Unjust enrichment scholarship in the courts: use and utility

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Utilising case law research both statistical and textual, and some general observations, this article explores the extent and nature of, and reasons for, the influence of academic writing on the law of unjust enrichment. It encourages a debate on the level of generality at which it is useful to analyse the principles; and it seeks to offer illustration and insight into how academic sources have been used in judgments in this field. The article concludes, inter alia, that the work and perspective of academics practising the doctrinal scholarship of traditional common law jurists is, and deserves to be, valued in judicial decision-making.

THE BRIEF

This article is based on a paper presented to the Commercial Court webinar on 20 June 2023, "Unjust Enrichment in the Commercial Court". I am delighted, and honoured, to have been invited by Professor Rose to submit a version of that paper for publication. As I did at the webinar, I pay tribute to the research work of High Court Judicial Assistants Alice Horn and Serena Lee, which has been of invaluable assistance.[1]

For the webinar, I was asked by Foxton J—slightly provocatively—to examine why English judges do not make more use in their judgments of the academic writing in the field of unjust enrichment. That was, of course, a leading question, assuming (i) that there is a definable extent to which we the judges should be making use of the academic sources in this area, and (ii) that in fact we do so only to some lesser extent. It hinted that there might be a plaintive cry from at least some academics of "Why don't you take more notice of us?".

By anecdotal contrast, I have heard the complaint voiced by a senior judge or two that the unjust enrichment treatises are less easy to use, and less helpful, than (say) *Benjamin's Sale of Goods*, *Chitty on Contracts*, or *Clerk & Lindsell on Torts*. They have seemed, so that complaint would have it, more occupied by an existential debate among themselves about unifying themes and overarching principles than by collecting, classifying and describing the case law in a way that will help to answer the case at hand.

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1. Serena Lee undertook initial work collecting and reviewing significant cases of the last decade or so. Alice Horn undertook substantial work on the Westlaw database and assisted with drafting the paper and this article. In the usual way, I take sole responsibility for all opinions expressed and (especially) for any errors.

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Thus, there were posited for my consideration two possibly contrasting views: of academics, that judges could and should make more use of their writing; of judges, that academics could and should make their writing more useful!

In the 7th edition of *Time Charters*,[2] within a Glossary of English Legal Terms, we offer the following high-level definition:

> "In English law, the law of 'restitution' refers to a body of rules of law under which a party may be ordered to pay money, or return property, to another in order to prevent unjust enrichment. A full discussion and explanation of those rules may be found in *Goff & Jones: The Law of Unjust Enrichment.*"[3]

I thus spoke at the webinar, and have written this article, as a judge who claims no subject-matter specialism in the field, and for whom, therefore, the first port of call in case of need has always been to *Goff & Jones* rather than to any assumption that I already know the law through a stock of personal expert knowledge of the cases. That made addressing the very knowledgeable audience at the webinar, chaired by Lord Burrows JSC, a daunting prospect; and only the more so knowing that Lord Burrows had devoted his Lionel Cohen Lecture in October 2021 to the relationship between judicial decision-making and academic writing;[4] and that even more recently, in Oxford, Carr LJ (as she still was then) gave the Harris Society Annual Lecture on the same theme.[5]

As an English judge, I spoke, and write, also as one for whom it is forensic gold dust to be shown binding or persuasive prior authority that there is no sensible reason to distinguish, or in its absence textbook or journal writing from a respected source, giving consideration to the specific problem at hand (see, for example, *Pisante v Logothetis (No 2)*[6]). The opportunity, when it comes along, to analyse an area of law at greater length and in greater depth, because it is necessary to do so to decide the case at hand, is of course a privilege, and one that I would always hope to respect and relish. But the job of an English judge would become impossible if that were necessary in every case.

With those limited personal credentials, and like an awkward witness confronted with a loaded question in cross-examination, I found myself drawn more to an investigation of the question-begging premise in the provocative brief than to an attempt to answer the question ultimately posed. What follows, therefore, is for the most part an attempt to identify and explore the facts concerning the use of academic sources in English judgments on this topic rather than the presentation of an opinion or argument as to its sufficiency or insufficiency. This paper will leave the reader to draw their own conclusion as to that. But I preface my report of that factual research with some general remarks, for context.

2. T Coghlin *et al*, *Time Charters,* 7th edn (London, 2014), 772 [G.35].

3. C Mitchell, P Mitchell and S Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment*, 10th edn (London, 2022).

4. Lord Burrows, "Judges and Academics, and the Endless Road to Unattainable Perfection", Lionel Cohen Lecture, delivered remotely, 25 October 2021; www.supremecourt.uk/docs/lionel-cohen-lecture-2021-lord-burrows.pdf.

5. Lady Justice Carr, "'Delicate Plants', 'Loose Cannons' or 'A Marriage of True Minds'? The Role of Academic Literature in Judicial Decision-Making", Harris Society Annual Lecture (Keble College Oxford, 16 May 2023); www.judiciary.uk/harris-society-annual-lecture-lady-justice-carr/.

6. [2022] EWHC 2575 (Comm); [2022] Costs LR 1481. In that case, given the nature of the specific point I had to resolve (the context was that of restitution following rescission for fraud), the textbooks in question were not the "unjust enrichment" textbooks.

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GENERAL REMARKS

The posited criticism of the academic writing, that it could and should be more useful, is not only the concern to which Lord Burrows referred in his Lionel Cohen Lecture. Law schools and legal academics, he warned, are in danger of forgetting that it is traditional, doctrinal, legal scholarship that serves, and deserves, a respected function in the development of the common law.[7] The criticism is also, in the case of unjust enrichment specifically, that there has been too much in the way of unifying themes and overarching principles stated at so high a level of generality as to be of little or no practical utility. For judges determining the cases listed before them, one case at a time, to say that an unjust enrichment claim requires (i) enrichment of the defendant (ii) at the expense of the claimant (iii) in circumstances the law will regard as unjust (iv) where there is no countervailing defence, is of little or no real use at all.

I do not mean by that to dissent from Lord Burrows' responsive observation at the webinar that the four-stage framework for discussing any unjust enrichment case was the most significant of the late Professor Birks' many contributions. But I do mean by it to sound the cautionary note that the variety of factual and relational situations in which an unjust enrichment claim has been recognised, and may yet be recognised, is so great that the reason why such a claim is recognised, or not, in one situation—most especially the reason why enrichment in that situation might be considered unjust, or not—may not translate at all so as to offer insight into whether an unjust enrichment claim should be recognised (or not) in a different situation.

There is something profound there, I suggest, concerning the common law method, which holds that sufficient unto the judgment of the day is the decision of the case then before the court. The distillation, from decisions allowing or refusing unjust enrichment claims in given sets of circumstances, of principles that are justified by those decisions is likely to require categorisation. That in turn involves generalisation. But the more broadly the categorisation is drawn, and in consequence the more general any suggested statement of principle, the less likely the result to be a useful tool for deciding new cases. It seemed, then, timely coincidence that, with the webinar already planned, and my paper for it under preparation, Professor Stevens' new book, *The Laws of Restitution*,[8] was published, with its thematic emphasis on its titular plural (contrast, for example, Lord Burrows' *The Law of Restitution*[9]).

With Professor Stevens one of those attending the webinar in person, and Lord Burrows in the Chair, it was tempting to stop there and invite them to argue out the singular versus the plural (*Law v Laws*), a debate essentially about the level of generality at which an analysis of applicable principles in this area is most usefully conducted.

In his Preface, Professor Stevens insists that his new work "is not a textbook, although … for many topics it could be used as one. Rather, it is a sustained argument as to how [this] part of the law fits together, and relates to other areas". So, I suspect Lord Burrows'

7. See section 2 of the Lionel Cohen Lecture 2021 (*supra*, fn.4), "How can academic work help judges?". Lord Burrows reiterated the concern in strong terms at the Commercial Court webinar on 20 June 2023.

8. Robert Stevens, *The Laws of Restitution* (Oxford, 2023).

9. Andrew Burrows, *The Law of Restitution*, 3rd edn (Oxford, 2010).

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royalty stream is safe, likewise that of *Goff & Jones*, the writings of the late Professor Birks, and no doubt others. *The Laws of Restitution*, I envisage, will become an addition, not a substitute, in the law library of anyone with more than a passing interest in the subject. The plurality of the recognised categories of unjust enrichment claims around which the new book is themed echoes, unsurprisingly, Professor Stevens' rejection, in "The Unjust Enrichment Disaster",[10] of the idea that, when *Goff & Jones* changed from *The Law of Restitution*[11] to *The Law of Unjust Enrichment*,[12] and in doing so jettisoned from its contents the restitution of gains resulting from wrongdoing, a single, coherent whole was or could be created.

