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## Introduction

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Enrichment is perhaps the most under-theorised aspect of the law of unjust enrichment but it is arguably the most important element for the future direction and consolidation of the subject. As Buxton LJ said in *Deutsche Morgan Grenfell plc v IRC*, enrichment is ‘not merely material to success, but the whole essence of the action’.<sup>1</sup> In recent years, the enrichment inquiry has attracted greater scholarly attention and a number of excellent attempts have been made to give more precise content to various parts of the enrichment inquiry.<sup>2</sup> However, the aim of this book is broader: to understand the theoretical structure and role of enrichment in the law of unjust enrichment and to propose a comprehensive model for the enrichment inquiry that is consistent with these theoretical foundations and explains and justifies the cases. The central thesis is that a defendant’s enrichment can be characterised in two different ways—*factually*, in terms of economic value, and *legally*, in terms of rights and obligations—and that this theoretical bifurcation has important substantive implications for determining when a defendant is enriched and, accordingly, the form restitution will take.

The division of enrichment into factual and legal enrichment challenges the prevailing orthodoxy in a fundamental way. It shows that enrichment is not a unitary element satisfied by a single test; rather, the *same benefit may be understood in two different ways*: (i) by the value of the benefit received (‘factual enrichment’); or (ii) by the change in the legal relations of the defendant effected by the acquisition of a right or the release of an obligation (‘legal enrichment’). For instance, the transfer of title to a car may be characterised factually—as the receipt of the value of the title to the car—or legally—by the change in the defendant’s rights and obligations. While a defendant who receives value as a result of a mistake, duress or failure of consideration is now commonly recognised as having an obligation

<sup>1</sup> *Deutsche Morgan Grenfell plc v IRC* [2005] EWCA Civ 78, [2006] Ch 243 [294] (Buxton LJ).

<sup>2</sup> See in particular M McInnes, ‘Enrichment Revisited’ in J Neyers, M McInnes and S Pitel (eds), *Understanding Unjust Enrichment* (Oxford, Hart, 2004); R Stevens, ‘Three Enrichment Issues’ in A Burrows and A Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (Oxford, Oxford University Press, 2006); R Chambers, ‘Two Kinds of Enrichment’ in R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford, Oxford University Press, 2009); J Edelman, ‘The Meaning of Loss and Enrichment’ in R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford, Oxford University Press, 2009); McGhee, ‘The Nature of the Enrichment Enquiry’ in J Edelman and S Degeling (eds), *Unjust Enrichment in Commercial Law* (Sydney, Lawbook Co, 2009).

to make restitution for unjust enrichment, the same analysis has not traditionally been applied to a defendant who, on precisely the same grounds, is required to make restitution specifically by way of resulting trust, rescission, rectification or subrogation.

The recognition of two kinds of enrichment reveals the connection between enrichment and the nature of the claim for restitution of an unjust enrichment. Rather than asking whether the defendant is enriched and then determining whether restitution should be monetary or proprietary, it is necessary to ascertain whether the claimant is asserting:

- (i) that the defendant is enriched by the value of the benefit received and seeks monetary restitution of that value; or
- (ii) that the defendant is enriched by the acquisition of a right (or release of an obligation) at the claimant's expense and seeks specific restitution of that right (or reinstatement of that obligation) in law.

In other words, the distinction between monetary and 'proprietary' restitution is not an open choice of remedies following a finding that the defendant is abstractly enriched; rather, the characterisation of the enrichment and the claim for restitution are linked. Specific restitution is the reversal of a legal enrichment, not by the payment of money, but in law. The value of the right or release is simply irrelevant to proof of enrichment in a claim framed in this way, although value may otherwise be relevant to the primary claim or defences.

Far from being a mere exercise in taxonomy or theoretical elegance, it will be shown that accepting this approach has wide-ranging substantive consequences for the enrichment inquiry and the law of unjust enrichment and restitution. The first consequence of accepting this division is that it illuminates the superficial understanding of 'restitution' in present analyses. Existing theories of restitution differentiate between monetary and 'proprietary' restitution,<sup>3</sup> but this distinction insufficiently appreciates the varieties of specific restitution. This book suggests that restitution is better divided into monetary restitution, which is a claim-right to the value received by the defendant at the claimant's expense, and 'specific restitution', which takes several different forms, including the power to obtain a specific right, the power to cancel a right, the power to create or modify a right and the reinstatement of a liability. All these responses share the same purpose and effect: to reverse a legal enrichment.

