the lender of an unsecured loan should have an equitable interest in the loan money which will enable him to recover in priority to other unsecured creditors in an insolvency. Under Lord Wilberforce's reasoning in *Barclays Bank v Quistclose*, a *Quistclose* trust consists of a primary trust for a third party, and upon the failure of the purpose a secondary trust arises for the lender. In contrast, it is proposed here that when money is paid for a specific purpose, if a *Quistclose* trust arises, the recipient holds the money immediately on trust for the provider of the funds, as opposed to this trust arising only when the purpose fails. This position has the support of Lord Millett in *Twinsectra Ltd v Yardley* who also argued that, under a *Quistclose* arrangement, there is an immediate trust for the lender.[2] However, by classifying the trust as a resulting trust,[3] Lord Millett overlooked the relevance of the lender's intentions. This chapter proposes that the *Quistclose* trust, like all specific purpose trusts, is created by the consensual arrangement between the parties. It therefore falls into the classification of trusts arising from the event of consent. For this reason, it cannot possibly be a resulting trust, as such trusts arise from the causative event of unjust enrichment. In simpler terms, the *Quistclose* trust is an express trust. The recipient holds the fund on an express trust for the payer and has authority to apply the money in accordance with the payer's instructions. When the instructions can no longer be carried out, the trustee holds the funds on a bare trust. Applying this thesis, there is only one trust throughout the relationship- both before and after the failure of the purpose- of whom the provider of the funds is the beneficiary.

By adopting this consent-based analysis, the *Quistclose* trust can be explained using orthodox equitable principles. Like any express trust, it is therefore not restricted to loan relationships. More importantly, by demonstrating that the *Quistclose* trust, like all specific purpose trusts, is not part of the law of unjust enrichment, it precludes the specific purpose trust from being used as an analogy to

[1] *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 (HL).
[2] *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164 [100], [102].
[3] *Ibid* [100].

advance the dangerous argument that subsequent failures in unjust enrichment can give rise to proprietary restitution.[4]

As to what follows, first this chapter explores the specific purpose trust in *Barclays Bank v Quistclose*. Second, it shows that there is a body of cases where money was given on the condition that the intended beneficiaries get married, and where the courts held that there was a trust of the money for the providers of the fund when the condition of marriage was not fulfilled. It is argued that the trust in these cases can be explained on the basis that the money was provided for the specific purpose of marriage. Consequently, the effect of the arrangement was that there was an express trust for the provider of the funds throughout. This enabled the provider to recover the money when the marriage did not take place and the purpose had thus failed. The significance of these cases is that as the trust which was recognised was an express trust, it had arisen from the event of consent and had nothing to do with unjust enrichment. Finally, this chapter explores a group of cases where money was given for a purpose which was fulfilled, leaving a surplus, and where it was held that this surplus was held on trust for the provider(s) of the fund. It will be argued that the courts' recognition of a trust for the provider in these surplus fund cases was unjustified. This is because the facts show that the money had not been given for an exclusive purpose. Therefore, when the recipient received the funds, he did not hold them on an express trust for the provider. Rather, the provider's proprietary interest in the money was extinguished at the time of the recipient's receipt. So when the purpose was fulfilled leaving an unapplied balance, the provider of the fund should not have been able to recover the surplus under an express trust. It will be argued that neither can these cases be explained on the basis that the surplus was held on a resulting trust for the providers of the fund. This is because the purpose for giving the money was possible to carry out at the time the recipient received the funds, and so the requirements for proprietary restitution were not satisfied.

2 The *Quistclose* trust

The *Quistclose* trust originates from *Barclays Bank Ltd v Quistclose Investments Ltd*.[5] The facts of the case are as follows. Rolls Razor had declared a dividend of £209,719, but was in financial difficulties and did not have enough liquid resources to make the dividend payment. The company had an account with Barclays Bank Ltd with a permitted overdraft of £250,000. However, it had exceeded this limit by nearly a quarter of a million pounds, and Barclays refused to increase the overdraft limit any further. A financier agreed to lend Rolls Razor £1,000,000 if Rolls Razor could first find the sums to meet the declared dividend. The Rolls Razor company then succeeded in obtaining a loan of £209,719 from Quistclose Investments Ltd. This loan was made 'for the purpose of that company paying the final

[4] R Chambers, *Resulting Trusts* (OUP 1997) ch 3.
[5] *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 (HL).

dividend due on July 24 next'.[6] Quistclose gave the loan to Rolls Razor by cheque, who then sent the cheque to Barclays with a letter to the joint branch manager which stated:

> 'Confirming our telephone conversation of today's date, will you please open a no.4 ordinary dividend share account. I enclose herewith a cheque valued £209,719 8s. 6d. being the total amount of dividend due on July 24, 1964. Will you please credit this to the above mentioned account. We would like to confirm the agreement reached with you this morning that this account will only be used to meet the dividend due on July 24, 1964'.[7]

The Bank opened a No.4 ordinary dividend account and credited it with the cheque. But Rolls Razor was placed into voluntary liquidation before the dividend was paid to the shareholders. Following this event, Barclays set off the credit balance in the No.4 ordinary dividend account against Rolls Razor's debit balances in other Barclays accounts. Quistclose Investments then sought to recover the £209, 719 from Barclays. It argued that the loan money was subject to a trust in its favour. Furthermore, since the bank knew that the money was provided solely for the purpose of paying the declared dividend, the bank had notice of the trust and was bound by it. Therefore, it could not set-off the money in Rolls Razor's dividend account against Rolls Razor's overdraft.

The House of Lords concluded that Rolls Razor held the chose in action to the No.4 dividend account on trust for Quistclose, and that the bank could not exercise its set-off rights. Consequently, Quistclose could recover the sums in the dividend account in priority to the bank. Lord Wilberforce, with whom the other Lordships agreed, justified this decision on the following basis:

> 'arrangements of this character for the payment of a person's creditors by a third person, give rise to a relationship of a fiduciary character of trust, in favour, as a primary trust, of the creditors, and secondarily, if the primary trust fails, of the third person …'[8]

According to Lord Wilberforce, the effect of the loan arrangement was that when Quistclose loaned the money to Rolls Razor, Rolls Razor became a trustee of the sums. It held the loan on a primary trust for the shareholders who were owed the dividend. When Rolls Razor entered liquidation, the primary trust failed. This caused the primary trust to be extinguished, and a new secondary trust to arise. Under the secondary trust, Rolls Razor was a trustee of the loan for Quistclose.

The decision in *Barclays Bank v Quistclose* was applied by the House of Lords in *Twinsectra Ltd v Yardley*,[9] now one of the leading cases on the *Quistclose* trust. Twinsectra agreed to lend £1m to Mr

[6] *Ibid* 579A.
[7] *Ibid* 579B-C.
[8] *Ibid* 580C.
[9] *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164.

Yardley for the purpose of purchasing land. The lender was only willing to make the loan if repayment was secured by a solicitor's personal undertaking. This would offer the lender some security for repayment, as the solicitor would be personally liable to repay the loan plus interest. Yardley's solicitor, Mr Leach, refused to make such undertaking. This led Yardley to approach another solicitor, Mr Sims, who was willing to do so. It was agreed between the lender and Sims that the loan was being made for the sole purpose of acquiring property on Yardley's behalf. Moreover, that Sims was to retain the money until it was applied for this purpose. However, Sims had misrepresented that he intended to abide by the terms of the agreement and that he was acting as a solicitor for his client in this transaction. This is an important fact, and one which we will return to.[10] When Sims received the loan, in breach of undertaking, he released the money to Yardley's solicitor Leach under the agreement that the money would be treated in accordance with the terms agreed between Sims and Twinsectra. But Leach released the funds as and when requested to Yardley and Yardley's companies, and did not ensure that the money was applied solely for the acquisition of property. Shortly after, Sims became bankrupt[11] and Yardley's companies were put into administration.[12] Twinsectra then sought to recover the loan from the only solvent party- Leach. It was held that Sims was a trustee of the fund for *Twinsectra*, and that it was a breach of trust when Sims released the funds to Leach. Their Lordships' reasons for recognising a trust in *Twinsectra* will be discussed later in this chapter.

This section will now demonstrate the need for a new analysis to explain the *Quistclose* trust, by exploring the difficulties with the reasoning employed by the House of Lords in *Barclays Bank v Quistclose*. First, it illustrates that contrary to Lord Wilberforce's reasoning there was no 'primary trust' for either the shareholders or a purpose. Second, his Lordship's view that the company's failure gave rise to a 'secondary trust' for the lender is also inexplicable.

1 Primary trust for the creditors

In *Quistclose*, Lord Wilberforce stated that there was 'a primary trust of the creditors'[13] whereby Rolls Razor held the money for the benefit of its shareholders. He explained why the primary trust arose:

> 'The *mutual intention* of the respondents and of Rolls Razor Ltd., and the essence of the bargain, was that the sum advanced should not become part of the assets of Rolls Razor Ltd, but should be used *exclusively* for payment of a particular class of its creditors, namely, those entitled to the dividend.'[14]

[10] See text to fn 58-61 below.
[11] *Twinsectra Ltd v Yardley* (CA, 28 April 1999) [29].
[12] *Twinsectra Ltd v Yardley* (CA, 28 April 1999) [3], [112].
[13] *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 (HL) 580C.
[14] *Ibid* 580B (emphasis added).

It could therefore be argued that, as Quistclose advanced the money to Rolls Razor 'exclusively' to pay the shareholders, the shareholders were intended to be the beneficial owners of the fund. Moreover, this primary trust for the shareholders was an express trust as it arose from the 'mutual intention' of the parties.

This analysis is supported by *Re Northern Developments*.[15] In that case, one of the subsidiary companies ('Kelly') in a group was in financial difficulties. The group's banks advanced over half a million pounds in an attempt to rescue Kelly. The money was placed into an account in the name of the parent company ('Northern') for the express purpose of 'provide money for Kelly's unsecured creditors over the ensuing weeks'. The fund was used to sustain Kelly for a period of time. But before the entire fund was spent, Kelly was put into receivership. The question was who was entitled to the balance: the banks who lent the money, or Kelly's creditors. On the basis of Lord Wilberforce's two-trust analysis in *Quistclose*, Megarry VC held there was a primary purpose trust enforceable by the subsidiaries' creditors.

Although *Re Northern Developments* supports Lord Wilberforce's analysis,[16] it is submitted that his approach should be rejected. The problem with Lord Wilberforce's approach is that a primary trust for the third-party creditors does not explain the *Quistclose* case. First, when a company enters liquidation it is only contrary to insolvency legislation for it to use *its own assets* to pay off particular classes of creditors such as shareholders.[17] Trust money does not belong to the company and is therefore not part of the insolvent company's assets. So if Rolls Razor held the money from the lender on trust for the shareholders, Rolls Razor's liquidation would not affect the shareholder's entitlement to the trust money.[18] Even after the liquidation, as beneficiaries of the chose in action to the No.4 dividend account, the shareholders could have exercised their *Saunders v Vautier* right to compel payment of the dividend.[19] Significantly, the liquidation could thus not have caused the primary trust to fail and 'it is far from clear' why in *Quistclose* it was held to have done so.[20] Importantly, as the shareholders could still be paid when the liquidation commenced, the secondary trust for Quistclose could not have arisen. Therefore, applying Lord Wilberforce's primary-secondary trust analysis, if there was a primary trust for the shareholders, at no point would *Quistclose* have a proprietary interest in the loan money. It would only have a contractual right against Rolls Razor for repayment of the loan. It is then somewhat surprising that the lender recovered the money, and 'it is extraordinary that [the beneficiaries] should have been given no opportunity to argue that the trust in their favour had not failed'.[21]

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[15] *In re Northern Developments (Holdings) Ltd* (Ch, 6 October 1978).
[16] Also, see *Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd* [1985] Ch 207 (Ch).
[17] See *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164 [98].
[18] P Millett, 'The *Quistclose* Trust: who can enforce it?' (1985) 101 LQR 269, 276.
[19] *Saunders v Vautier* (1841) 4 Beav 115 (Ch); G Virgo, *The Principles of Equity and Trusts* (3rd edn, OUP 2018) 243; W Swadling, 'Orthodoxy' in W Swadling (Ed), *The Quistclose Trust: Critical Essays* (Hart 2004) 27.
[20] P Millett, 'The *Quistclose* Trust: who can enforce it?' (1985) 101 LQR 269, 275.
[21] *Ibid* 275 fn 34.

