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Are banks winners from the madness that is the English law of "unjust enrichment"?

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A. Introduction

Just as Australia has been recovering from a bout of the "unjust enrichment" virus, which infected the law of restitution in many common law jurisdictions in the 1990s, the law of restitution in England and Wales has sadly gotten worse. The virus first fully presented itself in England in 1998 (there have been Continental variants) in *Banque Financière de la Cité v Parc (Battersea) Ltd.*[1] If the English let what has happened to their law of restitution jump species to the law of contract it would debilitate England as a centre for commercial law.

However, before revealing the pathology of "unjust enrichment", one should acknowledge in a paper prepared for an audience of banking lawyers that banks and other lenders in England have sometimes benefited from these English developments. "It is an ill wind", they say. But it is also said "beware what you wish for". A marker that their position might be precarious is that banks have been winners (unjustly enriched one might say) both as claimants and defendants. How could that be? Well, the problem is that unjust enrichment is so flawed a concept for solving restitutionary problems that it allows not only bad claims to succeed but also bad defences.

The basic change that has occurred in England can be explained in the following way. Before *Banque Financière*, it was generally necessary in a restitution claim for a claimant to show one of two things.[2] Either that the defendant had received the claimant's money or other property, or that the defendant had caused the claimant to perform, or to pay a third party to perform, services for it. These were not in themselves sufficient to mount a claim, but they were necessary. In fact, these alternative triggers of liability produced very different types of claim; the property one generally entailed strict liability, the services one not, though fault could be attenuated. The only thing the claims really had in common was that they resulted from something having gone off the rails between the parties, or in some case between the claimant and an earlier party in the chain of events. Restoration of position, or restitution, was being sought. But there is one other thing they had in common: in neither

[1] [1999] 1 AC 221, 227.

[2] Equitable contribution and recoupment need different explanations that are beyond the scope of this paper.

type of claim was it necessary for the claimant to show that the defendant had been enriched by what had happened.

After *Banque Financière*, it has become prima facie sufficient to show that something the claimant has done, perhaps for itself or for some third party, has causally enriched (increased the wealth of) the defendant. The trouble with this approach is that we enrich one another (economically as well as socially) all the time in our everyday lives without intending or wanting to. A prejudice against unwilled economic gain is an almost inevitable result of using unjust enrichment as the discrimen of the law of restitution, but it is a prejudice that is impossible to live with. Any containment will have to be left to "unjustness", a much vaguer concept (barely a concept at all) than is needed under the old methodology.

Before turning to look at some of the sad manifestations of the unjust enrichment virus, we should note two other things.

First, one of the major vectors of the transformation in the law has been the misuse of the concept of subrogation. This can be directly attributed to the *Banque Financière* case. Ignoring or overlooking *The Esso Bernicia*,[3] a decision of the House of Lords less than 10 years old, the Court fashioned for claimants a direct and aggressive unjust enrichment claim against a defendant which had neither received any of the claimant's money nor requested any services. In contrast, in *Esso Bernicia* the Court was emphatic, not too strong a word, that subrogation produced only an indirect claim. It remained necessary for the claimant to show that it had prima facie rights against the immediate recipient of the relevant money or requested services. Those rights could be contractual or restitutionary. It was those rights that justified the claimant taking over claims that the recipient had against the ultimate defendant. But the claimant got at the ultimate defendant *through* the intermediate party (who would usually need to be joined). Again, it was not necessary to show that the defendant was enriched; indeed to the extent that that mattered it was usually the immediate party that would be enriched if subrogation were not allowed. Happily, we shall see that the High Court of Australia, in *Bofinger v Kingsway Group Ltd*,[4] has expressly rejected the *Banque Financière* approach to subrogation.

Secondly, subrogation aside, under the old law of restitution the law of tracing was needed if the claimant was to reach beyond the immediate recipient of its money to later recipients of that money or its exchange products. Only the strongest types of restitutionary complaint (mainly

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[3] *Esso Petroleum Co Ltd v Hall Russell & Co Ltd, "Esso Bernicia"* [1989] AC 643.

[4] [2009] HCA 44, (2009) 239 CLR 269 [97]. See too M Conaglen and P Turner, 'Subrogation, Accounting and Unjust Enrichment' [2010] CLJ 30; and M Leeming, 'Subrogation, Equity and Unjust Enrichment' in J Glister and P Ridge (eds), *Fault Lines in Equity* (Hart Publishing 2012) Ch 2.

those where the claimant's money had been misappropriated) were afforded this privilege. It remained a right based on the defendant's receipt of money, not on enrichment. Now in England this constraint has also been lifted in *Relfo Ltd v Varsani*,[5] as we shall see.

In what follows six of the recent English cases have been selected from a larger pool of cases. Other cases, and a proffered exposition of the theoretical issues involved in the area, will be found in a recent contribution by the author to *Current Legal Problems* to be published later in 2016.[6] One should not give up hope that England may yet recover its restitutionary health. Opportunities for it to start to do so are currently in the Supreme Court lists.[7]

B. The recent cases from England and Wales

TFL Management Services Ltd v Lloyds TSB Bank Plc

TFL Management Services Ltd v Lloyds TSB Bank Plc[8] is a case where in fact a bank became prey to the unjust enrichment virus. But the claimant and the bank were both assignees of debts, so were both financiers of a sort. The claim arose in the following way. The claimant in earlier litigation against a totally different party, X, spent some £500,000 on lawyers trying to recover commissions alleged to be owing by X to the the claimant's assignor, only to receive a ruling from the judge that it was not the correct party to be suing. The relevant contracts had not been assigned to the claimant. X in that earlier litigation had taken that point right from the beginning. So the claimant now turned around and sued the defendant who *was* the successor in title of the party to which X was indebted. The claimant asserted that its expenditure in the earlier litigation had unjustly enriched the defendant. That expenditure had been wasted as far as the claimant was concerned, but from the defendant's standpoint the lawyers' work had cleared away many of the factual and legal uncertainties that beset the claim against X.

As far as orthodox restitution goes, this claim should never have got off the ground. The defendant had not received any money or other property of the claimant, nor had it requested or otherwise initiated the performance of the legal services undertaken by the claimant. Not surprisingly, the defendant sought to strike out the claim, and the judge

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[5] [2014] EWCA Civ 360, [2015] 1 BCLC 14. See the even more radical approach at first instance: 2012] EWHC 2168 (Ch) [87] (Sales J).

[6] P Watts '"Unjust Enrichment"—the Potion One Swallows for Well-meaning Sloppiness of Thought' [2016] CLP *.

