doctrines can be to nullify rights that would otherwise be generated for a claimant by the law of unjust enrichment. However, we do not believe that it is helpful to characterise the relationship between unjust enrichment and other sources of rights in private law as one of "subsidiarity" and "primacy".

2–04 One reason is that this terminology is unstable. Lawyers from common law systems, lawyers from civilian and mixed legal systems, and comparative lawyers all use the language of "subsidiarity" to express a number of different ideas about the reasons why a claimant might be debarred from relying on rights generated by one part of the law because his relationship with the defendant is also affected by rules emanating from another part of the law.[5] A second reason is that the language of "subsidiarity" suggests that English law maintains a hierarchy of rights under which rights generated by the law of unjust enrichment are invariably placed at the bottom.[6] English law does frequently subordinate rights in unjust enrichment to rights generated by other sources, but it does not always do so, and we share Stephen Waddams' view that in common law systems the relationship between mutually interdependent bodies of law such as contract and unjust enrichment is more complex and more subtle than is suggested by the idea of a hierarchy of rights.[7] So we consider that the language of subsidiarity is best avoided when analysing the interplay between unjust enrichment and other sources of rights that might generate overriding justifications for the defendant's enrichment at the claimant's expense.

2–05 As we have noted in Ch.1,[8] it is unclear as a matter of English law whether the presence of a legal ground justifying the defendant's enrichment should be understood as a defence to a claim in unjust enrichment, or whether the absence

[5] See e.g. B. Nicholas, "Unjust Enrichment and Subsidiarity" in F. Santoro Passarelli and M. Lupoi (eds), *Scintillae Iuris: Studi in Memoria di Gino Gorla* (Milan: A. Giuftre, 1994); B. Nicholas, "Modern Developments in the French Law of Unjustified Enrichment", in P.W.L. Russell (ed.), *Unjustified Enrichment: A Comparative Study of the Law of Restitution* (Amsterdam: Vrije Universiteit, 1996), pp.87–95; L. Smith, "Property, Subsidiarity, and Unjust Enrichment" in D. Johnston and R. Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge: Cambridge University Press, 2002); J. Beatson and E.J.H. Schrage (eds), *Cases, Materials and Text on Unjustified Enrichment* (Oxford: Hart Publishing, 2003), Ch.7; G.E. van Maanen, "Subsidiarity of the Action for Unjustified Enrichment—French Law and Dutch Law: Different Solutions for the Same Problem" (2006) 14 E.R.P.L. 409; N.R. Whitty, "*Transco Plc v Glasgow City Council*: Developing Enrichment Law after *Shilliday*" (2006) 10 Edinburgh Law Rev. 113, pp.122–132; D. Visser, "Unjustified Enrichment" in J.M. Smits (ed.), *Elgar Encyclopedia of Comparative Law* (Cheltenham: Edward Elgar, 2006), 767, pp.771–772.

[6] Grantham and Rickett (fn.2) is a case in point. At pp.273–274, they rightly state that "the extent or strength of the subsidiarity of unjust enrichment will depend upon the proper construction of the primary doctrine, and in particular whether in denying the plaintiff a claim the primary doctrine continues, by negative implication, to regulate the relationship"; but this qualification is lost from view as their argument proceeds.

[7] S. Waddams, "Contract and Unjust Enrichment: Competing Categories, or Complementary Concepts?" in C. Rickett and R. Grantham (eds), *Structure and Justification in Private Law* (Oxford: Hart Publishing, 2008). Stephen Smith, in his article "Concurrent Liability in Contract and Unjust Enrichment: the Fundamental Breach Requirement" (1999) 115 L.Q.R. 245, takes an even stronger position and claims that, in principle, the relationship between contract and unjust enrichment should be "the same as the relationship between contract and tort, namely there would be 'general' concurrent liability in each case". However, he concedes that there are formidable difficulties to the acceptance of this view, not the least being that the House of Lords (now the Supreme Court) would have to accept that a claim in unjust enrichment would lie even though the breach of contract is not so fundamental as to enable the claimant to elect to terminate the contract.

[8] See para 1.29.

of any such ground forms part of the claimant's cause of action in addition to the three clearly established elements of a claim, that the defendant has been enriched, at the claimant's expense, in circumstances deemed to be unjust. For this reason we have situated our discussion of justifying grounds at the start of this book, in Pt 2, before we consider these three elements in Pts 3–5, and before we consider defences in Pt 6. In this chapter, we look at statutes, judgments and court orders, and natural obligations; in the next chapter we look at contracts.

2–06 Obviously, where a defendant relies on a statute or judgment or contract as a legal ground for his enrichment, the claimant may be able to defeat this argument if he can show some reason why the justifying ground invoked by the defendant should be disregarded. If a justifying ground does not arise on the facts of the case then it will not affect the claimant's restitutionary right. It may also be that the claimant can attack the underlying validity of the justifying ground, for example by showing that the statute is ultra vires,[9] or by persuading an appellate court to overturn the judgment, or by showing that the contract is void for illegality. If a claimant seeks to avoid a contract by making an argument based on vitiated consent, for example by arguing mistake, duress or undue influence, then it should not be assumed that the rules governing the question when a contract can be set aside on these grounds are the same as the rules governing the question whether a benefit can be recovered on similar grounds in the law of unjust enrichment. However, detailed consideration of the rules governing the avoidance of contracts lies beyond the scope of the present work, and specialist texts should be consulted on this topic.[10]

2. STATUTES

2–07 There are different ways in which a statute might affect rights that would otherwise arise in the law of unjust enrichment. First, the statute might require the claimant to benefit the defendant, so that the defendant's enrichment is directly justified by the legislation. Secondly, the statute might expressly or impliedly extinguish a claimant's rights in unjust enrichment. Thirdly, a claim in unjust enrichment might be disallowed in order to avoid stultifying the policy underlying a statute that forbids parties to enter transactions of a certain type.

(a) *Statute Requires the Claimant to Benefit the Defendant*

2–08 Where a statute requires a claimant to transfer a benefit to a defendant the courts will usually hold that the defendant's enrichment is justified by the statute, so that no claim in unjust enrichment will lie to recover the benefit, even if the claimant can show that he made a mistake, or transferred the benefit for some other reason that would normally lead the courts to hold that the defendant's enrichment was unjust. To give a common example, taxpayers often overlook opportunities to

[9] For discussion of the different methods by which a claimant might attack a statute that apparently justifies the defendant's enrichment, see M. Chowdry and C. Mitchell, "Tax Legislation as a Justifying Factor" [2005] R.L.R. 1, pp.13–18.

[10] e.g. H. Beale (ed.), *Chitty on Contracts*, 32nd edn (London: Sweet & Maxwell, 2015), vol.1, Chs 5–7.

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arrange their affairs in a more tax-efficient way, and so they are legally obliged to pay more tax than they would have had to pay if they had arranged their affairs in a more tax-efficient way. Assuming that a taxpayer in this situation could show that he would have rearranged his affairs to reduce his tax liability if he had known that he could do this, he would still be unable to recover his mistaken overpayment, because the relevant tax statute justifies the tax authorities' enrichment at his expense: they are entitled to receive tax calculated in accordance with the relevant statutory rules by reference to the taxpayer's affairs as they actually are, and not as they might have been, had he arranged his affairs differently.[11]

2–09 In *Deutsche Morgan Grenfell Plc v IRC*[12] a majority of the House of Lords did not consider that this general principle applied on the facts of the case. This was a test claim under a group litigation order made to manage claims that were brought against the Revenue following *Metallgesellschaft Ltd v IRC* and *Hoechst AG v IRC*.[13] There the European Court of Justice (ECJ) held that the Income and Corporation Taxes Act 1988 s.247 infringed the EC Treaty. This section enabled UK resident corporate groups to postpone the time at which they paid corporation tax, but withheld this advantage from corporate groups with subsidiaries resident in the UK and parent companies resident elsewhere in the EU. Such groups had to pay tax sooner than their wholly UK-resident competitors: they had to pay advance corporation tax (ACT) while the others could make a "group income election" and pay mainstream corporation tax (MCT) at a later date. The ECJ held that this disparity of treatment was contrary to EU law, and directed the UK courts to provide disadvantaged groups with:

> ". . . an effective legal remedy in order to obtain reimbursement or reparation of the financial loss which they [had] sustained and from which the [tax] authorities [had] benefited."[14]

2–10 The central issue in *Deutsche Morgan Grenfell* was whether the claimant could bring an action in unjust enrichment against the Revenue founded on its "retrospective mistake of law",[15] or whether it could only bring an action grounded on the principle established in *Woolwich Equitable BS v IRC*,[16] a point that was understood to have consequences for the limitation period that would govern the claim.[17] For reasons that are discussed elsewhere,[18] the House of Lords held that the claimant could rely on retrospective mistake of law, and also held that on the facts the claimant was entitled to restitution on this ground. However, the latter finding is difficult to understand when one considers the structure of the statutory regime under which ACT was payable. The Income and Corporation Taxes Act 1988 imposed a liability to pay ACT from which corporate groups could escape by making a group income election. If a group made an election then it could

[11] A point made by counsel in *Test Claimants in the FII Litigation v HMRC (No.1)* [2008] EWHC 2893 (Ch); [2009] S.T.C. 254 at [257].
[12] *Deutsche Morgan Grenfell Plc v IRC* [2006] UKHL 49; [2007] 1 A.C. 558.
[13] *Metallgesellschaft Ltd v IRC* (Joined cases C-397/98 and C-410/98) [2001] All E.R. (E.C.) 496.
[14] *Metallgesellschaft* (fn.13) at [97].
[15] A ground of recovery established by *Kleinwort Benson* (fn.1); discussed at paras 9–101—9–127.
[16] *Woolwich Equitable BS v IRC* [1993] A.C. 70; discussed at paras 22–17—22–25.
[17] For the limitation aspect of the case, see paras 33–32—33–34.
[18] See paras 22–45—22–47.

wait and pay MCT later on, but if it did not, then ACT was payable. In *Metallgesellschaft* the ECJ held that the option to make an election should not have been withheld from corporate groups such as the claimant, but this finding did not affect the validity of the basic liability established by s.247, which stated that the tax was due unless an election was made. Since the claimant had in fact made no election, the ACT was therefore due under the statute when it was paid, suggesting that recovery should have been denied notwithstanding DMG's retrospective mistake, because the Revenue had been legally entitled to receive it.

2–11 At first instance, Park J sought to overcome this problem by holding both that the claimant would have made an election and that the Revenue would have allowed it to do so, had the rule laid down in *Metallgesellschaft* been known to both of them at the time when the payments were made.[19] The Court of Appeal did not need to address this point, because they thought that the claimant could not rely on mistake as a ground of recovery, but in obiter dicta Jonathan Parker LJ held that if the claimant had been allowed to claim for mistake of law, then it would have succeeded because the "relevant statutory regime was contrary to Article 52" so that it "gave rise to no obligation to pay".[20] In the House of Lords, Lord Hope agreed with Park J's analysis.[21] Lord Hoffmann and Lord Walker both rejected Park J's characterisation of the claimant's mistake, and preferred Jonathan Parker LJ's view that the claimant had been mistaken in thinking that the tax was due—but like Park J and Lord Hope, they also needed to rewrite the facts of the case to make their analysis work, asserting that "D.M.G. would undoubtedly have used" the election provisions in the statute if it had known that it was entitled to do so.[22] Lord Brown agreed with all three of them,[23] while Lord Scott dissented, holding that DMG's mistake had been ". . . that they did not realise that they could successfully challenge the failure of the ACT tax regime to allow them . . . to make a group income election . . . " but holding that even if this mistake had caused the claimant to pay, recovery should still be denied because "in the events that actually happened DMG paid the ACT that was due" under the statute.[24] In our view, Lord Scott's characterisation of the claimant's mistake missed the point of retrospective mistake as a ground for recovery, but even so he was correct to hold that recovery should have been denied on the basis that the Revenue's enrichment was justified by the statute. Lord Walker thought that this objection was "over-analytical",[25] and Andrew Burrows has sought to explain the result in the case by positing an exception to the rule that restitution should be denied where the defendant has a statutory right to be enriched, that recovery is allowed where the defendant's right arises "in a technical sense only".[26] However it is difficult to make out the scope of this posited exception.

2–12 The House of Lords' decision in *Deutsche Morgan Grenfell* can be contrasted with the Court of Appeal's decision in *Test Claimants in the FII Group Litigation*

[19] *Deutsche Morgan Grenfell Plc v IRC* [2004] EWHC 2387 (Ch); [2004] S.T.C. 1178 at [25].
[20] *Deutsche Morgan Grenfell Plc v IRC* [2005] EWCA Civ 389; [2006] Q.B. 37 at [231].
[21] *Deutsche Morgan Grenfell* (HL) (fn.12) at [62].
[22] *Deutsche Morgan Grenfell* (HL) (fn.12) at [32], per Lord Hoffmann. Cf. Lord Walker's comment at [143]: "the fact that there was a procedural requirement for a GIE does not alter the substance of its mistake."
[23] *Deutsche Morgan Grenfell* (HL) (fn.12) at [161].
[24] *Deutsche Morgan Grenfell* (HL) (fn.12) at [89].
[25] *Deutsche Morgan Grenfell* (HL) (fn.12) at [143].
[26] A. Burrows, "Restitution of Mistaken Payments" (2012) 92 Boston University L.R. 767, 777.

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v IRC (No.1).[27] The assumed facts of the latter case were that a claimant used tax reliefs to reduce its liability to pay tax that was unlawfully levied in breach of EU law. The question arose whether a claim would lie for the value of these reliefs, on the assumed basis that the claimant would have used them to reduce other, lawful, tax liabilities if it had not already used them to reduce its unlawful tax liabilities. The court held that no such claim would lie, for two reasons. One was that HMRC's gain would have been too remote a consequence of the claimant's loss to be recoverable.[28] The other was that HMRC could not have been unjustly enriched by a payment made to discharge a lawful tax liability because ex hypothesi this payment must have been due under the relevant statute.[29] This reasoning is hard to reconcile with the House of Lords' decision in *Deutsche Morgan Grenfell*. It is also premised on a mischaracterisation of the enrichment that was the subject-matter of the claim in *FII*: this was not the value of the money paid by the claimants in respect of lawful tax liabilities, but the value of HMRC's discharged obligation to allow the claimants a credit against lawfully due tax.

(b) *Statute Extinguishes the Claimant's Common Law Rights*

2–13 A statute may expressly prohibit common law claims in unjust enrichment, and give claimants no other rights, in which case they will be left without a remedy. For example, a claimant's common law rights may be extinguished by a limitation statute.[30]

2–14 A statute may also expressly remove a claimant's common law rights and give him a set of statutory rights in their place, in which case he will need to know whether or not the statute applies to the case, as this will determine which of two possible sets of rights he has. An example is provided by the Civil Liability (Contribution) Act 1978 s.7(3), which states that rights conferred by the statute supersede any rights which the claimant would otherwise have at common law. There is a practical reason why it matters whether a claimant's contribution rights arise at common law or under the statute, namely that different limitation rules apply to the two types of claim: the Limitation Act 1980 s.2 provides that a claimant has only two years within which to claim under the 1978 Act, rather than the six years that he would otherwise have at common law. Unfortunately, however, the courts have not agreed the test that should determine whether or not a claim falls within the scope of the legislation. This is discussed in Ch.19.[31]

2–15 A statute may also preclude common law rights in unjust enrichment by implication. Whether a statute has this effect is a question of interpretation. In cases where claimants have common law rights, but are also given statutory rights, the courts have tended to hold that Parliament's intention must have been

[27] *Test Claimants in the FII Litigation v HMRC (No.1)* [2010] EWCA Civ 103; [2010] S.T.C. 1251. This aspect of the CA's decision was not considered on appeal: *Test Claimants in the FII Group Litigation v HMRC (No.1)* [2012] UKSC 19; [2012] 2 A.C. 337.
[28] *FII* (CA) (fn.27) at [182].
[29] *FII* (CA) (fn.27) at [181].
[30] See Ch.33. For another example, see *Butler v Broadhead* [1975] Ch. 97, interpreting s.264 of the Companies Act 1948 and the Companies (Winding-Up) Rules 1949 (SI 1949/330) r.106, made under the Companies Act 1948 s.273(e).
[31] See paras 19–22—19–34.

to extinguish the claimant's common law rights in order to replace them with a different (and possibly more limited) set of statutory rights. In Sir John Dyson SCJ's words:

> "If the two remedies cover precisely the same ground and are inconsistent with each other, then the common law remedy will almost certainly have been excluded by necessary implication."[32]

However it can be harder to interpret Parliament's intention in cases where claimants have common law rights, some of which arise in situations where they also have statutory rights, but some of which arise in situations where they do not: in such cases, it can be difficult to tell whether Parliament intended to extinguish all of the claimants' common law rights, or only those which overlap with their statutory rights.

2–16 A case of the first kind is *Monro v HMRC*,[33] where the Court of Appeal held that Parliament intended to exclude common law recovery in unjust enrichment in cases where the Taxes Management Act 1970 s.33 applies; this section gives taxpayers a statutory right to relief where they have overpaid income tax, corporation tax or capital gains tax.[34] However, the court also held that Parliament cannot have meant to deprive taxpayers of their (wider) common law rights where European law requires them to be given an effective remedy, and this requirement is not met by providing them with rights under s.33.[35] A similar conclusion was drawn by the Supreme Court in *Test Claimants in the FII Group Litigation v IRC*,[36] where Lord Sumption held it to be "axiomatic" that:

> "... the courts cannot imply an exclusion of unrestricted rights of action at common law where that would be inconsistent with an overriding rule of EU law that an unrestricted right must be available."[37]

2–17 Cases of the second kind include *Woolwich Equitable Building Society v IRC*[38] and *Deutsche Morgan Grenfell Plc v IRC*,[39] in both of which the House of Lords held that it did not follow from the fact that claimants have a right of recovery under the Taxes Management Act 1970 s.33 in some cases that Parliament intended to exclude common law recovery in other cases where the section does

[32] *R. (Child Poverty Action Group) v Secretary of State for Work and Pensions* [2010] UKSC 54; [2011] 2 A.C. 15 at [33], instancing *Marcic v Thames Water Utilities Ltd* [2003] UKHL 66; [2004] 2 A.C. 42.
[33] *Monro v HMRC* [2008] EWCA Civ 306; [2009] Ch. 69; affirming Morritt C's decision at first instance: [2007] EWHC 114 (Ch); [2007] S.T.C. 1182.
[34] For further discussion of this section see paras 22–05—22–12.
[35] *Monro* (fn.33) at [34].
[36] *FII* (SC) (fn.27) at [204]; see also Lord Walker's comments at [118]–[119]. And cf. *Littlewoods Retail Ltd v HMRC (No.2)* [2015] EWCA Civ 515; [2016] Ch. 373 at [111]–[118]: the VAT Act 1994 ss.78(1) and 80(7) expressly excluded the claimant's common law right to recover compound interest as the time value of money paid as VAT that was not due; the sections could not be construed in a way that conformed with an EU law requirement that the claimant be permitted to bring such a claim as this would go against the grain of the legislation; hence EU law required that the sections should be disapplied.
[37] Named for *Marleasing v La Comercial Internacional de Alimentación* (C-106/89) [1990] E.C.R. I-4135.
[38] *Woolwich* (fn.16) at 169 and 199–200.
[39] *Deutsche Morgan Grenfell* (HL) (fn.12) at [19], [55] and [135].