Second, a primary express trust for the shareholders appears to be inconsistent with the lender's intentions, as it suggests that Quistclose intended to gift the money in the dividend account to the shareholders. The facts of the case, however, suggest that the money was lent to Rolls Razor for the specific purpose of meeting the dividend, with the view of keeping Rolls Razor financially afloat. Quistclose had no intention to benefit the shareholders come what may.[22] It was Quistclose's intention that if the company collapsed, the dividend was not to be paid.[23] This intention cannot be reconciled with a trust for the shareholders, as in this instance Quistclose would have no proprietary interest in the loan money, and would therefore have no control over Rolls Razor's use of the funds either before and/or after the liquidation.

Third, it is demonstrated by *Twinsectra* that there is a more compelling reason as to why the primary trust for the intended third-party recipient analysis is incorrect. In *Twinsectra*, if Sims held the fund on an express trust for the third-party Yardley, this does not explain why Sims was liable for breach of trust. This is because if Yardley was the beneficiary of the fund, then Sims transferring the sums to Leach to pay Yardley would be consistent with the trust for Yardley, as it would be Yardley's right as beneficiary to have the loan money transferred to him. Sims' transfer of the funds to Leach would only be in breach of its undertaking with Twinsectra, which would only give Twinsectra a claim for breach of contract against Sims.

Lastly, the primary trust for the shareholders' analysis does not explain the trust in *Re EVTR Ltd.*[24] In that case, the appellant made a loan of £60,000 to a company for the 'sole purpose of buying new equipment'. Before the equipment was delivered to the company, the company was put into receivership. According to the Court of Appeal, since the money was lent for a specific purpose which failed, the Court of Appeal concluded that the money was held on a *Quistclose* trust for the appellant. The problem with *Re EVTR* is that applying Lord Wilberforce's analysis, the company that borrowed the money, being the creditor, would itself be the beneficiary of the fund. Consequently, the loan money would form part of the borrowing company's assets. Upon the borrowing company entering into receivership, the appellant would therefore not have been able to recover the sums.

2 Primary trust for a purpose

Alternatively, the *Quistclose* trust could be interpreted as a trust for a purpose. The contractual terms of the loan created a purpose trust,[25] by restricting the recipient's use of the money to the specific purpose that the loan was given for. This analysis finds some support in Lord Wilberforce's judgment. He

[22] P Millett, 'The *Quistclose* Trust: who can enforce it?' (1985) 101 LQR 269, 286.
[23] See text to fn 90 below.
[24] *Re EVTR Ltd* (1987) 3 BCC 389 (CA).
[25] G Virgo, *The Principles of Equity and Trusts* (3rd edn, OUP 2018) 246-247.

referred to the primary trust as the 'primary purpose',[26] and said that the secondary trust only arises 'if the primary purpose cannot be carried out'.[27] Since the failure of the purpose causes the secondary trust for the lender to arise, the nature of the purpose is important as it determines if and when the lender's beneficial interest under the secondary trust comes into existence. In *Quistclose*, the purpose was either to prevent Rolls Razor's financial collapse, or to discharge the debt owed to the shareholders.[28] But as will be demonstrated, there are problems with both of these categorisations of the purpose.

1 Preventing Rolls Razor's financial collapse

A trust could not be created for the purpose of preventing Rolls Razor's collapse.[29] This is because a trust to ensure the solvency of Rolls Razor would be a trust for an abstract purpose. Trusts for non-charitable purposes are invalid for want of a beneficiary,[30] and so a primary purpose trust to prevent Rolls' collapse could not be created when Rolls Razor received the money.[31] Therefore, Lord Wilberforce erred when he said that there was a primary purpose trust in existence in the period between Rolls Razor's receipt of the funds and Rolls Razor's liquidation.

2 Discharging debt to shareholders

Neither could there be a trust for the purpose of paying the declared dividend, as this would also be a non-charitable purpose trust invalid for want of a beneficiary. Admittedly, there is the 'exception' in *Re Denley's Trust Deed*.[32] In *Denley*, the trustees held a plot of land to 'be maintained and used as and for the purpose of a recreation or sports ground primarily for the benefit of the employees of the company and secondarily for the benefit of such other person or persons (if any) as the trustees may allow to use the same…' This was a trust for a non-charitable purpose. Therefore, for it to be valid 'the individuals for whose benefit it is designed must be ascertained or capable of ascertainment at any given time'.[33] Although there were no identifiable beneficiaries in *Denley*, Goff J held that the trust did not violate the 'beneficiary principle':

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[26] *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 (HL) 581.
[27] *Ibid.*
[28] G Virgo, *The Principles of Equity and Trusts* (3rd edn, OUP 2018) 246-247; W Swadling, 'Orthodoxy' in W Swadling (Ed), *The Quistclose Trust: Critical Essays* (Hart Publishing 2004) 28.
[29] Though note that Lord Millett in *Twinsectra* said of *Quistclose* that 'the reason why the purpose failed… must be because the lender's object in making the money available was to save the borrower from… collapse'. *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164 [98].
[30] *Morice v Bishop of Durham* (1805) 9 Ves Jr 522. Importantly, saving Rolls Razor cannot be regarded as a charitable purpose, as defined in section 3 of the Charities Act 2011.
[31] W Swadling, 'Orthodoxy' in W Swadling (Ed), *The Quistclose Trust: Critical Essays* (Hart 2004) 28.
[32] *In Re Denley's Trust Deed* [1969] 1 Ch 373 (Ch).
[33] *Ibid* 386.

> 'Where, then, the trust, though expressed as a purpose, is directly or indirectly for the benefit of an individual or individuals, it seems to me that it is in general outside the mischief of the beneficiary principle'.[34]

The trust purpose 'directly or indirectly' benefitted the employees of the company, since they would have the use and enjoyment of the sports ground. Consequently, Goff J said that the purpose trust was valid and enforceable. On this analysis, the land was held on trust for the company's employees, and the employees thus had an equitable proprietary interest in the land. As trust beneficiaries, 'the employees could exercise their rights under *Saunders v Vautier* and compel the transfer of those rights to themselves'.[35]

However, it is submitted that the decision in *Re Denley,* that the land was held on trust for the use and enjoyment of the company's employees, cannot be justified. The settlor intended both present and future employees to benefit from the use of the ground, not for the present employees to take outright. It would therefore be contrary to the settlor's wishes if the employees could compel the trustees to convey the land to them. As Swadling explains,

> 'the trust which the settlor created was not one in which the employees were intended to have what we might loosely be called 'ownership' rights, only 'use' rights, which is not the same thing at all. Thus, despite Goff J's protestations to the contrary, the beneficiary principle was not satisfied on the facts of *re Denley*, and the trust should accordingly have been held void. As it is, we are left with the situation in *Denley* of not being able to point to any person for whom the rights were held'.[36]

The principle from *Re Denley* is, however, good law. Putting aside the *decision* in *Denley* but applying the *principle* from that case to the facts of *Quistclose*, the trust for the purpose of discharging the debt owed to the shareholders would be valid.[37] This is because the payment of the dividend directly benefitted Rolls Razor's shareholders, since they were the intended recipients of the loan money. The problem, however, is that if the shareholders were the beneficiaries of the purpose trust, even after the liquidation, they would be in a position to enforce the trust in their favour. This would be inconsistent with the lender's intentions. Again, one is left facing the same difficulty as if there had been a primary express trust for the shareholders.[38]

The trust in *Quistclose* therefore cannot be regarded as an express trust for the shareholders, a trust for the purpose of paying the declared dividend, or a trust for the purpose of preventing Rolls Razor's

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[34] *Ibid* 383-384.
[35] W Swadling, 'Orthodoxy' in W Swadling (Ed), *The Quistclose Trust: Critical Essays* (Hart 2004) 29.
[36] *Ibid*.
[37] G Virgo, *The Principles of Equity and Trusts* (3rd edn, OUP 2018) 247.
[38] See sub-section 'Primary trust for the creditors' at text to fns 13-24 above.

collapse. For the reasons given, Lord Wilberforce's two-trust analysis must be rejected. Having said this, it is argued that the decision in *Quistclose* was correct, since the case can be rescued on another ground. This is explained in the next section, which argues that in *Quistclose* the borrower held the loan on an express trust for the lender from the moment it received the money.

3 Cause of action

'All rights which can be realized in court', personal and proprietary, 'arise from some event which happens in the world'.[39] There are four categories of causative events: wrongs, unjust enrichment, miscellaneous others and consent. In *Quistclose*, the loan arrangement gave rise to a proprietary response in the form of a trust, but it is not clear what caused the trust to arise. This section explores each of the four causative events in turn, and demonstrates that the *Quistclose* trust is an example of a trust arising in response to the causative event of consent.

In *Quistclose*, Lord Wilberforce held that the lender's equitable interest in the fund arose only when Rolls Razor entered liquidation. In contrast, it is argued here that when Quistclose lent money to Rolls Razor for the specific purpose of paying the declared dividend, Rolls Razor immediately held the money on trust for Quistclose. Admittedly, Lord Millett in *Twinsectra Ltd v Yardley* also said that when there is a *Quistclose* arrangement there is an immediate trust for the lender.[40] However, the view adopted in this chapter can be distinguished from Lord Millett's. This chapter demonstrates that the *Quistclose* trust is an express trust for the lender, as opposed to it being a resulting trust as argued by Lord Millett. The trust is therefore explicable using the cause of action of consent. The correct classification of the *Quistclose* trust as a consensual trust for the lender is important for three reasons. First, this express trust analysis overcomes the difficulties presented by Lord Wilberforce's approach. Second, by demonstrating that the *Quistclose* trust is a consensual trust, and therefore not part of the law of unjust enrichment, it brings clarity to the law as it defines the boundaries of proprietary restitution for this cause of action because one can say for certain that trusts for specific purpose are outside of its realms. Lastly, the express trust analysis reveals that the borrower in *Quistclose*-type cases is subject to fiduciary obligations from the outset.

1 Wrongs

A 'wrong' is a 'breach of duty'.[41] When property is obtained from the committal of a wrong, if it is unconscionable for the defendant to retain the property, the wrong gives rise to a trust. The trust is

[39] P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 21.
[40] *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164 [100], [102].
[41] P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 21.

known as a 'constructive trust'. An example illustrating this is *Attorney-General of Hong Kong v Reid*.[42] The State prosecutor received bribes in breach of his fiduciary duty to the Hong Kong government. Lord Templeman said 'it is unconscionable for a fiduciary to obtain and retain a benefit in breach of duty',[43] and that a fiduciary 'must not be allowed by any means to make any profit from his wrongdoing'.[44] The Privy Council held that the bribes, and the traceable proceeds of the bribes, were held on constructive trust for the State.

Breach of fiduciary duty is the only breach of duty that gives rise to a trust. There was no fiduciary breach in *Quistclose*, and so a wrongs-based trust cannot explain why Rolls Razor held the rights to the money in the No.4 dividend account on trust for the lender. Rolls Razor was under a duty to perform its contractual obligations- namely, to place the loan money in a separate account as requested by the lender and to use it to pay the dividend for the purpose of enabling itself to continue trading. Contractual duties and fiduciary duties can exist within the same transaction. But as Lord Mustill explained in *Re Goldcorp*:

> 'the essence of a fiduciary relationship is that it creates obligations of a different character from those deriving from the contract itself'.[45]

On the one hand, in *Quistclose*, it could be said that Rolls Razor's obligation to apply the funds for the payment of the declared dividend did not go 'beyond… what it had by contract promised to do'.[46] Therefore, Rolls Razor did not owe any fiduciary duties. This eliminated the possibility of a fiducial breach which could bring into existence a wrongs-based trust. If, on the other hand, a fiduciary duty is identified in *Quistclose*, as it was by Lord Wilberforce,[47] it was not breached on the facts. Rolls Razor had not done anything which could constitute a fiducial breach; it was Barclays Bank that had attempted to set-off the funds, not the 'fiduciary'.

Likewise, the event of wrongs also fails to explain the *Twinsectra* trust. Sims was a solicitor, and 'a solicitor who acts for a client from time to time is no doubt rightly described throughout as being in a fiduciary capacity to him'.[48] However, Sims' client in this transaction was Yardley, not the lender. There was therefore no fiduciary relationship between the lender and Sims. Thus Sims did not owe any fiduciary duties to Twinsectra, eliminating any possibility of a wrongs-based trust.