[7] Appeals from *Investment Trust Companies (in liq) v Commissioners of Revenue and Customs* [2015] EWCA Civ 82; and *Swynson Ltd v Lowick Rose LLP* [2015] EWCA Civ 629.

[8] [2013] EWCA Civ 1415, [2014] 1 WLR 2006.

at first instance obliged. But the Court of Appeal, Sir Stanley Burnton dissenting, allowed the claim to proceed.

This was a classic case for the application of the famous dictum of Pollock CB in *Taylor v Laird*:[9] "one cleans another's shoes; what can the other do but put them on?" There is also hornbook authority from the House of Lords that windfalls of this sort cannot be the subject of restitutionary claims: *Ruabon SS Co Ltd v London Assurance*.[10]

The astonishing thing is that Floyd LJ, who gave the main judgment, just dismissed *Ruabon SS* as pre-dating the 4-step unjust enrichment test, academic in origin but endorsed in Lord Steyn's judgment in *Banque Financière*.[11] This test simply requires a judge to ask: is there an enrichment?; is it at the claimant's expense?; is it unjust?; and are there any defences? In my contemporary casenote on *Banque Financière* in the *Law Quarterly Review* I argued that this approach was "too underdeveloped to be safely used for determining cases". More explicitly, if traditional criteria are adhered to, the first question (enrichment) does not arise because receipt of the claimant's property or a request for services are sufficient and necessary, the second (the claimant's expense) answers itself, the third (unjustness) is largely defined by the concepts of vitiated and conditioned consent, but cannot be so confined if unjust enrichment is the test. The fourth (defences) is obvious, but uninformative. Yet Floyd LJ took the view that the four-step test is "likely to be adequate for most, if not all, purposes",[12] leading him to conclude that *Ruabon* "is of limited assistance in formulating a rule about 'incidental benefit' in the modern law of unjust enrichment".[13]

As a reflection of just how other-worldly English law has become, the whole and very express premise to Floyd LJ's judgment was that the defendant was seeking to plead a novel *exception* to a prima facie cause of action in unjust enrichment, namely "incidental benefit", for which the defendant could cite *no* authority! The judge stated:[14]

> Both sides are inviting this court to formulate for the first time, on this summary judgment appeal, an exception to the type of benefit which, if conferred on a defendant by a claimant, can be relied on for the purposes of an unjust enrichment claim.

The only conclusion to be drawn from this is that English law is indeed now in the position where all benefits in life need prima facie to be justified—an inversion of the former position. Floyd LJ was in immediate difficulty trying to explain why a tenant heating their

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[9] (1856) 25 LJ Ex 329, 332.
[10] [1900] AC 6 (HL).
[11] [2013] EWCA Civ 1415, [2014] 1 WLR 2006 [39].
[12] [2013] EWCA Civ 1415 [34];
[13] Ibid [39].
[14] Ibid [28].

apartment has no claim against their upstairs neighbour for obtaining the benefit of the rising heat, even if the tenant mistakenly thought the heating was paid for by the lessor. Where to next? X accidentally fails to meet a settlement date for the purchase of a house and thereby allows a back up offer from Y to succeed.[15] Surely X cannot sue Y. X accidentally but negligently runs into Y's car; can X claim a commission from Z, a panelbeater, for providing Z with work? Surely not, but *TFL*, if allowed to survive, has opened to door to endless possible types of claim. We cannot expect "unjustness" to define the beast.

Swynson Ltd v Lowick Rose LLP

In the next case, *Swynson Ltd v Lowick Rose LLP*,[16] only one judge of the panel of the Court of Appeal, Sales LJ, upheld the plea in unjust enrichment in reaching his decision. He was, however, in the majority (Davis LJ dissented) and since the case is under appeal to the Supreme Court it is as well to address it.

The first claimant, Swynson, was a lender of last resort. It had lent money to X Co. The second claimant, Mr Hunt, was Swynson's principal shareholder. It was Mr Hunt who was alleging that he had unjustly enriched the defendant. The defendant, which was a firm of accountants, had entered the picture because it had given Swynson "due diligence" advice about X Co before Swynson advanced its loan. The defendant's assessment of X Co was negligent. X Co duly defaulted. For various reasons of his own Mr Hunt then used his personal money to provide debt and equity capital to X Co so that it could pay down its debt to Swynson. Only later did Mr Hunt realise that his actions in causing X Co to discharge its obligations to Swynson may have prejudiced Swynson's claims against the defendant for negligence, because it had recovered its loan. Longmore and Sales LJJ felt able to treat Mr Hunt's actions as *res inter alios acta*, that is to say as if they had never happened. Sales LJ held in the alternative that Mr Hunt had unjustly enriched the defendant by reducing the size of the defendant's negligence liability.

Both these conclusions are hard to sustain on the basis of established principle. Mr Hunt had shot himself, or at least his company, in the foot (with apologies to Lord Hoffmann[17]) but his actions were hardly irrelevant to Swynson's claim against the defendant. Bad judgement in how one structures commercial action often results in windfalls to others and in the past would not have given rise to a cause of action against a sidewind party: see, for instance, *Receiver for the Metropolitan*

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[15] Cf D Klimchuk, 'The Normative Foundations of Unjust Enrichment' in R Chambers, C Mitchell, and J Penner (eds), *Philosophical Foundations of Unjust Enrichment* 81, 83 (failure to renew fishing quota enriches other licensees).
[16] [2015] EWCA Civ 629.
[17] *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 at 507.

Police District v Croydon Corp.[18] As in the *TFL* case, it was clear that the defendant had not received any money from the claimant, nor had it requested the actions that were alleged to have enriched it. Again, only a horror of unearned gain could lead one to Sales LJ's conclusion.

As is often the case with the unjust enrichment formula it is not clear just what the enrichment of the defendant was. Arguably, the only enrichment that the defendant obtained was the money it received for giving the poor advice, an enrichment solely at Swynson's expense. To say that Mr Hunt's actions had discharged the defendant's obligations begged the question just what the extent of those obligations was. Otherwise, there is a very sound rule that discharging another's debt without request is not actionable.[19]

Richards v Worcestershire County Council

The most recent case is *Richards v Worcestershire County Council.*[20] This was another strike-out application that was declined. Very briefly, the claimant in 1984 suffered a road accident for which he apparently received a substantial insurance payout. Twenty or so years later he continued to have many complex mental health issues, which saw him hospitalised. Under relevant provisions of the Mental Health Act 1983, not all of which are still in force, he was identified as needing ongoing assistance and care and it was argued that the statute imposed a duty on the NHS to provide them. Subsequently, his "property and affairs deputy" paid £644,645.87 in obtaining services to assist the claimant. It was now argued that the claimant, through the deputy, had unjustly enriched the defendant local authority which bore the statutory duties, by spending personal moneys when he was entitled to have the services paid for by the health system and the defendant in particular.