The second substantive consequence of bifurcating the enrichment inquiry is that it reveals that the freedom of choice concerns usually incorporated into the enrichment inquiry pertain only to factual enrichment cases. When transfers of value are properly understood, it becomes clear that 'subjective devaluation'<sup>4</sup>

<sup>3</sup> See ch 3, s III.C.

<sup>4</sup> See ch 6, s I.

must be rejected in favour of an objective enrichment model. It is suggested that a defendant is enriched by the value of a benefit received whenever:

- (i) there is a transfer of value to the defendant at the claimant's expense; and
- (ii) the defendant chose the benefit or it is 'incontrovertibly enriching'.<sup>5</sup>

This model addresses freedom of choice concerns in factual enrichment cases directly through the 'choice of benefit' test, affording much-needed clarity as to when holding a defendant to be enriched by the value of a benefit in kind will infringe her freedom of choice. By contrast, in legal enrichment cases, it is shown that the defendant's enrichment is established simply by proving that the defendant has obtained a right or the release of an obligation at the expense of the claimant.

Third, the bifurcation of enrichment proposed in this book clarifies the point at which enrichment occurs. The traditional approach, conflating factual and legal enrichment, confuses immediate and extant enrichment, as courts assess enrichment sometimes at the point of receipt and sometimes at the date of judgment. Once the two kinds of enrichment are properly understood separately, it becomes clear that the enrichment inquiry is always concerned with the immediate enrichment received by the defendant. In value cases, it will be shown that, subject to the limitations imposed by the requirement of proof of choice of the benefit or incontrovertibility, the defendant is enriched by the immediate value transferred, not the value surviving in the defendant's hands. In legal enrichment cases, the defendant is enriched by the right at the moment it is acquired or the release of the obligation at the moment it is released. As the claimant is seeking restitution of the specific right or reinstatement of the specific obligation and not the value of these benefits, no question of valuation arises. Until now, the failure to apprehend the difference in characterisation by value or in law has often led to the point of enrichment being confused with specific restitution of a right still held at the date of judgment.

Finally, such a radical reappraisal of the enrichment inquiry has wide-ranging implications for the relationship between enrichment and other aspects of the law of unjust enrichment. In particular, the 'at the expense of' requirement and the change of position defence are two aspects of the law of unjust enrichment that will need to be carefully reassessed in light of the theory of enrichment presented in this book. Although these questions fall beyond the strict scope of this book, the implications of accepting the factual-legal distinction are adumbrated in chapter eight. In relation to 'at the expense of', it is suggested that the bifurcation of enrichment does not necessarily entail the bifurcation of the 'at the expense of' inquiry and that understanding transfers of value in the manner proposed in this book may resolve several vexing questions in three-party cases. In relation

<sup>5</sup> See ch 6, s III.

to the change of position defence, it is suggested that accepting that enrichment is focused on immediate, as opposed to extant, enrichment provides a bright line between the enrichment inquiry and the defence: enrichment is directed to the defendant's immediate enrichment in the defective transaction, whereas the change of position defence concerns occurrences extraneous to the defective transaction. In addition, it is suggested that the defence may operate differently in factual and legal enrichment cases and that the enrichment model advanced here helps to identify the different issues that apply in each case.

As the goal of this book is to provide a coherent theoretical structure and comprehensive doctrinal account of the enrichment inquiry, it forms part of the broader debates concerning the principle of unjust enrichment and the response of restitution. It is helpful in this chapter to situate this book within those debates. Section I explains the principle of unjust enrichment and sets out the theoretical framework for the discussion in this book. Section II then addresses the restitutionary response to unjust enrichment and outlines a broader definition of restitution encompassing the two different kinds of enrichment that may be reversed by restitution. Section III then outlines the methodology applied in, and scope of, this book, while section IV outlines the structure and the key points that will be defended in each chapter.