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[42] *Attorney-General of Hong Kong v Reid* [1994] 1 AC 324 (NZPC).
[43] *Ibid* 331 (Lord Templeman).
[44] *Ibid* 338 (Lord Templeman).
[45] *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 (PC) 98.
[46] *Ibid* 98, though note he was discussing the facts of *Goldcorp* here, not *Quistclose*.
[47] See text to fn 8 above.
[48] *Boardman v Phipps* [1967] 2 AC 46 (HL) 126 (Lord Upjohn).

2 Unjust enrichment

An 'unjust enrichment' occurs when the defendant receives an enrichment at the expense of the claimant, and the receipt of the enrichment is unjust because one of the unjust factors is at play.[49] An unjust enrichment can give rise to a trust. The trust is a 'resulting trust', though 'unjust enrichment trust' is a better label.[50] It arises when the purpose the enrichment was transferred for is impossible to fulfil from the moment of the defendant's receipt. Classic examples of trusts arising in response to unjust enrichment can be found in *Chase Manhattan Bank v British-Israeli National Bank*,[51] *Neste Oy v Lloyds Bank Plc*[52] and *Angove's Pty Ltd v Bailey*.[53] However, it is submitted that the ingredients for an unjust enrichment trust were not present in *Quistclose*.

For a resulting trust to have arisen in *Quistclose*, the transfer of money from the lender to the borrower must have caused the borrower to be unjustly enriched from the moment of receipt in circumstances where the purpose of the payment was impossible to carry out. The only way that Rolls Razor could have been unjustly enriched from the outset is if Quistclose intended to create a trust for the purpose of preventing Rolls Razor's collapse. As discussed above, this purpose trust would never come into existence, but would fail from the outset.[54] It would follow that the lender's belief, that the borrower's use of the money was restricted for the purpose of saving Rolls Razor, was mistaken as its intentions could not be fulfilled. Rolls Razor would be unjustly enriched by the receipt of the loan money. It is the view of this author that this could have one of two consequences. Either the initial failure of the purpose trust would render the lender's purpose impossible, causing the unjust enrichment to give rise to proprietary restitution in the form of an immediate resulting trust for the settlor Quistclose. Or, Rolls Razor would become the legal beneficial owner of the money, leaving Quistclose with a personal right to recover the loan. At first sight there appears to have been an impossibility of the lender's purpose, since it was 'impossible' for the lender's intended purpose trust to be created. However, despite the fact that the intended purpose trust was not created, it will be demonstrated that the lender's purpose for the transfer was possible to carry out, precluding an unjust enrichment trust.

There was no impossibility because when Rolls Razor received the money, it satisfied the condition needed to obtain an absolute property right to the enrichment.[55] In the eyes of equity, Quistclose lent the money on the condition that it was possible for the money to be applied to pay the dividend to keep

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[49] See the discussion on the relevance of the unjust factors at text following fn 8 in ch 3.
[50] P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 304.
[51] *Chase Manhattan Bank v British-Israeli National Bank* [1981] Ch 105 (Ch).
[52] *Neste Oy v Lloyds Bank Plc* [1983] 2 Lloyd's Rep 658 (QBD). For further discussions of this case, see text to fn 52 in ch 1, and fns 48-52, 98 in ch 4.
[53] *Angove's Pty Ltd v Bailey* [2016] UKSC 47, [2016] 1 WLR 3179. For a more detailed analysis of this case, see ch 1.
[54] See text to 29-31 above.
[55] See discussions in sub-section 'The condition on which the defendant can retain the value' following text to fn 23 in ch 3.

Rolls Razor afloat. When the loan money was paid into Rolls Razor's No.4 dividend account, this purpose was capable of being fulfilled. So even though the purpose trust could not be created, causing Rolls Razor to be unjustly enriched, the purpose of the transfer was still possible in equity.[56] Consequently, a resulting trust for the lender could not arise. If the claim for recovery was premised on unjust enrichment, Rolls Razor would have become the absolute beneficial owner of the money from the moment of receipt. Thus upon liquidation, the Bank was entitled to exercise its set-off rights and claim the fund.

Even if it could be argued that Rolls Razor was unjustly enriched not when it received the loan, but when it entered liquidation, a resulting trust could still not arise. Assuming that the money was lent on the condition that it would be used to keep Rolls Razor afloat, by implication, the loan could only be paid to the shareholders while Rolls Razor was still trading. When this condition could no longer be carried out, there was a failure of consideration and Rolls Razor was unjustly enriched. Under this analysis, the money would have been at Rolls Razor's free disposal for the period of time between Rolls Razor's receipt and its liquidation. This precludes a resulting trust. Therefore, the unjust enrichment analysis cannot explain why Quistclose was able to recover the funds from the Bank.

The unjust enrichment analysis also does not explain the trust in *Twinsectra*. In *Twinsectra*, pursuant to an undertaking between the parties, the claimant transferred money to Sims. The claimant mispredicted that, in accordance with the undertaking, the money paid to Sims would (i) be used for the sole purpose of acquiring property on his client's behalf and (ii) be retained by Sims until it was applied for this purpose. A misprediction is not sufficient to give rise to an unjust enrichment.[57] Without an unjust enrichment, there is no possibility of proprietary restitution. Alternatively, it could be argued that the claimant made a mistake. The mistake was fraudulently induced by Sims' misrepresentations.[58] This is because Sims had falsely represented that he was acting on behalf of Yardley in a property transaction, and that he intended to abide by the terms of the undertaking. The evidence in support of this is that at the time the undertaking was signed by Sims, he had already agreed with his client Yardley that he (Sims) would take up the loan on his own account as principal debtor.[59] Moreover, he had pre-arranged to release the money to Yardley's solicitor as soon as it was received.[60] When a claimant's payment is fraudulently induced, it is the failure of the claimant's intentions, caused by the vitiation of the claimant's intent, which causes the recipient of the money to be unjustly enriched from the moment of receipt.[61] In *Twinsectra* the unjust enrichment could not give rise to a proprietary response. The reason is that the purpose of the payment, to apply the money to acquire property for Yardley, could still be

[56] This can be explained on the basis of main and ancillary purposes, see sub-section 'Difficult cases' at fns 54-60 in ch 3.
[57] Mispredictions are also discussed at text to fns 132-137 in ch 6.
[58] *Twinsectra Ltd v Yardley* (CA, 28 April 1999) [96] (Potter LJ).
[59] *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164 [57] (Lord Millett).
[60] *Ibid* [61] (Lord Millett).
[61] For a discussion on the relevance of the unjust factors at text near fn 8 in ch 3.

carried out at the time Sims received the sums. There was therefore no justification for equitable intervention in the form of a resulting trust for the lender.

3 Miscellaneous others

The 'miscellaneous others'[62] category captures events which 'fall outside the previous three'.[63] Birks said that the 'residual miscellany' is so large that 'to enumerate all its members requires encyclopaedic erudition'.[64] But what is important for our purposes is that this event can give rise to a trust.[65] Some of the instances in which it does so are set out in Swadling's work.[66] This author agrees with Swadling that the *Quistclose* trust does not fit within the residual miscellany.[67] It is argued that the trust can instead be explained using the causative event of consent. Therefore, one does not need to resort to the category of miscellaneous others.

4 Consent

1 Unexpressed intention to create a trust

According to Swadling, consensual trusts arise from either 'presumed' or 'proven' consent.[68] A presumed consent trust is created when there is a transfer of property from A to B, and there is an evidential gap as to how the rights to the property should be held. This was explained by Lord Goff in *Westdeutsche*,

> 'where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions'.[69]

[62] P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 22-24.
[63] *Ibid* 22.
[64] *Ibid*.
[65] *Ibid* 304.
[66] W Swadling, 'Orthodoxy' in W Swadling (Ed), *The Quistclose Trust: Critical Essays* (Hart Publishing 2004) 21-27.
[67] *Ibid* 21-27.
[68] W Swadling, 'Orthodoxy' in W Swadling (Ed), *The Quistclose Trust: Critical Essays* (Hart Publishing 2004).
[69] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) 708 (Lord Browne-Wilkinson).

Swadling argues that the fact proved by presumption is that the transferor declared a trust in his own favour.[70] This proposition finds support in *Re Vandervell (No.2)* where Megarry V.C said that 'the presumption… establishes… that [B] is to take on trust'.[71] Since the trust arises by presumption, B can rebut the presumption by any evidence which suggests that A did not intend a trust.[72]

It is proposed here that the concept of presumed consent trusts is misconceived.[73] There is no such category. When property is transferred to be held on trust, and the intention to create a trust is unexpressed, this is insufficient to give rise to an express trust. This is because there is no certainty of intention.[74] However, even if a category of presumed consent trusts were to exist, the event of presumed consent would not explain the *Quistclose* case. As will be explained below, the evidence showed that Quistclose transferred the money to Rolls Razor as a loan, and expressed an intention that the loan was to be held on trust. There was therefore no evidential gap, and no need to resort to a presumption to determine what the lender intended.[75]

2 Expressed intention to create a trust

When a party expresses, what is in the eyes of the law, an intention to create a trust, a consensual trust can arise. It is known as an 'express trust'. A settlor's expressed intentions can be sufficient to create a trust even though he has no knowledge of the trust concept. This is because whether a legal relationship of trust is intended is assessed objectively. So even though the idea of creating a trust may not have crossed one's mind, this does not preclude a trust from arising due to the circumstances in which the money was transferred.[76] In *Quistclose*, it follows that although the lender did not say that the recipient was to hold the loan money 'on trust' for the lender, not using the word 'trust' is inconclusive on the issue of whether the provider of the fund intended to create one.

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[70] W Swadling, 'Explaining Resulting Trusts' (2008) 124 LQR 72; Cf: see J Mee, 'Presumed resulting trusts, intention and declaration' (2014) 73 CLJ 86 who says 'the presumption is of an intention to create a trust for the transferor'. Virgo agrees with Mee, see G Virgo, *The Principles of Equity and Trusts* (3rd edn, OUP 2018) 215.
[71] *Re Vandervell's Trusts (No.2)* [1973] 3 WLR 744 (Ch) 767 (Megarry VC).
[72] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) 708G (Lord Browne-Wilkinson); W Swadling, 'Explaining Resulting Trusts' (2008) 124 LQR 72; W Swadling, 'A New Role for Resulting Trusts' (1996) 16 LS 110; E.g. *Aroso v Coutts & Co* [2001] 1 All ER (Comm) 241 (Ch) where the nephew rebutted the presumption by relying on the mandate form which stated that the money in the account was to be held by them jointly, with survivor taking beneficially; E.g. 2: the presumption of resulting trust is also rebutted when the presumption of advancement applies, *Grey v Grey* (1677) 2 Swans 594.
[73] Though note it is argued in this thesis that there is a category of presumed unjust enrichment trust (i.e. presumed resulting trusts). See text to fns 41-44 in ch 3.
[74] *Knight v Knight* (1840) 3 Beav 148 (Ch).
[75] W Swadling, 'Orthodoxy' in W Swadling (Ed), *The Quistclose Trust: Critical Essays* (Hart 2004) 12-13; R Chambers, 'Restrictions on the Use of Money' in W Swadling (Ed), *The Quistclose Trust: Critical Essays* (Hart 2004) 84.
[76] *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164 [71]; *Re Schebsman* [1944] Ch 83 (CA) 104.

Equity looks at substance rather than form. If a transferor of property expresses an intention to impose an obligation on the transferee to hold the property for the benefit of another,[77] the transferor's intent is interpreted as an intention to create a trust. An example illustrating this is *Re Adams and the Kensington Vestry*.[78] In his will, the testator said:

> 'I give, devise, and bequeath all my real and personal estate and effects whatever and wheresoever unto and to the absolute use of my dear wife *Harriet Smith*, her heirs, executors, administrators, and assigns, *in full confidence that she will do what is right* as to the disposal thereof between my children, either in her lifetime or by will after her decease.'

Cotton LJ said the will imposed only a 'moral obligation' on the wife, as it advised her to 'do what is right' by using the bequeathed property to provide for their children.[79] It did not impose a legal obligation on the wife to use the property for the children's benefit. Accordingly, the Court of Appeal held that an express trust was not created, and the property was an absolute gift to the wife.