As Professor Stevens put it, "What has remained is, however, still four or five different jigsaw puzzles in one box".[13] It is not happenstance that my personal law library continues to include the 7th edition of *Goff & Jones*, its last as *The Law of Restitution*, sitting alongside the current edition, calling itself the 10th edition, but which I have to say I consider the 3rd edition of a rather different book.

I dwell a moment more on the new book because of its Foreword, by Lord Reed PSC. Far from evidencing an insufficiency of academic influence over the development of the law, Lord Reed there expresses the opinion that restitution, or unjust enrichment, has been a field of law "in which the judiciary were particularly liable to defer to scholarly analysis". But he also notes the "susceptibility of senior judges to the attractions of grand unifying theories" and the philosopher AN Whitehead's advice, referred to by Lord Rodger of Earlsferry in *HMRC v Barclays Bank Plc*,[14] to "Seek simplicity, and distrust it". The general consensus now established around the four-stage framework of unjust enrichment has a truth and simplicity to it, but it will not help the legal adviser to advise whether their client may have, or may face, a good claim, or the judge to determine the resulting litigation. The framework operates at the same, very high level of generality as a statement that a negligence claim in tort requires (i) a duty of care, ie a situation in which the law attaches liability to carelessness without the need for any contract, (ii) carelessness and (iii) resulting damage of a foreseeable type.[15]

Against that background, I turn now to my findings on the factual research. In testament to the significance and influence of Birks' four-stage model for analysing unjust enrichment claims, what follows is an examination of how the academic writings, through their use in leading judgments, appear to have shaped or influenced the development of the law of unjust enrichment, largely by reference to that four-stage model, its high level of generality notwithstanding.

10. (2018) 134 LQR 574.
11. 1st edn (1966) to 7th edn (2007).
12. 8th edn (2011); now 10th edn (2022).
13. (2018) 134 LQR 574, 574.
14. [2006] UKHL 28; [2006] 2 Lloyd's Rep 327; [2007] 1 AC 181, [51].
15. *Cf* the statement of the "Requirements of the tort of negligence" in *Clerk & Lindsell on Torts*, 23rd edn (2020), at [7.04]. In the Second Supplement to the 23rd edn, the Editors of *Clerk & Lindsell* duly report and comment on the more complex six-stage framework for negligence claims proposed by a majority in the Supreme Court in *Manchester Building Soc v Grant Thornton UK LLP* [2021] UKSC 20; [2022] AC 783, [6]. I suggest that the observation I make in the text would apply also to that framework, which, in any event, seems to me not to be comprehensive.

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BASIC NUMBERS

Unjust enrichment cases

A case law search on Westlaw indicated that there have been a total of 328 unjust enrichment cases in this jurisdiction. That is to say, 328 of the judgments available on Westlaw have been tagged by the database as "unjust enrichment" cases.[16] These 328 decisions sit within a total of 890 cases classified by the database as "restitution" cases. Before delving further, a brief *caveat*. Those figures, and others that follow, are taken from the use of keyword searches via the Westlaw platform.[17] The "hits" generated have not been checked for accuracy, ie to ensure that each case flagged as such is a case I would also categorise as an unjust enrichment, or restitution, case. The intention is not to pretend to arithmetical accuracy, but rather to explore patterns and trends, and I propose that the categorisation reliability of the law reporters should be sufficient for that purpose.

Citing academic texts

Within that body of case law categorised by Westlaw as being of interest:

- *Goff & Jones*[18] is referenced in 142 (of 328) unjust enrichment cases. These mentions sit within the 277 references *to Goff & Jones* in the 890 cases classified as restitution cases.
- *The Law of Restitution* (Burrows) is referenced in 33 unjust enrichment cases (out of 61 restitution cases citing the same).
- *A Restatement of the English Law of Unjust Enrichment* (Burrows) ("Burrows' *Restatement*") is referred to in 27 unjust enrichment cases (within 34 citations in restitution cases).
- *An Introduction to the Law of Restitution* (Birks) is referenced in 21 unjust enrichment cases (out of 34 references to the text in restitution cases).
- *Unjust Enrichment* (Birks) appears to be referenced in 25 unjust enrichment cases (out of 39 references to the work in restitution cases).[19]
- *The Principles of the Law of Restitution* (Virgo) is referenced in 15 unjust enrichment cases (out of 25 references to the work in the broader category of restitution decisions).

Thus, we observe widespread citation of the leading academic texts; and *Goff & Jones* continues to stand out as the most significant, or at least the most often cited, reference work.

16. Though 10 of those predate *Lipkin Gorman v Karpnale Ltd* [1988] UKHL 12; [1991] 2 AC 548.
17. Searches undertaken and figures cited as at May 2023.
18. Keyword or key phrase searches were undertaken on the term as listed. As such cases citing *Goff & Jones* may refer to any edition of the work, and in this case is inclusive of references to editions published under both titles, *The Law of Restitution* and *The Law of Unjust Enrichment*. The same methodology applies to all terms subsequent.
19. This result is somewhat more heavily *caveated*, given the limitations of search terms and the obvious overlap in the title of the work and the content of any decision in this area. The above figure was arrived at by limiting results to those in which the term "Birks" appeared in the same sentence as *Unjust Enrichment*.

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Citing academic authors by name

In addition to that data, based on citations of the most well-known textbooks, there will be judicial references to journal articles, excerpts or chapters, rather than main texts, and there may be cases citing the thinking of academic writers by name, without referencing a particular work of theirs. In the 328 cases categorised by Westlaw as unjust enrichment cases, searches suggested up to the following number of citations by name or by reference to a specific article that may not have involved the citation of a textbook:

- Birks in 46 cases
- Virgo in 23 cases
- Stevens in 10 cases
- Day in 2 cases (though this is obviously hard to distinguish through word searching)
- Beatson in 5 cases
- Burrows in 51 cases ("Professor Burrows", 24 citations, plus "Professor Andrew Burrows", 11 citations, and "Andrew Burrows", 16 citations).[20]

Not citing academic work is the exception

Those figures cannot be aggregated to produce a number of unjust enrichment cases citing academic authorities, as many will cite more than one academic source. Approaching the search from the other perspective, however—that is to say, excluding cases with any reference to Goff,[21] Birks, Burrows (in his academic capacity[22]), Virgo or Stevens—left only 68 of the 328 unjust enrichment cases.[23]

In round terms, therefore, there seems to be a reasonable basis to claim that the writings of leading academics are cited in at least 80 per cent or so of judgments in this area; and that only *c*.20 per cent of the time is no reference made.[24]

Unreferenced influence

As a measure of influence, that *c*.80:20 split does not account for the influence of material not quoted or cited, be that an academic source that directly influenced the decision, or general reading in the academic sources that shaped the court's understanding.

In "Further Narrowing the Scope of Unjust Enrichment",[25] William Day was critical of what he thought was a judicial tendency to adopt, in absence of citation, ideas first espoused in the academic literature. He evidenced this point by noting the "striking

20. This approach to the search was used so as to exclude from the results references to Lord Burrows in his more recent, judicial capacity. Note this is only English case law. If we include all jurisdictions represented on Westlaw, the Burrows total goes up to 62.
21. As an exclusionary search term for this exercise, "Goff" as the more singular surname was taken to be a sound proxy for Goff and Jones (in this context, almost invariably cited as a duo because of the book).
22. This was done by excluding only "Professor Burrows" or "Andrew Burrows" from the results.
23. And 111 of the 890 restitution cases.
24. 68/328 = 20.73% (or, indeed, from the preceding footnote, 111/890 = 12.47%).
25. (2019) 78(1) CLJ 24, 27–28.