## I. Unjust Enrichment

### A. A Theoretical Framework

All legal rights are responses to causative events.<sup>6</sup> These causative events can be divided into the categories of consent,<sup>7</sup> wrongs,<sup>8</sup> unjust enrichment<sup>9</sup> and 'other events'<sup>10</sup> in what is often referred to as the 'Birksian taxonomy' of private law.

<sup>6</sup> J Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law*, 5th edn (London, John Murray, 1885) 760; P Birks, 'Equity in the Modern Common Law: An Exercise in Taxonomy' (1996) 26 *University of Western Australia Law Review* 1; P Birks, *Unjust Enrichment*, 2nd edn (Oxford, Clarendon Press, 2005) 20.

<sup>7</sup> Eg contracts, declarations of trust, gifts, conveyances and wills.

<sup>8</sup> Eg torts, equitable wrongs, breach of contract and breach of statutory duty.

<sup>9</sup> Enrichment at the expense of the claimant that is prima facie reversible due to the presence of an unjust factor: *Pavey & Matthews v Paul* (1987) 162 CLR 221 (HCA) 256–57 (Deane J); *Portman BS v Hamlyn Taylor Neck* [1998] 4 All ER 202 (CA) 206 (Millett LJ); *Banque Financiere de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 (HL) 227 (Lord Steyn) 234 (Lord Hoffmann); *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68, (2001) 208 CLR 516, 568 fn 257 (Kirby J); *Rowe v Vale of White Horse DC* [2003] EWHC 388 (Admin), [2003] 1 Lloyd's Rep 418 [11] (Lightman J); *Filby v Mortgage Express (No 2) Ltd* [2004] EWCA Civ 759, [2004] 2 P&CR DG16 [62] (May LJ); P Birks, *An Introduction to the Law of Restitution*, revised edn (Oxford, Clarendon Press, 1989) 21; G Virgo, *The Principles of the Law of Restitution*, 2nd edn (Oxford, Oxford University Press, 2006) 9; A Burrows, *The Law of Restitution*, 3rd edn (Oxford, Oxford University Press, 2010) 26–27. See, eg *Kelly v Solari* (1841) 9 M&W 54, 152 ER 24.

<sup>10</sup> Eg finder's rights, specification, accession and mixing.

Each category of ‘causative event’ comprises different causes of action that share common features. For example, all of the causes of action in the category of wrongs rely on the characterisation of the facts as a breach of duty in determining a legal response.<sup>11</sup> Further, each of these legally relevant events gives rise to certain responses such as compensation, restitution and disgorgement. This model has become a dominant taxonomy of private law and it serves as an heuristic for analysing the interaction between causative events and legal responses.

While the Birksian model has become an influential taxonomy of private law, there is considerable debate about which events give rise to which responses. For the most part, this book need not touch on this debate, but there is a critical schism that must be addressed at the outset. ‘Quadratonists’ insist that restitution is only ever a response to unjust enrichment.<sup>12</sup> Although quadratonists take different forms, quadratonists tend to divide the concept of unjust enrichment into unjust enrichment by wrongdoing, meaning unjust enrichment consequent upon a breach of duty, and autonomous unjust enrichment, which is not characterised by a breach of duty. In contrast, Birks<sup>13</sup> and other ‘multi-causalists’<sup>14</sup> deny that restitution is confined to unjust enrichment and insist that including restitution for wrongs under the umbrella of unjust enrichment is unhelpful. They also argue that restitution is a response to various events besides unjust enrichment and wrongs. Following recognition that wrongs-based liability in ‘knowing-receipt’ claims is restitutionary,<sup>15</sup> it is clear that the multi-causalist position is in

<sup>11</sup> J Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Oxford, Hart, 2002) 25, 33.