Newey J declined to strike out the claim. He stated (at [36]): 'So far as I am aware, however, failure to perform a public law duty has never of itself been held to be an unjust factor for the purposes of a claim in unjust enrichment or a sufficient basis for any other restitutionary claim.' But the judge went on to find that insofar as the claimant did what he did under a mistake (ignorance of the entitlement), his claim should stand.

Claims of this sort,[21] where the defendant was not the recipient of any

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[18] [1957] 2 QB 154. See too *Macaura v Northern Assurance Co Ltd* [1925] AC 619; and *Woolfson v Strathclyde Regional Council* 1978 SC (HL) 90. Cf *Milroy v Lord* (1862) 4 DeGF & J 264, 275, 45 ER 1185,

[19] *Re Cleadon Trust Ltd* [1939] Ch 286; *Esso Petroleum Co Ltd v Hall Russell & Co Ltd, "Esso Bernicia"* [1989] AC 643. See P Watts, 'Mistaken Payment of Another's Debt—A Brief Defence of the Orthodox View' [1993] NZ Recent Law Rev 248; and J Beatson, *The Use and Abuse of Unjust Enrichment* (OUP 1991) 200–206.

[20] [2016] EWHC 1954 (Ch).

[21] Including cases such as *Brook's Wharf & Bull Wharf Ltd v Goodman Bros* [1937] 1 KB 534.

payment and had not requested what was done, should not be determined by a common law cause of action. Liability arises only as a question of statutory construction. The questions to be asked were: (1) was there a legal duty to provide services of the sort obtained?; and (2) did that duty apply only where the duty-holder had itself determined what those services were to be before they were provided? If the answer to (2) was yes, it might be thought remarkable, but not perhaps always out of bounds, to further imply that where the failure to obtain permission first was because of (excusable) ignorance of rights, the scope of the duty could be extended. But the Court's approach engages with none of this machinery. It was found prima facie enough that a claimant's mistake had enriched someone else. This begged the question as to what the defendant's statutory duties were. The Court's focus on mistake also meant that the claimant was unlikely to have a claim for services he bought after he became aware that there was a statutory entitlement, again begging the question of the claimant's statutory entitlement. This is very unsatisfactory.

As for unwarranted enrichment, savings of expenditure of the sort in *Richards* are anyway going to be problematic. If the Worcestershire Council was funded only for services it actually provided, it will not have been holding onto any riches. If it had been funded, it was the funder that might, depending on the agreed arrangements, be thought to be the one with a complaint of unwarranted enrichment. The claimant's case rested on such entitlement as the statute gave, nothing else.

Bank of Cyprus UK Ltd v Menelaou

The next case is *Bank of Cyprus UK Ltd v Menelaou.*[22] This is a decision of the Supreme Court and might on that account have been dealt with first. But, unlike the previous three cases, this one involved a relatively straightforward restitutionary claim by the Bank. The trouble was that the Court of Appeal and then the Supreme Court, quite unnecessarily allowed themselves to be recruits for heterodoxy under the banner of unjust enrichment.

The Bank had a valid mortgage over House 1. The mortgagors needed to downscale, so sold House 1 and agreed to buy House 2, asking the Bank to release its mortgage over House 1 and take a substitute one over House 2. However the mortgagors also told the Bank that House 2 would be taken in the name of their daughter, Melissa Menelaou. Although Melissa knew she was to take ownership of House 2, and it appears she signed the sale and purchase agreement, she had been told by her father that he was putting the house in her name as a gift to her and her two siblings. She was not told that a mortgage would be necessary to provide part of the purchase moneys. It appears that her brother forged her signature on the mortgage given the Bank. There

[22] [2015] UKSC 66, [2016] AC 176.

were money flows (first from deposits, then from settlement moneys) from the sale of House 1 into the purchase of House 2, all taking place through the trust account of a firm of solicitors, that firm acting both for the Menelaous and the Bank. Some time later, Melissa discovered the forged mortgage and disowned it. These proceedings were the result.

On traditional tracing principles it seems plain that it was the Bank's money that reached the vendor of House 2, at least to the extent of the amount owing on mortgage 1. The Bank had a prima facie restitutionary claim against that vendor, which, if the vendor had a defence, would have given a right of subrogation to its rights against Melissa on the purchase contract. It may also have been possible to trace to House 2 itself.[23] However, at first instance these obvious points were derailed by two red-herring arguments, which have been addressed elsewhere.[24] These arguments were never tackled properly in the two appeals. Instead, the two Courts marched ahead, ditching the traditional main pillars of restitution, namely that the defendant had received the claimant's money or had otherwise requested services, relying only on a claimant's proving that something it had done, or had had done to it, had causatively enriched the defendant.

Once more too, there is difficulty in determining what the judges thought the enrichment was. Lord Neuberger and Lord Clarke, in their separate judgments, identified quite different enrichments, without even noticing that they were doing so. For Lord Neuberger, Melissa's enrichment was receiving "the freehold of [House 2] for nothing", or at least receiving it free of the Bank's charge.[25] Given that the judge had accepted the Bank's invitation to put his head in the clouds, it might be thought surprising that it did not seem to matter that Melissa was getting only a one-third beneficial ownership in House 2. He, and his colleagues, finessed this problem by confining the Bank's remedy to a non-recourse one against the land, which had the consequence that all the siblings would suffer the same degree of disappointment about their supposed gift. In contrast, Lord Clarke saw Melissa's enrichment, not as the house, but as the discharge of her obligation on the contract for its purchase.[26] Similar split vision afflicted the Court of Appeal, Floyd LJ's view of Melissa's enrichment aligning with Lord Neuberger's,[27] while Moses LJ clearly identified the enrichment as the discharge of her contractual obligation.[28]

If one had to choose between these putative enrichments, the stronger candidate was the discharge of Melissa's debt. She may have been told

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[23] See *The Federal Republic of Brazil v Durant International Corporation* [2015] UKPC 35, [2016] AC 297.
[24] See [2016] CLP *
[25] [2015] UKSC 66, [2016] AC 176 [62], [68] and [70].
[26] [2015] UKSC 66, [2016] AC 176 [20]. But cf [24].
[27] [2013] EWCA Civ 1960, [2014] 1 WLR 854 [28].
[28] [2013] EWCA Civ 1960, [2014] 1 WLR 854 [59].

by her father that she was getting House 2 as a gift, but it appears that she signed the purchase contract,[29] and it is most unlikely that the vendor would have known of her misapprehension. It also explains why one need not be concerned about the fact that she was only to be a one-third beneficial owner of the property. She had already exposed herself to liability for the whole price of the land.