In contrast to *Re Adams*, there was an express trust in *Quistclose*. Quistclose made a loan to Rolls Razor 'for the purpose of that company paying the final dividend due on July 24'. The parties' intentions, objectively ascertained from the terms of the agreement and the relationship between them,[80] were that Rolls Razor should not become an absolute owner of the fund. Rather, the agreement was imposing an obligation on Rolls Razor to hold the loan money for the benefit of Quistclose. As Lord Wilberforce explained, the 'mutual intention of the respondents and of Rolls Razor Ltd, and the essence of the bargain, was that the sum advanced should not become part of the assets of Rolls Razor Ltd, but should be used exclusively for payment of a particular class of its creditors, namely those entitled to the dividend. A necessary consequence from this, by process simply of interpretation, must be that if, for any reason, the dividend could not be paid, the money was to be returned to the respondents: the word 'only' or 'exclusively' can have no other meaning'.[81] This expressed intention was sufficient to create a legal relationship of trust in favour of Quistclose, and gave Rolls Razor a power to apply the fund for the stated purpose.

An express trust for the lender is consistent with the crux of the commercial arrangement between the parties. Rolls Razor was in financial difficulties. It had declared a dividend that it had no means to pay. In the circumstances, lending money to Rolls Razor was high-risk. There was a possibility that,

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[77] Or if he intends to impose an obligation on himself to hold property for the benefit of another, then this will be interpreted as a self-declaration of trust.
[78] (1884) 27 Ch D 394.
[79] *Re Adams and the Kensington Vestry* (1884) 27 Ch D 394 (CA) 409 (Cotton LJ).
[80] *Re Lehman Brothers International (Europe) (In Administration)* [2010] EWHC 2914 (Ch) [225].
[81] *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 (HL) 580; also see *Carreras Rothmans Ltd v Freeman Matthews Treasure Ltd* [1985] Ch 207 (Ch) 222: 'if the common intention is that property is transferred for a specific purpose and not so as to become the property of the transferee, the transferee cannot keep the property if for any reason that purpose cannot be fulfilled'.

between receiving the loan and applying it for the given purpose, Rolls Razor would financially collapse and would be unable to repay the loan to the lender under the contract. Quistclose's intention was to restrict the borrower's use of the funds and guarantee that if Rolls Razor entered liquidation before the money was applied for the purpose, the money would not become a part of the assets available for distribution in Rolls Razor's insolvency.[82] Instead, Quistclose intended itself to be able to recover the fund before any of Rolls Razor's other creditors were paid. This intended effect of the arrangement, 'to prevent the money from passing to the borrower's trustee in bankruptcy in the event of his insolvency',[83] could only be achieved through an express trust for the lender. As Chambers has said, 'restrictions on the use of money normally give rise to a trust'.[84] Therefore, Quistclose's intentions as manifested in the terms of the agreement were sufficient to create a trust, even though Quistclose had no knowledge of the trust concept, and creating a trust may not have crossed the parties' minds.

The consent-based analysis of the '*Quistclose* trust' can arguably be used to explain the decision of the House of Lords in *Twinsectra Ltd v Yardley*.[85] In *Twinsectra*, the loan was advanced to Sims to be used 'solely for the acquisition of property' on behalf of Yardley 'and for no other purpose'. Furthermore, it was agreed that the loan money was to be retained by Sims until it was applied for the acquisition of property. As the money could only be used for a specific purpose, and was thus not intended to be at the free disposal of the borrower,[86] the effect of the terms of the undertaking between the lender and Sims was that it placed Sims under an obligation to hold the property for the benefit of the lender (the '*Quistclose*' trust), and gave Sims a power to apply the money to acquire property on Yardley's behalf. As Lord Hoffmann explained,

> '*the effect of the undertaking* was to provide that the money in the Sims client account should remain Twinsectra's money until such time as it was applied for the acquisition of property in accordance with the undertaking. For example, if Mr Yardley went bankrupt before the money had been so applied, it would not have formed part of his estate… *The undertaking would have ensured* that Twinsectra could get it back. It follows that Sims held the money in *trust* for Twinsectra, but *subject to a power* to apply it by way of loan to Mr Yardley in accordance with the undertaking'.[87]

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[82] *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 (HL) 580B. The reason for restricting the use of the funds in this way was because if the money was applied for the given purpose, Rolls Razor would continue trading for a period of time; since a financier had agreed that if Rolls Razor could first find the sums to meet the declared dividend it would lend Rolls Razor £1,000,000. This would sustain the company for some time and hopefully ensure that the loan was repaid.
[83] *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164 [82].
[84] R Chambers, 'Restrictions on the Use of Money' in W Swadling (Ed), *The Quistclose Trust: Critical Essays* (Hart 2004) 97.
[85] *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164 [2] (Lord Slynn) [7] (Lord Steyn) [12]-[17] (Lord Hoffmann) [25] (Lord Hutton).
[86] *Ibid* [73]-[75] (Lord Millett).
[87] *Ibid* [13] (emphasis added).

Aspects of Lord Millett's judgment can also be interpreted as suggesting that the trust in *Twinsectra* was a consensual one which arose from the parties' undertaking. This is because Lord Millett said that whether a trust arose 'depends on the intention of the parties collected from the terms of the arrangement and the circumstances of the case'.[88]

3 Obstacles for the express trust analysis

Before delving into the details of how the *Quistclose* express trust operates, it is essential to address two major obstacles which arguably stand in the way of the express trust analysis. The first obstacle is whether Lord Wilberforce was correct to say that the evidence suggested Quistclose imposed a condition on the use of the loan, thereby preventing the money from being at the borrower's free disposal and creating a trust. Swadling argues that Lord Wilberforce erred in his interpretation of Quistclose's intentions, and criticises the express trust analysis of the *Quistclose* trust. According to Swadling, Quistclose's board meeting minutes suggest it was not a condition of the loan that it must be used solely for the purpose of enabling Rolls Razor to pay the dividend. Rather, it was merely the lender's motive that it be used for this end. He adds that even though Rolls Razor placed the money with Barclays and stated that the fund could only be used to discharge the dividend debt, this intent with regards to the loan could not be superimposed onto Quistclose.[89]

However, it is submitted that Swadling is incorrect. After the board meeting of the Quistclose company, where the decision to make the loan to Rolls Razor was made, Quistclose sent the following letter to Rolls Razor:

> 'Dear Sir, We are today forwarding a cheque for £209,719 8s. 6d. to Barclays Bank Ltd., City Office, for the credit of a special dividend account number 5 [sic]. This loan is being made to Rolls Razor Ltd. on the following conditions: (1) That it is used to pay the forthcoming dividend due on July 24 next. (2) That this dividend will be paid subject to the further finance required by Rolls Razor Ltd. being forthcoming by that time. In the event of these conditions not being fulfilled on or before July 24 the amount of £209,719 8s. 6d. is *immediately returnable to us*. Yours faithfully, M. G. Cass, Director.'[90]

This demonstrates that it was in fact a condition of the loan that it could only be used for the purpose of paying the dividend and that it was not intended to be used for any other purpose. Furthermore, as the lender knew that the borrower was facing financial difficulties, and thus made it a term of the loan

[88] *Ibid* [69].
[89] W Swadling, 'Orthodoxy' in W Swadling (Ed), *The Quistclose Trust: Critical Essays* (Hart 2004) 13.
[90] *Quistclose Investments Ltd v Rolls Razor Ltd* [1968] Ch 540 (CA) 550D-F (emphasis added).

that it was 'immediately returnable' in the event that it could not be applied for the purpose before July 24, liquidation being the only event that could prevent the purpose of the loan from being fulfilled, the only way this term of the loan arrangement- that the money must be returned if the purpose failed due to insolvency- could be effective was via an express trust. The letter from Quistclose therefore supports the view that Quistclose intended to ring-fence the loan monies by imposing a condition on the use of the loan. Importantly, not only was there evidence of a subjective intent to restrict the use of the money in this way, but as mentioned earlier above,[91] objectively there was sufficient evidence to support the position that a trust arose.

The second hurdle that needs to be overcome before an express trust can be recognised, is that for one to be a trustee of an express trust, one must accept the role of trusteeship. For Rolls Razor to have accepted its appointment as trustee, it must have been aware of the terms on which the loan was given. It is argued that Rolls Razor was aware of the trust terms *when it received the loan*. It had therefore accepted the trust terms before the liquidation. There are two ways of reaching this conclusion. First, John Bloom was the owner of the lending company, Quistclose Investments Ltd. Bloom was also the managing director, chairman and largest shareholder of Rolls Razor Ltd. A director is an agent of the company, and the knowledge of a director is taken to be the knowledge of the company.[92] Since Bloom was the director responsible for **both** Quistclose making the loan, and the acceptance of the loan by Rolls Razor, the conditions on which Bloom made the loan can be said to be have been known by the latter company. As Rolls Razor thus knew the conditions on which the loan was being received, it thus accepted the role of trusteeship upon receipt. Second, the abovementioned letter from Quistclose, which stated the conditions of the loan, was received by Rolls on July 17- the day that it passed a resolution to wind up the company. The minutes of Rolls Razor's board meeting on July 17 suggest that Rolls Razor had not agreed to condition (2) of the loan.[93] But in a later board meeting on July 20, Rolls Razor 'accepted' that the money was lent on the conditions stated in the letter:

> 'It was… accepted by the board that this payment to the company was made as part of a continuing negotiation with no intention that the company should retain the moneys if the relevant conditions were not satisfied and the negotiations did not fructify'.[94]

The question is whether Rolls Razor's 'acceptance' of the terms of the loan on July 20, days after receipt of the loan and after the winding up resolution was passed, sufficed as an acceptance of the role of trusteeship. To find the answer, one must turn to the decision of *Mallott v Wilson*.[95] In *Mallott*, the settlor transferred property to Carr to be held on specified trusts. Carr never accepted the trust and did

[91] See text at fns 80-84 above.
[92] *Petrodel Resources Ltd v Prest* [2013] UKSC 34, [2013] 2 AC 415.
[93] *Quistclose Investments Ltd v Rolls Razor Ltd* [1968] Ch 540 (CA) 550F (Harman LJ).
[94] *Ibid* 551A-B (Harman LJ).
[95] *Mallott v Wilson* [1903] 2 Ch 494 (Ch).

not execute the settlement, and later disclaimed the trusts. The settlor then tried to create another trust of the same property, and later died. It was held that the second trust was not effective. With regards to the first trust, Bryne J said:

> 'that the trust was really created, and that the fact that the trustee subsequently disclaimed did not destroy the trust'.[96]

So if property is transferred with a clear expressed intention that it is to be held on trust, the failure of the trustee to accept does not prevent the trust from coming into existence. This is further illustrated by the case of *Jones v Jones*,[97] which Bryne J referred to in his judgment.[98] Jones had a power of appointment over certain property and appointed Calder to take the property on certain trusts.[99] The deed was signed, sealed and delivered by Jones, but was not communicated to or executed by Calder. Years later, Calder discovered the deed and trusts on which he was to hold the property. However, he refused to take up the role of trusteeship. Discussing the *Jones* case in *Mallott*, Bryne J stated that 'this settlement was valid upon the face of it, and was believed to be such by the settlor up to the time of his death, though he never communicated the trust to the person named as trustee'.[100] Applying the principles from these cases to *Quistclose*, even if Rolls Razor did not accept the terms of the trust, when the money was received into Rolls' bank account an express trust in favour of the lender nonetheless arose.[101] This explains why the lender was able to recover the loan money from the bank.

4 Distinguishing *Quistclose* from everyday debtor-creditor relationships

Usually, when a lender loans money to a borrower for a purpose, the borrower becomes the absolute beneficial owner of the fund. The lender is a creditor, and only has a personal contractual right against the borrower to be repaid the loan plus interest.[102] This was explained by Lord Millett in *Twinsectra*,

> 'A lender will often inquire into the purpose for which a loan is sought in order to decide whether he would be justified in making it. He may be said to lend the money for the purpose

[96] *Ibid* 502-503.
[97] (1874) WN 190.
[98] *Mallott v Wilson* [1903] 2 Ch 494 (Ch) 503-504.
[99] *Jones v Jones* (1874) WN 190.
[100] *Mallott v Wilson* [1903] 2 Ch 494 (Ch) 503-504.
[101] At this point, unaware of the trust, the trustee would be under no obligations or duties with regards to the trust property. Once Rolls Razor became aware of the trust terms and accepted them on July 20, the company would then become subject to trust obligations.
[102] He retains no property rights in the money, which now belongs legally and beneficially to the borrower. If the borrower breaches the contract and uses the money for a purpose other than the one it was given for, the lender is limited to a breach of contract claim against him. As the lender's property rights in the loan are extinguished when the money is given to the borrower, when the borrower breaches the loan contract, the lender cannot make personal or proprietary claims against third parties who have received the funds.