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not apply.[40] In *Investment Trust Companies (in liq) v IRC*,[41] the Court of Appeal similarly held that it did not follow from the fact that taxable persons have a statutory right to recover overpaid VAT under the VAT Act 1994 s.80, that Parliament intended to exclude common law recovery by a final consumer of services on which VAT has been incorrectly charged, in cases where the relevant taxable person's statutory right is time-barred. Again, in *Legal Services Commission v Loomba*,[42] Cranston J held that the provisions of the Legal Aid Act 1988 and the Civil Legal Aid (General) Regulations 1989 did not impliedly prevent the claimant from bringing a common law action for the value of work done for solicitors in cases where the claimant had no statutory right to payment.

2–18 These decisions may be contrasted with the Supreme Court's decision in *R. (Child Poverty Action Group) v Secretary of State for Work and Pensions*.[43] This case concerned the question whether the Department for Work and Pensions had a common law claim in unjust enrichment where it had mistakenly made an ultra vires payment in circumstances which did not fall within the scope of the Social Security Administration Act 1992 s.71. This section gave the Department a statutory right to recover ultra vires payments, but only those made pursuant to a misrepresentation or failure to disclose a material fact. Drawing an analogy with *Deutsche Morgan Grenfell*, the trial judge held that the section did not preclude recovery in cases where the section did not apply,[44] but the appellate courts disagreed.

2–19 In the Court of Appeal, Sedley LJ held that s.71:

> "... was introduced into an established statutory scheme which had always been understood to be exhaustive of the rights, obligations and remedies of both the individual and the state."[45]

And in the Supreme Court, Lord Brown thought it:

> "... inconceivable that Parliament would have contemplated leaving the suggested common law restitutionary route to the recovery of overpayments available to the Secretary of State to be pursued by way of ordinary court proceedings alongside the carefully prescribed scheme of recovery set out in the statute."[46]

[40] Section 33 did not apply on the facts of *Woolwich* because there is no payment made pursuant to a relevant "assessment" if money is paid under ultra vires legislation: [1993] A.C. 70 at 169 and 199–200; and did not apply on the facts of *Deutsche Morgan Grenfell* because there is no payment under an "assessment" where money is paid under legislation that is contrary to European law: [2006] UKHL 49; [2007] 1 A.C. 558 at [19], [54] and [135].

[41] *Investment Trust Companies (in liq) v IRC* [2015] EWCA Civ 82; [2015] S.T.C. 1280 at [70]–[82].

[42] *Legal Services Commission v Loomba* [2012] EWHC 29 (QB); [2012] 1 W.L.R. 2461 at [65]–[69]; followed in *Lord Chancellor v Charles Ete and Co* [2016] EWHC 275 (QB) at [230]; but note that the opposite view of the same question was taken in *Legal Services Commission v Henthorn* [2011] EWHC 258 (QB), reversed on a different point [2011] EWCA Civ 1415; [2012] 1 W.L.R. 1173.

[43] *R. (Child Poverty Action Group) v Secretary of State for Work and Pensions* [2009] EWHC 341 (Admin); [2009] 3 All E.R. 633; reversed [2009] EWCA Civ 1058; [2010] 1 W.L.R. 1886; affirmed [2010] UKSC 54; [2011] 2 A.C. 15.

[44] *Child Poverty Action Group* (Admin) (fn.43) at [30]. Cf. *R. v Secretary of State for the Environment Ex p. London Borough of Camden* (1995) 28 H.L.R. 321, where Schiemann J made a similar finding in relation to the Local Government and Housing Act 1989 s.86.

[45] *Child Poverty Action Group* (CA) (fn.43) at [33].

[46] *Child Poverty Action Group* (SC) (fn.43) at [14].

In his view, the existence of two schemes would create serious practical problems, e.g. co-ordinating the parallel recovery proceedings that might then be brought against recipients.[47] The likelihood that Parliament intended such an outcome was also diminished by the fact that there was no common law right of recovery at the time when the 1992 Act was enacted.[48] Lord Brown took this to follow from the fact that the only possible ground for recovery at common law must have been mistake, and yet the Secretary of State could never have made any mistaken overpayment pursuant to an award in 1992 because there was then a division of functions between the adjudication of awards and their payment, responsibility for the former being allocated to adjudication officers and responsibility for the latter to the Secretary of State, who had a statutory duty to pay whatever amount was awarded.[49]

2–20 This assumed—probably incorrectly—that the Secretary of State could not have recovered an overpayment on the ground that he mistakenly believed the award to have been correctly calculated.[50] It also overlooked the possibility that even at the time when responsibility for awards and payments was divided, a common law claim to recover an overpayment could probably have been made pursuant to the principle in *Auckland Harbour Board v R*.[51] Even if they had accepted that a common law recovery right had existed in 1992, however, Lord Brown and Sir John Dyson SCJ would still have held that Parliament intended to prevent the Secretary of State from relying on it, either in cases falling within the scope of s.71 or in cases falling outside it. Ultimately this was an issue of statutory construction, and in Sir John's view the question whether common law rights are impliedly excluded by a statute that gives claimants a different set of rights turns not on "whether there are *any* differences between the common law remedy and the statutory scheme" but on:

> "... whether the differences are so substantial that they demonstrate that Parliament could not have intended the common law remedy to survive the introduction of the statutory scheme."[52]

(c) *Stultification of Statutory Policy*

2–21 The courts may refuse to allow a claim in unjust enrichment where this would lead to the enforcement of a transaction that a statute deems to be unenforceable. To decide whether a claim should be allowed, the courts must identify the policy of the statute and then decide whether this would be stultified if restitution were awarded.[53]

[47] *Child Poverty Action Group* (SC) (fn.43) at [14]. See too Sir John Dyson SCJ's comments at [35].

[48] *Child Poverty Action Group* (SC) (fn.43) at [13].

[49] *Child Poverty Action Group* (SC) (fn.43) at [13]. See too Sir John Dyson SCJ's comments at [20]–[25].

[50] *Child Poverty Action Group* (SC) (fn.43) at [21] where Sir John Dyson SCJ thought it "doubtful" that such an argument would have succeeded but does not explain why. Possibly his reason was that the mistake of law bar was not abolished until *Kleinwort Benson* (fn.1), but cases can be imagined where the Secretary of State might have made a mistake of fact.

[51] See paras 23–29—23–41.

[52] *Child Poverty Action Group* (SC) (fn.43) at [34].

[53] For additional discussion of this topic, see Chs 24–25 and 34–35.

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2–22 For example, in *R Leslie Ltd v Sheill*,[54] the Court of Appeal dismissed a claim in unjust enrichment to recover money lent by an adult to an infant, reasoning that if the claim had been allowed, the infant would then have been indirectly compelled to perform his primary obligation under a contract of loan which the Infants Relief Act 1874 had declared to be void. Again, in *Boissevain v Weil*[55] the House of Lords held that money lent to a British subject, contrary to the Defence (Finance) Regulations 1939, could not be recovered via a claim in unjust enrichment. Lord Radcliffe concluded that[56]:

> "If reg. 2 did extend to this transaction it forbade the very act of borrowing, not merely the contractual promise to repay. The act itself being forbidden, I do not think that it can be a source of civil rights in the courts of this country. It is very well to say that the respondent ought not in conscience to retain this money and that that consideration is enough to found an action for money had and received. But there are two answers to this. Firstly, when the transaction by which the money has reached the respondent is actually an offence by our laws, the matter passes beyond the field in which the requirements of the individual conscience are the determining consideration. Secondly, . . . if this claim based on unjust enrichment were a valid one, the court would be enforcing on the respondent just the exchange and just the liability, without her promise, which the Defence Regulation has said that she is not to undertake by her promise. A court that extended a remedy in such circumstances would merit rather to be blamed for stultifying the law than to be applauded for extending it. I would borrow the words which Lord Sumner used in *Sinclair v Brougham*: 'the law cannot *de jure* impute promises to repay, whether for money had and received or otherwise, which, if made *de facto*, it would inexorably avoid.' His principle is surely right whether the action for money had and received does or does not depend on an imputed promise to pay."

2–23 These decisions were fairly clear-cut examples of the principle that a restitutionary claim will not lie if its recognition would stultify the particular statutory provision. But at times the courts have tended too readily to deny a restitutionary claim on this ground. Such a case was *Sinclair v Brougham*,[57] which concerned the winding up of a building society that had undertaken ultra vires banking business. The House of Lords held that claimants who had deposited money with the building society under ultra vires contracts of deposit could not recover their money in a personal action either at law or in equity, because allowing their claim would have circumvented the ultra vires doctrine.[58] The court's decision in relation to the actions for money had and received was later overruled by a majority of the House of Lords in *Westdeutsche Landesbank Girozentrale v Islington LBC*,[59] for reasons that we discuss in detail elsewhere.[60] In brief, these

[54] *R Leslie Ltd v Sheill* [1914] 3 K.B. 607.
[55] *Boissevain v Weil* [1950] A.C. 327; cf. *Re HPC Productions Ltd* [1962] Ch. 466.
[56] *Boissevain* (fn.55) at 341. See also *Kasumu v Baba-Egbe* [1956] A.C. 539 at 549.
[57] *Sinclair v Brougham* [1914] A.C. 398.
[58] *Sinclair* (fn.57) at 414 per Viscount Haldane LC.
[59] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669 at 709–710 and 713–714, per Lord Browne-Wilkinson, at 718, per Lord Slynn, and at 738, per Lord Lloyd. A different view was taken at 688–689, per Lord Goff, and at 721, per Lord Woolf. For a careful analysis of their Lordships' reasoning, see *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579; [2012] Q.B. 549 at [65]–[80], per Aikens LJ, who concluded, at [87], that: "the majority of the House of Lords in [*Westdeutsche*] did depart from the decision in *Sinclair v Brougham* that a lender under a borrowing contract that is void because *ultra vires* the borrower, cannot recover the sum lent in a restitutionary claim at law."
[60] See paras 34–32—34–34.

reasons were that the ultra vires rule had been designed to protect the members of the building society, and its intra vires depositors, from expenditure of their money on purposes to which they had not consented; but this policy did not justify their enrichment at the expense of ultra vires depositors who had paid money to the building society, rather than receiving it.

2–24 The principle that statutory policy may preclude a restitutionary claim enables the recipient to retain a benefit which in other circumstances he would be bound to restore. It should, therefore, only be applied where the particular manifestation of policy is quite clear. Consequently, a court may be faithful to the statutory provisions, declare an agreement to be illegal, and yet hold that the restitutionary claim, being independent, might succeed at the trial. One such case is *Mohamed v Alaga & Co.*[61] The claimant was a professional translator of the Somali language who introduced Somali asylum seekers to the defendant firm of solicitors. In turn, the defendant promised to share fees received from the Legal Aid Board in respect of those clients. Lightman J and the Court of Appeal both held that rules made under the Solicitors Act 1974 rendered this agreement illegal and unenforceable. Lightman J, adopting Lord Radcliffe's reasoning in *Boissevain v Weil*,[62] held that the restitutionary claim must also fail; in substance it was a claim for a reasonable sum in consideration for the introduction of clients and similarly prohibited. However, the Court of Appeal reinstated the claim in unjust enrichment. "[The] preferable view . . . is that the plaintiff is not seeking to recover any part of the consideration payable under the unlawful contract, but simply a reasonable reward for professional services rendered"[63] "such as interpreting and translating actually performed by the claimant for the solicitors' clients".[64]

2–25 A similar principle emerges from *Close v Wilson*,[65] where the claimant advanced £20,000 to the defendant for the purpose of betting the money on horse races and accounting to him for the proceeds. The defendant refused to pay him anything, and the Court of Appeal held that the parties' agreement was void under the Gaming Act 1892 s.1. However, it formed part of the claimant's case that the defendant had not actually used all the money to place bets, and had used some of it for his own purposes instead. With regard to this part of the claim, Toulson LJ held that[66]:

> "If part of [the money] was used by Mr. Wilson for his own purposes, Mr. Close would . . . be entitled to recover that sum under ordinary principles of restitution. It would be simply a case in which Mr. Wilson had used money outside the scope of the agreement under which it had been provided. The unenforceable nature of the agreement itself would be no bar to Mr. Close's restitutionary claim if the money was used for a purpose extraneous to the agreement. Mr. Close's claim would not amount to enforcement of the agreement. It would be for the recovery of money put by Mr. Wilson to his own use."

[61] *Mohamed v Alaga & Co* [1998] 2 All E.R. 720; reversed in part [2000] 1 W.L.R. 1815. Cf. *Awwad v Geraghty & Co* [2001] Q.B. 570; *Westlaw Services Ltd v Boddy* [2010] EWCA Civ 929; [2011] P.N.L.R. 4; *Langsam v Beachcroft LLP* [2011] EWHC 1451 (Ch) at [251]–[253].
[62] *Boissevain* (fn.55); above, para.2–22.
[63] *Mohamed* (fn.61) at 1825 per Lord Bingham CJ.
[64] *Mohamed* (fn.61) at 1827 per Robert Walker LJ.
[65] *Close v Wilson* [2011] EWCA Civ 5.
[66] *Close* (fn.65) at [31].

2-26 Another illustration of the court analysing a statutory provision to determine whether a restitutionary claim should succeed is *Pavey & Matthews Pty Ltd v Paul*.[67] There the High Court of Australia had to consider whether a New South Wales statute, under which a building contract was not enforceable by the builder against the other party to the contract unless the contract was "... in writing signed by each of the parties or his agent in that behalf, and sufficiently describes the building work the subject of the contract" barred a restitutionary claim, in circumstances where the builder had completed the building in accordance with the terms of the oral contract. A majority of the court held that it did not, and granted the builder reasonable remuneration, which was, fortuitously, the sum which the defendant had orally promised to pay for the work requested by him. The intent of the legislature had to be gleaned from the bare language of the statute. This had been enacted so as to ensure that the other party could not be forced to comply with the terms of the contact, and it did embrace the situation where the other party requested and accepted the building work. The builder was not deprived of his common law right to recover fair and reasonable remuneration for work done and accepted, for the statute was not intended to penalise the builder beyond making the agreement unenforceable by him. The majority gave a further reason for their decision, namely, that dismissal of the builder's claims would be so draconian a result that it is difficult to suppose that the legislature intended it.[68]

2-27 On occasion the English courts have also been moved by such considerations. For example, in *Congresbury Motors Ltd v Anglo-Belge Finance Co Ltd*,[69] the defendant had lent the claimant money to buy certain property. On the claimant's instructions the defendant handed the money over to the vendor who conveyed the title to the claimant. Contemporaneously a legal mortgage was executed in the defendant's favour. Both the loan and the mortgage were declared to be unenforceable under the Moneylenders Act 1927 s.6, since no proper memorandum had been executed. Nevertheless the Court of Appeal allowed the defendant's counterclaim, and held that it should be subrogated to the vendor's lien for unpaid purchase money. The defendant was not attempting to enforce a contract of repayment for money lent and the statute only required formalities for such a contract. Nor was it decisive that the defendant must have known that the contract of repayment was unenforceable. Nor did its acceptance of the invalid legal mortgage mean that the valid lien had been waived, abandoned or superseded.

2-28 The court considered that the facts were similar to those in *Thurstan v Nottingham Permanent Benefit Building Society*.[70] There the defendant had lent

[67] *Pavey & Matthews Pty Ltd v Paul* (1987) 162 C.L.R. 221.

[68] For a fuller discussion of the reasons given by the High Court see D.J. Ibbetson, "Implied Contracts and Restitution" (1988) 8 O.J.L.S. 312.

[69] *Congresbury Motors Ltd v Anglo-Belge Finance Co Ltd* [1971] Ch. 81. Cf. *Bradford Advance Co v Ayers* [1924] W.N. 152 (money advanced under a bill of sale void under Bills of Sale Act 1882 recoverable).

[70] *Thurstan v Nottingham Permanent Benefit Building Society* [1902] 1 Ch. 1 (CA); [1903] A.C. 6 (HL).

money to the claimant, who was then an infant. On the infant's instructions part of the loan was applied to the purchase of land; the vendor conveyed the land to the infant and a legal mortgage was contemporaneously executed in the defendant's favour. Both the loan and the security were void under the Infants Relief Act 1874. The claimant brought an action against the defendant, seeking a declaration that the mortgage was void and claiming delivery of title deeds and possession of the property. Both the Court of Appeal and the House of Lords rejected the claim, reasoning that the defendant was entitled to be subrogated to the vendor's lien for unpaid purchase money. This did not conflict "with the legislation or its policy",[71] although the claim was without "ethical merits".[72]

2-29 However, in *Orakpo v Manson Investments Ltd*[73] the prospect of the defendant's unjust enrichment did not persuade the House of Lords to allow the restitutionary claim. The court overruled *Congresbury Motors* and held that it was improper to allow subrogation if the result was to enable the moneylender "to escape from the consequences of his breach of the statute".[74] The Court of Appeal, in the latter case, had paid "too little attention ... to a consideration of the construction of section 6 of the Act of 1927".[75] Its terms were manifestly different from those of the Infants Relief Act 1874. The Moneylenders Act rendered the loan unenforceable; the Infants Relief Act made the loan void. In one case the lender had a valid security; in the other, he had none. *Thurstan* was, therefore, "decided correctly".[76] But there can be no doubt that the policy of the Infants Relief Act is stronger than that of s.6 of the Moneylenders Act 1927; and it is for that reason that the lender "obtains nothing"[77] for his loan to an infant. Yet, as the law now stands, he can be subrogated to an unpaid vendor's lien while a moneylender who falls foul of s.6 cannot. This is a strange result.[78]

2-30 In *Boissevain v Weil*[79] the claimant sued on a contract of loan. But the principle which Lord Radcliffe formulated cannot be so limited. In *Dimond v Lovell*[80] the facts were similar to those in *Orakpo*. A consumer credit agreement was improperly executed. Dimond's car was damaged in an accident caused by Lovell's negligence. Whilst her car was being repaired Dimond hired a replacement vehicle from a company which allowed Dimond credit on the hire charges until her claim for damages against Lovell was concluded. Under the agreement between Dimond and the company, the company was given the right to pursue claims, in her name. The House of Lords held that the company had provided Dimond with credit and that the agreement was a consumer credit agreement which had not been properly executed. Hence it was unenforceable against Dimond. Since the agreement was unenforceable, Dimond had suffered no loss

[71] *Congresbury Motors* (fn.69) at 93, per curiam, commenting on *Thurstan*.

[72] *Congresbury Motors* (fn.69) at 90, per curiam.

[73] *Orakpo v Manson Investments Ltd* [1978] A.C. 95. Cf. *Menaka v Lum Kum Chaum* [1977] 1 W.L.R. 267 (PC).

[74] *Orakpo* (fn.73) at 111 per Lord Salmon.

[75] *Orakpo* (fn.73) at 118 per Lord Keith of Kinkel.

[76] *Orakpo* (fn.73) at 114–115 per Lord Edmund-Davies.

[77] *Orakpo* (fn.73) at 110 per Lord Salmon.

[78] *Orakpo* (fn.73) at 114 per Lord Edmund-Davies.