Both analyses are highly problematic for the general law of restitution insofar as they unshackle a claimant from showing that it was its money that, at law or equity, reached the defendant or a party who had rights against that defendant. The reach of the law of restitution is greatly widened, and to an unknowable extent. This is the kingdom of leaping frogs that Birks came to endorse in his *Unjust Enrichment*.[30] So, if my employee has been slowly stealing money from me, and because of his enhanced wealth decides to make a Christmas gift to his niece, I would on a mere causation test be able to sue the niece to recover the gift even if it was paid for entirely out of other funds, honestly derived. A mistaken payer would get similar rights against donees from the payee. Were it not for the fact that Melanie had made herself liable on the purchase contract, the reasoning in *Menelaou* furnishes almost direct support for the liability of that hypothetical donee.

The "close causal connection" test that both Lord Neuberger and Lord Clarke endorsed as a brake on unjust enrichment claims against parties who do not receive any money or other property belonging to the claimant[31] is likely to provide about as much grip to the law as "proximity" did for the test of negligence liability let loose in *Anns v London Borough of Merton*.[32] Indeed, "proximity" is already being invoked in this context as a synonym for close-causal-connection.[33] These tests are conclusory; the judges are putting up a balloon signaling "we make it up as we go along".

Relfo Ltd v Varsani

Relfo Ltd v Varsani[34] arrived in between the Court of Appeal and Supreme Court decisions in *Menelaou*. It too could have been decided the same way on traditional restitutionary criteria.

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[29] Surprisingly, it is not absolutely clear from the judgments at any level that Melissa signed the contract, but the inference that she did is very strong.
[30] P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) 89ff.
[31] See [2015] UKSC 66, [2016] AC 176 [31] (Lord Clarke) and [77] (Lord Neuberger), referring to the criteria suggested by Henderson J in *Investment Trust Companies v Revenue and Customs Commissioners* [2012] EWHC 458 (Ch), [2012] STC 1150 [68], endorsed on appeal, [2015] EWCA Civ 82 [67].
[32] [1978] AC 728. See too *Bofinger v Kingsway Group Ltd* [2009] HCA 44, (2009) 239 CLR 269 [87].
[33] *Relfo Ltd v Varsani* [2012] EWHC 2168 (Ch) [87].
[34] [2014] EWCA Civ 360, [2015] 1 BCLC 14.

The controllers and directors of the then insolvent claimant, in breach of fiduciary duty (and breach of trust), caused it to pay away £500,000 to a third party's Latvian bank account, with presumed intent to defeat the claimant's creditors. Its liquidator was able to show that on the same day an equivalent sum in US dollars was paid from a Lithuanian bank account to a Singaporean account of the defendant. The liquidator had real difficulties showing a chain of payments that connected the Latvian receipt and the Lithuanian pay-out. However, there was evidence that the claimant's controllers were close business associates of the defendant, that those controllers felt obliged to make good to the defendant his losses on other business ventures he was involved in with the controllers, and that that was the reason the defendant received money into his account.

Sales J at first instance accepted a submission, relying on little more than a tangential dictum of Lord Nicholls of Birkenhead in *Criterion Properties Plc v Stratford UK Properties Ltd*,[35] that the law of unjust enrichment allowed one to by-pass tracing rules.[36] A sufficiently strong factual connection between a disenriched claimant and an enriched defendant would do. Yet, not only was *Criterion* a two-party case, but it was concerned merely with the enforceability of a contract between those parties. There is nothing to indicate that Lord Nicholls had anything like a *Relfo* fact pattern in mind.

By the time *Relfo* went on appeal, there had been an outbreak of other judicial dicta supporting leap-frogging, including the Court of Appeal's judgments in *Menelaou*. The Court of Appeal did conclude, as in fact had Sales J at first instance, that the rules of tracing were sufficiently flexible to permit a property-based resolution of the case. But with varying degrees of enthusiasm, the Court also upheld the leap-frogging argument. Before Sales J, the defendant appeared to have conceded that if unjust enrichment could end-run the requirements of tracing, then a but-for test of benefit might suffice. This concession was withdrawn on appeal, which led the Court to consider what test of causation might suffice for leap-frogging. Both Arden and Floyd LJJ expressly adverted to the example of the donee of a gift that was *caused* by an intermediate party's unjust enrichment but not paid out of the claimant's traceable property.[37] Both judges doubted whether that would create a sufficiently strong causal connection to allow the claimant to sue the donee. We should note that Birks would have allowed leap-frogging even on that fact pattern,[38] and we have noted that *Menelaou* comes close to implementing it.

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[35] [2004] UKHL 28, [2004] 1 WLR 1846 [4].
[36] [2012] EWHC 2168 (Ch) [86].
[37] [2014] EWCA Civ 360, [2015] 1 BCLC 14 [78] and [114]. See too *Russell Gould Pty Ltd v Ramangkura* [2014] NSWCA 310, 313 ALR 367.
[38] P Birks *Unjust Enrichment* 80–81.

Floyd LJ went on to explain what he considered were on the facts sufficiently strong factors to justify leap-frogging. These included: the close business connections between the two relevant families; the fact that the two key bank payments occurred on the same day and were in the same amount; the dishonesty of the principal controller of the claimant, including his deliberate steps to make tracing of the initial payment impracticable.

With great respect, this reasoning is not satisfactory. The claimant should have been required to show that it was its money that reached the defendant, and on these facts that required it to meet the rules of tracing. There is only one other established method of reaching a remote recipient, and that is to show that the immediate payer to the defendant intended to act, and did act, as agent for the claimant in making the payment.[39] But in such cases, the claimant ceases to be a remote party simply by adopting the agent's act. Agency methodology was unlikely to have been available on the facts of *Relfo*, since the moneys received in Singapore would not have been paid on behalf of the claimant.