> in question, but this is not enough to create a trust… Similarly payments in advance for goods or services are paid for a particular purpose, but such payments do not ordinarily create a trust'.[103]

The consent-based analysis of *Quistclose* explains why not all contractual relationships give rise to a trust. For a *Quistclose* express trust to be created alongside the contract, the money must have been given for a 'specific purpose'.[104] This precludes the money from being at the recipient's 'free disposal',[105] as one's 'freedom to dispose of the money is necessarily excluded by an arrangement that the money shall be used *exclusively* for the stated purpose'.[106] A further indicator that the money is not the recipient's to use freely, is that the lender requires that the money is kept in a separate bank account.[107] This is because the separate account shows that the money is not to be mixed with the recipient's own, which means that it is not intended to be used to meet the recipient's daily outgoings (i.e. not to be used as part of cashflow), and that it can only be applied for the purpose that it was given for.

In contrast to situations where a *Quistclose* trust arises, in other situations where a payer has specified the purpose of a contractual payment, he does not expect the recipient to keep the money separate until it is applied for the purpose. This is because the payer does not intend for the exact notes and coins paid to be used to pursue the agreed end. Rather, since there is no ring-fenced trust, the recipient is free to use any funds to achieve the purpose. So for payments made under everyday sale of goods contracts, 'the money is intended to be at the free disposal of the supplier and may be used as part of his cashflow'.[108] This explains why the contractual relationship in *Re Goldcorp Exchange Ltd* was not sufficient to give rise to an express trust of the purchase monies paid under the contract.[109] The indicators of an express trust were not present in *Goldcorp*, because 'there was nothing in the express agreement to require, and nothing in their Lordships' view can be implied, which constrained in any way the company's freedom to spend the purchase money as it chose'.[110] Importantly, the decision in *Goldcorp* demonstrates that the recognition of an express trust in some commercial arrangements does not lead the law down the path of recognising trusts in everyday debtor-creditor relationships; the trust has a limited role in the commercial world. Therefore, the concern expressed by their Lordships in *Westdeutsche Landesbank v Islington Borough Council*, that the 'importation into commercial law of

[103] *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164 [73].
[104] *Ibid* [68]; *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 (HL) 580.
[105] *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164 [73]-[74] (Lord Millett).
[106] *Ibid* [74].
[107] *Ibid* [83], [95].
[108] *Ibid* [73].
[109] *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 (PC).
[110] *Ibid* 101; P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 195.

equitable principles' is 'inconsistent with the certainty and speed which are essential requirements for the orderly conduct of business affairs', is misconceived.[111]

4 Express trust with a power

This section will explore the *Quistclose* trust in more detail. The *Quistclose* trust has two key characteristics: (i) it is an express trust for the provider of the funds which springs into existence from the moment of the recipient's receipt, and (ii) the trustee has a power to apply the fund in accordance with the provider's instructions. As the trustee has a 'power', the trustee can choose whether or not he wants to carry out the instructions given by the provider of the fund. In contrast, if the trustee had a 'duty', then the provider's instructions would be mandatory for the trustee to perform. This would not be a *Quistclose* trust.[112] One should note that there are two other variations of the express trust which arises when money is given for an exclusive purpose, and these will be discussed later in this chapter.[113] It will now be discussed what the rights of the provider and recipient of a fund affected by a *Quistclose* trust are while the purpose is capable of being fulfilled, when the purpose is fulfilled, and when the purpose fails.

1 While purpose capable of being fulfilled

When A is the beneficiary of trust property held by B under a *Quistclose* trust, it is important to know what rights A and B have pending the application of the fund for the given purpose: whether A can compel B to apply the fund for the purpose agreed, what rights A has against B if the latter misapplies the money, and whether A can revoke the mandate given to B and recover the funds while the purpose is still capable of being fulfilled.

1 Right to compel application of fund

When money has been given for a specific purpose, whether the lender can compel the trustee to apply the money in accordance with the lender's instructions depends on whether the trustee has a power or duty to apply the money. A trustee who has a power is not under a duty to distribute the trust property. He is at liberty to exercise the power and use the money for the purpose it was provided. Therefore, if the trustees in *Quistclose* and *Twinsectra* had a power to apply the funds, the lenders could not respectively compel the trustees to pay the declared dividend and acquire property on behalf of their

[111] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) 704G-H.
[112] See section 5 on 'Other case law on trusts for specific purposes' below which discusses the cases where money is given on an express trust and the recipient has a duty to apply the funds, as opposed to a power.
[113] *Ibid.*

client. In contrast, if for instance the lender's instructions in *Quistclose* imposed a duty on Rolls Razor to distribute the loan to the shareholders in the form of dividend payments, the lender could compel Rolls Razor to apply the fund to this end. Furthermore, if this obligation was not performed, it would give the lender a claim for breach of contract against Rolls Razor.[114]

A trust with a power analysis of the *Quistclose* trust is reflected in Lord Hoffmann's reasoning in *Twinsectra*, as he said that 'Sims held the money in *trust* for Twinsectra, but subject to a *power* to apply it by way of loan to Mr Yardley in accordance with the undertaking'.[115] The undertaking stated that the loan must be 'utilised solely for the acquisition of property on behalf of our client and for no other purpose'. The power was sufficiently certain and therefore valid. This is because, citing *Re Baden's Deed Trusts (No.1)*,[116] Lord Hoffmann said that it was possible to say whether 'a given application of the money does or does not fall within its terms'.[117] The House of Lords did not, however, provide any guidance as to when a borrower has a power (as opposed to a duty) to apply money in accordance with a lender's instructions. Lord Millett stated that:

> 'whether the borrower is obliged to apply the money for the stated purpose or merely at liberty to do so… must depend on the circumstances of the particular case'.[118]

The answer can however be found in the extra-judicial works of Millett J, as he then was. Writing in the *Law Quarterly Review* in 1985, he said that one must consider each case individually and identify 'whether [the lender] has an interest, separate and distinct from that of [the borrower], in seeing that the primary trust is carried out'.[119] If the lender does, then the borrower is under a duty to apply the funds. The lender in *Quistclose* had no specific interest in seeing that Rolls Razor's shareholders were paid,[120] and therefore no vested commercial interest in enforcing payment of the dividend. This is because it made no difference to the lender whether Rolls Razor chose to pay the dividend or not. Regardless of whether the money was applied for the purpose, the lender's commercial objectives, to recover the loan plus interest, could still be achieved. The lender's intention was 'to benefit himself by furthering some private or commercial interest of his own'.[121] Paying the dividend to the shareholders was only in Rolls Razor's commercial interest, as a 'failure to pay the dividend, which had been approved by the shareholders, would cause a loss of confidence and almost certainly drive the company into liquidation'.[122] This indicates that the lender never intended to impose an obligation on the trustee to

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[114] J Penner, 'Lord Millett's Analysis' in W. Swadling (ed), *The Quistclose Trust: Critical Essays* (Hart 2004).
[115] *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164 [13].
[116] *Re Baden's Deed Trusts (No.1)* [1971] AC 424 (HL).
[117] *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164 [16] (Lord Hoffmann), also see [101] (Lord Millett).
[118] *Ibid* [100].
[119] P Millett, 'The *Quistclose* Trust: who can enforce it?' (1985) 101 LQR 269, 284.
[120] *Ibid*.
[121] P Millett, 'The *Quistclose* Trust: who can enforce it?' (1985) 101 LQR 269, 290.
[122] *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164 [74] (Lord Millett).

apply the money for the payment of the dividend. Therefore, a 'power construction' is consistent with the intentions of the contracting parties and explains why Rolls Razor was at liberty to apply the money for the purpose. Similarly, in *Twinsectra* it was in Sims' rather than the lender's commercial interest to utilise the loan to acquire property on behalf of Yardley. The reason is that Sims' failure to acquire the property would strain his relationship with his client Yardley, with the consequence that he would receive less or no legal work from this client in the future. Consequently, the trustee in *Twinsectra* did not have a duty to apply the fund.[123] Since the undertaking between the lender and Sims did not impose an obligation on Sims to apply the loan on behalf of Yardley to acquire properties, Sims only had a power to use the money for the designated purpose.

2 Right to restrain misuse

When the borrower has a power to apply the funds for the specified purpose, although the lender does not have a positive right to compel the trustee use the money for this end, the lender has a right to prevent misapplication of the fund.[124] Before or after the purpose fails, if the trustee applies the money in a manner that is inconsistent with the lender's instructions, remedies are available to the lender for breach of trust and breach of contract; since the restrictions on the borrower's use of the loan originate from both the contract and the trust.

3 Right to revoke

Before exploring whether the lender can revoke the power while the purpose is still capable of fulfilment, it is important to look at why the lender would want to do so. Let's look at this hypothetically in the context of the *Barclays Bank v Quistclose* case. Two possible situations in which Quistclose may have wanted to terminate Rolls Razor's mandate pending application of the money are: (i) if Quistclose found itself in urgent need of cash, and demanding the trust fund from Rolls Razor was the speediest way of getting hold of the necessary funds. Or (ii) if after the loan was given to Rolls Razor, but before the dividend was paid, it came to the lender's attention that even if the money was applied for the purpose, the borrower's dire financial situation would nevertheless result in its liquidation. In this instance, it would be in the lender's commercial interest to demand an early return of the loan. This is because as will be discussed later,[125] once the money is applied for the given purpose the lender's equitable interest in the loan is extinguished, leaving the lender with a personal contractual right to

[123] R Chambers, 'Restrictions on the Use of Money' in W Swadling (Ed), *The Quistclose Trust: Critical Essays* (Hart Publishing 2004) 85.
[124] P Millett, 'The *Quistclose* Trust: who can enforce it?' (1985) 101 LQR 269, 291; R Chambers, *Resulting Trusts* (OUP 1997) 74.
[125] See text to fn 137 below.

recover. It follows that if the borrower in *Quistclose* applied the money for the given purpose, but then entered liquidation, it is unlikely that the lender would fully recover the debt. Hence if the lender became aware that the borrower's liquidation was on the horizon, the sensible course of action to take would be to demand a return of the loan before it was applied for the payment of the declared dividend, as opposed to taking the risk of non-recovery in the liquidation by allowing the borrower to use the money. It is therefore in the lender's commercial interest that the loan be revocable.

There are differing views on whether the lender in a *Quistclose* relationship can revoke the trustee's mandate to apply the funds. In 1985, Millett J in his extra-judicial writings stated that 'pending the actual application of the fund by [the trustee], [the lender's] directions would normally be revocable by him',[126] unless there is a 'contract with [the trustee] not to revoke [the directions] without [the trustee's] consent'.[127] He argued that in the *Quistclose* case, there was no express contractual term preventing revocation, and so Rolls Razor's power was 'revocable by [Quistclose] at any time'.[128] Glister goes even further. He says that even if the lender has *promised not to revoke* the power, the lender can still terminate the arrangement while the purpose is capable of fulfilment.[129] This is also the view of Chambers who says that, if the lender was to be regarded as the beneficiary of the trust, it is difficult to imagine why he would not be able to revoke the trustee's power to pay the third party.[130]

However, the preferable stance is the one later taken by Lord Millett in *Twinsectra*, where he adopted a more flexible approach to when the trustee's mandate can be revoked:

> 'whether the lender can countermand the borrower's mandate while it is still capable of being carried out, must depend on the circumstances of the particular case'.[131]

Unfortunately, neither Lord Millett nor the rest of their Lordships expanded on this. It is submitted that in *Quistclose* and *Twinsectra*, the contract was the source of the trust.[132] Consequently, if there was an express or implied term in the contract to the effect that the lender cannot revoke, to protect the borrower's autonomy the lender would not have a right to recall the trust property before the purpose failed. This is because it is important to protect the recipient's security of receipt; his ability to plan his affairs in relation to the property that he has received.[133]

In both *Quistclose* and *Twinsectra*, there was nothing in the parties' agreement which stated that the lender could not ask for the money to be returned before it was used to acquire property on the client's

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[126] P Millett, 'The *Quistclose* Trust: who can enforce it?' (1985) 101 LQR 269, 285.
[127] *Ibid* 291.
[128] *Ibid* 284.
[129] J Glister, 'The nature of *Quistclose* trusts: classification and reconciliation' (2004) 63 CLJ 632, 649.
[130] R Chambers, 'Restrictions on the Use of Money' in W Swadling (ed), *The Quistclose Trust: Critical Essays* (Hart 2004) 85.
[131] *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164 [100] (Lord Millett).
[132] R Chambers, 'Restrictions on the Use of Money' in W Swadling (ed), *The Quistclose Trust: Critical Essays* (Hart 2004) 86.
[133] See text at fns 74-76 in ch 2.

behalf. Nonetheless, this author agrees with Birks that there was an implied term not to recall the legal title,[134] though note that an implied term not to revoke does not in practice prevent the lender from making a revocation.