<sup>12</sup> See *Halifax BS v Thomas* [1996] Ch 217 (CA) 224 (Peter Gibson LJ); K Mason and J Carter, *Restitution Law in Australia* (Sydney, Butterworths, 1996) 56–57; A Tettenborn, ‘Misnomer—A Response to Professor Birks’ in R Nolan (ed), *Restitution: Past, Present and Future* (Oxford, Hart, 1998); A Burrows, ‘Quadrating Restitution and Unjust Enrichment: A Matter of Principle?’ (2000) 8 *RLR* 257 cf Burrows, *The Law of Restitution* (2011) (n 9) 9–12, which adopts a nuanced middle position, insisting that ‘the principle of unjust enrichment underpins all claims for restitution while recognising that restitution is a response to both wrongs and unjust enrichment.

<sup>13</sup> P Birks, ‘Property and Unjust Enrichment: Categorical Truths’ [1997] *New Zealand Law Review* 623, 626–27, 658–59; P Birks, ‘Misnomer’ in Cornish (ed), *Restitution: Past, Present and Future* (Oxford, Hart, 1998) 1–29; P Birks, ‘Equity, Conscience and Unjust Enrichment’ (1999) 23 *Melbourne University Law Review* 1, 4–17; P Birks, ‘Unjust Enrichment and Wrongful Enrichment’ (2001) 79 *Texas Law Review* 1767; Birks, *Unjust Enrichment* (2005) (n 6) 11–16.

<sup>14</sup> L Smith, ‘The Province of the Law of Restitution’ (1992) 71 *Canadian Bar Review* 672; I Jackman, *The Varieties of Restitution* (Sydney, Federation Press, 1998); R Grantham and C Rickett, *Enrichment and Restitution in New Zealand* (Oxford, Hart, 2000) 471; J Edelman, ‘Unjust Enrichment, Restitution and Wrongs’ (2001) 79 *Texas Law Review* 1869; Edelman, *Gain-Based Damages* (2002) (n 11) 36–41; P Millett, ‘Proprietary Restitution’ in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Sydney, Thomson LBC, 2005) 312; Virgo, *The Principles of the Law of Restitution* (2006) (n 9) 6–8, 10; Chambers, ‘Two Kinds of Enrichment’ (2009) (n 2) 242–43; C Mitchell, P Mitchell and S Watterson, *Goff & Jones The Law of Unjust Enrichment*, 8th edn (London, Sweet & Maxwell 2011) §§1-01–1-05.

<sup>15</sup> *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 (PC) 386 (Lord Nicholls); *Jeffrey Lorne Gold v Primary Developments Ltd* [1997] 3 SCR 767 (SCC) [41]–[49] (La Forest, Cory & Iacobucci JJ); *Koorootang Nominees Pty Ltd v Australia and New Zealand Banking Group Ltd* [1998] 3 VR 16 (VSC) 78–105 (Hansen J) cf *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, (2007) 203 CLR 89 [140]–[158] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

the ascendancy,<sup>16</sup> and it has been accepted by the Supreme Court of Canada<sup>17</sup> and the House of Lords.<sup>18</sup> Restitution is a response both to unjust enrichment and wrongs,<sup>19</sup> and may arguably be a response to consent<sup>20</sup> and other events.<sup>21</sup> In light of the recognition that restitutionary awards are not confined to unjust enrichment, quadrature cannot be sustained and this book adopts the dominant multi-causalist position.

## B. The Elements of a Claim in Unjust Enrichment

Unjust enrichment is concerned with the reversal of normatively defective transactions enriching the defendant at the claimant's expense.<sup>22</sup> It is a category comprising various causes of action for restitution of a benefit obtained by the defendant, rather than compensation for losses suffered by the claimant.<sup>23</sup> It is now generally accepted in English law that a claim in unjust enrichment requires the satisfaction of four elements:<sup>24</sup>

- (i) that the defendant is enriched;
- (ii) that the enrichment is at the claimant's expense;
- (iii) that the enrichment is unjust; and,
- (iv) that no recognised defence applies

This book concerns the first of these four elements for a successful claim in unjust enrichment. Where a claim satisfies these elements, the law's response is usually restitutionary, although it will not always be.<sup>25</sup> The meaning of restitution is considered in section II below.

<sup>16</sup> See A Burrows, E McKendrick and J Edelman, *Cases and Materials on the Law of Restitution*, 2nd edn (Oxford, Oxford University Press, 2007) 2–3.