Mere but-for causation between one payment and another, let alone the fact that a payment causes some other type of benefit to occur, should not be sufficient to found a restitutionary claim. Evidential difficulties of the sort found in *Relfo* ought not be fixed up by creating, or even expanding, a cause of action with different rules. It is fair to say that Gloster LJ in *Relfo* alluded to these difficulties.[40] For example, what would happen on a fact pattern such as *Relfo* if by chance the missing banking records came to light and the rules of tracing led to a conclusion that the money had ended up elsewhere, say with a related party of the defendant? Might it still be possible to conclude that there was causative enrichment? If tracing and causative-enrichment can exist side-by-side, does it not follow that a claimant might have a *choice* of parties to sue, the tracing recipient and a causatively enriched party?

Then, where tracing fails against an insolvent recipient but there is a strong sense that the recipient's overall asset position remains enlarged, could one argue against its creditors that they have been causatively enriched? That would be a 'swollen assets' claim and inconsistent with the Privy Council decision in *Re Goldcorp Exchange Ltd*.[41] No one seems to be asking *why* courts in the past might have concluded that tracing was a prerequisite to reaching remote parties.

Jeremy D Stone Consultants Ltd v National Westminster Bank Plc

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[39] See P Birks, 'Tracing Misused: *Bank Tejerat v Hong Kong and Shanghai Banking Corp*' (1995) 9 TLI 91, which argument may, however, go further than here. Cf *Khan v Permayer* [2001] BPIR 95. See also T Cutts, 'Tracing, Value and Transactions' (2016) 79 MLR 381.

[40] [2014] EWCA Civ 360, [2015] 1 BCLC 14 [102].

[41] [1995] 1 AC 74.

The five cases just considered are all examples of the concept of unjust enrichment leading to an ill-defined judicial prejudice against windfalls. The last case is representative of the opposite problem, namely a claimant being shut out of a traditional restitutionary claim because it cannot show that the defendant has been enriched. The lucky defendant on this occasion was a bank. The case is *Jeremy D Stone Consultants Ltd v National Westminster Bank Plc*.[42]

In this case the claimants had been defrauded into making payments of some £15.5 million into a bank account of the fraudster, Mr Saunders. The claimants sued the receiving bank. Sales J (as he then was), in a terse section of a long judgment, ruled that the bank had not been unjustly enriched, or if it had been it had a defence. His Lordship reasoned simply that when the bank received the moneys its stock of assets went up but this receipt was immediately matched by a balancing liability. Therefore, there was no unjust enrichment.[43]

There is a very rich body of case law on the exposure of banks and other agents to liability to a restitutionary claim of this sort, readily accessible in the textbooks.[44] That case law is not consistent with the reasoning of Sales J.[45] Agents *are* prima facie liable to restitutionary claims where there was no basis for the payment.[46] It is not relevant, or at least not a defence, that they credit the sum received to their principal. This case law was cited to the judge but is not referred to in the judgment.[47]

The law has been as it has since Lord Mansfield's judgment in *Buller v Harrison* in 1777.[48] The accurate headnote to Cowper's report of that case states:

> If money be paid by mistake to an agent, and placed by him to the account of his principal, but not paid over, money had and received to the use of the person so paying it by mistake will lie against the agent—The mere passing such money in account or making rest, without any new credit given, fresh bills accepted or further sum advanced for the principal in consequence of it, is not equivalent to payment of it over.

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[42] [2013] EWHC 208 (Ch).

[43] See too *Bellis v Challinor* [2015] EWCA Civ 59 [114] (but point conceded). Cf. *Santander UK Plc v National Westminster Bank Plc* [2014] EWHC 2626 (Ch).

[44] For more modern sources, see G McMeel, [2014] RLR 192. See too E Ellinger, E Lomnicka, and C Hare *Ellinger's Modern Banking Law* (5th edn, OUP 2011) 539-545; R Stevens, [2005] LMCLQ 101; and E Bant, 'Payment over and Change of Position: Lessons from Agency Law' [2007] LMCLQ 225.

[45] Most of the cases do not involve mistakes in the formation of a contract, unlike *Jeremy D Stone*, but once a defrauded party rescinds the contract before the agent accounts to the principal, the agent would, historically, have been liable in an action in money had and received.

[46] The position is different if the claimant is merely asserting non-performance of conditions by the principal: *Ellis v Goulton* [1893] 1 QB 350 (CA). In such cases, there is a valid reason for the payment.

[47] As confirmed with counsel in the case.

[48] (1777) 2 Cowp 565, 98 ER 1243.

This view of the law prevailed from then on, and has been affirmed many times at appeal level, including at least twice in the House of Lords: *Kleinwort, Sons & Co v Dunlop Rubber Co*,[49] and *Kerrison v Glyn, Mills, Currie & Co.*[50] Again, the headnote of *Kerrison* is accurate:

> The position of a banker does not differ from that of any other recipient of money acting as factor or agent; and money paid to a banker under a mistake of fact can be successfully re-demanded from the banker by the person who paid it.

Buller v Harrison made plain that the agent would have a defence if it had accounted to the principal before being notified of the adverse claim. But even then, this defence was not defined by absence of enrichment. Hence, a formal accounting communicated to the principal before knowledge of the adverse claim, but not usually a mere entry in the agent's running accounts, would in many circumstances allow the agent subsequently to use the funds to offset a liability of the principal to the agent. Such formal accounting was treated as if the agent had handed cash over to the principal who had handed it back again in discharge of the internal debt. The position was well stated by Collins MR in *Continental Caoutchouc & Gutta Percha Co v Kleinwort, Sons & Co*,[51] as follows:

> He [the agent] has thus no doubt benefited by getting his debt paid, but he has done so in discharging his primary duty of passing the money on to his principal. He has constructively sent it on and received it back, and has done nothing incompatible with his position as a conduit-pipe or intermediary.

It is at this point, but only at this point, appropriate to accept that the fact that the agent is benefiting from the transaction can have some relevance. At least where the claimant is asserting no consent at all to the disposition, as opposed to a mere mistake, it is possible that the fact that the agent is wanting to use the money to discharge a debt owed the agent by the principal makes constructive knowledge of the adverse claim sufficient to prevent the agent from doing this.[52] An agent who seeks no collateral benefit is probably safe unless he or she had *actual* knowledge of the adverse claim at the time of accounting to the principal.