In *Quistclose* and *Twinsectra*, the money had been given on a certain basis, and one which the transferor and recipient had co-ordinated and planned together. The lenders lent the money knowing that it was urgently required by the borrowers, and the borrowers received the loan on the basis that they would have the opportunity to use the fund for the specified purpose. As the borrowers planned their commercial activities on the basis that the money they had received would be available for them to use in accordance with the agreed understanding, if the lenders then revoked the loan while the purpose was still capable of being fulfilled, the borrowers' security of receipt would be undermined. Thus to protect the recipient's autonomy, the lenders' *Saunders v Vautier* right was 'fettered by contract'[135] until the purpose failed.[136] The lenders were not entitled to revoke the loan while the purpose was still capable of being fulfilled.

2 Purpose fulfilled

When the borrower carries out the purpose, the lender's equitable interest in the fund is extinguished. This was explained by Lord Wilberforce in *Barclays Bank v Quistclose*:

> 'when the purpose has been carried out (i.e., the debt paid) the lender has his remedy against the borrower in debt'.[137]

Consequently, if Rolls Razor had used the money to pay the dividend, the lender would have become Rolls Razor's creditor. It would have a contractual and therefore personal right against Rolls Razor to be repaid the loan plus interest. If after paying the shareholders, Rolls Razor entered liquidation, the lender would be in the same position as Rolls Razor's other unsecured creditors, as there would no longer be a fund in which the lender had proprietary rights.

3 Failure of purpose

[134] P Birks, 'Retrieving Tied Money' in W Swadling (ed), *The Quistclose Trust: Critical Essays* (Hart 2004) 126; Chambers also says that the loan was not revocable. R Chambers, *Resulting Trusts* (OUP 1997) 74.
[135] P Birks, 'Retrieving Tied Money' in W. Swadling (ed), *The Quistclose Trust: Critical Essays* (Hart 2004) 126.
[136] The *Saunders v Vautier* right in the context of Quistclose express trusts is discussed further at text to fns 136-138 in ch 4.
[137] *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 (HL) 581H.

In *Quistclose*, as the money was lent for the exclusive purpose of paying the dividend to keep Rolls Razor afloat, as Lord Wilberforce explained, 'if, for any reason, the dividend could not be paid, the money was to be returned to the respondents: the word 'only' or 'exclusively' can have no other meaning or effect'.[138] When Rolls Razor entered liquidation, the purpose thus failed. As the trust term could not be carried out, this caused Rolls Razor's power to lapse. It no longer had any authority to use the funds. Rolls Razor continued to hold the chose in action against the bank on an express trust for the lender, but the extinction of the power rendered it a bare trustee. The lender's right to the trust property was now unfettered. Since the bank had notice of the trust when it exercised its rights of set-off, the bank could not take the fund free of the trust. Quistclose could thus recover the money from the bank by exercising its *Saunders v Vautier* right to compel a transfer of the legal title to the money to itself. In *Twinsectra*, the purpose of the fund was that it should be used to acquire property. This purpose failed when the money was applied in pursuit of other purposes in breach of trust.

Under the analysis proposed in this chapter, in both *Quistclose* and *Twinsectra* there was only one trust throughout. Before the purpose failed, the borrower held the fund on an express trust for the lender, and had a power to apply it for the purpose. After the failure, the borrower continued to hold the money on the same trust for the lender, but now without a mandate to apply the money.[139] It follows that Lord Wilberforce erred in *Quistclose* when he said that the failure of the purpose caused a new trust to arise in favour of the lender.[140]

5 Other case law on trusts for specific purposes

This section will discuss two other groups of cases. The first group consists of cases where a fund was provided for the exclusive purpose of marriage, and upon the marriage not having taken place, it was held that the provider could recover the money. This can be explained on the basis that, like in *Quistclose*, since the money was given for a specific purpose, there was an express trust for the provider of the funds from the outset. This is because when the money was paid the settlor's expressed intention indicated that he intended to retain an element of the beneficial interest in the transferred property. Since there was an-identifiable beneficiary of the equitable proprietary right, the arrangement took effect in equity. The consequence of this is that it allowed the settlor, when the condition of marriage was not fulfilled, to recall the fund by exercising his *Saunders v Vautier* right.

The second group of cases are those where money was provided for example, for the purposes of maintenance and education, and the purpose of the fund was fulfilled leaving a surplus. In some of these cases, the court held that the surplus could be recovered by the provider(s) of the fund under a trust of

[138] *Ibid* 580.
[139] *Twinsectra Ltd v Yardley* [2002] 2 AC 164 (HL) [100] (Lord Millett).
[140] *Ibid* 582.

the surplus of which they were beneficiaries. In others, it was held that the excess funds were a gift to the beneficiaries of the purpose. It will be demonstrated that in all these cases, either the reasoning or the outcome was incorrect. This is because there was no causative event which could give rise to a trust for the provider, and neither was there any evidence to suggest that the provider of the fund intended to make an absolute gift of the surplus to the purpose beneficiaries. The first reason is that in none of the cases did the providers of the fund express an intention sufficient to create an express trust in their own favour. The second reason is that there was no impossibility and thus no proprietary restitution, and so the outcome in these cases cannot be explained on the ground that there was a resulting trust for the provider of the fund which enabled him to recover the money. The third reason is that, in the cases where the excess funds were said to be a gift to the purpose beneficiaries, in none of them was it the providers' intention that the surplus funds should belong absolutely to these individuals in these circumstances. It will be argued that in cases where the surplus was returned to the provider, although the reasoning in these cases was incorrect, the outcome can be justified on the basis that the provider of the fund had a personal claim in unjust enrichment against the trustee. But in those cases where the surplus funds were given to the purpose beneficiaries, the outcome cannot be justified and it is submitted that this group of cases were wrongly decided.

1 Money given on the condition of marriage

In these cases, money was given on the condition that the intended beneficiaries must get married before they can benefit from the fund. The only difference between the express trust arrangement in these cases and the *Quistclose* trust discussed earlier in this chapter is that, in contrast to *Quistclose*, the trustees of the funds *had* to apply the property in accordance with the purpose, and could be compelled to do so if the intended beneficiaries of the fund fulfilled the condition of marriage, as opposed to in *Quistclose* arrangements where the trustees have a choice whether or not they want to do so. Consequently, the arrangement takes effect in the form of an express trust for the lender, with the trustee having a duty, rather than a power like for the *Quistclose* trust, to apply the money in line with the trust purpose.

The key case illustrating this is *Re Ames*' *Settlement*.[141] The settlor transferred money to trustees for the specific purpose of giving it to Miss Hamilton and John Ames if they got married, and then for the married couple's future children. As the settlor's terms of the transfer had specified that the money was given exclusively 'in consideration of the said intended marriage', by implication this meant that it was intended that if the marriage did not take place, the couple should not receive the funds. Whereas if the couple's marriage was solemnized, as the couple would have satisfied the condition for receiving the money, they could compel the trustees to carry out their duties in relation to the fund. However, since the money was given for a particular purpose, and was therefore not to be used for any other purpose,

[141] *Re Ames' Settlement* [1946] Ch 217 (Ch).

by process of interpretation, the settlor intended to retain the proprietary interest until the condition of marriage was fulfilled. Therefore, pending the application of the money to this end the equitable interest was not in suspense; the trustees held the fund on an express trust for the settlor. Eighteen years later, the marriage between the couple was declared void ab initio; in the eyes of the law it had never taken place. Consequently, the purpose of the fund failed, and the trustees no longer had a right to distribute the monies. As a result, the couple's next of kin could not claim under the marriage settlement. Instead, the settlor's estate had an unfettered right to the property under the existing express trust in the settlor's favour.

Similarly, there is the case of *Essery v Cowlard*.[142] A settlement declared that a quantity of stock belonging to the intended wife was to be transferred by her to two trustees, and upon the solemnisation of the intended marriage was to be held for the benefit of the intended wife for life, after her death for the intended husband for life, and then upon his death for the children of the intended marriage. The couple did not marry but co-habited and had three children. The claimants- the intended wife and intended husband- commenced an action against the trustees of the settlement, claiming that the wife was entitled to the stock and the future income from it. The reason for commencing this action was that, in the absence of marriage, the wife was not entitled to the property under the settlement. Hence on the facts the property was only accessible to her if she could reclaim the stock as settlor, or if she could establish that there was a trust of the stock of which she was the beneficiary. It was held that as 'the settlement was executed with reference to the marriage which was then contemplated by the parties',[143] since the marriage never took place, the female claimant was entitled to the trust fund.[144] This can be explained on the basis that the money was given for the specific purpose of marriage. When the purpose failed, like in *Re Ames'* settlement, this gave the settlor- the female claimant- an unfettered right to the settlement property.

2 Case law on surplus funds

Moving on from the cases where money was given for the specific purpose of marriage, this section explores cases where money was given for instance, for the purposes of maintenance and education, and where the purpose was fulfilled leaving an unapplied balance. In some of these cases, it was held that the provider of the fund was able to recover the surplus property under a trust. In others, the surplus was held to be a gift to the beneficiaries of the purpose. As to what follows, it will be argued that all of these cases were wrongly decided. First, although the money was provided for a purpose, it had not been given exclusively for that purpose. It was therefore not ring-fenced. As a result, there was no express trust for the provider of the fund. Rather, when the purpose was fulfilled leaving a surplus, it

[142] *Essery v Cowlard* (1884) 26 Ch D 191 (Ch).
[143] *Ibid* 193.
[144] *Ibid.*

belonged absolutely to the holder of the legal title to the surplus fund subject to the provider of the fund's personal claim for restitution. Second, the provider intended to enrich only the purpose beneficiaries, and only until the purpose was complete. It follows that there was no intention to make a gift of the surplus funds to the purpose beneficiaries, or to the fund trustees.[145] The retention of the surplus by either of these parties would thus cause them to be unjustly enriched at the expense of the provider of the fund, and the enrichee would be under an obligation to make restitution of the surplus to the provider, rather than have an absolute right to the unapplied balance as was held in some of these cases. Importantly, the provider's claim to the surplus would be personal only, as opposed to proprietary. This is because when the provider gave the money to the trustees to use for the benefit of the intended beneficiaries of the purpose, in all the cases, at the time of the trustees' receipt the purpose the money was provided for was possible to carry out. As there was no impossibility, there was no proprietary restitution in the form of a resulting trust for the provider of the fund.

One such case where a surplus fund was said to be held on trust for the donors and could thus be recovered by them is *Re Abbott Trust Funds*,[146] but there are also other cases which support this proposition.[147] In *Re Abbott*, a trust was set up for the purpose of enabling two disabled sisters 'to reside in lodgings in Cambridge' and 'to provide for the very moderate wants of these two ladies'. There were many subscribers to the Abbott fund. The money collected was applied by the two trustees of the fund in accordance with the purpose of the donations. When the sisters died, a large surplus remained. This raised the question of who was entitled to the unapplied balance: the subscribers or the sisters' estate. Stirling J concluded that the trustees held the surplus fund on a trust for the subscribers.

The trust in *Abbot* was not an express trust. When the subscribers made the donations, they had no intention to retain any control of the funds. They intended to part with their property in the money absolutely, and so there was no intention to create an express trust. The subscribers therefore did not retain a proprietary interest in the donations and could not recover the surplus on the basis that it was held on an express trust for them.