<sup>17</sup> *Kingstreet Investments v New Brunswick (Department of Finance)* [2007] 1 SCR 3 (SCC) [33].

<sup>18</sup> *Sempra Metals Ltd v IRC* [2007] UKHL 34, [2008] 1 AC 561 [116] (Lord Nicholls) [132]–[146] (Lord Scott) [230]–[231] (Lord Mance).

<sup>19</sup> Eg *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 (HL); *Strand Electric and Engineering Co Ltd v Bristol Entertainments Ltd* [1952] 2 QB 246 (CA); *Inverurie v Hackett* [1995] 1 WLR 713 (PC).

<sup>20</sup> Eg Birks argues that a loan contract where the borrower consents to make restitution of the loan amount is restitution in the category of consent, see Birks, *An Introduction to the Law of Restitution* (1989) (n 9) 44–46; Birks, *Unjust Enrichment* (2005) (n 6) 11.

<sup>21</sup> Eg *vindicatio* claims, see *Macmillan Inc v Bishopsgate Investment Trust Plc (No 3)* [1996] 1 WLR 387 (CA); *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) 707 (Lord Browne-Wilkinson).

<sup>22</sup> *Gribbon v Lutton* [2001] EWCA Civ 1956, [2002] QB 902 [60] (Robert Walker LJ); *Kingstreet Investments v New Brunswick (Department of Finance)* [2007] 1 SCR 3 (SCC) [32]. See L Smith, 'Unjust Enrichment: Big or Small?' in S Degeling and J Edelman (eds), *Unjust Enrichment in Commercial Law* (Sydney, Lawbook Co, 2008) 49–52.

<sup>23</sup> *Sempra Metals Ltd v IRC* [2007] UKHL 34, [2008] 1 AC 561 [28] (Lord Hope); *Haugesund Kommune v Depfa ACS Bank* [2010] EWHC 227, [2010] 1 All ER 1109 [18] (Tomlinson J).

<sup>24</sup> See n 9. A fifth question is sometimes added as to what right the claimant obtains, eg whether it is personal or proprietary: P Millett, 'Restitution and Constructive Trusts' (1998) 114 *LQR* 399, 408; Birks, *Unjust Enrichment* (2005) (n 6) 39.

<sup>25</sup> Mitchell, Mitchell and Watterson, *Goff & Jones The Law of Unjust Enrichment* (2011) (n 14) §§1-03, 36-28–36-37 *cf* Burrows, *The Law of Restitution* (2010) (n 9) 9. Goff & Jones takes the view that

## II. Restitution

This book takes the view that restitution is *the reversal of the defendant's enrichment*. Restitution is a 'gains-based' response. It takes the form of a right or power to reverse the defendant's enrichment at the claimant's expense. Restitution is not restricted to giving that enrichment back *to the claimant*; it includes remedies that cancel or negate the enrichment *received by the defendant*.<sup>26</sup> This conclusion follows from the thesis advanced here that restitution can take two forms mirroring the two characterisations of enrichment: (i) the reversal of transfers of value in money; and (ii) the reversal of the acquisition of a right or release of an obligation in law.<sup>27</sup> Nonetheless, the purpose and effect of both kinds of restitution is the same: the reversal of the defendant's enrichment.

The definition of 'restitution' adopted above is controversial. The orthodox definition is that restitution refers to the 'reversal of a transfer of value' from the claimant to the defendant.<sup>28</sup> However, it will be shown that this definition only covers some of the cases that form part of the law of restitution. Value is not the measure of restitution in legal enrichment cases: the value of the right transferred or the obligation released at the time of the defective transaction may be very different from the value of that right or release at some later date, depending on the myriad factors that may influence the value of any given right or obligation. Nonetheless, it is generally accepted that 'proprietary restitution' cases are instances of restitution and this book argues that the restitution of specific rights is part of the law of restitution. Furthermore, this book suggests that the reinstatement of obligations is also part of the law of restitution. As such, definitions of restitution that are restricted to the reversal of transfers of value are inadequate. This book prefers a modified version of Birks's original definition in *An Introduction to the Law of Restitution*, which covers both factual and legal enrichment: 'Restitution

preventative remedies are a response to unjust enrichment, citing exonerative relief, declaratory relief, and insurers' subrogation rights as examples. In ch 5, s IVA of this book, it is argued that prophylactic subrogation arises to prevent unjust enrichment.