It might have been possible for the law to have taken the stance that where the payer was aware it was making a payment to a party whom it knew was only an agent, this was in effect a payment solely to the principal,[53] even if there had been a flaw in the decision to make the payment. On that basis there would not have been a right of stoppage *in transitu* against the agent in the way *Buller v Harrison* permitted. But

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[49] (1907) LT 263 (HL).
[50] (1911) 81 LJKB 465 (HL).
[51] (1904) 90 LT 474, 476. See too *Jones v Churcher* [2009] EWHC 722 (QB), [2009] 2 Lloyd's Rep 94 [72].
[52] For criticism of an "unconscionability" test in this context, see P Watts, 'Tests of Knowledge in the Receipt of Misapplied Funds' (2015) 131 LQR 511.
[53] There is some authority that undisclosed agents do not get the agency defence: *Newall v Tomlinson* (1871) LR 6 CP 410.

even in 1777 the courts were alive to the fact that an agent's principal often lived abroad, and it would be highly convenient to be able to recall from the agent moneys that at the time of payment were not owed to the principal. Indeed, in *Buller*, Harrison's principal was a New York partnership. There is insufficient reason to throw over nearly 250 years of case law for Sales J's solution. The law of restitution has been about liability for getting in the way of flawed dispositions, not about unjust enrichment.

C. The general irrelevance of enrichment to restitutionary claims

Jeremy D Stone is just one example of the irrelevance of enrichment to restitutionary claims. Indeed, it is more than arguable that enrichment is neither necessary nor sufficient for liability to a restitutionary claim.

Elaborating somewhat on the Introduction to this paper, one needs at least three principles to explain the principal material that lawyers have traditionally encompassed within the law of restitution. Enrichment is important to none of these, and hence unjust enrichment is not merely inadequate as a way of bringing restitutionary claims together, it is the wrong concept. There is a fourth, arguably less central, group of cases, those involving equitable contribution, where it *is* arguable that arbitrary escape from liability is the explanation of the claim. Again, the only real connection between restitutionary claims is that they are rectifying, or salvage, claims where something has gone wrong in relations between persons, independently of questions of breach of promise or the commission of a tort or other wrong.

The largest group of restitutionary claims is concerned with recovering property where there has been a flaw in the process of transfer from an owner to a successor party. The most serious flaw that can occur is where there was no consent at all to the transfer. Where the property taken is money, historically, claims have been brought within the restitutionary claim in money had and received. Where the property is goods, these have been dealt with from within the law of tort. This is arguably just an accident of history, because we know that fault in the defendant is irrelevant to such a claim, unlike with most torts. So too is enrichment irrelevant. The innocent purchaser of stolen property (including property stolen by an owner's employee, where it can be particularly difficult to know who owned it) has no defence of "lack of enrichment". Equally, if one's agent, innocently or not, misunderstands the scope of his or her authority and makes an unauthorized purchase or sale of an asset, one can recover one's money or property, as the case may be, even if the counterparty has given more than market value in exchange. It is the receipt and lack of consent to the transfer that supports the cause of action, not enrichment. Counter-restitution may be necessary, but that is simply one non-enrichment claim coming up against another.

This is the strongest type of restitutionary claim, yet many "unjust enrichment" theorists want to hive off this material to a different subject. The features of such claims are mostly the same as claims to recover property transferred as a result of mistake or other form of impaired consent, except that in the latter case, notwithstanding the restitutionary liability of the first recipient, title passes to that recipient. This is simply because, in contrast to the position where there is no consent at all, the claimant has personally participated in the process of transfer and that participation warrants limiting the claim to the first recipient rather than subjecting remote recipients to the law of restitution (though later developments in constructive trusts have expanded the reach of restitutionary claims, in some jurisdictions). Again, a fuller explanation of these points can be found in the *Current Legal Problems* article.

So long as one confines flawed consent cases to property (including money payments), it is prima facie sufficient to found a restitutionary claim that there has been a sufficiently serious flaw in the process of transfer to warrant undoing the transfer as against the first recipient. Enrichment is not a required element of the claim. Indeed, one could not possibly have such a powerful general principle as the one protecting interests in property if one debased the coinage and opened the law of restitution to mere enrichment.

In limited circumstances, most notably in those mistake cases where the claimant was solely responsible for the flaw, it is justifiable to take account of a recipient's post-receipt changes of position. Again, one does not need to resort to unjust enrichment to explain the existence of such a defence. In contrast, the defendant's state of knowledge of, and any conduct in creating, the flaw are potent factors in the realization of restitutionary claims.

One can also obtain restitution of property where there was no flaw in the disposition but the disposition was conditioned (either on an existing state of affairs continuing or on a new state of affairs coming about) and the conditions have failed to be met. Once more, the disposition and the failure of conditions are the elements of the cause of action, and enrichment is superfluous. Hence, the recipient may have put great effort and expense into trying to perform the conditions but will still have to effect restitution if he or she fails. A good recent example is *Gartell & Son (a firm) v Yeovil Town Football & Athletic Club Ltd*,[54] where a firm was contracted to lay a new football field but made such a hash of it that the Club was entitled to declare the performance a total failure of consideration. In fact, the price had not yet been paid, but it is clear that if it had been it would have been recoverable. There

[54] [2016] EWCA Civ 62. For other examples, see *Head v Tattersall* (1870) LR 7 Ex 7; *Heywood v Wellers* [1976] QB 446, 458, citing *Hill v Featherstonhaugh* (1831) 7 Bing 569, 131 ER 220 (CP). See also *Wilkinson v Lloyd* (1845) 7 QB 27, 115 ER 398; *Ebrahim Dawood Ltd v Heath Ltd* [1961] 2 Lloyd's Rep 512.

was, however, no question of the firm being enriched by what had happened.

The protection of our interests in property is one of the limited number of interests that the law of restitution serves. Another, cognate, interest is the protection of our autonomy in binding ourselves to legal obligations. While the exigencies of the contracting process have led most common law systems to adopt an objective approach to determining whether a contract has arisen, proof of a defendant's enrichment is not a requirement of an action to rescind a contract on the basis that there was a sufficient flaw in the claimant's decision to enter into the contract.[55] This is not to deny that in practice most contracts sought to be avoided for misrepresentation, undue influence, unconscionability, or duress do involve inequality of exchange. But that is simply the statistically most common reason rescission is sought. It is not a *legal* requirement of any of these grounds that the bargain enriches the defendant at the claimant's expense. Yet many restitution scholars assert that the basis of these claims is unjust enrichment. It simply is not. Even if the defendant promises more than market value for the contract, the victim of misrepresentation, undue influence or duress (and for that matter the person of substandard capacity) can rescind if the flaw in the decision to contract was known (or less clearly, ought to have been known) to the defendant.[56]