[79] *Boissevain* (fn.55).

[80] *Dimond v Lovell* [2002] 1 A.C. 384; followed in *Wilson v First County Trust Ltd (No.2)* [2003] UKHL 40; [2004] 1 A.C. 816.

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through obtaining the replacement vehicle. According to Lord Hoffmann, the company's subrogated claim against Lovell failed because:

> "Parliament intended that . . . subject to the enforcement powers of the court, the debtor should not have to pay. This meant that Parliament contemplated that he might be enriched."

And in these circumstances it was not "open to the court to say that this consequence is unjust and should be reversed by a remedy at common law".[81]

3. JUDGMENTS AND COURT ORDERS

2–31 A court may order the unsuccessful party to a suit to pay money or transfer property to the successful party. In these circumstances the recipient's enrichment is justified by the court order, and so there is generally no prospect of the unsuccessful party recovering the benefit for as long as the order subsists. Thus, in *Marriot v Hampton*,[82] for example, the claimant paid for goods bought from the defendant, and the defendant then brought an action for payment of the price, alleging that he had not been paid. The claimant could not find the receipt he had been given following the first payment, and was ordered by the court to pay again. He then found the receipt and brought an action for money had and received to recover the second payment. The claimant was non-suited, Lord Kenyon CJ stating that[83]:

> "If this action could be maintained I know not what cause of action could ever be at rest. After a recovery by process of law there must be an end of litigation, otherwise there would be no security for any person."

2–32 In the course of reaching his decision, Lord Kenyon distinguished *Moses v Macferlan*.[84] There Moses endorsed four promissory notes to Macferlan for 30 shillings each. The parties agreed that Moses would not be liable for the payment of the notes, but in breach of this agreement Macferlan sued Moses on the notes in the Court of Conscience. In his defence, Moses tried to rely on the agreement, but the court held that it lacked the power to consider evidence of this and ordered Moses to pay. Moses paid the four notes and brought an action for money had and received in King's Bench where Lord Mansfield CJ ordered restitution. In his Lordship's view:

> "[T]he ground of this action [was] not, 'that the judgment was wrong' but, 'that, (for a reason which the now plaintiff could not avail himself of against that judgment,) the defendant ought not in justice to keep the money.'"[85]

[81] *Dimond* (fn.80) at 398.
[82] *Marriot v Hampton* (1797) 7 T.R. 269; 101 E.R. 969; 2 Esp. 546; 170 E.R. 450. See too *Knibbs v Hall* (1794) 1 Esp. 84; 170 E.R. 287; *Brown v M'Kinally* (1795) 1 Esp. 279; 170 E.R. 356.
[83] *Marriot v Hampton* (1797) 7 T.R. 269 at 269; 101 E.R. 969 at 969.
[84] *Moses v Macferlan* (1760) 2 Burr. 1005; 97 E.R. 676.
[85] *Moses* (fn.84) at 2 Burr. 1009; 97 E.R. 680.

In *Marriot* Lord Kenyon held that this principle did not apply, ruling that[86]:

> "[T]he plaintiff [in *Moses*] had been allowed to recover back money adjudged to the defendant in the Court of Conscience, not on the footing of the merits, but that from the nature of the jurisdiction of the Court below, the plaintiff could not avail himself of a legal defence: but in this case the present plaintiff, at the time the former action was brought, must have been possessed of that instrument upon which he now grounded his claims, and on which, had he relied, the present defendant could not have recovered against him."

2–33 In other cases the view was expressed that the decision in *Moses* was simply wrong, suggesting that claims would never lie to recover money paid pursuant to a subsisting court order, whatever the reason why the claimant had failed to persuade the court in the original action to find in his favour.[87] In *Duke de Cadaval v Collins*,[88] however, the court departed from *Marriot* for another reason, namely that a distinction had to be drawn between judgments obtained in good faith and judgments obtained by fraud. The facts were that the claimant was arrested by the defendant on the false basis that he owed him money. He paid £500 to secure his release and then successfully recovered his payment in an action for money had and received. For Lord Denman CJ, the question was "is it still the plaintiff's money? How is it shewn not to be so?", and he gave this answer[89]:

> "Why, by striving to give effect to a fraud. That is the finding of the jury: the arrest was fraudulent; and the money was parted with under the arrest, to get rid of the pressure. This case differs from all which have been cited as being otherwise decided: in none of those was the *bona fides* negatived, not even in *Marriott v Hampton* . . . for, in default of evidence to the contrary, the party there might have believed the debt to be due. But here the jury find that the defendant did know that he had no claim."

2–34 Revisiting these cases three years later in *Wilson v Ray*, Lord Denman drew the same distinction[90]:

> "[The] principle established in *Marriott v Hampton* . . . [is] that what a party recovers from another by legal process, without fraud, the loser shall never recover back by virtue of any facts which could have availed him in the former proceeding. Money so recovered was . . . received to the use of the successful party by authority of law. If any error was committed in the former proceeding, still the plaintiff is estopped from proving it after failing to do so at that time. If this were otherwise, the rights of parties could never be finally settled by the most solemn proceeding; and verdicts and judgments might be rendered nugatory by evidence which, if produced at the proper

[86] *Marriot v Hampton* (1797) 2 Esp. 546 at 548; 170 E.R. 450 at 451.
[87] *Phillips v Hunter* (1795) 2 H. Bl. 402 at 416; 126 E.R. 618 at 626 per Eyre CJ: "Shall the same judgment create a duty for the recoveror, upon which he may have debt, and a duty against him, upon which an action for money had and received will lie? This goes beyond my comprehension. I believe that judgment did not satisfy Westminster Hall at the time; I never could subscribe to it; it seemed to me to unsettle foundations." In *Brisbane v Dacres* (1813) 5 Taunt. 143 at 160; 128 E.R. 641 at 649, Heath J referred to these comments with approval although Lord Mansfield was sitting with him on the bench.
[88] *Duke de Cadaval v Collins* (1836) 4 Ad. & El. 858; 111 E.R. 1006.
[89] *Duke de Cadaval* (fn.88) at 4 Ad & El. 864–865; 111 E.R. 1010.
[90] *Wilson v Ray* (1839) 10 Ad. & El. 82 at 88–89; 113 E.R. 32 at 35–36.

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season, might have received a complete answer. The *Duke de Cadaval's case* was not intended to be, nor is it, inconsistent with this doctrine. It turned on fraud and extortion practised by an abuse of *ex parte* legal process by one who knew that he had no right to the money he obtained."

2-35 The general rule, therefore, is that money paid pursuant to a court order is irrecoverable for as long as the order subsists, but there is an exception to this principle in cases where the order has been obtained by fraud[91]—a situation, it may be noted, in which the claimant may alternatively be entitled to recover compensatory damages for the tort of malicious prosecution of legal proceedings.[92]

2-36 The general rule has been extended to the situation where money is paid following the issue of proceedings which do not proceed to judgment,[93] and it applies to orders issued by a foreign court as well by the English courts. For example, in *Clydesdale Bank Ltd v Schröder & Co*[94] the claimants were mortgagees of a ship that was arrested in Chile when the defendants successfully brought proceedings before the Chilean court to assert a lien over the vessel in respect of money lent to the owners and master. To secure the release of the ship the claimants paid the amount due under protest, and then sued to recover their payment in the English court. Their claim was rejected by Bray J, who stated that[95]:

> "It is quite clear on the authorities that if an action is brought in the English courts against a person and he pays the claim, he cannot afterwards recover the money back although he may have said that he only paid under protest and that he reserved all his rights. If he desires to prove that he is not liable to pay the money, he must defend the action which has been brought for the very purpose of deciding whether the money is payable or not. He cannot by paying under protest reserve his right to raise the question of his liability in some subsequent proceedings .... [There] is no difference in principle for this purpose between proceedings in a foreign court and proceedings in this country .... If a person is given an opportunity of contesting a claim in a court of law, whether in this country or abroad, and if instead of doing so he pays the claim under protest, he cannot afterwards recover back the money. In both cases the money has been paid under compulsion of law."

2-37 The rule that money paid pursuant to a court order is generally irrecoverable in an action for unjust enrichment applies even if there are good reasons for thinking that the court has made a mistake. The court has jurisdiction to decide wrongly as well as rightly,[96] and if it makes a mistake, the mistake is conclusive

[91] See too *Pitt v Coomes* (1835) 2 Ad. & El. 459; 111 E.R. 178; *De Medina v Grove* (1846) 10 Q.B. 152 at 171; 116 E.R. 59 at 68; *Ward & Co v Wallis* [1900] 1 K.B. 675.
[92] *Willers v Joyce* [2016] UKSC 43; [2016] 3 WLR 477.
[93] *Hamlet v Richardson* (1833) 9 Bing. 644; 131 E.R. 756; *Maskell v Horner* [1915] 3 K.B. 106 at 121–122; *Henderson v Folkestone Waterworks Co* (1885) 1 T.L.R. 329; *William Whiteley Ltd v R.* (1909) 101 L.T. 741; *Sargood Brothers v Commonwealth of Australia* (1910) 11 C.L.R. 258 at 301; *Woolwich* (fn.16) at 165. In *Moore v Vestry of Fulham* [1895] 1 Q.B. 399 at 401–402, Lord Halsbury said that: "when a person has had an opportunity of defending an action if he chose, but has thought proper to pay the money claimed by the action, the law will not allow him to try in a second action what he might have set up in the defence to the original action."
[94] *Clydesdale Bank Ltd v Schröder & Co* [1913] 2 K.B. 1.
[95] *Schröder* (fn.94) at 5.
[96] *Philips v Bury* (1694) Skin. 447 at 485; 90 E.R. 198 at 216.

between the parties unless and until it is corrected by an appellate court.[97] The unsuccessful party can appeal from the court's order, and if the appeal is successful then he will be entitled to recover the benefit that he transferred to the recipient.[98] But:

> "... once the time for appealing has elapsed, the respondent who was successful in the court below is entitled to regard the judgment in his favour as being final."[99]

2-38 These principles are illustrated by *Minshall v HMRC*,[100] where the claimant paid £80,000 pursuant to a confiscation order by the Crown Court, the lawful enforceability of which was confirmed by Pitchford J in judicial review proceedings where he decided that the appellant's rights to a fair trial under Art.6 of the European Convention of Human Rights had not been infringed. The claimant made no appeal to a domestic court with the authority and jurisdiction to overturn the Crown Court's confiscation order, and it followed that the money could not be recovered, even though the claimant had won a declaration that his Art.6 rights had been infringed from the European Court of Human Rights in the interim.

2-39 Will a judgment continue to operate as a justifying factor as between the parties to the case even if it is later overruled in a separate case? In these circumstances the unsuccessful party might conceivably argue that he should be entitled to recover his money on the ground that it was paid under a "retrospective mistake of law" of the kind that was recognised by the House of Lords in *Kleinwort Benson v Lincoln CC*.[101] Disallowing recovery would mean that the unsuccessful party was treated differently from other payors who were not parties to the litigation, but who also paid money to a recipient in the belief that they were legally required to do so under the rule established by the case in which the claimant was ordered to pay. However, we consider that the principle of finality in litigation is sufficiently important to override this consideration. Support for this conclusion can be drawn from parts of Croom-Johnson J's judgment in *Sawyer v Window Brace Ltd*,[102] although that case was decided at a time when the bar against recovery on the ground of mistake of law was in place.[103]

2-40 Two final points remain to be made. First, the rule against recovery does not apply in cases where money is paid under a void judgment, for example because the court had no jurisdiction,[104] or because the correct procedure was not followed.[105] Secondly, the rule does not apply in cases where money is not paid pursuant to a decision of the court (whether by consent, or in default, or following submissions from both sides) but pursuant to an essentially administrative order after receiving an application from one party only, of which the

[97] *Meyers v Casey* (1913) 17 C.L.R. 90 at 115.
[98] See Ch.26.
[99] *Norwich & Peterborough Building Society v Steed* [1991] 1 W.L.R. 449 at 454.
[100] *Minshall v HMRC* [2015] EWCA Civ 741; [2015] Lloyd's Rep. F.C. 515.
[101] *Kleinwort Benson* (fn.1), discussed at paras 9–101—9–127.
[102] *Sawyer v Window Brace Ltd* [1943] K.B. 32 at 35–36.
[103] See para.9–101.
[104] *Newdigate v Davy* (1701) 1 Ld. Raym. 742; 91 E.R. 1397.
[105] *Farrow v Mayes* (1852) 18 Q.B. 516; 118 E.R. 195; *Gowan v Wright* (1886) 18 Q.B.D. 209; *Re Smith* (1888) 20 Q.B.D. 321.

was possible if express contractual liability could not have arisen on the same facts.[5] Fortunately this misunderstanding about the nature of liability in unjust enrichment has now been eliminated, but its prevalence, particularly during the 19th and early 20th centuries, means that judicial pronouncements on the issue from that period must be treated with caution.[6]

(b) *Loans of Money*

3–03 The influence of the quasi-contractual analysis was particularly powerful when applied to contracts for loans of money. Thus, in *Sinclair v Brougham*[7] the House of Lords had to decide whether depositors could recover in full the sums they had deposited in bank accounts at the Birkbeck Building Society. The banking business of the Society was beyond its statutory powers, and one ground on which the depositors claimed to be entitled to recovery was that, as a result of the banking business being ultra vires, the basis for making those deposits had failed. Their claim on this basis was dismissed, it being said that since an express promise by the Society to repay the funds held in the bank accounts would have been void, no such promise could be implied in quasi-contract.

3–04 Despite subsequent clarification of the nature of liability in unjust enrichment,[8] the conclusion of the House of Lords in the *Sinclair* case[9] was to prove surprisingly tenacious. In *Westdeutsche Landesbank Girozentrale v Islington LBC*,[10] Hobhouse J held that the general principle of liability in unjust enrichment where the basis for a transfer has failed was:

> "... subject to the requirement that the courts should not grant a remedy which amounts to the direct or indirect enforcement of a contract which the law requires to be treated as ineffective."[11]

This would be the case, he indicated, where the void contract purported to create a creditor and debtor relationship.[12] On the facts of the case, the contract was not a loan, and so the exception did not apply. In the Court of Appeal, Leggatt LJ expressly endorsed Hobhouse J's analysis[13]; Dillon LJ made no objection to it, and Kennedy LJ agreed with both appellate judgments.[14] The appeal to the House of Lords was on grounds that did not concern the claim in unjust enrichment for

[5] *Sinclair v Brougham* [1914] A.C. 398.
[6] The beginnings of a new approach in the mid-20th century can be seen by a comparison of P. Winfield, *The Law of Quasi-Contracts* (London: Sweet & Maxwell, 1952) with the first edition of this work: R. Goff and G. Jones, *The Law of Restitution* (London: Sweet & Maxwell, 1966). Winfield's division of the subject into categories including "pseudo-quasi-contracts", "pure quasi-contracts" and "doubtful quasi-contracts" (at p.26) indicates the analytical difficulties inherent in the quasi-contractual idea.
[7] *Sinclair v Brougham* [1914] A.C. 398.
[8] e.g. Lord Wright's speech in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] A.C. 32.
[9] *Sinclair* (fn.7).
[10] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1994] 4 All E.R. 890.
[11] *Westdeutsche* (fn.10) at 929.
[12] *Westdeutsche* (fn.10) at 930.
[13] *Westdeutsche* (fn.10) at 967.
[14] *Westdeutsche* (fn.10) at 971.

failure of basis of the transfer.[15] Their Lordships, however, made some observations on the decision in *Sinclair* so far as it related to the claim for recovery on the ground of failure of basis. Lord Browne-Wilkinson described the reasoning used in *Sinclair* as "no longer sound", since it was now recognised that that "the common law restitutionary claim is based not on implied contract but on unjust enrichment".[16] The depositors in *Sinclair*, he continued, "should have had a personal claim to recover the moneys at law based on a total failure of consideration".[17] Lord Slynn and Lord Lloyd agreed with him. Lord Goff, by contrast, held that the decision in *Sinclair* should be seen as "a response to that problem in the case of ultra vires borrowing contracts", and that it should not be departed from since it might be supported on the ground of "public policy". In Lord Goff's view, giving a remedy where the ineffective contract had purported to create a relationship of creditor and debtor would not indirectly enforce that void contract:

> "... for such an action would be unaffected by any of the contractual terms governing the borrowing, and moreover would be subject (where appropriate) to any available restitutionary defences."[18]

Lord Woolf agreed with Lord Goff.

3–05 The position was further clarified by the Court of Appeal's decision in *Haugesund Kommune v Depfa ACS Bank*.[19] There, on facts concerning loan contracts, it was held that the majority of the House of Lords in *Westdeutsche* had departed from the decision in *Sinclair*. A claim in unjust enrichment on the ground of failure of basis was, therefore, available.[20] The Court of Appeal agreed with Lord Goff that such a claim would not indirectly enforce a void contract, and also acknowledged that a claim might be defeated if recovery were found to be inconsistent with the policy of the statute rendering the parties' contract void. On the facts of the case, however, the statute governing the powers of the local authority in question neither expressly nor implicitly barred recovery.[21]

3–06 The Court of Appeal's approach in the *Haugesund* case has much to commend it. Technically, it could have disregarded the House of Lords' remarks in the *Westdeutsche* case since they were unnecessary for the decision of the appeal, but, instead, the Court of Appeal seized the opportunity to clarify the law. The approach it took allows claims for unjust enrichment in respect of ineffective loan contracts to be dealt with under the same general principles as claims arising in respect of other types of ineffective contract. The main argument against that approach was based on the now discredited theory of quasi-contract. However, two points still require further clarification.

[15] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669.
[16] *Westdeutsche* (HL) (fn.15) at 710, noting statements to the same effect by the High Court of Australia in *Pavey & Matthews Pty Ltd v Paul* (1987) 162 C.L.R. 221 at 227 and 255. For discussion of the *Pavey* court's repudiation of implied contract as the basis of claims in unjust enrichment, see D.J. Ibbetson, "Implied Contracts and Restitution" (1988) 8 O.J.L.S. 312.
[17] *Westdeutsche* (HL) (fn.15) at 710.
[18] *Westdeutsche* (fn.15) at 688–689.
[19] *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579; [2012] Q.B. 549.
[20] *Haugesund* (fn.19) at [87].
[21] *Haugesund* (fn.19) at [102]. The statute was the Norwegian Local Government Act 1992.

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breach of it where ordinary contractual remedies can apply and payment of damages is the secondary liability for which the contract provides."