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similarity" between the approach to compound interest after *Investment Trust Companies*[26] ("*ITC*") proposed by Professor Stevens in "The Unjust Enrichment Disaster", and the approach the Supreme Court adopted in *Prudential Assurance v HMRC*,[27] a draft copy of the article, Day said, having been provided to the Court.[28]

It seems fair to observe that, despite the similarities in the approach ultimately adopted by the Supreme Court and Professor Stevens' views, *Prudential Assurance*, which overturned *Sempra Metals v HMRC*[29] on the availability of compound interest in unjust enrichment claims, was decided with reference to five significant contextual factors which arose only after the decision in *Sempra* and which were not referenced by Stevens in his article. These were that:

1. The CJEU had since found that there was no requirement to award compound interest in a case where taxes were levied in breach of EU law.
2. The House of Lords had not considered that compound interest at common law conflicted with statutory provision stipulating only simple interest on overdue tax.
3. The retrospective limitation period introduced by Parliament to limit claims for compound interest against the Revenue (which was in place when *Sempra* was decided) had been struck down on the basis that it was incompatible with EU law.
4. Consequently, large claims for compound interest were disrupting public finances.
5. Decisions since *Sempra* called into question the recognition of a compound interest claim representing the value of money.

As to Lord Burrows' article which Day cited[30] in support of a consistent pattern of failure by the Supreme Court to cite academic opinion:

- The reference was to "Narrowing the scope of unjust enrichment",[31] written after *ITC*,[32] in which the Supreme Court clarified the need for the alleged unjust enrichment to have been at the expense of the claimant.
- In the article, it was said that the one slight disappointment with the "superb"[33] judgment was that Lord Reed had failed to note the academic writings on that issue. It was posited, diplomatically, that it may have been a case where, although cited to the court, "they were not thought to be particularly helpful",[34] and it was acknowledged that Lord Reed made extensive reference to academic authority in *Benedetti v Sawiris*,[35] but, still, it was notable that the similarity of the Court's findings to the reasoning in a case note by Frederick Wilmot-Smith,[36] which criticised the approach taken by the Court of Appeal in *ITC*, was not acknowledged.

26. *Investment Trust Companies (in liquidation) v HMRC* [2017] UKSC 29; [2018] AC 275 ("*ITC*").
27. *Prudential Assurance Co Ltd v HMRC* [2018] UKSC 39; [2019] AC 929.
28. He also referred to articles by Burrows (2017) 133 LQR 537, at 541–542, and PS Davies [2018] LMCLQ 433, at 437–438.
29. *Sempra Metals Ltd v IRC* [2007] UKHL 34; [2008] 1 AC 561.
30. See *supra*, fn.28.
31. (2017) 133 LQR 537.
32. [2017] UKSC 29 (*supra*, fn.26).
33. (2017) 133 LQR 537, 541.
34. *Ibid*.
35. [2013] UKSC 50.
36. (2015) 131 LQR 531.

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- The article recognised that, in the English common law system, past case law is a primary source of law in a way that academic commentary is not and suggested that, whatever the level of citation in judgments, in this field there has been an "important and fruitful" working relationship between courts and academics, and hoped "long may that continue".[37]

Some provocative (rhetorical) questions arising might be the following:

1. Does it matter that the article to which Day refers was in draft? Given that it was in draft, was it appropriate to refer the Supreme Court to it? If it was appropriate to refer the Court to it, and if it influenced the decision, ought the Supreme Court to have reserved judgment until after the article was published, so it could then be cited and its influence overtly acknowledged?
2. Does the substantial reference in the Supreme Court in *Barton v Morris*[38] to the note by Day and Professor Virgo[39] on the Court of Appeal decision in that case show that academic criticism over lack of citation has made a difference? Or does it just reflect the fact that Professor Burrows is now Lord Burrows JSC?
3. *ITC* is one of the very few leading recent cases in which no reference was made to academic authority.
   (a) Was that deliberate on Lord Reed's part, to emphasise his point (I paraphrase) that, despite unjust enrichment being a newly established area of law, it was established as such because the case law showed that there was a place for it; that recognition did not displace the previous decisions leading to it; and nor did the fact that it was a developing area mean that academics (instead of case law) should (at all events primarily) determine how issues were to be dealt with?
   (b) Whatever the answer to that, is *ITC* evidence of a material uncited academic impact on the development of the law? If so, the suggested conclusion that *c*.80 per cent of cases recognised as unjust enrichment cases appear to have been influenced by the academic writing in the field may be an underestimate.
4. Might the 80%-odd also be an underestimate in that, as the unjust enrichment case law develops and matures, the tendency must be for a prior decision (which may have been influenced by or based on ideas in the academic sources) more often to be available to answer the immediate issue, obviating the need, given our system of precedent, to cite anything more?

Lord Burrows JSC still to make a mark?

The quantitative analysis, above, suggests that, combining textbook citations and references to his name rather than the books, Professor Burrows' academic work may have been overtly influential in up to about one third of unjust enrichment cases (111 / 328).[40]

37. (2017) 133 LQR 537, 542.
38. [2023] UKSC 3; [2023] 1 Lloyd's Rep 297; [2023] AC 684.
39. "Risks on the contract/unjust enrichment borderline" (2020) 136 LQR 349.
40. A particular focus on Lord Burrows' contribution arose from his presence at and participation in the Commercial Court webinar for which the first version of this paper was prepared, as I mentioned at the outset.

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By comparison, Lord Burrows JSC had sat, according to Westlaw at the date when the searches were run, on 137 cases (including determinations of applications for permission to appeal), with reference to *dicta* of Lord Burrows apparently being made in 277 other judgments.

However, of those 137 cases, only two were unjust enrichment cases. One was not a case in this jurisdiction, but that will not prevent it from being influential (*Samsoondar v Capital Insurance Co*[41] in the Privy Council). In the other, *Barton v Morris*,[42] Lord Burrows' influence is limited to that indirect influence that can be provided by the offering of a different way of looking at things whereby to understand what a judgment has decided (which is to say, Lord Burrows' view did not prevail, as he was in the minority as to the correct result in that case[43]).

Of the 277 references to his decisions, only five are to either of his two unjust enrichment judgments. (I note in passing, however, that there seems to have been a marked increase, at least by those putting forward legal argument in cases, in the number of citations of his academic work, since he became Lord Burrows JSC.)

WHY SO INFLUENTIAL?

Having found evidence of academia's significant influence, the question arises why—ie, why are academic texts so widely cited in this field?

Academics credited with the identification of "unjust enrichment" as a field of law in its own right

First, as I have noted already, unjust enrichment is a relatively new and evolving area of law. It was properly established in this jurisdiction only in 1991, by the House of Lords' decision in *Lipkin Gorman v Karpnale Ltd*.[44] In *Dargamo Holdings Ltd v Avonwick Holdings Ltd*,[45] Carr LJ (as she was then) credited *Goff & Jones* for planting the seeds ultimately responsible for the recognition of unjust enrichment in English law. She said:[46]

"It was not until 1966 when Robert Goff and Gareth Jones (as they then were) published their ground-breaking work, *The Law of Restitution* (1st edn), that English law sought to recognise a principled basis for the law of restitution based on reversing unjust enrichment. Their thesis gained widespread acceptance amongst judges, practitioners and academics and, following ever-increasing judicial references to restitution and unjust enrichment, the subject was established firmly in English law by the House of Lords in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548."

41. [2020] UKPC 33 (Trinidad and Tobago).
42. [2023] UKSC 3; [2023] 1 Lloyd's Rep 297; [2023] AC 684.
43. The majority being Lord Briggs, Lord Stephens and Lady Rose JJSC.
44. [1988] UKHL 12; [1991] 2 AC 548.
45. [2021] EWCA Civ 1149; [2021] 2 CLC 583. In the section headed "The Law" ([51–105]), she set out a history of the law of unjust enrichment.
46. *Ibid*, [51].

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Difficulties of adjudicating on unjust enrichment

Unjust enrichment does not concern, as the title might suggest to the layperson, a particular judge's sense of the fairness or unfairness of some set of facts. As Carr LJ put it in *Dargamo*,[47] "The purpose of the claim is to correct normatively defective transfers of value, usually by restoring the parties to their pre-transfer positions"; and the ground upon which a successful claim may be put forward, as Lord Sumption said in *Swynson*,[48] "is not a matter of judicial discretion". To the contrary, as Lord Reed said in *ITC*,[49] "the legal rights arising from unjust enrichment should be determined by rules of law which are ascertainable and consistently applied"; or again, as Deane J expressed it in *Pavey*,[50] unjust enrichment "does not assert a judicial basis to do whatever idiosyncratic notions of what is fair and just might dictate … [Unjust enrichment] constitutes a unifying legal concept which explains why the law recognises, in a variety of distinct categories of case, an obligation on the part of the defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff …".