The third main group of restitutionary claims are those involving the performance of services, historically covered by the quantum meruit remedy. These do not usually implicate banks, so they will not be treated in any detail here. The key point is that it is clear that enrichment is once more neither necessary nor sufficient for liability. Where there is no contract, or at least enforceable contract, providing for the services, some sort of request or other involvement by the defendant in their performance is needed. It is that conduct of the defendant that is the key to liability, not enrichment. Yet in two recent quantum meruit cases, the United Kingdom Supreme Court dutifully followed the dogma that restitutionary claims are based on unjust enrichment: *Benedetti v Sawiris*,[57] and *Barnes v Eastenders Cash & Carry Plc.*[58]

The *Barnes* case could in fact have implications for banks, since it involved a group of invalid receiverships. The receivers had, as it happened, been appointed as a result of Crown application under the Proceeds of Crimes Act 2002. Their contracts of appointment expressly

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[55] But cf Contractual Mistakes Act 1977, s6 (requiring substantially unequal exchange of values).
[56] See, e.g. *CIBC Mortgages Plc v Pitt* [1994] AC 200, 209; *Geffen v Goodman* [1991] 2 SCR 372 at * per La Forest J (manifest disadvantage probably relevant only to presumption of undue influence).
[57] [2013] UKSC 50, [2014] AC 938.
[58] [2014] UKSC 26, [2015] AC 1.

provided that they were to have no recourse to the Crown for fees and expenses; those were to be met solely out of the assets of the parties in receivership. However, those parties later succeeded in arguing that the orders were not warranted, and had them quashed. This left the receivers wondering who was going to pay them for all the work they had performed by taking over the relevant companies. The Court held that the Crown had to pay. Lord Toulson, giving the main judgment, accepted a submission that the basis of the quantum meruit was unjust enrichment, but noted that in the present context the phrase was "a term of art". The Crown had wanted the services only if it did not have to pay for them, and there could be no question of the Crown's having made any economic gain out of the receivership.

What use is a term of art, at least when artifice can easily be avoided? Purveyors of the "unjust enrichment" concept frequently expect us to accept highly technical, indeed artificial, uses of the concept of "enrichment" at the same time as they are wanting fully to maintain the moral dimension of the term, namely gaining without desert. [59] This is not a recipe for sound thinking. Quantum meruit claims, outside contract, rest on a range of factors, but the conduct (often fault) of the defendant is central to liability. In *Barnes*, the Crown had made the receivers' position a non-recourse one in order, one assumes, to incentivize efficient administration of the receiverships. It was unreasonable to expect the receivers to bear the risk of their very appointment being invalidated when it was the Crown that initiated events. *Benedetti* is a more complex case. It has been more closely addressed in the *Current Legal Problems* article, but once more unwarranted gain on the defendant's part was not an issue, and the focus on unjust enrichment was simply a distraction.

Hopefully enough has been said to support the view that the concept of unjust enrichment fails the (overlapping) warranties applied to contracts of sale: it does not correspond with description, it is not fit for purpose, and it is not of merchantable quality.

D. The position in Australia and New Zealand

Having bought the pup in the late 1980s, Australia in the 2000s has rejected unjust enrichment as a cause of action. In a series of decisions, starting with *Roxburgh v Rothmans of Pall Mall Australia Ltd*,[60] and including *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*,[61] *Lumbers v W*

[59] See e.g. Burrows's treatment of *Martin v Pont* [1993] 3 NZLR 25 in E Bant and M Harding (eds), *Exploring Private Law* 75. There was never any prospect of real enrichment on the defendant's part in *Martin v Pont*.
[60] [2001] HCA 68, (2001) 208 CLR 516.
[61] [2007] HCA 22, (2007) 230 CLR 89.

Cook Builders Pty Ltd,[62] *Bofinger v Kingsway Group Ltd*,[63] *Friend v Brooker*,[64] and *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd*,[65] the High Court of Australia has been remorselessly negative about the so-called principle of unjust enrichment.[66] The Court has not gone so far as to say that the notion of unjust enrichment is utterly irrelevant to legal thinking, but one gets the feeling that this is only because there is a degree of embarrassment about resiling from the dicta of so many earlier High Court decisions.

As for those earlier decisions, most if not all involved direct payments of money from claimant to defendant or requested services, so their subject matter was not intrinsically problematic. It was only in the 2000s that cases began to surface based on mere enrichment. Few of the more recent cases are directly relevant to banks, but three are worth brief discussion here.

Bofinger (2009) establishes that a guarantor of a first mortgage, having paid out the lender, is entitled to take over the mortgagee's interest in that secured property ahead of junior mortgagees, even where the guarantor has also guaranteed the debts secured by those junior mortgages. The mere fact that the guarantor is also obliged to them, does not give the junior mortgagees a right to short-circuit the subrogation process. Unjust enrichment was said by the Court to be irrelevant to that right to be subrogated. The *Banque Financière* case, which it should be recalled is largely responsible for the idea that there might be a direct unjust enrichment claim even though the claimant has not transferred money or other property to the defendant (and nor is there a request), was expressly rejected.

Friend v Brooker, decided earlier in 2009, is a case where the plaintiff was not relying on a property transfer or request to assert a restitutionary claim. Unjust enrichment was just one aspect of the plaintiff's case. The method by which the plaintiff attempted to engage unjust enrichment was through equitable contribution, a potentially troublesome cause of action.[67] The plaintiff was one of two shareholders who had provided more debt capital to their company to keep it trading than the other in a way that was alleged to have benefited that other. The Court rejected the unjust enrichment plea. It said:[68] 'the bare fact

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[62] [2008] HCA 28, (2008) 232 CLR 635 at [77]–[78].
[63] [2009] HCA 44, (2009) 239 CLR 269 [97]. See too M Conaglen and P Turner, 'Subrogation, Accounting and Unjust Enrichment' [2010] CLJ 30; and M Leeming, 'Subrogation, Equity and Unjust Enrichment' in J Glister and P Ridge (eds), *Fault Lines in Equity* (Hart Publishing 2012) Ch 2.
[64] [2009] HCA 21, (2009) 239 CLR 129 at [7].
[65] [2014] HCA 14, (2014) 253 CLR 560.
[66] There is some tangential consideration of unjust enrichment in *Stewart v Atco Controls Pty Ltd* [2014] HCA 15; (2014) 252 CLR 307 (liquidator's right of recoupment from funds recovered from persons entitled to the funds not confined by enrichment).
[67] See too *Lavin v Toppi* [2015] HCA 4.
[68] [2009] HCA 21, (2009) 239 CLR 129 at [7.

of the conferral of some benefit upon another does not suffice to establish an obligation to repay the expenditure in providing that benefit.' It went on to say that 'the concept of unjust enrichment itself is not a principle which can be taken as a sufficient premise for direct application in a particular case.' It might be observed that the plaintiff appears to have been a volunteer in providing the debt capital, but one infers from the Court's approach to the unjust enrichment plea that even if the plaintiff had made some important mistake no claim would have been recognised.