3–12 The very broad terms of the reasoning quoted above are not supported by authority. The suggestion, in the final sentence quoted, that where there is a breach of contract, there is "no room" for a remedy other than damages, is incorrect—there are many authorities in which, following a breach of contract, a remedy in unjust enrichment has been given.[35] It is also incorrect to assert that an intention to exclude all remedies in unjust enrichment can be imputed to contracting parties. Certainly the parties might expressly exclude or limit remedies in unjust enrichment, or the terms of their contract may lead to the conclusion that a remedy in unjust enrichment has been displaced[36]; but those possibilities depend on the facts of the individual case, and cannot be automatically presumed. Finally, the point about the historical development of unjust enrichment in situations where there was no contract or no effective contract has worrying echoes of the quasi-contract fallacy. The fact that, under the influence of that fallacy, remedies in unjust enrichment were previously confined to such situations is hardly an argument for continuing those restrictions now that the quasi-contract fallacy has been exploded. In short, the current relationship between unjust enrichment and contractual liability is far more subtle and nuanced than Cooke J was prepared to allow. As a matter of authority, the decision in *Taylor*'s case can be supported on a narrower basis, which is hinted at later in the judgment,[37] namely, that if the claimant had been allowed to claim in unjust enrichment, it would have subverted the contractual allocation of risk. The claimant having performed services which were assigned a financial value in his contract of employment (through salary and the bonus scheme), it would have been inappropriate for the law of unjust enrichment to allow him to reopen the question of the value of those services.[38]

(b) *Subsisting Contract*

(i) *Current Law*

3–13 Where there is a contract between the parties relating to the benefit transferred, no claim in unjust enrichment will generally lie while the contract is subsisting.[39] Thus, in *Kwei Tek Chao v British Traders and Shippers Ltd*[40] the buyer of goods was unable to recover the price paid on the ground of failure of consideration

[35] e.g. *Rowland v Divall* [1923] 2 K.B. 500; *Warman v Southern Counties Car Finance Corp Ltd* [1949] 2 K.B. 576; *Butterworth v Kingsway Motors Ltd* [1954] 1 W.L.R. 1286; *Barber v NWS Bank Plc* [1996] 1 W.L.R. 641.
[36] See para.3–28 and following.
[37] *Taylor* (fn.33) at [25].
[38] See further, para.3–40 and following.
[39] *Weston v Downes* (1778) 1 Doug. 23; 99 E.R. 19; *Towers v Barrett* (1786) 1 T.R. 133; 99 E.R. 1014; *Hulle v Heightman* (1802) 2 East. 145; 102 E.R. 324; *De Bernardy v Harding* (1853) 8 Exch. 822, 155 E.R. 1586; *Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 2 Q.B. 459; *Diamandis v Wills* [2015] EWHC 312 (Ch) at [84]. For a critique of the rule see A. Tettenborn, "Subsisting Contracts and Failure of Consideration—A Little Scepticism" [2002] R.L.R. 1; for a proposal that the rule should be abolished see S. Smith, "Concurrent Liability in Contract and Unjust Enrichment: The Fundamental Breach Requirement" (1999) 115 L.Q.R. 245.
[40] *Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 2 Q.B. 459.

because he had accepted the goods and affirmed the contract. Once the contract has come to an end for a reason other than frustration,[41] a claim in unjust enrichment may be available provided that the requirements for liability in unjust enrichment are satisfied.

(ii) *Historical Explanations for Subsisting Contract Rule*

3–14 Historically, two explanations were often given for the principle that a claim in unjust enrichment was not available if the contract remained open. The first was that the claim in unjust enrichment should not be overused. As Lord Mansfield CJ remarked:

> "I am a great friend to the action for money had and received; and therefore I am not for stretching, lest I should endanger it."[42]

The concern about overuse was particularly relevant in the late 18th century, when the full scope of the action was beginning to be explored,[43] and its lack of formal requirements made it an attractive alternative to a claim for breach of contract (where the contract had to be accurately pleaded). Today the action for money had and received is too well established to be put at risk of extinction through overuse, and the pleading arguments do not apply.

3–15 The second explanation often used was that a remedy in unjust enrichment was a kind of implied contractual remedy, and, as such, could not be permitted where it differed from the remedy under an express contract. For instance, in *Steven v Bromley & Son* Scrutton LJ observed that:

> "It is a commonplace of the law that there can be no implied contract as to matters covered by an express contract until the express contract is displaced."[44]

Since it is now recognised that liability in unjust enrichment cannot be explained by reference to an implied contract, this kind of reasoning can no longer be supported. However, today the general principle is justifiable on a different basis, which emphasises the parties' own allocations of risk and valuations, as expressed in the contract.

(iii) *Contractual Allocation of Risk*

3–16 The general principle that no claim in unjust enrichment is permitted where a contract governing the benefit in question is still in force between the parties is today justifiable on the basis that the law should give effect to the parties' own

[41] Law Reform (Frustrated Contracts) Act 1943 regulates the consequences of frustration. See Ch.15.
[42] *Weston v Downes* (1778) 1 Doug 23; 99 E.R. 19. See also *Longchamp v Kenny* (1779) 1 Doug. 137; 99 E.R. 91.
[43] *Moses v Macferlan* (1760) 2 Burr. 1005; 97 E.R. 676, considered in W. Swain, "*Moses v Macferlan* (1760)" in C. Mitchell and P. Mitchell (eds), *Landmark Cases in the Law of Restitution* (Oxford: Hart Publishing, 2006), p.19.
[44] *Steven v Bromley & Son* [1919] 2 K.B. 722 at 727. For further examples see *Stoomvaart Maatschappij Nederlandsche Lloyd v General Mercantile Co Ltd (The Olanda)* [1919] 2 K.B. 728n. at 730, per Lord Dunedin: "As regards quantum meruit where there are two parties who are under contract quantum meruit must be a new contract, and in order to have a new contract you must get rid of the old contract"; *Re Richmond Gate Property Co Ltd* [1965] 1 W.L.R. 335.

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allocations of risk and valuations, as expressed in the contract, and should not permit the law of unjust enrichment to be used to overturn those allocations or valuations.[45] The point can be illustrated by reference to *Re Richmond Gate Property Co Ltd*,[46] where the claimant had been employed by the company as its managing director. The company's articles provided that the managing director's remuneration was to be "such amount as the directors shall determine", but the company went into voluntary liquidation before any amount had been fixed. The claimant claimed £400 as the value of enriching services which, at the company's request, he had conferred on it. His claim failed. Plowman J clearly regarded a claim in unjust enrichment as an inferior type of contractual claim, stating that:

> "Since there is an express contract with the company in regard to the payment of remuneration it seems to me that any question of quantum meruit is automatically excluded."[47]

While that language would not be appropriate today (for reasons given above), the result can be supported in terms of risk allocation. The claimant took the risk of the directors fixing his remuneration at whatever level they chose, which might be above or below the market rate, and which included the risk that they might not fix it at all. If the claimant had been allowed to claim in unjust enrichment, that contractually allocated risk would have been subverted.

(iv) *The Scope of the Contractual Allocation of Risk*

3–17 If the underlying explanation for the principle that there is no claim in unjust enrichment where the contract is still subsisting, is that the contractual allocation of risk must be respected, an important consequence follows: claims in unjust enrichment should be permitted, even where a contract is still subsisting, if those claims do not undermine the contractual risks. For instance, a claim in unjust enrichment might yield a lower award than a claim for damages for breach of a subsisting contract, but might be preferred for procedural or evidential reasons. In principle, such a claim should be allowed.[48]

(v) *Subsisting Contract: Earlier Authorities*

3–18 It is important to note that before the House of Lords' decision in *Fibrosa Spolka Akcynja v Fairbairn Lawson Combe Barbour Ltd*,[49] it was thought that no claim in unjust enrichment could lie unless the contract had been rescinded ab initio.[50] In other words, before 1942 it was necessary for the parties to be put back into the position they had occupied before the contract was entered into. This view no

[45] E. McKendrick, "The Battle of Forms and the Law of Restitution" (1988) 8 O.J.L.S. 197, 202 and following; J. Beatson, "Restitution and Contract: Non-Cumul?" (2000) 1 *Theoretical Inquiries in Law* 83; C. Mitchell (fn.4) para.18.78.
[46] *Re Richmond Gate Property Co Ltd* [1965] 1 W.L.R. 335.
[47] *Re Richmond Gate* (fn.46) at 337.
[48] Beatson (fn.45) at 93–94.
[49] *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] A.C. 32.
[50] *Chandler v Webster* [1904] 1 K.B. 493; *Mussen v Van Diemen's Land Co* [1938] 1 Ch. 253. The rule can be traced back at least as far as *Dutch v Warren* (1721) 1 Str. 406; 93 E.R. 598, reported more fully by Mansfield CJ in *Moses* (1760) 2 Burr. 1005 at 1010–1012; 97 E.R. 676 at 681.

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longer prevails; indeed, it has been recognised that where a contract is discharged for breach, the discharge operates only prospectively, leaving rights already accrued under the contract undisturbed.[51] The result is that unjust enrichment remedies are available in a wider variety of situations than was previously the case; it is also necessary to approach cases decided before 1942 with particular caution, because the courts were often concerned with the—now irrelevant—question of whether the parties could be put back to their original positions.

3–19 One such case, which was given some prominence in earlier editions of this work, is *Hunt v Silk*.[52] There the parties agreed that in consideration of the claimant paying £10 to the defendant, the defendant would grant a lease of a house to the claimant within 10 days, and also effect certain repairs to the property. The claimant paid, and took possession immediately, but the repairs were never completed and no lease was granted. Some days after the 10-day period had elapsed, the claimant left the house, and sought to recover back his earlier payment. His claim failed, because he had been in possession after the 10-day period expired, and this "intermediate occupation" (as it was described[53]) was not capable of being rescinded. If the same facts arose today, the courts would be likely to focus on whether the basis for the claimant's payment had failed—for instance, was the payment made, at least partly, in exchange for the initial period of 10 days occupation? There might also be issues to consider in relation to a possible affirmation of the contract by the claimant when he stayed on beyond the initial 10-day period. However, the decision in *Hunt v Silk* itself is concerned with requirements which are now obsolete.[54]

(vi) *Availability of Unjust Enrichment Claim where Contract Subsisting?*

3–20 As explained above, where a contract is still subsisting, it is generally thought that no remedy in respect of matters governed by the contract is available in unjust enrichment. However, in *Miles v Wakefield MDC*,[55] dicta of Lord Brightman[56] and Lord Templeman[57] indicated that where an employee's industrial action took the form of offering partial performance, and the employer accepted that performance, the employee would be entitled to sue for the value of the services given. On the facts of the case, the claimant's employers had indicated that they refused to accept such services, and so the point did not require decision; Lord Brandon and Lord Oliver reserved their opinion, and Lord Bridge indicated that he found it "difficult to understand the basis"[58] on which remuneration for services could be claimed. In Lord Bridge's view, recovery of the value of the services " . . . would presuppose that the original contract of employment

[51] *Johnson v Agnew* [1980] A.C. 367, discussed in C. Mitchell, "*Johnson v Agnew* (1979)" in Mitchell and Mitchell (eds), *Landmark Cases in the Law of Contract* (Oxford: Hart Publishing, 2008), at 351.
[52] *Hunt v Silk* (1804) 5 East 449; 102 E.R. 1142. See G. Jones, *Goff & Jones: The Law of Restitution*, 7th edn (London: Sweet & Maxwell, 2006), para.20–013.
[53] *Hunt v Silk* at 4 East 452; 102 E.R. 1145, per Lord Ellenborough CJ, and at 4 East 453; 102 E.R. 1145, per Lawrence J.
[54] For further analysis of *Hunt v Silk* see P. Mitchell, "Artificiality in Failure of Consideration" (2010) 29 *University of Queensland Law Journal* 191, at 193–196.
[55] *Miles v Wakefield MDC* [1987] 1 A.C. 539.
[56] *Miles* (fn.55) at 552–553.
[57] *Miles* (fn.55) at 561.
[58] *Miles* (fn.55) at 552.

had in some way been superseded by a new agreement by which the employee undertook to work as requested by the employer for remuneration in a reasonable sum", which, he thought, was "contrary to the realities of the situation".

3–21 It may be possible to reconcile Lord Brightman and Lord Templeman's view with the general principle that a subsisting contract prevents a claim in unjust enrichment from arising by interpreting their remarks narrowly, so as to limit them to situations where the work offered differs significantly from the work required by the contract of employment. In such a situation it might be legitimately said that no existing contract governed the parties' relationship.[59] However, it must be doubtful whether Lord Brightman and Lord Templeman had such a narrow situation in mind: on the facts of the case they were considering, a superintendent registrar had performed all of his duties except for conducting marriage ceremonies on Saturday mornings, and had been willing to attend his office on Saturday mornings to carry out other tasks. Had these services been accepted by his employer, it is difficult to see how the employee could be said to have been performing significantly different duties to those required by his contract of employment.

3–22 On the other hand, it is unlikely that Lord Brightman and Lord Templeman intended, with little discussion, to effect a major change in the relationship between the law of contract and the law of unjust enrichment, by relegating the existence of a contract governing the situation to a mere matter of "background" in the unjust enrichment claim.[60] The context of their dicta may well explain their true significance: the case concerned a long-running campaign of industrial action, and it may be that Lord Brightman and Lord Templeman had in mind a situation where parties affected by such a campaign had, temporarily, come to an informal understanding that would cause less damage to the employer's business than a strike, while being consistent with the employee's industrial action. In such circumstances, services would be offered and accepted on a different basis to the basis expressed in the contract, until the trade dispute was settled; once the dispute was settled, the ordinary contract of employment would resume. It would not, in such circumstances, be necessary to find, as Lord Bridge thought, that the original contract has been "superseded", merely that it had been temporarily suspended. The true significance of the dicta may be to highlight that deciding whether a subsisting contract governs the situation or not requires subtle and careful analysis. By contrast, where it is clear that the contract of employment continues to govern the relationship between the parties, it has been held that the dicta of Lord Brightman and Lord Templeman have no application.[61]

(c) *Where the Contract Has Been Discharged by Performance*

(i) *The General Rule*

3–23 Where a contract has been discharged by performance, there is generally no remedy in unjust enrichment in respect of benefits transferred under that contract.

[59] G. Mead, "Restitution within Contract?" (1991) 11 L.S. 172.

[60] Cf. P. Sales, "Contract and Restitution in the Employment Relationship: No Work, No Pay" (1988) 8 O.J.L.S. 301, at 307: "there is no reason in principle why the existence of the contract of employment in the background should preclude the operation of the usual rules allowing recovery in restitution."

[61] *Spackman v London Metropolitan University* [2007] I.R.L.R. 744 at [56] (County Ct).

Thus, in *Stoomvaart Maatschappij Nederlandsche Lloyd v General Mercantile Company Ltd (The Olanda)*[62] a charterparty provided for the ship to receive a full cargo of wheat, maize, rye or linseed or rape seed. Any wheat, maize or rye was to be paid for at 32s per ton; linseed and rape seed were to be paid for at 33s per ton. The charterparty provided that the cargo must be not more than 50 per cent linseed, but the cargo shipped in fact consisted of significantly more than 50 per cent of that product. The charterer paid for the quantity of linseed carried at 33s per ton. The shipowners, however, sought to recover in unjust enrichment, calculating the value of the benefit they had conferred by reference to the prevailing rate of freight for linseed (which was significantly higher than 33s per ton). The House of Lords rejected their claim, holding that both parties intended that the excess linseed should be carried at the price per ton specified in the charterparty. Whilst it might be questioned whether the owners really did have that intention (if they did, then the term requiring no more than 50 per cent linseed seems rather pointless), the decision provides an excellent illustration of why, in general, no claim in unjust enrichment can be brought in respect of contracts discharged by performance. Had the claim been allowed, it would have effectively allowed the owners to recover a higher price than the one by which they had agreed to be bound. The obvious explanation for the disparity between the agreed rate and the market rate was that the market had risen after the contract had been made. The owners had taken the risk of that rise, just as the charterers had taken the risk of a fall in the market. In other words, allowing the owners to recover at the prevailing market rate would have enabled them to avoid the consequences of a risk that they had agreed to bear.

3–24 A similar approach can be seen in *Taylor v Motability Finance Ltd*.[63] There the claimant had worked as the defendant's finance director until being dismissed. While in post he had succeeded in bringing about the settlement of a £80 million insurance claim, as a result of which he received the maximum possible award under the company's bonus scheme. Following his dismissal, he sought to recover in unjust enrichment for the services he had given to obtain the settlement, valuing those services at £400,000. His claim was rejected, with Cooke J commenting that:

> "[I]f it were otherwise, not only would the claimant be able to recover more than his contractual entitlement in respect of bonus, but he could also seek to establish that he was underpaid in terms of salary, despite his agreement thereto."[64]

As this reasoning highlights, when a price for services is agreed by contract in advance, the provider takes the risk of the services proving more valuable than expected, and the recipient of the services takes the risk of them being less valuable. It is important that the law of unjust enrichment does not provide a means of subverting that allocation of risk.

[62] *Stoomvaart Maatschappij Nederlandsche Lloyd v General Mercantile Co Ltd (The Olanda)* [1919] 2 K.B. 728n.

[63] [2004] EWHC 2619 (Comm).

[64] *Taylor* (fn.63) at [25].

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3–32 **Late completion of contractual performance** By contrast, where the contract provides for work to be completed by a specified time, and the work is completed late, it seems that a claim for unjust enrichment is available. In *Burn v Miller*[88] a landlord agreed with his tenant, that the tenant would build a tap-room within two months of the date of the agreement, pursuant to a plan to be agreed between the parties; at the end of the tenant's lease, the landlord would pay the value of the new room. No plan was agreed, but the tenant built a tap-room, which he took four months to complete. At some point after the end of the second month, the landlord encouraged the tenant to continue with work on a room above the tap-room. On these facts, the court held that the tenant was entitled to recover the value of the work done, observing that:

> "[T]here are many contracts made with relation to time, upon which, although the works are not finished when the time is expired, the work and labour or other beneficial matter may nevertheless be recovered for."[89]

It may be possible to regard this statement as a dictum, since the tap-room as built did not conform to any agreed plan,[90] and it may also be possible to interpret the landlord's encouragement to the tenant as redefining the basis of the arrangement.[91] The Court of Common Pleas, however, clearly regarded the point about late performance as a general principle.

3–33 If the court's view is accepted, then the different treatment of incomplete and late performance is not easy to explain, as it could be said, in both situations, that the sole basis on which the defendant agreed to pay for the work was set out in the contract.[92] However, the distinction may be explained by analogy with the rules governing the enforceability of express exclusion clauses.[93] Where the claimant has received what he bargained for under the contract, albeit later than expected, it would not generally be reasonable to regard the contractual provisions as to time of performance as having implicitly displaced any remedy in unjust enrichment. Of course, if it is shown that the contractual performance was so time-sensitive that late performance is of little or no value, it may then be reasonable to regard the contractual provisions as to time of performance as having implicitly displaced an unjust enrichment claim in respect of late performance. Where work has been done under a contract imposing conditions as to both time and complete performance before payment is due, and the work is both late and incomplete, no claim in unjust enrichment is available.[94]

3–34 **Deviation in a contract for carriage by sea** Where, under a contract for carriage by sea, the ship has deviated from the agreed route, any deviation

[88] *Burn v Miller* (1813) 4 Taunt. 745; 128 E.R. 523.
[89] *Burn* (fn.91) at 4 Taunt. 748; 128 E.R. 526.
[90] The decision on the facts might have to be explained as a case of free acceptance. See Ch.17.
[91] See the cautious approach to this case taken by Barton (fn.79) at 59.
[92] Cf. *British Steel Corp v Cleveland Bridge Engineering Co Ltd* [1984] 1 All E.R. 504, discussed at paras 16–04—16–05, where non-contractual specifications as to time of delivery were not held to be part of the basis for payment.
[93] See above, para.3–27.
[94] *Munro v Butt* (1858) 8 E. & B. 738; 120 E.R. 275.