Determining what is considered unjust

Thus the question becomes, in the absence of a general notion of fairness, or a judicial discretion, how are courts to determine what the law demands? As adverted to already, it is now widely accepted, following some debate,[51] that any unjust enrichment claim involves four elements:

(1) Has the defendant been enriched?
(2) Was that enrichment at the claimant's expense?
(3) Was that enrichment unjust?
Here the burden lies on the claimant to establish, by reference to an unjust factor, things such as mistake, duress, undue influence, failure of basis or consideration, necessity, or legal compulsion, that in the circumstances the benefit conferred was not one they intended unconditionally to confer.
(4) Do any defences apply?

However, those elements are only "a conceptual structure".[52] They should not be applied rigidly, and importantly, they are not tests.[53] As stated by Lord Reed,[54] they are

47. [2021] EWCA Civ 1149, [54]. The paragraph in full was this: "Despite its evolutionary nature, the common law claim in unjust enrichment can, for present purposes, be summarised as follows: a claimant has a right to restitution against a defendant who is unjustly enriched at the claimant's expense. The purpose of the claim is to correct normatively defective transfers of value, usually by restoring the parties to their pre-transfer positions (see *Menelaou v Bank of Cyprus Plc* [2015] UKSC 66; [2016] AC 176, at [23] and *ITC* [2017] UKSC 29; [2018] AC 275, [42], where Lord Reed went on to comment that it "reflects an Aristotelian conception of justice as a restoration of a balance or equilibrium which has been disrupted").

48. *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32; [2018] AC 313, [22].

49. [2017] UKSC 29, [39].

50. *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, [14].

51. To subject matter experts, this may seem a throwaway reference to the complex history of the law in this area, but it is a history which does not need to be explained or explored in this article.

52. *Dargamo* [2021] EWCA Civ 1149, [55].

53. *ITC* [2017] UKSC 29, [41], *per* Lord Reed.

54. *Ibid*.

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"signposts towards areas of inquiry involving a number of distinct legal requirements". Nor is the list of unjust factors at step 3 of Birks' formulation closed.[55] In the common law tradition, it remains open to claimants to advance cases seeking the recognition of novel unjust factors.

Putting that all together, we find ourselves adjudicating on matters in a young, highly fact-sensitive area of law which demands that decisions be made "in accordance with rules of law which are ascertainable and consistently applied",[56] at a time when the rules are still largely being ascertained and defined.

That naturally affords room, more so than in other fields of law, it may be, to consider expressions of defined rules, and to examine the implications of the existing law, or of changes to it or novel applications of it, that may be proposed by academic contributors in the field.

Against all of that background, how within the analysis of unjust enrichment cases is the academic thinking seen to be influential?

Methodology

To answer a question of that kind requires a review of the content of judgments, not merely a set of statistics on the citation of academic sources. I sought to identify the significant cases of the last decade or so that cited academic commentary or articles in relation to the *ratio* or the key issue before the court. That search returned around 20 results. I then expanded the search to include significant decisions within the same time period which did not reference academic sources in the determination of the key issue before the court. That search produced far fewer results, five at the time. Of those, one was *Barton v Morris* (in the Court of Appeal);[57] but now, in the Supreme Court, extensive reference is made to academic texts in the judgments of the majority and in the dissenting judgment of Lord Burrows JSC (see below as to the other dissenting judgment, that of Lord Leggatt JSC); and three of the five made at least some reference to academic texts, even if it did not seem critical to the ultimate determination of the central issues. Thus, now, only two of 24 significant recent cases make no reference at all to the academic writing in the field: *ITC*, the possible background to which I have pondered, above; and *Jeremy Stone*,[58] which, though it dealt with unjust enrichment, was primarily concerned with claims for the recovery of funds in the aftermath of a fraudulent investment scheme.[59]

55. See *Dargamo* [2021] EWCA Civ 1149, [63], citing Lord Burrows (as Professor Burrows) in the 1st edn of Burrows' *Restatement* (2012).

56. *ITC* [2017] UKSC 29, [39], *per* Lord Reed.

57. *Barton v Gwyn-Jones* [2019] EWCA Civ 1999; [2020] 2 All ER (Comm) 652.

58. *Jeremy D Stone Consultants Ltd v Nat West Bank Plc* [2013] EWHC 208 (Ch)

59. This allows me a second reference to my decision in *Pisante v Logothetis (No 2) (supra*, fn.6), which I do not put forward as an especially significant case, but which is of passing interest at this point for being, like *Jeremy Stone*, a case (in relevant respect) about restitution whereby to restore a *status quo ante* following an investment induced by fraud.

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The 24 cases considered for the purposes of this analysis were the following:[60]

(1) *Sharma v Simposh Ltd* [2011] EWCA Civ 1383; [2013] Ch 23
(2) *Test Claimants in the FII Group Litigation v HMRC (No 1)* [2012] UKSC 19; [2012] 2 AC 337 ("*FII Group (No 1)*")
(3) *Dry Bulk Handy Holding Inc v Fayette International Holdings Ltd (The Bulk Chile)* [2012] EWHC 2107 (Comm); [2012] 2 Lloyd's Rep 594
(4) *Jeremy D Stone Consultants Ltd v National Westminster Bank Plc* [2013] EWHC 208 (Ch)
(5) *Benedetti v Sawiris* [2013] UKSC 50; [2014] 1 AC 938
(6) *Relfo Ltd (in liquidation) v Varsani* [2014] EWCA Civ 360; [2015] 1 BCLC 14
(7) *Crown Prosecution Service v The Eastenders Group* (also known as *Barnes v Eastenders Cash & Carry Plc*) [2014] UKSC 26; [2015] 1 AC 1
(8) *Investment Trust Companies (in liquidation) v HMRC* [2017] UKSC 29; [2018] AC 275
(9) *Swynson Ltd v Lowick Rose LLP (in liquidation) (formerly Hurst Morrison Thompson LLP)* [2017] UKSC 32; [2018] AC 313
(10) *Prudential Assurance Co Ltd v HMRC* [2018] UKSC 39; [2019] AC 929
(11) *Equitas Insurance v Municipal Mutual Insurance Ltd* [2019] EWCA Civ 718; [2019] Lloyd's Rep IR 359; [2020] QB 418
(12) *Vodafone Ltd v Office of Communications* [2019] EWHC 1234 (Comm); [2020] QB 200 ("*Vodafone* [2019]")
(13) *Skandinaviska Enskilda Banken AB (Publ) v Conway* [2019] UKPC 36; [2020] AC 1111
(14) *Vodafone v Office of Communications (Ofcom)* [2020] EWCA Civ 183; [2020] QB 857 ("*Vodafone* [2020]")
(15) *Delta Petroleum (Caribbean) Ltd v British Virgin Islands Electricity Corporation* [2020] UKPC 23; [2021] 1 WLR 5741
(16) *Test Claimants in the Franked Investment Income Group Litigation v HMRC (No 2)* [2020] UKSC 47; [2022] AC 1 ("*FII Group (No 2)*")
(17) *Samsoondar v Capital Insurance Co Ltd* [2020] UKPC 33; [2021] 2 All ER (Comm) 353
(18) *Surrey County Council v NHS Lincolnshire Clinical Commissioning Group* [2020] EWHC 3550 (QB); [2021] QB 896
(19) *School Facility Management Ltd v Governing Body of Christ the King College* [2021] EWCA Civ 1053; [2021] 1 WLR 6129 ("*Christ the King*")
(20) *Test Claimants in the FII Group Litigation v HMRC (No 3)* [2021] UKSC 31; [2021] 1 WLR 4354 ("*FII Group (No 3)*")
(21) *Dargamo Holdings Ltd v Avonwick Holdings Ltd* [2021] EWCA Civ 1149
(22) *Tecnimont Arabia Ltd v National Westminster Bank Plc* [2022] EWHC 1172 (Comm); [2023] Bus LR 106

60. In this list, given their influence, Privy Council decisions were included where deemed significant in the development of the law of unjust enrichment.

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(23) *Banca Intesa Sanpaolo SpA v Comune Di Venezia* [2022] EWHC 2586 (Comm); [2023] Bus LR 384[61]

(24) *Barton v Morris (in place of Gwyn-Jones (deceased))* [2023] UKSC 3; [2023] 1 Lloyd's Rep 297; [2023] AC 684; rvsg [2019] EWCA Civ 1999

I do not hold that list out as definitive. There may be other decisions that would have merited an equal billing. In any event, for present purposes, those were the cases analysed.