<sup>26</sup> Cf Virgo, *The Principles of the Law of Restitution* (2006) (n 9) 4–5.

<sup>27</sup> See ch 3, s III.C.

<sup>28</sup> *Commissioner of State Revenue (Victoria) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 (HCA) 75; *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) 681 (Lord Goff); *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68, (2001) 208 CLR 516 [20]–[26] (Gleeson CJ, Gaudron and Hayne JJ); L Smith, 'Restitution: The Heart of Corrective Justice' (2001) 79 *Texas Law Review* 2115, 2142; Edelman, *Gain-Based Damages* (2002) (n 11) 66; E Weinrib, 'The Normative Structure of Unjust Enrichment' in C Rickett and R Grantham (eds), *Structure and Justification in Private Law* (Oxford, Hart, 2008); E Weinrib, 'Correctively Unjust Enrichment' in R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford, Oxford University Press, 2009) 39; E Bant, *The Change of Position Defence* (Oxford, Hart, 2009) 13; Mitchell, Mitchell and Watterson, *Goff & Jones The Law of Unjust Enrichment* (2011) (n 14) §4-01.

is the response which consists in causing one person to give up ... *an enrichment received at [the claimant's] expense or its value in money*' (emphasis added).<sup>29</sup>

Restitution must be distinguished from disgorgement.<sup>30</sup> A restitutionary award reverses an enrichment of the defendant obtained at the claimant's expense; a disgorging award, by contrast, extends to all of the defendant's gains causally attributable to the cause of action, whether from the claimant or not.<sup>31</sup> The distinction between factual and legal enrichment helps to avoid confusion of the two gains-based awards. For example, specific restitution of rights is often confused with disgorgement because the claimant may obtain a right that has increased in value by the date of judgment.<sup>32</sup> On the approach articulated in this book, these cases are properly classified as restitutionary: the remedy specifically reverses a legal enrichment, rather than disgorging profits. In chapter seven, it is explained that the unjust enrichment defendant is enriched by the value immediately transferred (subject to proof of choice or incontrovertibility), or the right or release immediately obtained, in the defective transaction (or its 'traceable substitute'). This is a restitutionary response.

In this book, therefore, 'restitution' refers to the reversal of a defendant's enrichment. The purpose and effect of restitution is to reverse benefits conferred in defective transactions, either by reversing value transferred or by reversing the acquisition of a right or release of an obligation in that transaction. This can be achieved by means other than the payment of money, for example by way of resulting trust, rescission, rectification or subrogation. The restitutionary operation of these doctrines is explored in detail in chapter five, where it is explained that restitution extends to those responses where the defendant's acquisition of a right or release from an obligation is reversed in law.

### III. Methodology and Scope

The book seeks to develop a theoretical model for the enrichment inquiry in the modern law of unjust enrichment that is drawn from an analysis of the cases. The approach is explicitly 'bottom-up', rather than 'top-down', attempting to distil the principles of enrichment from the cases and the historical development of the

<sup>29</sup> Birks, *An Introduction to the Law of Restitution* (1989) (n 9) 13.

<sup>30</sup> *Sempre Metals Ltd v IRC* [2007] UKHL 34, [2008] 1 AC 561 [32] (Lord Hope). See Smith, 'The Province of the Law of Restitution' (1992) 696; Edelman, *Gain-Based Damages* (2002) (n 11) 65–91; M McInnes, 'The Measure of Restitution' (2002) 52 *University of Toronto Law Journal* 163, 185; J Edelman, 'Gain-Based Damages: Development and Reflections' in A Burrows and A Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (Oxford, Oxford University Press, 2006) cf Birks, 'Equity in the Modern Common Law: An Exercise in Taxonomy' (1996) (n 6) 28; Virgo, *The Principles of the Law of Restitution* (2006) (n 9) 5–6.