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amounts to a repudiatory breach of contract,[95] which may be accepted by the innocent party. The contractual obligation to pay freight is usually conditional on the successful completion of the contracted voyage.[96] Since the contracted voyage has not been performed, the contractual right to freight has not been earned, and the question arises whether there is liability in unjust enrichment. If the voyage is only partly completed, there would appear, applying the general principles set out above, to be no liability in unjust enrichment. Where, however, the voyage has been completed before the charterer becomes aware of the deviation, the charterer is still entitled to terminate the contract for a repudiatory breach, and—since the voyage was not as specified in the contract—the contractual right to freight has not been earned. Whether the shipowner may bring a claim in unjust enrichment for the value of the benefit conferred on the charterer is not absolutely clear. However, in *Hain Steamship Co Ltd v Tate & Lyle Ltd*[97] the House of Lords tentatively endorsed the view that a claim would be available. As Lord Wright MR commented, the contrary view would have "startling consequences" as it would mean that, if there had been even a very minor deviation, a charterer would be entitled to receive the benefits of a successful voyage without being liable to pay.[98]

(f) *Whether a Benefit Falls within the Contract*

3–35 Since contractual provisions governing payment for a benefit will implicitly displace a claim for unjust enrichment in respect of that benefit, careful analysis may be needed in order to ascertain whether the benefit in question falls within the contract. For instance, in *Harrison v James*[99] the claimant had agreed to take the defendant's son as an apprentice on the following terms. There would be an initial trial period of one month; if at the conclusion of that month both parties were satisfied, the son was to become the claimant's apprentice for four years, with the defendant paying £40 on execution of the indenture of apprenticeship, and £20 in each of the following three years. The son went to work in the defendant's shop in August 1859, and remained there until December 1860. No indenture was ever executed. The defendant's claim for the value of board and lodging he had provided during this period was rejected, with Pollock C.B. commenting that "the parties meant nothing more than the extension of the month's trial."[100] Since it had been agreed that no payment should be made for the month's trial, it followed that none could be demanded for the extended trial period either. The decision is best interpreted as an example of contractual terms being varied by conduct so as to displace any possible claim in unjust enrichment.

[95] *Joseph Thorley Ltd v Orchis Steamship Co Ltd* [1907] 1 K.B. 660; *Hain Steamship Co Ltd v Tate & Lyle Ltd* [1936] 2 All E.R. 597.
[96] e.g. *Hopper v Burness* (1876) 1 C.P.D. 137.
[97] *Hain Steamship Co Ltd v Tate & Lyle Ltd* [1936] 2 All E.R. 597.
[98] *Hain* (fn.97) at 612. See further Stevens and McFarlane (fn.82) at 592–594 (arguing that the obligation not to deviate should not be seen as a condition precedent to the right to claim the contract freight).
[99] *Harrison v James* (1862) 7 H. & N. 804; 158 E.R. 693.
[100] *Harrison* (fn.99) at 7 H. & N. 808; 158 E.R. 695. See also per Wilde B. at 7 H. & N. 809; 158 E.R. 696.

terminated.[120] Since the power to terminate for breach lies with the innocent party, it follows that the innocent party has the ability to suppress a claim for unjust enrichment by his contracting partner: if the innocent party continues to affirm the contract, and press for performance, the contract continues in existence, and the precondition for a claim in unjust enrichment does not arise. Andrew Tettenborn has highlighted that this rule has the potential to create injustice where a buyer under an instalment contract finds himself unable to raise the funds needed to complete the purchase, since, by continuing to affirm the contract, the seller could prevent him recovering back his payments.[121] One possible solution to this potential injustice would be for the courts to draw on the principles that prevent a contracting party from insisting on rendering unwanted performance so as to satisfy the conditions for payment under the contract.[122] Unwanted affirmation of a contract seems to have similar underlying policy features.[123] Thus, if it was "wholly unreasonable" for the innocent party to continue to affirm the contract, the court could hold that the contract had been terminated, thereby permitting a claim in unjust enrichment for instalments paid. However, it should be noted that, if the court did intervene in this way, it would technically be going beyond the principles governing situations where a party insists on rendering unwanted performance. Under those principles, the affirming party is not forced to accept the other party's breach; he is merely prevented from claiming for debt rather than claiming in damages.[124]

5. Contractual Valuation of Benefits Conferred

3–41 Where a claim for unjust enrichment arises out of a contractual arrangement, the price agreed for the benefit to be transferred will often be useful evidence of the value of the benefit.[125] However, whether the contractual terms regarding payment can have a further role, in fixing the amount of recovery in unjust enrichment is far more controversial. It is necessary to distinguish between void and valid contracts, and between attempts to limit the claim in three different ways. First, to the full contract price, second to a pro-rated contract price, and third, to the contractual payment that would have been earned on the facts of the case.

[120] See para.3–13 and following.
[121] A. Tettenborn, "Subsisting Contracts and Failure of Consideration—A Little Scepticism" [2002] R.L.R. 1 at 2–3.
[122] *White and Carter (Councils) Ltd v McGregor* [1962] A.C. 413 at 431, per Lord Reid; *Clea Shipping Corp v Bulk Oil International Ltd (The Alaskan Trader)* [1984] 1 All E.R. 129.
[123] McMeel (fn.74) at 237–238.
[124] *The Alaskan Trader* (fn.122) at 137. P. Birks, *An Introduction to the Law of Restitution*, revised edition (Oxford: Oxford University Press, 1989), p.236, fn.48, seems to be expressed too broadly when it states that: "the innocent party cannot keep the contract open unless he has a 'legitimate interest' in doing so."
[125] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 N.S.W.L.R. 234 at 278; *Sopov v Kane Constructions Pty Ltd (No.2)* [2009] VSCA 141; (2009) 257 A.L.R. 182 at [24]–[30].

(a) *Void Contracts*

3–42 In *Rover International Ltd v Cannon Film Sales Ltd*[126] the defendant's predecessor, EMI, agreed to a joint venture with an Italian film distributor for the dubbing and distribution of seventeen films belonging to EMI. The parties agreed that a new company, Rover, should be created to carry out the dubbing and distribution work and to make payments due to EMI. The contractual arrangements were made between EMI and this new company. Rover was to bear the initial costs of dubbing and distribution, recouping them out of the gross receipts from distributing the films. Once those expenses had been recouped, the gross receipts were to be shared with EMI. EMI was to determine release dates. Unfortunately, at the date of the agreement, Rover had not yet been incorporated, with the result that the intended contract was void. Before the parties realised that the agreement was void, various steps were taken to perform it, including the distribution by Rover of one film in advance of the date approved for distribution by the defendants. EMI terminated the agreement for this breach, and also sought to rely on the fact that the contract was void. Rover sought to recover the repayment of advances it had paid to EMI after it had been incorporated, and also to recover for its dubbing and distribution expenses.

3–43 The defendants argued that recovery should be subject to a "ceiling" of:

> "[T]he maximum which Rover could have recovered under the agreement if this had been valid, bearing in mind . . . that it would in any event have been lawfully terminated by Cannon."[127]

On the facts, this would have been a very small amount, as very little had been earned in gross receipts at the date that the agreement was terminated. The Court of Appeal rejected the imposition of such a ceiling. Kerr LJ gave both pragmatic and principled reasons. The pragmatic reasons were that it was unfair for the defendant to rely on the invalidity of the agreement and simultaneously try to limit the claimant's claim to what would have been recovered if the agreement had been valid. The reason of principle was that the contractual and unjust enrichment claims should be kept separate.[128] Dillon LJ agreed, stating that the ceiling argument involved "a confusion of ideas",[129] it being irrelevant what the contractual position would have been if the agreement had been valid. Nicholls LJ agreed with both judgments.

3–44 It is important to note two features of the situation in the *Rover International* case, which limit its application. First, that the agreement was void. Although some of the language used by the judges, particularly Kerr LJ, might suggest that a similar approach would apply to valid contracts,[130] different considerations apply.[131] Second, that the ceiling argued for was not what the claimants could have expected to receive following full performance of the contract, but was

[126] *Rover* (fn.118), noted by Beatson (fn.118) and Birks (fn.102).
[127] *Rover* (fn.118) at 923.
[128] *Rover* (fn.118) at 927.
[129] *Rover* (fn.118) at 936.
[130] Beatson (fn.118) at 181.
[131] See paras 3–45 and following.

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7–28 Tatiana Cutts[59] has more recently argued—persuasively in our view—that this idea of "tracing value" is conceptually and practically misleading. To take a simple example, if the defendant takes the claimant's painting worth £20,000, and exchanges it with a third party for a sculpture worth £40,000, the rules of tracing hold that the title to the sculpture is the traceable substitute of title to the painting. The fact that the sculpture is worth more than the painting might provide a practical reason why the claimant might wish to assert a proprietary claim to the sculpture. However, in what sense is the tracing process concerned with tracing the movement of "value", from (title to) the painting, into (title to) the sculpture?

7–29 One possibility is that "value" here means simply "*exchange*" or "*market value*"—i.e., a measure of what the right is worth, reflecting its likely value in economic exchange. However, this conception of value has no abstract existence that makes it possible to track its "movement" from asset to asset, in the same way that the movement of assets can be tracked from person to person. Furthermore, the rules of tracing, in identifying one asset as the substitute for another, demonstrably operate without reference to relative values.[60] That Asset B is worth substantially more[61] or less[62] than Asset A, for which it was exchanged, does not prevent the identification of Asset B as the traceable substitute of Asset A.

7–30 A second possibility is that "value" here means "exchange potential"—i.e. the potential for exchange inherent in assignable rights. On this view, when Smith and Lord Millett talk about tracing value from asset to asset, what they may mean is that the acquisition of the substitute is attributable to exploitation of the exchange potential inherent in title to the original asset.[63] However, this also presents difficulties. As Cutts has argued, "exchange potential" is a description of what can be done with an asset. It is not something that moves, from asset to asset, through substitutions. The continuity expressed by the terminology of "tracing value" does not exist. All that this alternative analysis tells us is that the "link" between assets is found in the fact that an actor has exchanged one asset for another.

(ii) *"Asset Exchanges"?*

7–31 The core instance of a qualifying tracing connection is commonly conveyed via the idea of an "exchange of assets". Indeed, in our last edition, we suggested that the tracing rules are "tightly focused" on asset exchanges",[64] before drawing attention to some ramifications of this apparent orientation of the law.[65] It now seems clearer, in the light of intervening case law and academic contributions, that this idea needs to be treated with caution. The rules of tracing are centrally concerned with identifying when one asset can for legal purposes be deemed the "substitute" for the old. However, their precise details are not pre-ordained: there are inevitably policy choices for the courts to confront in developing them. The Privy Council recently acknowledged as much in *Federal Republic of Brazil v Durant International Corp*,[66] a decision which affirmed a decision of the Jersey Court of Appeal, in which the same point was made very clearly[67]:

> "The starting point is to recognise the true nature of the exercise with which the court is engaged when it is asked to trace a plaintiff's property . . . . [It] is being asked to identify an asset which represents the plaintiff's property, in other words, an asset which is not in reality the plaintiff's original property but one which the law is prepared to treat as a 'substitute' for the original. That being the true nature of the process, . . . the court is liable to be making an evaluative judgment . . . [and] is accordingly making a policy choice as to whether the law is prepared to recognise one asset as representing, or as a substitute for, another on the particular facts of the case in hand."

On close examination, there is a real risk that the rules of tracing—as well as the solutions which they may provide for perfectly common problems—will be misperceived, and unduly hampered, if the rules are too rigidly cast in terms of the idea that the tracing exercise assumes an "exchange of assets"—at least, in any narrow sense—or in more complex cases, a continuous/unbroken chain of such exchanges. Several key illustrations of this point follow.

7–32 **Tracing through inter-account bank payments** It is well accepted that it is possible to trace through inter-account bank transfers, so as to identify the credit to the transferee's account as the product of the debit to the paying customer's account, whether the transfer is "in-house"[68] or "inter-bank",[69] and in the latter case, regardless of the particular process by which the inter-bank payment process operates.[70] However, attempts to explain this can become needlessly complex, if the courts are too firmly wedded to the idea that it is invariably necessary to prove a continuous chain of intermediate asset exchanges. Even in the simplest "in-house" transfer between accounts in credit with the same bank, there is no "exchange" of assets in any simple sense. There is simply a matched adjustment of the debts owed by the bank to the paying customer—whose credit balance is reduced—and to the recipient customer—whose credit balance is increased.[71] Misperception of the same point is also why some courts have—wrongly—assumed that tracing might be impossible at common law in perfectly

[59] Cutts (fn.54).

[60] This does not mean that the value of the original asset is immaterial. Leaving aside the problem of mixtures, when the relative contributions will be important, the value of the asset may bear on the identification and quantification of the remedy to which the claimant may be entitled, consequent upon the tracing exercise; see further Ch.37.

[61] See e.g. *Trustee of FC Jones* (fn.27) (monies invested profitably yielded a fund five times the original size); *Foskett* (HL) (fn.56) (life insurance premiums yielded a substantially more valuable insurance payout); Cutts (fn.54) p.393.

[62] Cutts (fn.54), p.393.

[63] Cutts (fn.54), pp.395–396.

[64] *Goff & Jones*, 8th edn (fn.3) para.7–18.

[65] *Goff & Jones*, 8th edn (fn.3) para.7–18 and following.

[66] *Federal Republic of Brazil v Durant International Corp* [2015] UKPC 35; [2016] A.C. 297.

[67] *Federal Republic of Brazil v Durant International Corp* [2013] JCA 107; 2013 J.L.R. 273 at [48]–[49].

[68] i.e. between accounts held with the *same* bank.

[69] i.e. between accounts held with *different* banks.

[70] e.g. directly between the banks, who are in a correspondent relationship; or more likely, via a formalised inter-bank clearing and settlement system, of which the banks are members, directly or via the agency of other banks as their correspondents. See e.g. *Agip* (Millett J.) (fn.27) and (CA) (fn.27); *El Ajou v Dollar Land Holdings Plc* [1994] 2 All E.R. 685; *Foskett* (HL) (fn.56); *Relfo* (fn.58); *Durant* (PC) (fn.66).

[71] A point assuming real practical importance in *R v Preddy* [1996] A.C. 815.

routine cases of inter-bank transfers, because of intermediate "mixing" within the inter-bank payments system.[72]

7–33 Lionel Smith has suggested an elegant answer to this conundrum, via a modified notion of the "exchange" or "substitution" involved in tracing: what he calls "tracing in transit".[73] In essence, if B pays C, in return for payment from A, then the payment B to C can be regarded as the exchange product of the payment A to B.[74] This idea can be readily applied to "in-house" transfers: thus, if Bank A credits customer 2, in return for reimbursement from customer 1, then using this theory, the credit to customer 2's account could be regarded as the traceable product of the debiting to customer 1's account. More complex "inter-bank" transfers could likewise be built from the same starting points—each intermediate bank participant funding the next, in return for reimbursement from the earlier party in the chain. This no doubt reflects the mechanics by which inter-bank payments are ultimately funded. Nevertheless, there remain difficulties in characterising the chain of intervening transactions as a series of "exchanges of assets". Even more importantly, it is doubtful whether it is necessary, in order to connect the crediting of the transferee's account with the debiting of the transferor's account, to inquire into intermediate mechanics, simple or complex. As Cutts has argued, in a standard case, what allows these to be linked, and regarded as part of one overall transaction, is the payment instruction, on which the participating banks act.[75]

7–34 **Tracing "out of" bank accounts** A further consequence of a rigid adherence to the need for an "exchange of assets" is that bright lines may need to be drawn, in the context of otherwise identical payment transactions involving a claimant's bank account, according to the state of the account. The account may begin sufficiently in credit—in which case, the customer begins with a valuable asset, represented by a debt owed by its bank, which is diminished when the account is debited for the transaction. But what if the account has a zero balance, or is overdrawn, with the result that, when the account is debited for the transaction, the account is overdrawn or further overdrawn—whether pursuant to a standing overdraft facility or by way of unarranged ad hoc overdraft? At this point, the crediting to the transferee's account cannot be regarded as the product or substitute of a valuable asset of the customer: the resulting debit balance is a liability of the customer, owed to its bank. Should that difference disable the customer from tracing?

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7–35 **Tracing "through" bank accounts** Rigid adherence to the idea that the tracing exercise requires an unbroken chain of exchanges of valuable assets can also mean that the exercise is apt to be inhibited by other circumstances that are perfectly common in the banking world—for example, where an attempt is made

[72] See esp. *Agip* (Millett J.) (fn.27) at 286; *Agip* (CA) (fn.27) at 565–566; *El Ajou v Dollar Land Holdings Plc* [1993] 3 All E.R. 717 at 733–734; *Bank Tejarat v Hong Kong & Shanghai Banking Corp (CI) Ltd* [1995] 1 Lloyd's Rep. 239; *Bank of America v Arnell* [1999] Lloyd's Rep. Bank. 399; *London Allied Holdings* (fn.36) at [256].
[73] Smith (1997) (fn.29), pp. 243–262.
[74] This is an idea that seems to have been influential in the recent decision in *Relfo* (fn.58).
[75] Cf. on this, Cutts (fn.54), pp.387–388, and p.397 and following (esp. pp.399–402).

to trace payments "through" an overdrawn account.[76] Suppose that the claimant's money is paid to the credit of the defendant's bank account—which immediately before the crediting, was overdrawn. Payments will have *previously* been made *from* that account to third parties, resulting in the overdraft debt which the crediting attributable to the claimant's money reduced. Payments will also *subsequently* be made to third parties from the same account. Can the claimant trace "through" the overdrawn account, into any of those payments? A narrow understanding would suggest not. There is no asset that can be regarded as the immediate product of the claimant's money, upon its crediting to the defendant's account—the crediting has simply resulted in the pro tanto release of the defendant's overdraft liability. If an unbroken chain of substitutions of valuable assets is indeed required, then it might seem that the tracing process must stop. Numerous cases have indeed assumed that that is the case: i.e. they have held that one cannot trace "through" an overdrawn account.[77]

7–36 Is that correct? Some commentators have suggested that a solution might be found by recognising a form of "backwards tracing"[78]—the theory is that if an asset is acquired on credit, the asset can be regarded as the traceable product of the money which is later used to repay the borrowing. Insofar as this is a valid theory, it could certainly explain how an asset previously acquired by overdrawing on an account can be regarded as the traceable product of money subsequently credited to the same account, which repays the overdrawing. Until recently, there was limited judicial support for this possibility.[79] However, the tide may be turning. In *Federal Republic of Brazil v Durant International Corp*,[80] the Privy Council was faced with the question whether bribe payments paid *into* an intermediate party's account could be traced into payments made *from* that account to the defendant companies, even if the payments *from* the account had preceded the payments *in*; and regardless of the state of the balance in the intermediate account at the relevant times. The Privy Council held that they might be, on the assumption that—irrespective of the order of the credits and debits, or the state of balance of the intermediate account—it was possible to conclude that the relevant transactions were part of a "co-ordinated scheme".[81]

7–37 *Durant* is an important decision, with potentially wide-ranging ramifications. The principle recognised in the case can explain why—despite the ordering of the transactions—an asset previously acquired by a defendant, by overdrawing on his account, can be regarded as the traceable product of monies derived from the claimant, which are subsequently credited to the account. This is so at least if these transactions can be regarded as part of a "co-ordinated scheme", presumably demonstrated by proof or inference that the asset was purchased in anticipation of it being paid for by monies obtained from the claimant. However, it is important to see that the same idea—followed through to its conclusion—can point in a different direction. Notwithstanding the idea that one cannot trace

[76] Cf. on this, Cutts (fn.54), pp.389–392, and pp.402–403.
[77] See the cases noted at para.7–69.
[78] L.D. Smith, "Tracing into the Payment of a Debt" [1995] C.L.J. 290, especially pp.292–295, expanded in Smith (1997) (fn.29), pp.146–152. See further para.7–71 and following.
[79] See the cases noted at para.7–71.
[80] *Durant* (PC) (fn.66). See further para.7–74 and following.
[81] *Durant* (PC) (fn.66) at [38].