Where in the 4-step unjust enrichment analysis is the academic writing being cited?

Of the 24 cases 22 made some explicit reference to academic sources. First, by reference to Birks' four-stage framework, and considering at which stage judges were most likely to be assisted by the academic writing:

- Three (possibly four[62]) centred on the determination of whether or not the defendant had been enriched. These cases dealt with questions of what enrichment means, how enrichment is to be valued, and the relevance of interest to enrichment.[63]
- Three were principally concerned with determining if an enrichment could, in law, amount to enrichment at the claimant's expense. These cases dealt primarily with the requirement of directness, and how that requirement was or was not met in banking cases.[64]
- 13 focused on determining if the enrichment was unjust under any recognised factor, or if the factual situation justified the recognition by the law of a novel unjust factor. Here we find the court dealing *inter alia* with statutory and contractual issues to determine if the situation gives rise to a ground sufficient in law for a reversal of the enrichment to be required.[65]
- Three cases turned to academic sources in the determination of whether a valid defence applied.[66]

I think it is no real surprise to discover, as thus we do, that the third stage in the four-stage unjust enrichment analysis is where we find most of the intellectual endeavour and consequent consideration of academic commentary—when will English law say that enrichment is unjust? There most acutely lies any debate over whether there is, or can sensibly be, a singular, unified category of unjust enrichment claim, rather than a number of distinct categories of claim.

61. Note that at the time of submission of this article for publication, an appeal to the Court of Appeal was pending from the decision of Foxton J.

62. As discussed above, in (10) *Prudential Assurance*, the reasoning adopted is basically the same as the reasoning of Professor Stevens' article, "The Unjust Enrichment Disaster", but it is not cited.

63. (5) *Benedetti*, (15) *Delta Petroleum*, (20) *FII Group (No 3)*.

64. (6) *Relfo*, (14) *Vodafone* [2020], (22) *Tecnimont*.

65. (1) *Sharma,* (2) *FII Group (No 1),* (3) *The Bulk Chile*, (6) *Relfo*, (7) *Barnes,* (8) *Samsoondar,* (9) *Swynson,* (11) *Equitas Insurance*, (16) *FII Group (No 2),* (18) *Surrey CC v NHS Lincolnshire,* (21) *Dargamo,* (23) *Banca Intesa,* (24) *Barton*.

66. (12) *Vodafone* [2019], (13) *Skandinaviska,* (19) *Christ the King*.

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JUDICIAL TECHNIQUES

Having identified the (type of) issue for which academic authorities were being cited, I turn to the different ways in which those authorities were then used. The categorisation that follows has no prior or independent source. It is only a categorisation that was suggested by the review of those recent cases. That said, I would recognise it as descriptive of the different ways in which we judges find ourselves constructing reasoning from existing case law; and I note that it overlaps with the categorisation used by Carr LJ (as she was then) in her Harris Society Annual Lecture, referred to above,[67] within her reasoned conclusion that there is nowadays a constructive dialogue between jurists and judges.

(Note: (24) *Barton v Morris* is not detailed in this section of the review, given the complexity of categorisation presented now by a Supreme Court decision on a 3:2 majority with the dissenting judgments adopting different analyses. It is discussed separately, in the final part of this article, below.)

Defining or restating principles

In four of the cases, use of academic sources was limited to the provision of definitions and the restatement of accepted principles.[68]

- In (1) *Sharma*, the adoption of Birks' definition of "failure of basis"[69] and his approach to identifying the "basis" of a transfer[70] were determinative of the key issues in the case. This illustrates the impact academics can have simply by stating the accepted legal position or consolidating principles reflected in various sources (mainly case law) into applicable statements of legal principle—classic doctrinal scholarship.
- In (9) *Swynson*, (13) *Skandinaviska* and (14) *Vodafone* [2020], the use of the authorities is to set out or restate established principles, but these do not impact greatly on the outcome of the case. Even then, however, these cases evidence that judges pick up and read from the academic texts when tackling an unjust enrichment problem.

Comparing and contrasting

A further four cases make use of the commentaries, *obiter*, to compare various approaches to issues arising.[71]

- The "compare and contrast" approach was applied in (3) *The Bulk Chile*, which dealt with a claim under a bill of lading, where a tertiary argument was made for the recovery of a *quantum meruit* on the basis that the defendants had been unjustly enriched as a result of "freely accepting" services for which they ought to have known that payment would have been expected. The court held that the services were not freely accepted, but

67. *Ante*, text to fn.5.
68. (1) *Sharma*, (9) *Swynson*, (13) *Skandinaviska*, (14) *Vodafone* [2020].
69. *Sharma* [2011] EWCA Civ 1383; [2013] Ch 23, [24].
70. *Ibid*, [45].
71. (3) *The Bulk Chile*, (11) *Equitas*, (17) *Samsoondar*, (19) *Christ the King*.

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performed subject to a binding contract and therefore the unjust enrichment question did not require determination.

  - Before moving to the analysis on the existence of such a principle, Andrew Smith J held that the original way in which the claim for unjust enrichment had been put—that the defendants, having been unjustly enriched at the expense of the claimant, were obliged to provide restitution if they could not establish a relevant defence—failed as it lacked a recognised unjust factor. In response, the claimant argued, in reliance on and quoting from *Goff & Jones*, that the unjust enrichment claim could be based on free acceptance.
  - As to that, the judge noted that: "A principle of this kind has had more academic than judicial recognition (and has been questioned academically: for example, by A Burrows in 'Free Acceptance and the Law of Restitution').[72] … For my part, I consider that English law probably does provide quantum meruit relief for 'freely accepted' services, but I am not persuaded that Fayette would have been liable on this basis even if I had rejected the other claims."[73]
  - Before arriving at that conclusion, he noted that the principle of free acceptance was recognised by Arden LJ in (5) *Benedetti*.[74]

- (11) *Equitas* involved Leggatt LJ (as he was then) foreshadowing what is now his dissenting, and rather emphatic, judgment in the Supreme Court in *Barton*. His judgment in *Equitas* was supplementary, providing additional reasoning but ultimately concurring with the main judgment.
  - He dealt[75] with the suggestion by Burrows that there could be exceptions to the rule that there cannot be a claim for unjust enrichment where a defendant is legally entitled to the enrichment. He contrasted this view (Burrows') with four articles which argued against that position. Then, he suggested that the "response of allowing an equitable principle or restitutionary claim to override a valid and binding contract should in my view be regarded as an absolutely last resort, if not a counsel of despair".[76]
- In (17) *Samsoondar*, Lord Burrows' Privy Council case, he dealt *obiter* with the question of whether mistake as opposed to legal compulsion could found a claim in unjust enrichment. This point was not pleaded and so had not been considered in the courts below. Ultimately the claim failed on the basis that the claimant had not been subject to legal compulsion to pay a third party; therefore, no pleaded unjust factor arose. As to the (possible) unpleaded factor, considered *obiter*:
  - Lord Burrows cited Birks and *Goff & Jones*, before stating that "in principle there seems to be no good reason why reliance on mistake rather than legal compulsion should mean that no restitution is available in respect of the discharge of another's liability".[77]

72. (1988) 104 LQR 576.
73. *The Bulk Chile* [2012] EWHC 2107 (Comm); [2012] 2 Lloyd's Rep 594, [81], [82].
74. [2010] EWCA Civ 1427, [2].
75. [2019] EWCA Civ 718, [144].
76. *Ibid*, [145]. *Cf* Lord Leggatt's dissenting judgment in *Barton* [2023] UKSC 3, notably his comments at [191].
77. *Samsoondar* [2020] UKPC 33, [25].