Neither could the trust in *Abbott* be a resulting trust. The subscribers provided the money for the purpose of the maintenance of the two sisters, so only intended to enrich the sisters to the extent required for this purpose to be carried out. When the sisters died, as the purpose was exhausted the Abbott fund trustees no longer had a reason to retain the surplus, and nor was there was any basis for the sisters' estate to receive the unapplied balance. As Megarry VC explained in *Re Osoba*:

[145] J Mee, 'The Past, Present, and Future of Resulting Trusts' (2017) 70 CLP 189.
[146] *Re Abbott Fund Trusts* [1900] 2 Ch 326 (Ch).
[147] *Re Sanderson's Trust* (1857) 3 K & J 497; *Re Gillingham Bus Disaster Fund* [1959] Ch 62 (CA) where surpluses were held on trust for the providers of the fund.

> 'no subscriber, touched by their plight, could very well be expected to have intended any surplus to pass under the wills or intestacies of the ladies to people who might well be totally unknown to the subscribers'.[148]

Consequently, the trustees of the fund were unjustly enriched, and the subscribers were entitled to restitution. The restitutionary response was personal, as opposed to proprietary. This is because the subscribers provided the money for the purpose of maintaining the sisters. When the trustees of the fund received the monies, as the sisters were alive, this purpose was capable of being carried out. Upon the death of both the sisters, this purpose was no longer possible. Since this was a subsequent impossibility, as there was a period of time between the trustees' receipt of the monies and death of the sisters where the purpose could be performed, the unjust enrichment could not give rise to proprietary restitution in the form of a resulting trust. The subscribers could recover their donations only on the basis of a personal claim in unjust enrichment, not via a trust as was held by Stirling J. It should be noted that it is also the view of Swadling that in cases such as this, to strip the transferee of his enrichment, the settlor should only have a personal claim in unjust enrichment for the value received.[149]

There is also the case of *Re Gillingham Bus Disaster Fund*.[150] Following a road accident in which a number of Royal Marine cadets were killed and injured, a trust fund was set up. Money was collected to pay for the care of the cadets who had been disabled and injured in the accident, the funeral expenses of those who had died, and to other causes in memory of those who lost their lives. A sum of nearly £9000 was raised. After £2368 was spent on funeral expenses and caring for the disabled, the injured cadets and the families of those who had died succeeded in obtaining full compensation from the bus company. Consequently, there was a large unspent balance of the trust fund and the question of who was entitled to the surplus then arose. Harman J concluded that the surplus was held on a trust for the donors. It is accepted that Harman J was right to hold that the surplus had to be returned to those who donated the funds. However, it is submitted that the donors recovered not because there was a trust in their favour. Like in *Re Abbott*, as the money was given for a purpose which was subsequently exhausted, the donors could only recover the funds by making a personal claim in unjust enrichment. It is important to note that in none of these cases was the trust determinative, as a personal claim would have achieve the same result.

Admittedly, in some instances where money has been given on trust for the purpose of maintenance and education, the courts have said that the surplus fund is not held on trust for the providers. Instead, it is a gift to the beneficiaries and thus belongs to the beneficiaries absolutely. An example is *Re Osoba*.[151] By will, the testator bequeathed to his second wife all his personal chattels so long as she was

[148] *Re Osoba* [1978] 1 WLR 791 (Ch) 795 (Megarry VC).
[149] W Swadling, 'Explaining Resulting Trusts' (2008) 124 LQR 72, 99.
[150] *Re Gillingham Bus Disaster Fund* [1959] Ch 62 (CA).
[151] *Re Osoba* [1979] 1 WLR 247 (CA).

resident in Nigeria. He also bequeathed to his wife the rents from the properties he was leasing in Nigeria 'for her maintenance and for the training of my daughter Abiola up to university grade and for the maintenance of my aged mother provided my wife is resident in Nigeria'. The residue of his estate was also left to his wife upon trust for this purpose. The testator's mother predeceased him. After the testator's death, the testator's second wife also died. Some years later, his daughter's university education was completed. The issue was who was entitled to the residue of the estate. It was held that the testator made an absolute gift to his mother, second wife and daughter and that the three of them had equal shares in the whole of the residue. Goff LJ said that where 'the purpose is that of maintenance or education, that is tantamount to a gift to the beneficiary and the purpose is accordingly disregarded'.[152] This was also the view of Kekewich J in *Re Andrew's Trust*.[153] In *Andrews,* it was held that after a fund for the purpose of educating a deceased clergyman's children had been applied to the extent that the fund's purpose was fulfilled, the surplus ought to be divided equally amongst the children, since one's education does not end when formal education ceases:

> '[Education must be construed] in the broadest possible sense, and not to consider the purpose exhausted because the children have attained such ages that education in the vulgar sense is no longer necessary'.[154]

According to these decisions, the donor intended to abandon his beneficial interest in the surplus when the purpose was fulfilled, leaving the beneficiary of the purpose with an unfettered and absolute right to the fund. These cases support the view that there should be no express trust where money is provided for maintenance and education. However, with all respect, the courts' decision in *Osoba* and *Andrews* that there was an absolute gift to the beneficiaries was contrary to the donor's intention in these cases. In *Osoba*, the settlor had stated that the money was provided for the daughter's education and maintenance up to university grade. There was no intention to benefit the daughter in any respect after her education was completed. Therefore, the court's decision in *Re Osoba* completely and unjustifiably disregarded the donor's intentions. The settlor's estate should have been entitled to personal restitution of the surplus fund.

6 Conclusion

This chapter demonstrated that when money is given for a specific non-charitable purpose, the recipient immediately holds the fund on an express trust for the provider of the funds subject to a power or duty

[152] *Ibid* 252 (Goff LJ), also p.255 (Buckley LJ).
[153] *Re Andrew's Trust* [1905] 2 Ch 48 (Ch).
[154] *Ibid* 53 (Kekewich J); also, see *Re Osoba* [1978] 1 WLR 791 (Ch) 794 where on this issue Megarry VC said that 'no judge who daily listens to the submissions of counsel would regard his education as having ended'.

to apply the money for the specific purpose. It was argued that the *Quistclose* trust, originating from the case of *Barclays Bank v Quistclose*, is one such example of an express trust for a purpose. Importantly, this chapter demonstrated that as the *Quistclose* trust is created by the consensual arrangement between the parties, it therefore cannot possibly be a resulting trust, as such trusts arise from the causative event of unjust enrichment.

Chapter 8 Conclusion

1 The approach

This thesis has demonstrated that an unjust enrichment can give rise to proprietary restitution. The original contribution that sets this thesis apart from the current literature is it proposes that the availability of proprietary restitution can be explained using the concept of impossibility. It argues that first, the claimant must establish that the defendant has been unjustly enriched. Second, that when the defendant received the enrichment the claimant's purpose for making the transfer must be impossible to carry out. Once both elements have been established, a resulting trust arises.

2 Birks' analysis

Although Professor Peter Birks formulated an unjust enrichment theory to explain when an unjust enrichment gives rise to proprietary restitution, this thesis has demonstrated that his initial failures of basis approach does not explain the cases. This is because in every case where a recipient is unjustly enriched from the moment of receipt, applying Birks' approach proprietary restitution should be available to the claimant. Consequently, all mistaken contractual and non-contractual payments would give rise to a trust of the monies paid, but this position is not reflected in the case law. On the other hand, when it is accepted that the foundations of proprietary restitution are based on the notion of impossibility, one can adequately reconcile the cases. The reason is the impossibility concept explains why not all initial unjust enrichments give rise to proprietary restitution.

Another problem with the initial failure of basis approach is that it did not provide a strong normative basis for proprietary restitution. Applying Birks' analysis, a claimant does not obtain the benefit of proprietary restitution simply by showing that the defendant was unjustly enriched; for a proprietary response to be available, the defendant must also not have had unrestricted beneficial ownership of the enrichment before the claimant's right to restitution arose. This requirement is satisfied, for instance, by showing that the defendant was unjustly enriched at the moment they received the enrichment. Since in this situation, there is no period of time where the enrichment was at the defendant's free disposal. However, Birks did not provide a justification for why this requirement was necessary for a proprietary response to be available. As a result, it is not clear why enrichments which are subsequently unjust, and where the defendant therefore had the enrichment at his free disposal for a period of time, cannot give rise to a resulting trust under his analysis. In contrast, the benefit of the impossibility analysis is it shows that the goal of autonomy protection explains when an enrichment is not at the free disposal of the unjustly enriched defendant and why this gives rise to a trust of the enrichment.

3 Autonomy as the normative basis

In this thesis, it was argued that property is a means through which individuals exercise their autonomy. Autonomy can be defined in terms of freedom, as it refers to one's freedom to choose and have their choices fulfilled. When an individual has the freedom to choose, it means he has a free choice as to what choice he pursues. Furthermore, that when he made his choice, he had a range of options available to him, and these differed in substance to the degree that the consequence of pursuing each option was not the same. Freedom to have choices fulfilled is also important for individual autonomy. This is because choices are made with the intention of achieving goals, and so having free choice would be meaningless if it could not also be carried through. Therefore, it is integral to freedom that an individual is free from factors, such as coercion, that would undermine his ability to make his own choices, and also that he is free from the circumstances that prevent his choice from being fulfilled.

Individuals exercise their autonomy through property. This is because when an individual owns property, he has the power to decide how the property should be dealt with. When a property owner makes a decision to carry out a particular action in relation to his property, he is making a choice with the aim of fulfilling a goal. Since property is the subject matter of choice and can be used by individuals to advance their goals and achieve their ends, private property therefore facilitates in the exercise of one's autonomy.

The law protects property through property rights, and thus protects individual autonomy. However, property rights do not protect an individual's freedom to objects absolutely. The consequence is that when an individual transfers his property to achieve a certain outcome, but this outcome is not realised, although the individual may have intended his property right to subsist in these circumstances as his freedom to have his choice fulfilled was compromised, the law of property may decide that his property right is nevertheless extinguished. This is because the law of property interprets an individual's intentions for making the property transfer objectively, thus overlooking the property owner's subjective intentions for the transfer. It was demonstrated that there are two reasons why adopting the objective standard for protecting autonomy is necessary in the property context. First, if every individual's freedoms were protected absolutely, in a situation where two parties try to claim the same *res*, neither party would be entitled to the property with the result that the freedoms of both parties would become meaningless. Second, by focusing on objective intent, it promotes security of receipt by disregarding motives and hidden purposes for a property transfer. This upholds autonomy because the law will not protect the property rights of a claimant who transferred property pursuant to a purpose that failed if the recipient never knew of, and therefore could not fulfil, the claimant's purpose.

In Chapter 3, it was shown that one way in which the law protects a property owner's autonomy is through the law of unjust enrichment. When an individual transfers his property in circumstances where

his intention to transfer was not freely formed, or pursuant to a purpose that fails, his autonomy is compromised. The law of unjust enrichment then intervenes to protect his property rights, either indirectly by giving the claimant a personal right to restitution, or directly by creating a new proprietary right in the transferred fund. For instance, when a claimant transfers property under compulsion, duress or undue influence, he has not freely chosen to make the transfer. The lack of free choice establishes that the defendant's enrichment is unjust. Consequently, the law protects the claimant's autonomy via a claim for restitution. The absence of freely formed intent also explains why restitution is available for ignorance cases. The ignorance unjust factor comes into play when the claimant's property has been taken away from him without his consent, and thus autonomy is relevant as the claimant had no choice over what to do with his property.[1]

In other cases, for example, mistaken payments and failures of consideration, the claimant's intent is freely formed; the claimant freely chose to make the transfer. But since the claimant only intended to enrich the recipient in the event that the purpose of the payment could be carried out, the recipient could only retain the value of the enrichment if the purpose was fulfilled. So when the claimant's intentions for making the transfer cannot be fulfilled, the claimant did not make an autonomous decision to enrich the recipient. The lack of intent fulfilment renders the defendant's enrichment unjust, and the law intervenes to protect the claimant's autonomy by giving him a right to restitution. This was illustrated in this thesis using the classic example of the mistaken payment of a non-existent debt. In this instance, although the payer is mistaken, his choice to make the payment is freely made. Nevertheless, as there is no debt to be discharged, the payer's intentions cannot be fulfilled. His autonomy is thus undermined. The law of unjust enrichment thus protects his property right by giving him a right to restitution of the fund.