<sup>31</sup> *Eg Reading v Attorney General* [1951] AC 507 (HL); *Boardman v Phipps* [1967] 2 AC 46 (HL).

<sup>32</sup> See R Chambers, 'Resulting Trusts' in A Burrows and A Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (Oxford, Oxford University Press, 2006) 250–51.

law. It is shown that the various common counts in *indebitatus assumpsit* from which the modern law of unjust enrichment emerged did not bequeath causes of action, but rather a response to causes of action. Where the basis of the award was unjust enrichment, the common counts did no more than categorise restitutionary awards by the nature of the defendant's enrichment, that is money, services, goods or the release of obligations. As these awards were historically similar in origin and purpose and responded to the same grounds for liability, their artificial segregation yielded to the recognition of unjust enrichment as the organising principle in English law. Furthermore, both at law and in equity, transactions were reversed on similar grounds by rescission and, in equity, by way of resulting trusts, rectification and subrogation. Although these responses have not traditionally been conceptualised as restitution for unjust enrichment, this book contends that, following the abolition of the forms of action and the fusion of the administration of law and equity, similar responses to identical grounds for restitution should be understood together.

Chapters two and three of the book set out a theoretical framework for the enrichment inquiry, while chapters four, five, six and seven set out the doctrine and application of the enrichment model in the cases. Although the theory of enrichment is outlined before the analysis of the cases, this is for the purposes of exposition only. It will be clear that the theoretical model is developed from an analysis of the cases and the historical development of the law of unjust enrichment. This book does not attempt a full examination of the individual causes of action in unjust enrichment or the law of resulting trusts, rescission, rectification and subrogation, each of which is another book in itself; rather, the aim is to show that each of these doctrines may reverse unjust enrichment. The focus of the analysis is on identifying the enrichment in each case and understanding the operation of the enrichment inquiry across the law of unjust enrichment.

It is helpful to define the scope of the analysis by noting a number of limitations on this book at the outset. First, it does not provide an extended analysis of enrichment in restitution for wrongs cases. Although it is suggested in chapter eight that the enrichment model proposed here can generally be extrapolated to wrongs cases, restitution for wrongs cases are otherwise considered in this book only to the extent that they shed light on unjust enrichment. Second, the discussion in this book is limited to bilateral two-party scenarios involving the claimant and an immediate enricher from the claimant. The implications of bifurcating the enrichment inquiry for the 'at the expense of' requirement in more complex situations are outlined in chapter eight. Third, this book is not concerned with identifying when specific restitution of a legal enrichment will be granted, only establishing that the characterisation of the enrichment is different in these cases. The availability of specific restitution for unjust enrichment is evidently more constrained than monetary restitution, but this book does not seek to determine when a claimant will be prevented from seeking specific restitution. As such, questions of when the involvement of third parties, particularly in circumstances of insolvency, will preclude specific restitution of a legal enrichment are not considered

in this work. Nevertheless, it is suggested in chapter eight that the bifurcated enrichment model advanced here is key to resolving the question of when specific restitution is available.

## IV. Structure of the Book

The first part of the book, comprising chapters two and three, is predominantly theoretical. Chapter two sets out the conceptual building blocks of the enrichment inquiry: value, rights and obligations. These concepts form the basis of the distinction between factual and legal enrichment developed in the rest of the book. It is shown that value in the law is an objectively ascertained, relational concept, which can, and should, be distinguished from idiosyncratic conceptions of valuation arising from an individual's personal preferences and priorities. Value, understood in this way, is contrasted with rights, powers and obligations, which are juridical constructs that form the basis of legal enrichment. In addition, the chapter examines the concept of wealth, which is a concept often employed in the definition of enrichment in academic writing. It is argued that wealth is an unhelpful and confusing concept that should be eschewed in enrichment analysis. Finally, the chapter outlines the relationship between all of these concepts in the law of unjust enrichment.

Chapter three proposes an alternative theoretical model of enrichment in the law of unjust enrichment. It is a broad outline of the theory presented in this book that a defendant's enrichment can be characterised factually or legally and that different considerations pertain in each case. The chapter outlines the purpose of the enrichment inquiry and the justification for the label 'enrichment', before presenting a theoretical framework for factual and legal enrichment cases. It is shown that factual enrichment cases involve objectively ascertaining the value transferred to the defendant in the defective transaction, while legal enrichment cases involve identifying the legal characterisation of the benefit received.