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- He also noted (which will have made the academic writing an obvious resource to consult, whoever the judge) that the case law was "far from straightforward".[78]

- In (19) *Christ the King*,[79] Popplewell LJ compared the approach suggested by four academic contributors—here Birks, Burrows, Goff and Jones, and Edelman and Bant[80]—to determine how, and specifically in what order, the counter-restitution principle should be applied as against a defence of change of position.
  - *Birks* (in an approach cautioned against by Popplewell LJ, as it was predicated on the German "unified theory of unjust enrichment"[81]) proposed that counter-restitution should be treated as a condition of recovery in cases where each claimant had a separate but valid claim against the other. *Burrows* advocated for a cross claim analysis in which counter-restitution functions in a manner akin to a set-off defence.[82] *Goff & Jones* seconded Birk's "condition of recovery" approach (though their work did not attract the same German law-based *caveat*). *Edelman & Bant* again lent their support to the cross-claim approach, but on the basis that a change of position defence should be available to each of the parties in a cross claim, not just to the claimant.
  - Ultimately, having examined the authorities, Popplewell LJ found that the issue did not arise on the facts and did not, therefore, fall to be determined by the court on that occasion. Yet, despite having cautioned against the adoption of Birks' German law-influenced approach, he declined, as he did not think it appropriate, to "express a concluded view", on the basis that there could be instances in which one or more of the approaches "may provide a valid justification" and that "[w]here they compete, the facts of the case may render one more suitable than another".[83]

Setting out, to distinguish

In seven cases, the academic authorities are used to set out the established legal position, as a basis against which the change arising from a proposed development of the law might be examined for acceptability. The comma in the heading is important here—it is "setting out, to distinguish", not "setting out to distinguish"!

Four cases used the "set out, to distinguish" approach as a background against which to refuse a proposed change to the existing law. That is to say, to show that the change suggested fell outside established bounds of the law of unjust enrichment and was out of pace with the development of the law, so that the court should decline to develop the law as proposed.[84]

78. *Ibid*.
79. A decision in which the Court of Appeal considered "less than satisfactory" counsel's failure to provide the trial judge with "assistance or citation of authority" on the relevant point: see [2021] EWCA Civ 1053, [2]. Noting that Court's reliance on academic writing, I take it to have intended the non-citation of such writing to be within the ambit of the criticism of a failure to assist the court.
80. See *ibid*, [75–77] ("Academic Writings").
81. *Ibid*, [75].
82. Though Popplewell LJ expressed some difficulty in reconciling different articulations of Burrows' view across the various texts.
83. *Ibid*, [78].
84. (12) *Vodafone* [2019], (15) *Delta*, (20) *FII Group (No 3)*, (22) *Tecnimont*.

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- In (12) *Vodafone* [2019], this approach was used by the court as a basis to defeat the claimant's attempt to establish, in reliance on *Goff & Jones*, a new counterfactual principle in the law of unjust enrichment.
  - Ofcom made an unlawful demand for payment which it did not, at the time, know was unlawful. Had it realised that the demand was unlawful, under its own powers, Ofcom could have made lawful changes to the regulations which would have made the fees legally chargeable.
  - Ofcom argued in reliance on that counterfactual that there was no unjust enrichment and supported the reliance on counterfactuals by reference to a discussion in *Goff & Jones* of cases in which some form of counterfactual was applied, or might have been applied, to resolve a particular issue. In essence it seems to have argued that, taken as a whole, the examples set out by the academics added up to a rule which should be applied by the court.
  - This was rejected by the court. There was also something of a warning note levelled at academics for too readily taking it upon themselves to suggest novel principles, or to suggest that they had been established, rather than to keep in mind that individual cases may turn on their particular circumstances and do not always make new law.
- In (15) *Delta*, the "set out, to distinguish" technique was applied to reject a submission that the court should further narrow the definition of enrichment, to include only benefit *retained* by the defendant, which if accepted would have defeated the claim as at that time the defendant was no longer in possession of the enrichment.
  - The argument was made by the defendant in reliance on *R (Seago) v HMCTS*,[85] in which the court did not order restitution against a liquidator to whom the claimant had erroneously been ordered to pay money.
  - Lord Leggatt relied on the analysis in *Goff & Jones* to distinguish *Delta* from *Seago*. *Goff & Jones* posited that the liquidator had a change of position defence and that this, not a requirement of retained benefit, was why restitution was not ordered.
  - Lord Leggatt went on to clarify the position, quoting from *Goff & Jones*, that, "[i]f the respondent has sold the property transferred, he is liable to make restitution of the proceeds".[86]
- In (20) *FII Group (No 3)*, this technique was used to explain why it was possible, generally, but not warranted on the facts, to reduce the defendant's enrichment in light of liability arising as a result of the unjust payment.
  - The court cited Virgo, Edelman and Bant, and Burrows, to the effect that the *quantum* of enrichment may not be as simple as the amount of money transferred to the defendant. The court should have regard to the net value of the enrichment in light of any automatic costs or deductions triggered by the transfer; e.g., if receipt of funds meant loss of a valuable tax benefit, the court could take into account the lost value in determining the enrichment.

85. [2012] EWHC 3490 (Admin).
86. *Delta* [2020] UKPC 23, [59].

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  - But, while they affirmed the principle, the court distinguished the facts on the basis that the purported reduction in the value of HMRC's enrichment was not triggered by the payment. The tax credits which it claimed had reduced its enrichment were due to be paid either way. Thus, the facts were distinguished, and the legal principle was upheld but not expanded.
- Finally, in (22) *Tecnimont*, HHJ Bird examined and rejected the argument made by two academic sources[87] that there is enrichment "at the expense of the claimant" where a claimant makes an international, inter-bank, transfer of funds to the defendant's bank account. In rejecting the view stated in those sources, HHJ Bird clarified that the directness element was not an issue for determination by reference to a causally based examination of the "economic reality" underlying the transaction. The correct approach to the determination of directness, following the Supreme Court in *ITC*, was to examine the mechanism by which the enrichment passed to the defendant. It was the transfer mechanism itself which the law required to be direct. However, in such an international transfer, no funds are exchanged (only a corresponding balance is amended on an account ledger), and all exchanges are made via a "non agent" intermediary, so there was no direct contact between the claimant and the defendant; hence, when examined on a proper basis, the transfer was not capable of satisfying the requirement of directness in a claim for unjust enrichment.

Equally the "set out, to distinguish" approach has been used as a basis upon which to justify diverging from an apparently accepted position or evolving the law. Here the court has shown how the proposed change differs from the established position before finding that the proposed change should be accepted or implemented.[88]

- In (6) *Relfo*, Arden, Gloster and Floyd LJJ considered the meaning of a supposed rule that the defendant's enrichment had to have been received "directly" from the claimant. This "direct providers only rule" was referred to as the "DPR". The court found that the existing body of decisions already surpassed the limitation propounded by the academic texts, and as such determined that the court had, by its actions, shown an intent to evolve beyond the academic position. This is most clearly stated by Gloster LJ: "It is clear from the cases to which Arden LJ referred that the court has not limited the remedy to cases falling within what Professor Burrows in *The Restatement* refers to as 'the direct providers only' rule and that there are exceptions to the rule".[89]
  - Here the court started from what was said to be the accepted rule, as set out in Burrows' *Restatement*, and then considered other sources who "favoured a wider principle than the DPR".[90] Arden LJ reasoned that, as the exceptions were a "motley collection" taken from a range of different areas of law they were not the "principles

87. *Goff & Jones*, 9th edn (2016), [6.62]; and M Brindle and R Cox, *The Law of Bank Payments*, 5th edn (2018), [6.62].
88. (6) *Relfo*, (18) *Surrey CC v NHS Lincolnshire*, (23) *Banca Intesa*.
89. *Relfo* [2014] EWCA Civ 360, [14].
90. *Ibid*, [76].