"through" an overdrawn account, the criterion on which *Durant* seems to be proceed might allow a sufficient connection to be identified between a credit to the defendant's account, and either (i) an asset acquired via an earlier withdrawal, which gave rise to the overdraft, or (ii) an asset acquired via a subsequent withdrawal from the account.[82] In short, *Durant* supplies a principle that might enable a qualifying transactional connection to be identified on the demonstration of some overall design, such that the relevant withdrawal from the account, regardless of timing and the state of balance at the relevant time, was ultimately to be funded by the monies obtained from the claimant.

7–38 The approach manifested by the *Durant* decision could have even wider ramifications. In the last edition of this work, we suggested that one consequence of the courts' "tight focus on asset exchanges" was that:

> "... tracing is not possible where the claimant cannot show that a substitution has taken place, although he can [show that] the defendant's receipt of one asset and his acquisition of another are connected by a causal link."[83]

This basic premise remains valid, despite the *Durant* decision. However, *Durant* does suggest that a broader perspective may be required, when it comes to identifying a qualifying "substitution" or "exchange".

7–39 Consider the following example, involving an attempt to "trace" payments made into and from different accounts held by the same customer:[84]:

> "[The] claimant pays money into the defendant's bank account, and . . . the defendant is thereby enabled to use money from another account to buy a new asset that he would not have bought if he had not been enriched by the claimant's payment. In this case the new asset would not be regarded as the traceable product of the claimant's money because the required 'nexus' between the claimant's money and the new asset is not present."

Durant suggests that this statement might require qualification. Suppose that that the defendant used funds in an account with Bank A, to purchase a new asset, with the intention of recouping himself for the outlay by misappropriating monies from the claimant, which are credited to an account with Bank B, also in the defendant's name. In this case, there would be something more than a mere counter-factual, but for causal connection between the transactions—the purchase of the asset, and the misappropriation of the claimant's monies. The defendant's intention would reveal a "co-ordination" between the transactions, which could allow them to be characterised as part of one overall design, and consistently with *Durant*, might enable the acquisition of the asset to be treated as the traceable product of the claimant's money.[85]

[82] *Durant* (PC) (fn.66) at [38].
[83] *Goff & Jones*, 8th edn (fn.3), para.7–19.
[84] *Goff & Jones*, 8th edn (fn.3), para.7–19, citing *Serious Fraud Office v Lexi Holdings Plc (In Administration)* [2008] EWCA Crim 1443; [2009] Q.B. 376 at [49]–[50], discussed further at para.7–65.
[85] Cf. Cutts (fn.54), p. 401. Cf also Justice Edelman, "Understanding Tracing Rules", WA Lee Equity Lecture 2015.

7–40 **Improvements to existing assets** A narrow focus on "asset exchanges" also tends to imply a very restrictive approach to situations where a defendant spends money received from the claimant on making alterations to property that he already owns.[86] In *Re Diplock*[87] the argument was made that tracing into the property should be allowed in such cases because the situation should be treated as though the defendant had used a mixture of his existing property and the claimant's money to acquire new property. The Court of Appeal rejected this for several reasons. However, none of these stand up to scrutiny. One was that the alterations might not affect the value of the property, or might cause it to go down, and in such cases the court considered that the defendant's expenditure should be treated as a dissipation of the money.[88] Laying to one side the complicating factor of rises and falls in the property market, this reasoning leaves out of account the fact that real property does not hold its value even when the property market is steady. If houses are not maintained they fall into disrepair, and they fall in value. The court's conception of the value of real property was therefore too static, and to the extent that repairs to property prevent it from falling in value they should be regarded as leaving a traceable residuum in the owner's hands, and should not be treated as a dissipation of funds.[89]

7–41 The court's second reason was that evidential problems might arise if a defendant spent money on only one part of his property, as there would then be argument as to whether the claimant could trace into that part alone, or into the whole property. This problem could be dealt with by a court making robust findings of fact. The third reason given by the Court of Appeal was that permitting a claimant to trace through expenditure on alterations into a defendant's pre-existing property would lead to the claimant making a proprietary claim against the property, and that this would be unfair to a defendant who had acted in good faith. This problem could be dealt with by holding that good faith defendants who spend money in this way are entitled to the defence of change of position, with the result that any order for sale and remission of proceeds to the claimant could be deferred in a manner that was fair to both parties.[90]

7–42 In *Foskett v McKeown*[91] the House of Lords had to decide who had the right to a death benefit of about £1 million paid by insurers pursuant to a whole of life policy. Some of the premiums were paid with money misappropriated from the appellants by the deceased, and the respondents were the children of the deceased whom he had nominated as the policy beneficiaries. According to Lord Browne-Wilkinson[92]:

[86] As discussed in T. Akkouh and S. Worthington, "*Re Diplock*", in Mitchell and Mitchell (eds) (fn.31), pp.305–315. See too *Satnam Investments Ltd v Dunlop Heywood* [1993] 3 All E.R. 652 at 671 where the Court of Appeal declined to hold that a development site could be the traceable product of confidential information.
[87] *Re Diplock* [1948] Ch. 465 at 545–548.
[88] See too *Re Esteem Settlement* 2002 J.L.R. 53 at 106 per Birt DB, where a claimant's money has been used to pay for repairs to property that do not bring about an increase in value "there can be no tracing as the funds will have been lost".
[89] This point is discussed further at para.27–17.
[90] Cf. *Re Gareau Estate* (1995) 9 E.T.R. (2d) 95, discussed at paras 27–20 and 27–69.
[91] *Foskett v McKeown* [2001] 1 A.C. 102. And cf. Millett LJ's comments in *Boscawen* (fn.8) at 340–341, discussed at para.27–13.
[92] *Foskett* (HL) (fn.91) at 109–110.

> "The question which arises in this case is whether, for tracing purposes, the payments of the fourth and fifth premiums on a policy which, up to that date, had been the sole property of the children for tracing purposes fall to be treated as analogous to the expenditure of cash on the physical property of another or as analogous to the mixture of moneys in a bank account."

A majority of the House of Lords held that the latter analogy was more appropriate and allowed the appellants to trace their money into the policy proceeds on that basis. However, Lord Browne-Wilkinson also made the obiter comment that where:

> " . . . moneys of one person have been innocently expended on [maintaining or improving] the property of another . . . [this expenditure] normally gives rise, at the most, to a proprietary lien to recover the moneys so expended."

He also thought that *Re Diplock* merely establishes an exception to this general principle, by preventing a claimant from relying on the rules of tracing in such a case if it would be unfair to award him a proprietary interest.[93]

7–43 However, even if one accepts that a claimant who expends money on maintaining or improving another person's property should be restricted to a lien to secure restitution of the value of his expenditure (and should not be allowed a proportionate ownership interest), this remedy can only be justified on the basis that the claimant can trace his money into the property. Otherwise there is no link between the claimant's money and the defendant's property sufficient to justify the imposition of a lien on that property rather than any other property belonging to the defendant. Hobhouse LJ drew the opposite conclusion in the Court of Appeal in *Foskett*, holding both that the claimants could not trace their money into the proceeds of the policy, and that they should nonetheless be entitled to a lien over the proceeds for the amount of their money.[94] But this was inconsistent with Keene LJ's statement of principle in *Serious Fraud Office v Lexi Holdings Plc (In Administration)*, that[95]:

> "For [an] equitable charge to attach [to assets in a defendant's hands] it must attach to assets in existence which derive from the [claimant's property]. There must be a nexus. Were it otherwise the principles of following and tracing could become otiose. On the contrary, tracing in this area is a vital process: just because it is by that process that the necessary nexus is established and the proprietary remedy, be it by way of constructive trust or equitable charge, made effectual."

7–44 It is therefore arguable that the situation where a claimant's money is used to repair or improve a defendant's existing property is in need of a judicial rethink, and so too is the situation where a claimant performs services for the defendant which have the same outcome. As Tim Akkouh and Sarah Worthington have written, cases of this kind are even harder to integrate into a set of tracing rules focused on "real exchanges" because the performance of services delivers no

[93] *Foskett* (HL) (fn.91) at 109.
[94] *Foskett v McKeown* [1998] Ch. 265 at 291–292.
[95] *Serious Fraud Office v Lexi Holdings Plc (In Administration)* [2008] EWCA Crim 1443; [2009] Q.B. 376 at [49]–[50].

"physical exchange".[96] Nevertheless some explanation is needed for cases in which the courts have awarded a lien over property owned by a defendant who has been unjustly enriched by a claimant performing services whose effect is to increase the property's value. An example is *Spencer v S Franses Ltd*,[97] where an expert on antiques was awarded a lien over some embroideries to secure the owner's liability in unjust enrichment to pay for the value of research that the expert undertook to identify the embroideries. The judge held that a lien should only be awarded if the work done had increased the value of the property, but considered that this requirement was satisfied on the facts, because the effect of the work was to increase the marketability of the embroideries.[98]

(iii) *Future Questions*

7–45 Drawing the threads together, there are a number of challenges that face the courts in developing the rules on "tracing" in future. The first and most immediately pressing set of questions concern the rules that determine an appropriate linkage between assets, for one to be regarded as a "substitute" for another. The law has numerous well-established rules, catalogued in the following sections, by reference to which this can occur. The concept of an "exchange" or "substitution" of assets undoubtedly remains central to them. However, as we have explained, it is a mistake to think that the law's rules can be reduced to this idea—and certainly, to a narrow conception, that assumes that one is concerned to "trace" a continuous flow of "value" through an unbroken chain of exchanges of valuable assets. It will certainly hamper the law's recognition of proprietary claims to improved assets.[99] Even more importantly, it may unduly hamper the law's ability to respond to phenomena that are routine in the world of banking, and in particular, modern money flows.[100] Recent cases contain the seeds of a pragmatic solution, with potentially extensive ramifications: it may now be possible to identify a sufficient transactional linkage and "substitution", irrespective of the intermediate mechanics, where the facts, and in particular, the intentions of the relevant actor(s), reveal some coordinated overall design.[101] However, this is only a recent and under-developed insight, and courts should be cautious before making such findings.

7–46 A second set of questions concerns whether it is really correct to imagine that the "tracing" process must invariably identify the substitute for an asset that originally belonged to the claimant. If it is not, then further refinement of familiar images of the tracing process, and its role, will be needed. The tracing process would not be accurately captured exclusively in terms of a set of rules that identify one asset as a substitute for another, for the purpose of enabling claims to be made in respect of it. Instead, and at least within the law of unjust enrichment, the "tracing" rules would become rules that identify a set of sufficient transactional linkages that allow an identified asset to be treated as

[96] Akkouh and Worthington (fn.86), p.312.
[97] *Spencer v S Franses Ltd* [2011] EWHC 1269 (QB).
[98] *Spencer* (fn.97) at [245]–[262]; considering *Hollis v Claridge* (1813) 4 Taunt. 807; 128 E.R. 549; *Steadman v Hockley* (1846) 15 M. & W. 553; 153 E.R. 969; and *Hatton v Car Maintenance Co Ltd* [1915] 1 Ch. 621.
[99] See paras 7–40—7–44.
[100] See para.7–32 and following.
[101] See paras 7–36—7–37.

acquired "at the claimant's expense" for the purpose of enabling proprietary claims, whether the relevant asset is attributable to an application of the claimant's money, or to another asset of the claimant, or to the claimant's labour,[102] or to the claimant's incurring of monetary liability.[103]

(b) *Straight Substitutions*

7–47 In *Foskett v McKeown*,[104] Lord Millett distinguished between cases where there is a straight substitution of one asset for another, and cases of "mixed substitution", i.e. cases where an asset is mixed with other assets, and an asset is then withdrawn from the mixture and used to acquire some new asset. Cases of straight substitution are simple: if cash is exchanged for a car, or for a chose in action against a bank, then the car or the chose in action will be treated as the traceable product of the cash.[105]

(c) *Mixed Substitutions*

7–48 Cases of mixed substitution are more complicated. In these cases, the tracing rules resemble the following rules, insofar as they provide that in cases of evidential uncertainty gains and losses to a mixture of assets must be shared rateably between innocent contributors to the mixture. They also provide that evidential uncertainty created by a bad faith defendant is resolved against him. The following sections illustrate their application to mixtures of money.

(i) *Where a Defendant Knowingly Mixes a Claimant's Money With His Own Money*

7–49 Suppose that a defendant mixes £10,000 of his own money with £10,000 received from a claimant to which the defendant knows he is not entitled. Suppose further that the funds lose their separate identities as a result of the mixing and that the defendant then takes £10,000 out of the mixture and dissipates it. Whose money has been lost? In *Re Hallett's Estate*,[106] the Court of Appeal resolved the evidential uncertainty created by the mixing by deeming the defendant to have kept the claimant's money intact and to have spent his own money.

7–50 Suppose, again, that a defendant mixes £10,000 of his own money with £10,000 of trust money in such a way that the funds lose their separate identities. But now suppose that he takes £10,000 out of the mixture and uses it to buy a painting, and that he dissipates the remaining £10,000. In this situation, too, the evidential uncertainty is resolved against the defendant, this time by deeming him to have used the claimant's money to buy the painting. This is the rule in *Re Oatway*, where Joyce J said that the defendant:

[102] See para.7–44.
[103] See para.7–34.
[104] *Foskett v McKeown* [2001] 1 A.C. 102 at 130.
[105] *Taylor v Plumer* (fn.27); *Banque Belge* (fn.27); *Trustee of FC Jones* (fn.27).
[106] *Re Hallett's Estate* (1880) 13 Ch.D. 696.

"... cannot maintain that the investment which remains represents his money alone and that what has been spent and can no longer be traced and recovered was money belonging to the [claimant]."[107]

7–51 A third situation might arise, which requires us to consider whether the claimant can "cherry pick" between the rule in *Re Hallett's Estate* and the rule in *Re Oatway*. Suppose that a defendant knowingly mixes £10,000 of his own money with £10,000 of the claimant's money in such a way that the funds lose their separate identities, that he takes £10,000 out of the mixture and uses it to buy a painting that triples in value, but that £10,000 is left. Is the governing authority *Re Hallett's Estate*, deeming the defendant to have kept the claimant's £10,000 intact, or *Re Oatway*, deeming the painting to have been bought with the claimant's money?

7–52 This was considered in *Shalson v Russo*, where Rimer J said this:[108]

> "Normally, it is presumed that if a [defendant knowingly] uses money from a fund in which he has mixed [a claimant's money] with his own, he uses his own money first: *Re Hallett's Estate*.... But [counsel] submits that this is not an inflexible rule and that if the [defendant] can be shown to have made an early application of the mixed fund into an investment, the [claimant] is entitled to claim that for himself. He says, and I agree, that this is supported by *Re Oatway*.... The justice of this is that, if the [claimant] is not entitled to do this, the [defendant] may be left with all the cherries and the [claimant] with nothing."

However, the same question then arose in a second case, *Turner v Jacob*, where it seems that *Shalson* was not cited to the judge, Patten J. He interpreted *Re Oatway* to stand for the rather different proposition that[109]:

> "where the [defendant] maintains in the account an amount equal to the [amount received from the claimant], the [claimant's] right to trace is limited to that fund. It is not open to the [claimant] to assert a lien against an investment made using monies out of the mixed account unless the sum expended is of such a size that it must have included [money emanating from the claimant] or the balance remaining in the account after the investment is then expended so as to become untraceable."

7–53 The authorities are therefore inconsistent. We believe that Patten J's statement of the principle established by *Re Oatway* is closer than Rimer J's statement to what the case actually decided. However we prefer Rimer J's view of the merits. If the principle that underlies the law in this area is that presumptions should be made against defendants who knowingly create evidential uncertainty by mixing money received from a claimant with their own money, we believe that this principle should extend to giving claimants the right to choose whichever presumption produces the best result for them. Note that the rule in *Clayton's case*, considered below, does not apply in this situation.[110]

[107] *Re Oatway* [1903] 2 Ch. 356 at 360. See too *Grey v Haig* (1855) 20 Beav. 219 at 226; 52 E.R. 587 at 590.
[108] *Shalson v Russo* [2003] EWHC 1637 (Ch); [2005] Ch. 281 at [144].
[109] *Turner v Jacob* [2006] EWHC 1317 (Ch); [2008] W.T.L.R. 307 at [102].
[110] *Oatway* (fn.107) at 360–361: "The order of priority in which the various withdrawals and investments may have been respectively made is wholly immaterial." See too *Hallett's Estate* (fn.106) at 728.

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7–54 The rules in *Re Hallett's Estate* and *Re Oatway* are designed to resolve evidential uncertainty. Hence they have no bite in a situation that is not evidentially uncertain.[111] Suppose that a defendant mixes £50,000 of his own money and £50,000 of the claimant's money and places the mixture in an empty bank account. Suppose that he then withdraws £80,000, loses it, and then adds another £30,000 of his own money, so that there is now £50,000 in the account. Here, the claimant cannot invoke the rule in *Re Hallett's Estate* to identify more than £20,000 in the account as his property, because it is not evidentially uncertain that at least £30,000 of the remaining funds came from the defendant's own resources.[112] This rule, established in *James Roscoe (Bolton) Ltd v Winder*,[113] is known as "the lowest intermediate balance rule":

> "[A]bsent any payment in of money with the intention of making good earlier depredations, tracing cannot occur through a mixed account for any larger sum than is the lowest balance in the account between the time the [claimant's] money goes in, and the time the remedy is sought."[114]

7–55 By way of qualification of what has just been said, the claimant may be able to trace his money into later additions to the mixed fund if he can show that the defendant intended to make good the claimant's loss by replacing the missing assets.[115] Even where the defendant is a trustee for the claimant, however, the court will not presume the defendant to have had such an intention, and the onus of proving it will lie on the claimant.[116] Austin Scott justified this result on the ground that:

[111] Cf. *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (In Administrative Receivership)* [2010] EWHC 1614 (Ch); [2011] 1 B.C.L.C. 202 at [154].

[112] Cf. *Law Society of Upper Canada v Toronto-Dominion Bank* (1999) 169 D.L.R. (4th) 353, where the Ontario CA failed to grasp this point, as noted by L.D. Smith (2000) 33 Can. Bus. L.J. 75; this case was distinguished by the same court in *Re Graphicshoppe Ltd* (2005) 78 O.R. (3d) 401.