This was followed by demonstrating that the autonomy concept determines the law's response to a defendant's unjust enrichment; whether it protects property indirectly via a personal right to restitution which takes the form of a personal claim for the value of property transferred, or directly via a proprietary right in the transferred fund. By drawing on case law, it was shown that when the recipient is unjustly enriched by property at the claimant's expense in circumstances where the claimant's objective purpose for the property transfer to the recipient is impossible from the outset, the claimant's autonomy is compromised to the extent that justifies proprietary restitution. This is because when a claimant's purpose for a transfer was never capable of being fulfilled, the claimant's intentions are completely defeated. There is thus no point in time where the defendant had a reason to retain the property beneficially, and so there is no justification to strictly enforce the law of property and bind the claimant to the transfer. Conversely, if the recipient is unjustly enriched, but there is a possibility at the time of receipt that the purpose of the transfer can be fulfilled, the recipient receives unrestricted

[1] The ignorance unjust factor was discussed at fns 119-122 in ch 6.

beneficial ownership of the enrichment. There is no trust. Instead, the claimant's property rights are protected obliquely by a claim for personal restitution.

4 Reconciling the case law

The thesis then illustrated how the impossibility analysis for proprietary restitution could be used to reconcile the case law.

1 Insolvency

> On Monday, A pays £2000 to B to build a fireplace for him on Friday. But on Wednesday, B becomes insolvent.

The impossibility analysis explains why there would be no proprietary response here. When B received the payment, the purpose of the payment, to build the fireplace, was capable of being performed. Therefore, a trust of the money could not arise. This is consistent with the case law. In *Re Goldcorp Exchange Ltd*,[2] customers paid the defendant company for the storage and delivery of gold bullion. Subsequently, the company entered into receivership and could not carry out delivery. The Privy Council held that there was no trust of the purchase monies. The outcome is explicable on the basis of impossibility. At the time the defendant received the payments, it was still capable of making deliveries of gold to its customers. As there was no impossibility, proprietary restitution was not available. In contrast, a trust arose due to the insolvency of the recipient in *Neste Oy v Lloyds Bank Plc*.[3] In *Neste Oy*, at the time that the claimant paid the agent to discharge the claimant's debts to third-party service providers, the agent had already ceased trading and appointed a receiver. The purpose of the claimant's payment was thus impossible to carry out. Consequently, a trust of the money arose.

The insolvency of the recipient was also a live issue in cases involving the so-called '*Quistclose* trust', which originates from the case of *Barclays Bank v Quistclose Investments Ltd*.[4] The '*Quistclose* trust' has typically been recognised when A makes a loan to B for a specific purpose with the effect that borrower holds the fund on an immediate trust for the lender subject to a power to apply the loan for the purpose that it was given for. Although the courts have classified this trust as a resulting trust, this thesis demonstrated that these trusts arise from the consensual arrangement between the parties. They are therefore express trusts rather than resulting trusts, as the latter arise in response to the causative event of unjust enrichment. This conclusion is significant as it explains why a trust can arise from the

[2] [1995] 1 AC 74 (PC).
[3] [1983] 2 Lloyd's Rep 658 (QBD).
[4] [1970] AC 567 (HL).

moment of the borrower's receipt of the loan monies, even though the lender's purpose for the loan is still possible to carry out at that time.

2 Fraud

> B asks A for £10,000 so that he can release his inheritance. In return for the money, B says that he will give A £30,000 from the inheritance which B will receive. A gives B the money. However, there was no such inheritance, and this was always known to B.

A's payment was made pursuant to an impossible purpose. Applying the analysis proposed in this thesis, when B received the £10,000, he would immediately hold the fund on trust for A. This is because there was no possibility of A receiving £30,000 from the inheritance fund, since no such fund existed. That fraud can cause an impossibility sufficient for proprietary restitution is supported by *Halley v Law Society*.[5] In *Halley*, the recipient obtained money by fraud from the payer. The payer had made this payment under the belief, which was induced by the recipient's fraudulent misrepresentations, that the money would be used to obtain bank instruments which would give the payer access to certain funds. This purpose was impossible from the outset, as it was not possible for funds to be released by the delivery of bank instruments.

It was explained in this thesis that a trust arising while a contract is still in place does not undermine the contract. When an enrichment is transferred under a contract which is impossible to perform from the outset, as there is no possibility of contractual performance, there is no reason for the defendant to retain the claimant's property. This is because when a claimant makes a contractual payment, he is transferring the money on the condition that the purpose of the payment was capable of being achieved. When the purpose is always impossible, the claimant's intentions are thus completely defeated. Since at no point in time does the defendant have a reason to retain the property beneficially, there is no justification to strictly enforce the law of property and bind the claimant to the transfer.[6] The consequence is that the defendant holds the money he has received on trust for the payer.

> B persuades A to invest in B's company. He tells A that the company has £100,000 of assets and that its yearly profits have been between £40,000 and £50,000 for the past three years. A purchases shares from B on this basis. However, B knew all along that all of the representations he made were false and that the true figures were a third of what he had stated to A.

[5] [2003] EWCA Civ 97, [2003] WTLR 845.
[6] See text at fns 92-94 in ch 4.

In this example, even though A's payments were fraudulently induced by B, and thus B was unjustly enriched on receipt of the sums, A's money would not be held on trust. A's payment was made for the purpose of purchasing shares in B's company. This purpose was capable of being carried out when B received the sums. Hence no trust could arise. That proprietary restitution would not be available in this instance can be illustrated by the case of *Nolan v Minerva*.[7] In *Minerva*, the claimants were fraudulently induced to invest money in return for shares in a German nursing home scheme. The fraud related to the terms on which the nursing homes were purchased, which in turn prevented the investment from making the expected returns. It was held that despite the fraud, the claimants' money was not held on trust. This outcome could be explained using the impossibility analysis. The claimants' purpose for the payments was to acquire shares in the nursing homes. These nursing homes were acquired as promised by the defendant's wholly owned subsidiary, and the claimants thus acquired the relevant shares in the scheme. As the purpose of the payments was possible to carry out when the defendant received the claimants' money, a trust could not arise.

3 Unknown purposes

The impossibility analysis also explains why, when a claimant transfers property to another and there is no evidence to indicate the basis on which the claimant intended the recipient to hold the property, a resulting trust arises. It was argued that although the claimant may have freely chosen to make the transfer, as the purpose for the transfer cannot be identified, it is not clear whether any aspect of the claimant's intentions were fulfilled when the defendant received the property. In this instance, the law presumes that the claimant's intentions were not fulfilled, and the defendant is therefore unjustly enriched. Furthermore, since the purpose of the transfer cannot be identified, equity takes the position that the purpose was impossible from the outset. It then intervenes to protect the claimant's autonomy, by safeguarding his property rights using the trust device from the moment the defendant receives the enrichment.[8]

4 Void contracts

This thesis demonstrated that in the same way the presence of a contract does not preclude the availability of proprietary restitution, a contract's invalidity has no bearing on whether a trust can arise in response to the unjust enrichment. In cases involving void swaps contracts, it was shown that contrary to the House of Lords' obiter dicta in *Westdeutsche Landesbank v Islington London Borough Council*,[9]

[7] [2014] JRC 078A (Jersey Royal Court).
[8] See text to fns 41-45 in ch 3.
[9] [1996] AC 669 (HL).

a trust should have been available on the basis of autonomy protection. This is because the claimants in the swaps cases paid the defendants with the intention that one of the parties to the swap would profit from the transaction. But there was no possibility of this happening for the reason that the court was always going to unwind the transactions due to policy reasons and not let either party to retain any benefits from the swaps.

By drawing on case law, it was shown that payments made under void contracts do not always give rise to a proprietary restitutionary response in the form of a trust of the monies. This was illustrated using the case of *Rover International Ltd v Cannon Film Sales Ltd*.[10] In *Rover*, the claimant made advance payments to a defendant under a contract that was void ab initio. The defendant was unjustly enriched. But since the payments were made in pursuit of a profit, and it was possible for the claimant to make a profit at the time the advance payments were made, there was no impossibility. As a result, there could be no trust of the monies paid under the void contract.

5 Payments of non-existent debts

> A pays £1 million to B to discharge a debt. He then pays B again a second time not realising that he has already made the payment.

This example reflects the facts of *Chase Manhattan v British-Israeli National Bank*,[11] where Goulding J held that the claimant's payment was held on trust. The outcome can be explained using the impossibility analysis. The claimant paid £1m for the purpose of discharging an obligation. However, as the obligation no longer existed the claimant's purpose was impossible to carry out. A trust therefore arose. This thesis demonstrated that the impossibility analysis is also capable of explaining the trust in *Angove's Pty Ltd v Bailey*[12] and *Ex parte James*.[13] In *Angove's*, the payers paid the defendant under the mistaken belief that they were under an obligation to pay the sums. As there was no such obligation, like in *Chase*, the purpose of the transfer was impossible, and the defendant held the money on trust for the payers. That proprietary restitution is available when a recipient is unjustly enriched by receipt of money which was paid to discharge a non-existent debt is not a recent phenomenon and has been recognised in English law since the nineteenth century. This is illustrated by the *Ex parte James* line of cases which were explored in Chapter 6 of this thesis.

> A owes B £10,000. In error, he pays B £12,000.

[10] [1989] 1 WLR 912 (CA).
[11] [1981] Ch 105 (Ch).
[12] [2016] UKSC 47, [2016] 1 WLR 3179.
[13] (1874) 9 Ch App 609.

In contrast to the previous example, where the obligation to pay does exist and the claimant in a single transfer pays more money than is owed, a proprietary claim is never available. This is because the claimant's purpose for the transfer is to discharge a debt, and although too much money has been paid, the payment is capable of discharging the obligation. The purpose is therefore possible at the moment of the defendant's receipt.[14] Therefore, proprietary restitution is not available for the mistaken overpayment.

6 Wrong recipient

> A makes a gift of £1000 to B rather than C. This is because A thinks that that she has not made a gift to B before, but that she has to C. Then A realises that she has already made a gift to B and that the gift should thus have been made to C.

As the law of property protects individual autonomy, there can only be a proprietary response when the objectively determined purpose of a transfer is impossible to fulfil.[15] The natural consequence of this is that mistaken gifts are less likely to attract a proprietary response. This is because when an individual makes a voluntary disposition, his motives for making the transfer cannot usually be objectively deduced. It follows that even where the transferor subjectively believes the purpose is impossible, it is not recognised as impossible for the purposes of proprietary restitution. This was illustrated in this thesis using the case of *Lady Hood of Avalon v Mackinnon*,[16] where to achieve equality between her two daughters the donor made a gift to her elder daughter. A deed was used to execute the gift, in which the elder daughter was named as the beneficiary of the appointment. However, the donor made this gift having forgotten that she had already appointed property to this daughter. The second appointment thus could not achieve the intended equality between her two children. Applying the impossibility analysis, the purpose of the transfer, deduced from the deed, was to make a gift to the elder daughter. This was both achievable and achieved by the irrevocable appointment to the same. The mother's intention that the gift should achieve equality between her two children was a subjective condition of the transfer, as it was not discoverable from the deed. Therefore, it was not recognised by equity as being a part of the purpose of the transfer. So although the gift could not achieve the intended equality, and the elder daughter was unjustly enriched from the outset, the impossibility of this motive for the gift could not give the donor the benefit of proprietary restitution.

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[14] The reluctance to apportion the amount transferred where overpayments are concerned (even though it should be noted that it was in the context of whether the defendant was a bona fide purchaser of the entire amount) is apparent in *Ilich v R* [1987] HCA 1, (1987) 162 CLR 110 [25] (Wilson and Dawson JJ): 'We do not think that it is possible to say that only the correct amount was paid for valuable consideration and that the amount of the overpayment passed hands for no consideration and hence as mere chattels rather than currency.'

[15] See ch 2 and ch 3.

[16] [1909] 1 Ch 476 (Ch).

> A wants to purchase goods online from company B. When he goes online, he ends up purchasing the goods for the same price from company C, thinking that C is B. By the time A realises his mistake, it is too late to return the goods. A is annoyed because he would have got a free gift if he had made the purchase from company B.

Since the payer paid the wrong seller, it looks like the payer's purpose for making the payment was impossible. However, A's objectively determined purpose was to purchase the relevant books. His motive for purchasing from the particular seller, company B, was ancillary to the transaction.[17] Therefore, when A could not receive a free gift, this did not defeat A's intention for the payment to company C.

In summary, the impossibility analysis explains why not all unjust enrichments are held on trust for the payer. Moreover, it resolves the difficult issue of when a contractual payment, made in circumstances in which the recipient is unjustly enriched from the moment of receipt, gives rise to a proprietary response.

[17] For further discussions of main and ancillary purposes, see sub-section 'Difficult cases' at fns 54-60 in ch 3. Cross reference to main/ ancillary discussions in chapter 3.

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