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for imposing liability for unjust enrichment carved out of the DPR".[91] On this basis she concluded that Burrows' list was not an exhaustive list of exceptions.
  - In reliance on those decisions, she posited that a "general principle" was emerging which required only a "sufficient link".[92] This was supported by Gloster LJ in the quotation above and Floyd LJ, who observed that the courts had not always "rigidly observed"[93] the DPR.
  - The Supreme Court reversed this, and the "sufficient link" idea, in *ITC*, considering that a test for enrichment which relied on "economic or commercial reality" was "difficult to apply with any rigour or certainty … or consistently with the purpose of restitution".[94] *Relfo* was said to be an exceptional case as it involved a "sham"[95] designed to conceal the connection between the claimant and defendant.
- The same approach was followed in (18) *Surrey CC v NHS Lincolnshire*. In this case, as part of the decision to accept a proposed novel unjust factor, Thornton J held that NHS Lincolnshire had been unjustly enriched, as it had failed to assess and take over the treatment of an autistic patient, who had been in Surrey's care, at the time when the patient reached adulthood. The novel element was that Surrey, which continued to provide care, had a statutory duty to do so until Lincolnshire took over, which Lincolnshire erroneously refused to do. Surrey's claim depended on the court's finding that Lincolnshire had been enriched as a result of Surrey's complying with a statutory duty, as a result of which the payments made by Surrey were not unlawful or *ultra vires* – Surrey was in those circumstances legally obliged to pay. It also involved finding that an enrichment had occurred, not via the payment of any funds, but via the discharge of a liability.
  - Thornton J noted that the case was comparable with the *Woolwich*[96] and *Auckland*[97] principles, but could be distinguished on the facts, largely for the reasons identified above.
  - She relied on Burrows' *Restatement*'s analysis to hold that the *Woolwich* and *Auckland* principles were founded on the "controlling concept" of "public law unlawfulness" and for the proposition that Surrey's statutory duty did not override the unlawfulness, so as to find by analogy that the claim should succeed since the underlying principles accorded with the established legal rules even if the facts were distinct.
- In (23) *Banca Intesa*, Foxton J used the academic commentary as a test, addressing and overcoming, in turn, each of the reasons given by commentaries for the unavailability of a change of position defence in response to a claim for unjust enrichment founded on a "failure of basis" by reason of a void contract having been assumed to be valid. He found that the answer was "in principle, yes".[98] This is a detailed example of

91. *Ibid*, [80].
92. *Ibid*, [95].
93. *Ibid*, [113].
94. *ITC* [2017] UKSC 29, [59].
95. *Ibid*, [48].
96. See *Woolwich Equitable Building Soc v IRC (No 2)* [1993] AC 70.
97. *Auckland Harbour Board v King* [1924] AC 318.
98. See [2022] EWHC 2586 (Comm), [393–425].

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the "set out, to distinguish" approach. Foxton J followed a clear pattern: (1) this is the accepted position; (2) this is the point of difference between the submission and the law as it stands; (3) this is the case law and academic commentary on the point; (4) this is the conclusion, in light of (1)–(3). (*Banca Intesa* is subject to appeal, but (I respectfully suggest) the quality of the analysis, as an illustration of the "set out, to distinguish" technique, is independent of whether the Court of Appeal agree with Foxton J's evaluative conclusion at the end of it.)

Building blocks

In two cases, the academic commentaries have been used as the building blocks in the rationale of a decision—either to show why something cannot be said to be the position in law, or to explain why something should, or should not, in law, be possible.[99]

- This reliance on academic texts to build out the elements of a decision can be seen even in the highest courts. In (2) *FII Group (No 1)* the Supreme Court used the academic sources as building blocks of the rationale when it decided to extend the *Woolwich* principle to apply in absence of an unlawful demand by the public authority.
- Likewise, in the Court of Appeal, in (21) *Dargamo*, Carr LJ examined the extent to which a claim in unjust enrichment was precluded by the existence of a contract between the parties. The case concerned a contract which it was submitted was entered into on the basis that certain payments were made in respect of a future contract the details of which were not included in the parties' signed contract. The paying party claimed for unjust enrichment, but the court found that the contractual terms allocated the risk. As a result, this was not a case where unjust enrichment should intervene.
  - Academic authorities were relied on to analyse the extent to which the existence of the contract precluded the claim and for the rationale for excluding the claim:
    - Burrows' *Restatement* was used to codify the exceptions to the rule
    - *Goff & Jones* provided the rationale for the exceptions
    - Birks was used to highlight how rare an exception to the rule would be
    - Wilmot-Smith was used to defeat the defendant's submission that unjust enrichment is a "gap filling" mechanism subservient to contract
  - Carr LJ explained that it should not be thought that unjust enrichment is an inferior source of rights and obligations, but nonetheless there is often "no 'space' for the law of unjust enrichment in particular claims".[100]

Supporting a decision to overrule a HL/SC decision

In one instance (or possibly two instances, if we account for the possible uncited contribution of Stevens in *Prudential Assurance*[101]), academic commentary was used as support for arguments in which the Supreme Court overturned earlier decisions by the House of Lords: (10) *Prudential Assurance*, and (16) *FII Group (No 2).*

99. (2) *FII Group (No 1)*, (21) *Dargamo*.
100. *Dargamo* [2021] EWCA Civ 1149, [75–76].
101. See *ante*, pp.629–631.

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- *Prudential Assurance* overturned the House of Lords in *Sempra Metals* on the availability of compound interest in unjust enrichment claims.
- *FII Group (No 2)* overturned the House of Lords[102] on what it means for a mistake of law to be discoverable with reasonable diligence. The link to unjust enrichment is the discoverability of a situation where the basis for the transaction is not the same as the basis on which the parties had acted so as to give rise to a potential failure of basis.

It is an obvious comment, but this role for academic writing is perhaps critically important where an applicant seeks the reversal of a decision by the House of Lords or the Supreme Court, as who other than academics may so freely criticise the approach taken in those decisions if they consider it to be problematic?

PARTICULAR CONTRIBUTIONS

Finally, I identify and discuss examples, some larger, some smaller, of academic contributions to the substance of the developing law, irrespective of questions of the judicial technique used when deploying the academic sources in judgments.

(i) Introducing new/improved terminology

Adoption of failure of basis

The dispute over the nomenclature to be applied to this unjust factor predates the recognition of unjust enrichment as a distinct field of law. The definition to be applied in the context of the law of restitution has been agreed since Birks' revised 1989 edition of *An Introduction to the Law of Restitution*.[103] The best or preferred term to represent the concept has been less clear.

To avoid potential confusion with "failure of consideration" in contract law, Birks argued for a Roman understanding of "failure of condition". That is to say that failure of consideration simply referred to a conditionality in relation to the conferred benefit, and in that regard a condition which happens to fail.

In 2011, in the 8th edition of *Goff & Jones*, as the book became "*The Law of Unjust Enrichment*", the authors addressed the continuing use of both terms and put their support behind the use of "failure of basis" in unjust enrichment. Then:

- From 2012, cases moved to failure of basis, following *Goff & Jones*.
- The Supreme Court engaged with this first in *Barnes* in 2014, noting that "Whichever terminology is used, the legal content is the same. The attraction of 'failure of basis' is that it is more apt, but 'failure of consideration' is more familiar".[104]

102. *Deutsche Morgan Grenfell Group Plc v IRC* [2006] UKHL 49; [2007] 1 AC 558.
103. "It means that the state of affairs contemplated as the basis or the reason for the payment has failed to materialise, or if it did exist, has failed to sustain itself."; *Ibid* at 223.
104. *Barnes* [2014] UKSC 26, [105].

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- In 2021, in *Dargamo*,[105] Carr LJ stated that she preferred to adopt the terminology of "failure of basis" suggested by *Goff & Jones*.
- The change in terminology was then firmly endorsed this year by the Supreme Court in *Barton*, affirming that, for the reasons set out in *Dargamo*, the term "failure of basis" is generally to be preferred to "failure of consideration".[106]

(ii) Accepting a suggestion to apply test at different stage of the analysis

- In (5) *Benedetti v Sawiris*, in which the court accepted a principle of "subjective devaluation" to the assessment of the defendant's enrichment, Lord Reed, noting that the principle was based on recognition of the defendant's freedom of choice, suggested in reliance on academic sources that the issue was best dealt with at stage 3 (unjust factors), an approach he considered to have the "virtue of simplicity".[107]

Determining a novel unjust factor or narrowing a previously recognised factor

Aiding in the development of a novel unjust factor

- In (18) *Surrey CC v NHS Lincolnshire* Thornton J relied on Burrows' *Restatement* for the proposition that both the *Woolwich* and *Auckland* unjust factors were based on the "controlling concept" of public law unlawfulness and reasoned that this by analogy permitted an unjust enrichment claim on the facts of that case, and also that the fact that Surrey had been obliged by statue to pay for the individuals' care did not nullify the novel unjust factor where the claim was brought on the basis that NHS Lincolnshire was enriched as a result of not paying for care that was their responsibility, and that failure to discharge a legal duty caused the statutory liability to be passed to Surrey.

Aiding in the determination of whether an existing factor should be narrowed

- In (15) *Delta*, the defendant argued that any enrichment no longer retained by the defendant should be considered when determining the value of the defendant's enrichment. The defendant argued that this position was supported by the academic authorities. The court rejected the argument, relying *inter alia* on *Goff & Jones*[108] for the proposition that, if the defendant has sold the property transferred, he is liable to make restitution of the proceeds, with the effect that the position as stated by *Goff & Jones* was incorporated into the case law, and the defendant's proposed narrowing of the definition of enrichment was rejected.