[113] *James Roscoe (Bolton) Ltd v Winder* [1915] 1 Ch. 62; endorsed in *Goldcorp* (fn.47) at 107–108; *Bishopsgate Investment Management Ltd (In Liquidation) v Homan* [1995] Ch. 211 at 219 and 220; *Shalson* (fn.108) at [143]–[144]; *Campden Hill Ltd v Chakrani* [2005] EWHC 911 (Ch) at [79]; *Turner* (fn.109) at [88], [101]. See too *Re Ontario Securities Commission and Greymac Credit Corp* (1986) 55 O.R. (2d) 673 at 677, affirmed *Greymac Trust Co v Ontario (Securities Commission)* [1988] 2 S.C.R. 172.

[114] *Re French Caledonia Travel Service Pty Ltd* (2003) 59 N.S.W.L.R. 361 at [175] per Campbell J. For application of the principle where goods are successively withdrawn and deposited in a mixed bulk, see *Glencore v Metro* (fn.23) at [201]–[202]; revisited in *Glencore v Alpina* (fn.40) at [14]–[20].

[115] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1994] 4 All E.R. 890 at 939 (not considered on appeal); *Re BA Peters Plc (In Administration)* [2008] EWHC 2205 (Ch); [2008] B.P.I.R. 1180 at [18] and [46]–[47] (affirmed [2008] EWCA Civ 1604; [2010] 1 B.C.L.C. 142); *Sinclair Investments* (Ch) (fn.111) at [152]. See too *Viscariello v Bernsteen Pty Ltd (In Liquidation)* [2004] SASC 266 at [30].

[116] *Ontario (Real Estate and Business Brokers Act, Director) v NRS Mississauga Inc* (2003) 226 D.L.R. (4th) 361 at [49]. See too *Brookfield Bridge Lending Fund Inc v Karl Oil and Gas Ltd* [2009] ABCA 99; [2009] 7 W.W.R. 1 at [16]: "If the trust funds were segregated, the outcome would be clearer. If the trustee misappropriated segregated funds, and then deposited non-trust funds into the segregated account, the intent must have been to replenish the trust account. But where the trust funds are commingled with other funds, the intent is not so clear. Since the trustee by definition is using the account for trust and non-trust purposes, the deposits might simply be made to enable further non-trust expenditures."

> "... the real reason for allowing the claimant to reach the balance [of the mixed fund] is that he has an equitable interest in the mingled fund which the wrongdoer cannot destroy as long as any part of the fund remains; but there is no reason for subjecting other property of the wrongdoer to the claimant's claim any more than to the claims of other creditors merely because the money happens to be put in the same place where the claimant's money formerly was, unless the wrongdoer actually intended to make restitution to the claimant."[117]

(ii) *Where Money Belonging to Equally Innocent Claimants is Mixed Together*

7–56 If money belonging to equally innocent claimants is mixed together then they will generally have equally strong claims to a rateable share of gains, and equally weak claims to avoid taking a rateable share of losses, to the mixed fund. As Lord Millett said in *Foskett*[118]:

> "[W]here [an innocent contributor's claim] is in competition with the claims of other innocent contributors, there is no basis upon which any of the claims can be subordinated to any of the others."

Hence, gains and losses are generally shared between them in proportion to their contributions to the mixture.[119]

7–57 Until recently, there was thought to be an exception to this principle, deriving from *Clayton's case*.[120] This concerned a dispute centring on the appropriation of payments as between a bank and its customer,[121] but it came to be seen as authority for the rule that if a defendant places money belonging to two (or more) different claimants into the same unbroken running account,[122] any withdrawals that he makes from the account are deemed to be made in the same order as the payments in, on a "first in, first out" basis.[123] Thus, for example, if a defendant puts £10,000 from claimant A into a current bank account, and then puts in £10,000 from claimant B, and then withdraws £10,000 and loses it (or uses it to buy an asset which triples in value), then the loss (or gain) will be attributed solely to claimant A.

[117] *Scott on Trusts* § 518.1. See too *Law Society of Upper Canada* (fn.112) at [19] per Blair J: "[The rule] seeks to recognize that at some point in time, because of earlier misappropriations, an earlier beneficiary's money has unquestionably left the fund and therefore cannot physically still be in the fund. Accordingly, it cannot be 'traced' to any subsequent versions of the fund that have been swollen by the contributions of others, beyond the lowest intermediate balance in the fund."

[118] *Foskett* (HL) (fn.104) at 132.

[119] *Edinburgh Corp v Lord Advocate* (1879) 4 App. Cas. 823; *Diplock* (fn.87) at 533, 534 and 539.

[120] *Clayton's case* (1816) 1 Mer. 529; 25 E.R. 767. For the history of the case see Smith (1997) (fn.29), pp.183–194, and *Re French Caledonia Travel* (fn.114) at [20]–[172].

[121] This aspect of the rule established by the case has continued practical significance for the relationship between banks and their customers: see P. Hood, "*Clayton's Case* and Connected Matters" [2013] Jur. Rev. 501.

[122] e.g. a current bank account, a solicitor's trust account or a moneylender's account. The rule does not apply where there are distinct and separate debts: *The Mecca* [1897] A.C. 286; *Re Sherry* (1884) 25 Ch.D. 692 at 702. Nor does the rule apply to entries on the same day: it is the end-of-day balance which counts: *The Mecca* at 291.

[123] *Bank of Scotland v Christie* (1840) 8 Cl. & Fin 214; 8 E.R. 84; *Pennell v Deffell* (1853) 4 De G.M. & G. 372; 43 E.R. 551; *Brown v Adams* (1869) L.R. 4 Ch. App. 764; *Hancock v Smith* (1889) 41 Ch.D. 456 at 461; *Re Stenning* [1895] 2 Ch. 433; *Diplock* (fn.87) at 553–554.

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7–58 As between claimant A and claimant B this is an "irrational and arbitrary" result,[124] and for this reason the "first in, first out" rule has been discarded in many Commonwealth jurisdictions, in favour of a pro rata approach.[125] In *Barlow Clowes International Ltd v Vaughan*,[126] the Court of Appeal reaffirmed the general application of *Clayton's case* in English law, except where its application would be impracticable or would result in injustice between the parties. However, more recent English cases suggest that the rule will not often be applied, for the courts are now swift to find that the rule is an impracticable or unjust method of resolving disputes between the victims of shared misfortune, particularly in cases of large-scale fraud.[127]

7–59 *Barlow Clowes* concerned the liquidation of an investment company whose fraudulent managers had stolen most of the company's assets, leaving thousands of investors out of pocket. The question arose as to how the surviving assets should be distributed between the investors. The court held that the rule in *Clayton's case* should not be used to resolve this question because the investors had all intended that their money should be pooled in a single fund for investment purposes, so that it would conform with their original intentions if they all shared rateably in what remained in the pool. However, Woolf and Leggatt LJJ[128] also indicated that a "rolling charge" solution might be fairer than rateable sharing so that claimants should share losses and gains to the fund in proportion to their interest in the fund immediately prior to each withdrawal.

7–60 This would work as follows. Suppose that a defendant pays £2,000 from claimant A and then £4,000 from claimant B into an empty current bank account. He then withdraws £3,000 and loses it. He then pays in £3,000 from claimant C before withdrawing another £3,000 to buy shares whose value increases tenfold. He then withdraws the remaining £3,000 and loses it. Applying the "rolling charge" rule, the first loss must be borne by A and B in the ratio 1:2, and C need not bear this loss at all. Immediately after the first withdrawal the remaining £3,000 would be attributed to A and B in the ratio 1:2, and after the next deposit, the £6,000 in the account would be attributable to A, B, and C in the ratio 1:2:3.

[124] *Re Walter J Schmidt & Co* 298 F. 314 (1923) at 316 per Learned Hand J.
[125] *Re Ontario Securities Commission* (1985) 30 D.L.R. (4th) 1; affirmed (1998) 52 D.L.R. (4th) 767; *Re Registered Securities Commission* [1991] 1 N.Z.L.R. 545; *Keefe v Law Society of New South Wales* (1998) 44 N.S.W.L.R. 451; *ASIC v Enterprise Solutions 2000 Pty Ltd* [2001] QSC 82; *Re Esteem Settlement* (fn.88); *Re French Caledonia Travel* (fn.114); *Re International Investment Unit Trust* [2005] 1 N.Z.L.R. 270; *Re Magarey Farlam Lawyers Trust Accounts (No.3)* [2007] SASC 9; (2007) 96 S.A.S.R. 337 at [136]–[139]; *ASIC v Letten (No.7)* [2010] FCA 1231; (2010) 190 F.C.R. 59.
[126] *Barlow Clowes International Ltd v Vaughan* [1992] 4 All E.R. 22.
[127] *El Ajou v Dollar Land Holdings Plc (No.2)* [1995] 2 All E.R. 213 at 222; *Russell-Cooke Trust Co v Prentis* [2002] EWHC 2227 (Ch); [2003] 2 All E.R. 478 at [54]–[58]; *Commerzbank AG v IMB Morgan Plc* [2004] EWHC 2771 (Ch); [2005] 2 Lloyd's Rep. 298 at [43]–[50]; *Re Ahmed & Co* [2006] EWHC 480 (Ch); (2006) 8 I.T.E.L.R. 779 at [131]–[138]; *Charity Commission for England and Wales v Framjee* [2014] EWHC 2507 (Ch); [2015] 1 W.L.R. 16 at [49]; *National Crime Agency v Robb* [2014] EWHC 4384 (Ch); [2015] Ch. 520 at [64]–[65]. Note too that in *El Ajou (No.2)*, at 223–224, Robert Walker J held that where A and B's money is mixed in an account and *Clayton's case* deems A's money (and not B's) to have been paid to D, B can still trace into the money received by D and claim against him if A makes no claim and is unlikely to do so. This was followed in *Campden Hill* (fn.113) at [76]–[77].
[128] *Barlow Clowes* (fn.126) at 35 and 44.

Hence, the shares should be attributed to them in the same proportion, leaving A with shares worth £5,000, B with shares worth £10,000 and C with shares worth £15,000. In contrast, the pro rata rule would attribute all gains and losses in proportion to the total contributions made by each claimant, giving a ratio of 2:4:3, and leaving A with shares worth £6,667, B with shares worth £13,333, and C with shares worth £10,000. The "first in, first out" rule, meanwhile, would produce the result that all of A's money is lost, that £1,000 of B's money is lost, that all the shares belong to B, and that all of C's money is lost.

7–61 In *Shalson v Russo*,[129] Rimer J suggested that the rolling charge rule should always be used to resolve cases of this kind, because the pro rata rule ignores evidence of what has actually happened to the claimants' money: thus, in the example, we know that no part of C's £3,000 can have gone into the trustee's first withdrawal, suggesting that C should not have to share this loss with A and B. Rimer J's position can certainly be supported by reference to *Roscoe v Winder*,[130] but in a case involving thousands of investors and hundreds of thousands of deposits and withdrawals, the expense and practical difficulties of calculation using the rolling charge rule may be prohibitive,[131] leaving the claimants with a choice between the rough justice of the pro rata rule, and the even rougher justice of "first in, first out".[132] Similar evidential difficulties recently arose in *Charity Commission for England and Wales v Framjee*, and Henderson J applied the "simple" pro rata rule.[133]

(iii) *Where a Defendant Innocently Mixes a Claimant's Money With His Own Money*

7–62 Where a defendant innocently mixes the claimant's money with his own money, the rules governing the situation will be the same as those which govern the case where money belonging to two innocent claimants is mixed together by the defendant[134]: gains and losses will be shared rateably, possibly subject to the rule in *Clayton's case*[135] if the court sees fit to apply it.[136]

[129] *Shalson v Russo* [2003] EWHC 1637 (Ch); [2005] Ch. 281 at [150].
[130] *Roscoe v Winder* (fn.113), discussed in para.7–54.
[131] In *Magarey Farlam* (fn.125) at [141], Debelle J held that the cost and complexity of applying the rule to the facts of the case rendered it "entirely unsuitable" as a method of resolving the issues between the parties.
[132] See also Australian and Canadian authorities for the proposition that the so-called lowest intermediate balance rule in *Roscoe v Winder* should also not be applied in cases involving multiple claimants where the application of the rule would be excessively complex and difficult: e.g. *Law Society of Upper Canada* (fn.112) at [24]–[25]; *Magarey Farlam* (fn.125) at [140]; *Letten* (fn.125) at [279].
[133] *Framjee* (fn.127) at [47]–[64].
[134] *Diplock* (fn.28) at 524 and 539.
[135] *Diplock* (fn.28) at 554.
[136] See para.7–57 and following. If the defendant pays the money into a separate account as soon as he learns of the claim, this will be regarded as effectively unmixing the fund so that the claim will then relate only to the money in the account: *Diplock* (fn.87) at 551–552, dealing with the claim against the National Institute for the Deaf, reversed on an amended statement of the facts: at 559–560.

court to take an active part in opposing the main claim.[31] It was recognised, however, that a defendant sued for contribution by this mechanism had a legitimate interest in the main proceedings, and so he was allowed to take an active role in these, subject to the court's directions, if he could show that the claimant was making inadequate efforts to defend himself.[32] He could cross-examine the witnesses in the main proceedings on the question of whether the claimant was liable,[33] call witnesses of his own to testify on this point,[34] and raise defences on the claimant's behalf that he would not raise for himself.[35] He could also be substituted as the defendant to the main proceedings with the consent of the person who had brought them.[36]

20–13 Where he was not substituted as a defendant in the main proceedings, it was unclear whether an order allowing him to participate made him a party, with the results, first, that he was bound by the court's finding against the claimant for the purposes of the claimant's action against him, and, secondly, that he could appeal from a judgment against the claimant. Canadian authority suggested this to be so,[37] and this was consistent with the (what is now) Senior Courts Act 1981 s.151(1), which states that for the purposes of construing English statutes and other documents, the term "party" in relation to any proceedings:

> "... includes any person who pursuant to or by virtue of rules of court ... has been served with, or has intervened in, those proceedings."

However, the English cases which touched on the point suggested that the defendant would only be bound by the court's decision if he had agreed to this at the time when the court ordered that he could participate in the main proceedings.[38] Otherwise, he would have no right to appeal from a judgment against the claimant.[39]

20–14 Under the Civil Procedure Rules, if a defendant is joined to a set of proceedings by the issue of a Pt 20 claim, he is a party to these proceedings by dint of CPR r.20.10(1). Also, under CPR r.20.13, where a defence is filed to a Pt 20 claim, the court must consider the future conduct of proceedings, and must give directions which ensure that the Pt 20 claim and the main claim are managed together, so far as this is practicable. These rules suggest that the court can still permit a defendant to raise defences on a claimant's behalf in the main proceedings, provided that this would be just, proportionate to the expense that might be entailed, and consistent with the goal of enabling the parties to reach a speedy resolution of their dispute.

[31] *Barton v London & North Western Railway Co* (1888) 38 Ch. D. 144 at 150–151 and 153–154; *Gillespie v Anglo-Irish Beef Processors Ltd* [1994] B.N.I.L. 68.
[32] RSC Ord.16 r.4(4); CCR Ord.12 r.3(1).
[33] *Barton* (fn.31) at 150 and 154 (CA); *Re Salmon* (1889) 42 Ch. D. 351 at 362. See too *Eden v Weardale Iron and Coal Co* (1887) 35 Ch. D. 287; followed in *Pioneer Concrete (NT) Pty Ltd v Watkins Ltd* (1983) 66 F.L.R. 279 at 291.
[34] *Barton* (fn.31) at 150 and 154.
[35] *Witham v Vane* (1880) 49 LJ Ch. 242; *Callender v Wallingford* (1884) LJ Q.B. 569 at 570; *Barton* (fn.31) at 150 and 154; *Barclays Bank v Tom* [1923] 1 K.B. 221 at 224.
[36] *Matthey v Curling* [1922] A.C. 180 at 198.
[37] *McFall v Vancouver Exhibition Association* [1943] 3 D.L.R. 39 at 40.
[38] *Benecke v Frost* (1876) 1 Q.B.D. 419; *Coles v Civil Service Supply Association* (1884) 26 Ch. D. 529 at 531; *Edison* (fn.30) at 33.
[39] *Asphalt & Public Works Ltd v Indemnity Guarantee Trust Ltd* [1969] 1 Q.B. 465 at 470–471 and 472–473 (CA), distinguishing *The Millwall* [1905] P. 155 at 165–166.

(ii) *Previous Court Orders*

20–15 A claimant may not bring new proceedings for contribution or reimbursement if he and the defendant have already been sued to judgment as co-defendants to an action by the third party and a contribution order has been made in those proceedings.[40] Nor may he relitigate the quantum of his entitlement if the court has already apportioned the burden of paying the third party in earlier proceedings.[41]

20–16 In contrast, where a claimant alone is sued to judgment by the third party, and brings separate proceedings against a defendant who was not a party to the first proceedings, either as a co-defendant or as defendant to a Pt 20 claim, the defendant can challenge the findings made in the first action. This appears from a series of dicta, stating that the whole point of third-party proceedings (as opposed to successive sets of independent proceedings) is to prevent the same question from being tried twice over with possibly different results,[42] and from the fact that there is nothing in the Civil Procedure Rules to stop a defendant from reopening the question of the claimant's liability.[43]

20–17 This is unsatisfactory. When a single incident gives rise to several sets of proceedings in which the courts make inconsistent findings of fact, the parties may rightly feel that justice has not been done.[44] Note, in particular, that a claimant who is found liable to a third party in one set of proceedings remains liable even if a different court holds otherwise in a later set of proceedings. This follows from the principle that a competent court has jurisdiction to decide wrongly as well as rightly[45]: if it makes a mistake, then the mistake will be conclusive between the parties unless and until it is corrected by an appellate court.[46] Sixty-five years ago, these considerations led Glanville Williams to argue that the English rules of civil procedure should be altered to oblige claimants to use the machinery of third-party proceedings to recover contribution and to prevent them from issuing separate sets of proceedings with this end in mind.[47] This excellent suggestion has never been implemented.[48]

[40] *Bell v Holmes* [1956] 1 W.L.R. 1359.
[41] *Wall v Radford* [1991] 2 All E.R. 741; *Talbot v Berkshire CC* [1994] Q.B. 290.
[42] *Benecke* (fn.36) at 422; *Tom* (fn.35) at 224; *Standard Securities Ltd v Hubbard* [1967] Ch. 1056 at 1059.
[43] *Powell v Pallisers of Hereford Ltd* [2002] EWCA Civ 99 esp. at [14].
[44] See Lord Neuberger MR's comments in *Wright (A Child) v Cambridge Medical Group* [2011] EWCA Civ 669 at [86]–[87]. And cf. *Johnson v Cartledge and Matthews* [1939] 3 All E.R. 654, where the incident with which the case was concerned gave rise to five separate sets of proceedings in which the courts had reached inconsistent findings on the question of liability.
[45] *Philips v Bury* (1694) Skin. 447 at 485; 90 E.R. 198 at 216.
[46] *Meyers v Casey* (1913) 17 C.L.R. 90 at 115.
[47] G. Williams, *Joint Torts and Contributory Negligence* (London: Stevens, 1951), pp.185–186, allowing for exceptions where third-party proceedings are impossible.
[48] Though note CMR art.39. For discussion by law reform bodies of the question whether claimants should be compelled to seek contribution by third-party proceedings, see University of Alberta, Institute of Law Research and Reform, *Contributory Negligence and Concurrent Wrongdoers* (Report No.31, 1979) p.74; Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988) pp.215–216; Scottish Law Commission, *Report on Civil Liability: Contribution* (Scot Law Com. No.115, 1988) paras 3.78–3.79; New Zealand Law Commission, *Apportionment of Civil Liability* (NZLC PP 19, 1992) para.256; New South Wales Law Reform Commission, *Contribution Between Persons Liable for the Same Damage* (Discussion Paper No.38, 1997) paras 7.3–7.11.