The remainder of the book adopts a doctrinal approach by reference to the cases, justifying the theoretical model defended in chapter three in the manifold different circumstances in which a defendant could be said to be enriched. Chapter four examines factual enrichment in the cases. The common counts in *indebitatus assumpsit* are assimilated into the law of unjust enrichment under the rubric of enrichment by the receipt of value. It is shown that the factual enrichment model can explain enrichment by the receipt of money (including awards of money had and received), services (quantum meruit), goods (quantum valebat), land and the discharge and release of obligations (including those cases formerly categorised under the money paid count). The award of monetary restitution in these cases is subject to the limitations imposed by the protection of the defendant's freedom of choice, which is examined in chapter six.

Chapter five then applies the enrichment model developed in chapter three to legal enrichment cases. It is argued that a defendant can be enriched by the acquisition of contractual rights, property rights and other rights by their nature capable of assignment, as well as by the release of obligations. Where the claimant seeks specific restitution of a right acquired or an obligation released at the claimant's expense in circumstances that are unjust, the law's response is to award a *power* to obtain restitution. It is shown that this can be achieved through resulting trusts, rescission, rectification or subrogation.

Chapter six recognises that the freedom of choice problems that arise in establishing enrichment are confined to factual enrichment cases where the defendant is required to make restitution in money for a benefit in kind. The chapter rejects the prevailing 'subjective devaluation' orthodoxy in favour of an objective 'choice of benefit' test. It is argued that a defendant will be enriched by the receipt of value where the defendant is either incontrovertibly enriched by the value received or has chosen the benefit in which the value inheres. The requirements for a choice of a benefit to be effective are closely examined and it is contended that the defendant must have a choice to accept or reject the benefit and acceptance of the benefit must constitute an assumption of responsibility to pay for it.

Chapter seven focuses on identifying the point of enrichment, arguing that the moment of enrichment is the relevant point of valuation in all cases. In factual enrichment cases, enrichment is the immediate value transferred in the defective transaction, subject to the limitations imposed by the requirement of choice of the benefit or incontrovertibility. In legal enrichment cases, the defendant is enriched by the right created or obligation released in the defective transaction. The chapter examines and rejects various extant enrichment approaches, concluding that liability in unjust enrichment is normatively limited to the enrichment received in a defective transaction. Enrichment is concerned, therefore, with the value received or right or release obtained in the defective transaction, not what the defendant still holds. While the law of unjust enrichment takes account of what survives in the defendant's hands, this represents the principled distinction between the enrichment inquiry and the defence of change of position. Furthermore, it is argued that the focus on immediate enrichment is mandated by the 'at the expense of' requirement, which connects the two parties to the defective transaction.

Finally, chapter eight summarises the conclusions of the book and examines six key implications for the law of unjust enrichment and restitution. The first implication of the factual and legal enrichment distinction is that it will help clarify when specific restitution of a legal enrichment is available. Although this book does not resolve this vexed question, the distinction between factual and legal enrichment simplifies the problem and suggests the beginnings of an answer to when specific restitution should be available. Second, the factual and legal enrichment distinction raises the question of when monetary and specific restitution claims can be combined. The chapter suggests that the proper principle is that both types of claim may be combined, except where it would involve

double recovery. Third, this chapter examines whether or not the factual and legal enrichment distinction is replicated in the 'at the expense of' requirement. It is concluded that it is not, but that the proper identification of enrichment clarifies the question of what must be at the expense of the claimant. The fourth implication of the analysis in this book is that it exposes difficulties with Birks's 'absence of basis' approach in legal enrichment cases, particularly rescission. Fifth, it is shown that the immediate enrichment thesis clarifies the operation of the most important defence to unjust enrichment claims, change of position. Finally, it is suggested that the same factual and legal enrichment distinction applies in the law of restitution for wrongs, subject to possible limitations on the appeal to freedom of choice.

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