105. *Dargamo* [2021] EWCA Civ 1149, [78].
106. *Barton* [2023] UKSC 3, [78].
107. *Benedetti* [2013] UKSC 50, [118].
108. *Goff & Jones*, 7th edn (2007), [16.001].

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Responding to an academic consensus

Courts seem likely to respond when the academic literature reaches a consensus

- In (2) *FII Group (No 1)*, the Court was asked to extend the application of the *Woolwich* principle (as an unjust factor) to cover situations in which an unlawful payment had been made but without any unlawful demand.[109]
- In (22) *Tecnimont*, the claimant sought, in reliance on a consensus of several academic sources, to persuade the court to recognise a novel exception to the requirement of directness at stage 2 (enrichment at the expense of the claimant).

In *FII Group (No 1)*, the court was taken to some nine separate academic sources, each of which supported the claimant's argument. Citing the "formidable volume of distinguished academic opinion"[110] and the recurring theme among them of the "high constitutional importance of the principle that there should be no taxation without Parliament…",[111] the court accepted the proposition that the change in law should be made and Lord Hope went on to state that the Supreme Court "should restate the *Woolwich* principle"[112] to reflect the academic consensus.

In *Tecnimont*, the court declined to recognise the exception on the basis that, since the articles in question, *ITC* had clarified the law. The causation-based analyses relied on by the academics to justify the exception contended for by the claimant were found to be contrary to the Court's reasoning in *ITC*, and as a result the proposed exception was not allowed.

Value placed by the judiciary on the work of academics:

In (17) *Samsoondar*, one of the two unjust enrichment cases on which Lord Burrows has sat, there is effectively an invitation for more thoughts, or a suitable case to decide so that the law can be clarified. The judgment opens as follows:[113]

> "Although the principal sum at stake in this motor insurance dispute is only $43,400, the case raises such interesting legal issues that, at times, the Board felt almost as if it was tackling an exam question. It involves the retrospectivity of a judicial interpretation of a statute, which overturned a previous judicial interpretation, and, in the light of that, there are questions on contractual interpretation and on the compulsory or mistaken discharge of another's legal liability in the law of unjust enrichment. As will become clear—and perhaps disappointingly for the development of the law—it will be unnecessary to answer all those questions in order to decide this appeal."

109. A self-assessment indicated that a sum was due, part of which was *ultra vires*, and which was paid, but no demand was issued.

110. [2012] UKSC 19, [74].

111. *Ibid*, [74].

112. *Ibid*, [79]. His formulation is: "so as to cover all sums paid to a public authority in response to (and sufficiently causally connected with) an apparent statutory requirement to pay tax which (in fact and in law) is not lawfully due", which accords with the academic view.

113. *Samsoondar* [2020] UKPC 33, [1].

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When considering whether mistake can operate as the unjust factor Lord Burrows set out a provisional view, then relied on the commentaries to explain the current contradictions within the case law:[114]

"In principle, there seems no good reason why reliance on mistake rather than legal compulsion should mean that no restitution is available in respect of the discharge of another's liability. However, the case law on this question is far from straightforward: see, eg, Birks, *An Introduction to the Law of Restitution*, revised ed (1989), pp 185–193; and *Goff & Jones on The Law of Unjust Enrichment* (eds Mitchell, Mitchell and Watterson, 9th ed (2018), para 5.61). As nothing turns on further examination of this issue, and as we have heard no submissions on it, we decline to say anything more about it."

This valued the contribution of academic writers devoting attention to a specific aspect so as to highlight an uncertainty in the state of the law.

Contribution of Day and Virgo in *Barton*

William Day and Graham Virgo criticised the reasoning of the Court of Appeal in *Barton* in an article titled "Risks on the contract/unjust enrichment borderline".[115]

In the Supreme Court, the majority judgment (written by Lady Rose, with whom Lord Briggs and Lord Stevens agreed) cited with approval the acceptance, in previous decisions,[116] of the definitions of "failure of basis" and the "unjust" element of unjust enrichment proposed by *Goff & Jones*.

Then on the decisive issue, which was the effect of the contract on the asserted unjust enrichment claim, Lady Rose stated her conclusion that an obligation on Foxpace to pay commission without fulfilling the condition upon which it had been agreed that commission would be payable was "at odds with what was agreed by [the parties]"[117], and continued: "I agree therefore with the criticism of the Court of Appeal's decision in the article …that the Court of Appeal was mistaken in the inference it drew from the silence of the contract and the judge's rejection of the 'if, and only if' evidence",[118] before setting out in full the paragraph at which Day and Virgo explained their reasoning.

In his dissenting judgment, Lord Burrows referenced *Goff & Jones* for a general discussion on the interrelationship between contract and unjust enrichment,[119] and the possibility of excluding by contract a liability to give restitution for unjust enrichment,[120] and accepted Birks' definition of failure of basis (and, like the majority, endorsed the use of that terminology).[121] He also engaged directly with Day and Virgo's analysis of the decision below. Having stated that in his view free acceptance is not an unjust factor,[122]

114. *Ibid*, [25].
115. (2020) 136 LQR 349.
116. (21) *Dargamo* and (13) *Barnes* respectively.
117. [2023] UKSC 3, [103].
118. *Ibid*.
119. *Ibid*, [226].
120. *Ibid*, [235].
121. *Ibid*, [232–233].
122. *Ibid*, [230].

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he relied on the rationale provided in the article: "The objection to free acceptance as a factor was well put by William Day and Graham Virgo …",[123] setting out in full the relevant paragraph from the article. Then again, in setting out his ultimate conclusions on the matter if analysed as an unjust enrichment claim, Lord Burrows returned to the article, acknowledging that he was disagreeing with its central thrust in reasoning that the silence of a contract results in the application of any default law and that in relevant respect, "here there is the default law of unjust enrichment".[124]

CONCLUSION

In my view a few points stand out:

- First, the work and perspective of academics is and deserves to be respected by judges in our decision-making.
- Second, through reliance on and reference to academic work, judges generally do affirm the use of academic commentary as a significant tool to aid in the evaluation of arguments, and long may that continue.
- Third, the judicial conclusion may be to agree with the commentary, to disagree with it, or a bit of both. That does not diminish the value of the contribution. In 1986, in *The Spiliada*,[125] Lord Goff of Chieveley famously acknowledged how useful he had found the academic writing on *forum non conveniens* and described jurists and judges as pilgrims together on an "endless road to unattainable perfection"; he also said that in that case, the academic writers would observe "that I have not agreed with them on all points; but even when I have disagreed with them, I have found their work to be of assistance."
- Fourth, the use of academic sources, or a lack thereof, can be symptomatic of an *a priori* inclination as to how to characterise an issue. In summarising aspects of *Barton* in the Supreme Court, I made no reference to Lord Leggatt's dissent. That is not because no academic sources are used in his judgment. There are in fact numerous references to academic writing … *on the law of contract*. That was the exclusive lens through which in his view the issue in *Barton* fell to be decided. That is to say, for Lord Leggatt, *Barton* was not an unjust enrichment case at all!

As noted in the introduction, as to the sufficiency or insufficiency of use by the judiciary of academic sources, and equally as to the broader question which ultimately launched the investigation, I leave the reader to draw their own conclusions. What I hope this article may foster is an appreciation of the ways in which the academic texts are relied on by judges. The review, above, of how academic writing has been influential might then assist practitioners to identify, and accordingly to cite, academic sources likely to help their tribunal. For academics, I hope that this brief compilation

123. *Ibid*, [230].
124. *Ibid*, [239].
125. *Spiliada Maritime Corp v Cansulex Ltd* (*The Spiliada*) [1987] 1 Lloyd's Rep 1, 18; [1987] AC 460, 488 ((11) Postscript).

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of significant examples from academic contributors not only reaffirms the growing understanding of the important role and contribution of legal scholarship to the rule of law, but that it might also provide insight as to how academic work might best be presented so as to contribute to that shared aim of judges and jurists, the creation of a system of law in which, to quote Lord Reed again, the "legal rights … are determined by rules of law which are ascertainable and consistently applied".[126] I for one pay tribute to the contribution of legal academics to our shared aim.

126. *ITC* [2017] UKSC 29, [39].

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