In *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd*,[69] the claimant finance company was duped by a fraudster into making payments to the defendants on the basis that the defendants had supplied equipment that was to be subject to a finance lease by the claimant to the fraudster. In fact the defendants had not supplied such equipment but had previously supplied equipment to the fraudster's companies and were creditors for those supplies. The fraudster told them the money coming in was in payment of those earlier supplies. In due course the claimant became aware of the fraud and the fact that it was not indebted to the defendants and sued in money had and received. The defendants pleaded the change of position defence on a number of bases including that in reliance on the payments they had themselves continued to supply equipment to the fraudster's companies. The main question was whether the defendants' change of position defence required them to show just how much extra equipment they had supplied in reliance on the payments. The High Court held that the defence was not bounded by net actual disenrichment. The cause of action was not based on unjust enrichment and the defence was not based on disenrichment.

Each generation of judges, not much less than children in respect (or lack of it) of their parents, has a tendency to reopen the reasoning of their immediate predecessors, so Australia's retreat from unjust enrichment cannot be assumed to be permanent. But, it is to be hoped that the courts will come permanently to realise that looking for genuine enrichment is in many cases to search for the wrong thing. It is less easy to be confident that where there is undoubtedly enrichment but the enrichment is indirect (that is without a direct property transfer or a request by the defendant) future courts will hold the line against actionability. If they do not, they will open a can or worms.

Turning briefly to New Zealand, there is less to say. There are quite a few references to unjust enrichment to be found in cases if one goes looking for them. On the other hand, there have been few cases where the issue of enrichment, as opposed to the receipt of property, has been of importance. Most recently, in *Hotchin v New Zealand Guardian Trust*

[69] [2014] HCA 14, (2014) 253 CLR 560.

Co Ltd,[70] a majority of the Supreme Court took a liberal view of the scope of equitable contribution, but the concept of unjust enrichment was not referred to in either majority or minority judgments.

There is, however, a problematic first instance case, *Lykov v Wei*.[71] Here, the agents of owners of an apartment represented to buyers that the apartment was not suffering from "leaky building syndrome" when it was. Indeed, the owners had joined in an action in tort brought by the body corporate of the apartment building and the holders of other units in the building against parties alleged to be responsible for the faulty design and construction of the building. After completion of the sale, the court proceedings were settled with a substantial payment, and the owners received their share of the settlement proceeds. The buyers sued the owners for breach of warranty, and in the alternative in unjust enrichment in relation to the settlement moneys which the buyers argued should have been paid over to them. They succeeded on both grounds before Hinton J. The holding on the misrepresentation seems unobjectionable. The holding on unjust enrichment is quite unconventional, and is as objectionable as many of the recent English cases.[72]

In the Court of Appeal in *Stiassny v CIR*,[73] it was stated: 'It is not in dispute that the conceptual basis upon which a restitutionary remedy may be granted for moneys paid under mistake of fact or law is that the payee has been unjustly enriched'. Nothing was said on this topic when that case went on appeal to the Supreme Court.[74] Nor did the Court of Appeal seem to be aware of the Court's earlier scepticism as to a cause of action in unjust enrichment in *Rod Milner Motors Ltd v Att-Gen*.[75] Famously, of course, Mahon J was hostile to unjust enrichment in *Avondale Printers & Stationers Ltd v Haggie*.[76] He considered that to adopt the concept would be to consign a litigant's claim to justice 'to the formless void of individual moral opinion.'[77] That dictum has not yet been disapproved.

One thing to be borne in mind about New Zealand law is that New Zealand has adopted the open-ended approach to negligence liability endorsed by *Anns v London Borough of Merton*, referred to above. A legal

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[70] [2016] NZSC 24, *.
[71] [2015] NZHC 3009.
[72] To the extent that use might have been made, but was not, of *Lord Napier and Ettrick v Hunter* [1993] AC 713 that case, itself doubtful, was clearly distinguishable.
[73] [2012] NZCA 93, [2013] 1 NZLR 140 at [92].
[74] [2012] NZSC 106, [2013] 1 NZLR 453.
[75] [1999] 2 NZLR 568, 576: 'As to unjust enrichment, we agree with the observation of Smellie J in *Equiticorp Industries Group Ltd v R* [1996] 3 NZLR 586 at p 611 that the principle does not yet have the status of a cause of action.'
[76] [1979] 2 NZLR 124, 148. Cf the remarks of Lord Diplock in *Orakpo v Manson Investments Ltd* [1978] AC 95, 104.
[77] [1979] 2 NZLR 124, 154. Mahon J was in fact quoting an earlier judgment of his, *Carly v Farrelly* [1975] 1 NZLR 356, 367.

system that accepts that duties of care are not confined to protected interests (principally our interest in property) and therefore that we can owe one another a legal duty not to cause economic loss on the basis that it is "fair, just and reasonable to impose a duty of care",[78] may feel few qualms about recognizing a duty not to be unjustly enriched by the actions of others.

This is scarcely, however, a legal system governed by the rule of law. In an interesting and important recent article, John Gardner has argued that the ubiquitous recourse to the reasonable person in private law creates 'a zone of legally licensed adjudicative discretion, or (more pejoratively) adjudicative arbitrariness.'[79] This is, he argues, necessary and tolerable only because there is law that invites in the reasonable person. But it is strongly arguable that there is no law at all in the New Zealand test for negligence liability if the test is simply one of fairness, justice and reasonableness. There is little law too in an open-ended concept of unjust enrichment.

It remains to be seen, therefore, just whether unjust enrichment launches itself fully into the New Zealand environment or whether New Zealand can come through the plague relatively unscarred. All things considered, banks like everyone else should be better off if the law confines itself to reversing faulty transfers of property and to remedying cases where there has been a request for, or other initiation of, services but something precludes using the formal law of contract to pay for them.

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78 *Att-Gen v Carter* [2003] NZLR 160 at [24]. See now *Carter Holt Harvey Ltd v Minister of Education* [2016] NZSC 95 at [57].

79 J Gardner, 'The Many Faces of the Reasonable Person" (2015) 131 LQR 563.