(iii) *Settlements*

20–18 If a claimant settles a third party's claim, and then sues a defendant, the defendant may wish to argue that the settlement figure was too high or that the claimant should not have settled at all. Such arguments are open to defendants in some situations.

20–19 For example, where several sureties have guaranteed a debt, and the debt falls due, one can give notice to the others that they should take steps to defend the creditor's claim, make terms, or pay their due shares of the debt, and if they do nothing after receiving this notice, they cannot complain if he settles with the creditor on their behalf. If he fails to give notice, however, then the others can object that the creditor's claim was unfounded or that the settlement could have been made on better terms.[49]

20–20 Under the Civil Liability (Contribution) Act 1978 s.1(4), a claimant "who has made or agreed to make any payment in bona fide settlement or compromise"[50] of a third party's claim[51]:

> "... shall be entitled to recover contribution in accordance with this section without regard to whether or not he himself is or ever was liable in respect of the damage, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established."

This subsection was enacted to overcome the problems created by *Stott v West Yorkshire Road Car Co Ltd*,[52] where it was held that a claimant who settled a third party's claim could not recover contribution from a defendant unless he could prove that he would have been held liable if the third party had sued him to judgment. The Law Commission thought that a claimant who settled a third party's claim might find this hard to prove, particularly where he had denied liability in order to negotiate a more favourable settlement,[53] suggesting that the *Stott* rule discouraged the settlement of claims.[54] Hence, s.1(4) was enacted to relieve a settling claimant of the need to show that the third party would have been able to prove the factual basis of his claim.

20–21 Section 1(4) refers to claimants who have entered "bona fide" settlements, and unlike the Irish Civil Liability Act 1961 s.22, it does not say that the settlement must have been "reasonable" before the claimant is entitled to contribution. Nor does it empower the courts to fix the amount at which an "unreasonable"

[49] *Duffield v Scott* (1789) 3 T.R. 374; 100 E.R. 628; *Smith v Compton* (1832) 3 B. & Ad. 407; 110 E.R. 146; *Jones v Williams* (1841) 7 M. & W. 493 at 501; 151 E.R. 860 at 864; *Pettmann v Keble* (1850) 9 C.B. 701; 137 E.R. 1067; *Stewart v Braun* [1925] 2 D.L.R. 423; *BSE Trading Ltd v Hands* (1998) 75 P. & C.R. 138.

[50] The word "payment" includes "payment in kind", and so the subsection applies where a claimant does work to repair damage to property: *Baker & Davies Plc v Leslie Wilks Associates (A Firm)* [2005] EWHC 1179 (TCC); [2005] 3 All E.R. 603.

[51] See too the Defamation Act 1996 s.3(8)(a): where a claimant offers to make amends for defaming a third party by paying him compensation, and the offer is accepted, "the amount of compensation paid under the offer shall be treated as paid in bona fide settlement or compromise of the claim" for the purposes of the 1978 Act.

[52] *Stott v West Yorkshire Road Car Co Ltd* [1971] 2 Q.B. 651, especially at 657. See too *James P. Corry & Co Ltd v Clarke* [1967] N.I. 62 at 71. And cf. *Baylis v Waugh* [1962] N.Z.L.R. 44 at 49.

[53] As was subsequently the case in e.g. *Thomas Saunders Partnership v Harvey* (1989) 30 Con. L.R. 103 at 120–121.

[54] Law Commission, *Report on Contribution* (1977) Law Com. No.79, paras 44–57.

settlement should have been settled for the purposes of assessing contribution. The Law Commission chose the "bona fide" wording because it wished to prevent dishonest collusion between a claimant and a third party.[55] An attempt was made in Parliament to add a requirement that the settlement must have been reasonable, but the amendment was withdrawn when critics objected that it would enable the defendant to reopen the merits of the third party's claim against the claimant, which they took to be undesirable.[56] This suggests that Parliament's intention when enacting the statute was to prevent defendants from challenging settlement agreements unless they can prove fraudulent intent. Nevertheless, the courts have assumed that even where the other parties have acted in good faith, the defendant can argue that the claimant acted unreasonably in settling for too large a sum.[57] This has prompted the further questions, whether it is relevant that the claimant acted on legal advice, and if so, whether the defendant should have discovery of communications between the claimant and his legal adviser? The weight of authority suggests that such legal advice is usually irrelevant to the question whether the settlement was reasonable, as this is something for the court alone to decide.[58]

20–22 In *WH Newson Holding Ltd v IMI Plc*,[59] the Court of Appeal considered whether the proviso to s.1(4) means that a claimant not only has to show that he would have incurred a prima facie liability to the third party on the assumed facts, but also has to show that he would have had no viable defence to the third party's claim. Previously in *Arab Monetary Fund v Hashim*,[60] Chadwick J had held that the proviso permits the defendant to escape liability for contribution if the claimant would have had a defence to the third party's claim, but in *Newson* the court held that this was not a permissible interpretation of the subsection, which prohibits inquiry as to whether the claimant was *or was not* actually liable to the third party.

(c) *Disproving the Defendant's Liability to the Third Party*

20–23 A defendant will escape liability to the claimant if he can show that he was not liable to the third party. Alternatively, if he can show that he had a partial defence

[55] Law Com. No. 279 (fn.54), paras 55–57. For a case where an arrangement was allegedly reached in bad faith between the third party and the claimant, see *Abbey National Plc v Gouldman* [2003] EWHC 925 (Ch); [2003] 1 W.L.R. 2042 at [14].

[56] *Hansard, Reports of Standing Committees for 1977–1978 Session, Vol.2: Standing Committee C: Sittings on the Civil Liability (Contribution) Bill*, especially cols 23–24 and 43 (I. Percival MP) and cols 40–41 (P. Mayhew MP) (7 June 1978).

[57] e.g. *Oxford University Press v John Stedman Design Group* (1990) 34 Con. L.R. 1; *Society of Lloyd's v Kitsons Environmental Services Ltd* [1994] C.I.L.L. 940; *DSL Group Ltd v Unisys International Services Ltd* [1994] C.I.L.L. 942; *J Sainsbury Plc v Broadway Malyan (A Firm)* (1998) 61 Con. L.R. 31. Cf. *Nesbitt v Beattie* [1955] 2 D.L.R. 91 at 94; *Bakker v Joppich* (1980) 25 S.A.S.R. 468 at 475; *Saccardo Constructions Pty Ltd v Gammon* (1991) 56 S.A.S.R. 552 at 559–560; *Dowthwaite Holdings Pty Ltd v Saliba* [2006] WASCA 72 at [89]–[95].

[58] *Oxford University Press* (fn.57) at 101–102; *DSL Group* (fn.57) at 39–43; *Sainsbury* (fn.57) at 64. Contra, *Lloyd's* (fn.57) at 29–30; *P&O Developments Ltd v Guy's and St Thomas NHS Trust* (1998) 62 Con L.R. 38 at 55.

[59] *WH Newson Holding Ltd v IMI Plc* [2016] EWCA Civ 773, esp. at [54]–[62], affirming the result, though not the reasoning, of Rose J's decision at first instance: [2015] EWHC 1676 (Ch); [2015] 1 W.L.R. 4881. See too *BRB (Residuary) Ltd v Connex South Eastern Ltd* [2008] EWHC 1172 (QB); [2008] 1 W.L.R. 2867.

[60] Unreported 28 May 1993 Ch. D.

to the third party's claim, his liability to the claimant will be correspondingly reduced.

(i) *Previous Court Orders*

20–24 Where a defendant defeats a claim by a third party, and the third party successfully sues a claimant instead, can the claimant then relitigate the defendant's liability to the third party in new proceedings? This question was considered by the Law Commission in the Working Paper[61] which preceded their 1977 *Report on Contribution*, which led in turn to the enactment of the Civil Liability (Contribution) Act 1978. In the Working Paper, the Law Commission suggested that the claimant should be able to reopen the question of the defendant's liability to the third party, if he can show that he has evidence conclusive of the defendant's liability, of which the third party was unaware at the time of the first action.[62] Following its consultation process, however, the Law Commission concluded that it was better that the claimant should be bound by the previous decision in the defendant's favour than that the defendant should have to defend himself twice. Hence they recommended that a defendant should not be liable for contribution once he has defeated an action by a third party on its merits.[63]

20–25 However, the Law Commission also thought that a defendant who defeats a third party's claim by relying on the expiry of a limitation period should not be relieved from liability to pay contribution. Otherwise, an inconsistency would be created with the rule that a defendant is liable to pay contribution where the third party never sues him at all, although he would have been liable on the merits if he had been sued in time. In the Law Commission's view, a defendant "... ought to be no better off if the [third party's] proceedings against [him] fail on a 'limitation' point than if they are never brought"[64] and they drew the same conclusion with regard to the situation where a defendant has the third party's proceedings against him dismissed for want of prosecution.[65] Hence they proposed that the contribution legislation should provide that where a defendant has defeated a third party's claim, this should amount to conclusive evidence that he is not liable to pay contribution, but they also wished to add this proviso to the relevant section of their bill[66]:

> "[P]rovided that the judgment in his favour rested on a determination of the merits of the claim against him in respect of the damage (and not, for example, on the fact that the action was brought after the expiration of any period of limitation applicable thereto)."

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20–26 In the event, this wording was not incorporated into the 1978 Act, s.1(5) of which states that:

> "[A] judgment given in any action brought in any part of the United Kingdom by or on behalf of the person who suffered the damage in question against any person from

[61] Law Commission, *Working Paper on Contribution*, (1975) LCWP No.59.
[62] LCWP No.59 (fn.61) para.39.
[63] Law Com. No. 279 (fn.54), paras 63–65.
[64] Law Com. No.279 (fn.54) para.60.
[65] Law Com. No.279 (fn.54) para.61.
[66] Draft Civil Liability (Contribution) Bill cl.3(7).

> whom contribution is sought under this section shall be conclusive in the proceedings for contribution as to any issue determined by that judgment in favour of the person from whom the contribution is sought."

Taken at face value, s.1(5) therefore allows a defendant to rely on a technical determination in his favour in a previous action by a third party. The cases suggest that the courts are reluctant to interpret the subsection in this way,[67] but note that there are stronger reasons for allowing a defendant the protection of a previous judgment in his favour where the third party's proceedings were time-barred than where they were dismissed for want of prosecution. In the former case, judgment against the third party is final, but dismissal for want of prosecution is an interim order that does not bar further proceedings on the same facts.[68]

20–27 In *Moy v Pettman Smith (A Firm)*,[69] the question arose whether s.1(5) prevents a claimant from appealing against a decision that a defendant is not liable to a third party, where the third party has sued the claimant and defendant as joint defendants, and has won against the claimant but lost against the defendant. In the Court of Appeal, Latham LJ held that this is not prohibited by the subsection. Although this was enacted "... to ensure that a person is not exposed to the risks of further litigation after the issues have prima facie been resolved", he thought that the "... same considerations do not apply where, as in this case, all the relevant parties were present at, and took a full part in, the trial of those issues."[70] This was confirmed on appeal,[71] but it may be questioned whether the fact that the parties appeared in court together as defendants provides sufficient justification for this result, given that the opposite rule still governs the case where the parties have been sued in separate proceedings. In both situations, the claimant may have a legitimate complaint that his chances of recovery have been destroyed by the third party's failure to make out a claim against the defendant. If the interests of finality dictate that this complaint must be overridden in the one case, why is it not also overridden in the other?

(ii) *Settlements*

20–28 The Civil Liability (Contribution) Act 1978 s.1(3) states that a defendant is liable for contribution under the 1978 Act:

[67] *RA Lister & Co Ltd v EG Thomson (Shipping) Ltd (No.2)* [1987] 1 W.L.R. 1614 at 1623; *Nottingham Health Authority v Nottingham CC* [1988] 1 W.L.R. 903 at 906.
[68] A point made by Callinan J in *James Hardie & Co Pty Ltd v Seltsam Pty Ltd* (1998) 196 C.L.R. 53 at 96, considering *Hart v Hall & Pickles Ltd* [1969] 1 Q.B. 405, where it was held that a contribution claim would lie under the Law Reform (Married Women and Tortfeasors) Act 1935 s.6, where the third party's previous action against the defendant had been dismissed for want of prosecution. The 1935 Act contained no provision equivalent to s.1(5), and so the *Hart* case only has persuasive authority when construing the latter subsection.
[69] *Moy v Pettman Smith (A Firm)* [2002] EWCA Civ 875; [2002] P.N.L.R. 961.
[70] *Moy* (CA) (fn.69) at [10].
[71] *Moy v Pettman Smith (A Firm)* [2005] UKHL 7; [2005] 1 W.L.R. 581, where Lord Carswell also noted Goddard LJ's finding in *Hanson v Wearmouth Coal Co Ltd* [1939] 3 All E.R. 47 at 55, that the claimant should be entitled to appeal a decision in the defendant's favour. Note, though, that this was a case decided under the Law Reform (Married Women and Tortfeasors) Act 1935.

"... notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred."

The main purpose of this subsection is to render defendants liable for contribution although the third party has lost his ability to sue them by the time of the claimant's payment, through the expiry of a limitation period.[72] However, it has been held that the subsection also renders a defendant liable to pay contribution although he has previously settled the third party's claim.[73]

20–29 Where there is no evidence of dishonest collusion between the defendant and the third party,[74] it seems arguable that the defendant should not have to pay more by way of contribution than he agreed to pay the third party. Such a rule would be consistent with s.2(3)(a) of the 1978 Act, which states that where the defendant's liability to a third party is limited by a pre-existing contract, he is not liable for a greater sum by way of contribution.[75] The rule has also been adopted by the Defamation Act 1996 s.3(8)(b), which states that where a defendant offers to make amends for defaming a third party by paying him compensation, and the third party accepts this offer, but then recovers from the claimant instead, the defendant is not liable for a larger sum by way of contribution than the amount he agreed to pay.[76] However, it might be said that the defendant should not be allowed to prejudice the claimant's position by settling with the third party for less than his true share of his common liability.

20–30 This was considered in *Jameson v Central Electricity Generating Board*,[77] where the questions arose whether a third party is debarred from suing a claimant where the claimant and the defendant are several concurrent tortfeasors and the third party has settled his claim against the defendant, and if not, whether the claimant can recover contribution from the defendant if the third party wins judgment against him? Jameson was exposed to asbestos dust at different locations, including premises owned by CEGB, during his employment by Babcock. He contracted mesothelioma, and sued Babcock for negligence and breach of statutory duty. This action was settled shortly before he died of the disease. The settlement figure, paid "in full and final settlement and satisfaction" of his claim, was around £80,000, which was assumed to have been less than two-thirds of his actual loss. After his death, Jameson's widow brought a claim against CEGB under the Fatal Accidents Act 1976, making similar allegations of negligence and breach of statutory duty. The CEGB brought third-party proceedings against Babcock seeking a contribution under the Civil Liability (Contribution) Act 1978. The Court of Appeal held that Babcock was liable under the 1976 Act and that Babcock could recover a contribution from CEGB.[78]

[72] See paras 20–45—20–46.

[73] *Watts v Aldington*, *The Times*, 16 December 1993; *Guinness Plc v CMD Property Developments Ltd* (1995) 76 B.L.R. 40; *British Racing Drivers' Club Ltd v Hextall Erskine & Co (A Firm)* [1996] 3 All E.R. 667 at 683; *Jameson v Central Electricity Generating Board* [2000] 1 A.C. 455 at 471; *Heaton v AXA Equity and Law Life Assurance Society Plc* [2002] 2 A.C. 329 at 356. But cf. *Kazakhstan Kagazy Plc v Zhunus* [2016] EWHC 1048 (Comm); [2016] 4 W.L.R. 86.

[74] As in *Corvi v Ellis*, 1969 S.L.T. 350, where a man sued his own daughter and then abandoned his suit with a view to having judgment ordered in her favour and a contribution claim precluded.

[75] For discussion of the relevant part of the 1978 Act s.2(3)(a), see paras 20–38—20–40.

[76] Discussed in *Veliu v Mazrekaj* [2006] EWHC 1710 (QB); [2007] 1 W.L.R. 495.

[77] *Jameson v Central Electricity Generating Board* [2000] 1 A.C. 455.

[78] *Jameson v Central Electricity Generating Board* [1998] Q.B. 323.

20–31 The first of these findings was reversed by the House of Lords for reasons that are discussed below. So far as the contribution claim was concerned, Lord Hope accepted that in principle CEGB would have been entitled to a contribution from Babcock if it had been liable to Jameson's widow in the main proceedings, and he also thought that Babcock would have been "exposed to a claim for a contribution ... which [would have been] calculated as if [its settlement with Jameson] had not been entered into".[79] In other words, he did not think that a defendant's liability to pay contribution should generally be capped at the amount which the defendant has previously agreed to pay in settlement of the third party's claim.

20–32 The reasons why Lord Hope held that CEGB was not liable to Jameson's widow were as follows. He considered that[80]:

"The liability which is in issue in this case is that of [several] concurrent tortfeasors, because the acts of negligence and breach of statutory duty which are alleged against Babcock and the defendant respectively are not the same. So the plaintiff has a separate cause of action against each of them for the same loss. But the existence of damage is an essential part of the cause of action in any claim for damages. It would seem to follow ... that once the plaintiff's claim has been satisfied by any one of several tortfeasors, his cause of action for damages is extinguished against all of them."

It was therefore necessary to decide whether Jameson's agreement with Babcock had relevantly "satisfied" Jameson's claim for damages, by examining the terms of the agreement and comparing them with what his widow was now claiming. The relevant question was not whether he had been fully compensated for his loss, but whether he had accepted that the settlement figure should be taken to fix the full measure of his loss, with the result that he had accepted Babcock's payment in full satisfaction. On the facts, Lord Hope considered that Jameson had accepted Babcock's payment as representing the full measure of his loss, and it followed that his widow was debarred from recovering from CEGB.

20–33 This reasoning was reaffirmed and extended by the House of Lords in two further cases, to take in situations where the same damage has been caused to a victim by two wrongdoers who have not committed a tort, but who have committed a breach of contract, breach of statutory duty, or equitable wrong.[81] Their Lordships distinguished *Jameson* in both cases, holding that on the facts the victim had not accepted the settlement payment as fixing the full measure of the loss which he had suffered.

20–34 As we discuss below,[82] joint tortfeasors and several concurrent tortfeasors are both liable for the same damage, but there is a significant difference between

[79] *Jameson* (HL) (fn.77) at 471.

[80] *Jameson* (HL) (fn.77) at 472.

[81] *Heaton v AXA Equity and Law Life Assurance Society Plc* [2002] 2 A.C. 329; *Cape and Dalgliesh (A Firm) v Fitzgerald* [2002] UKHL 16; [2003] 1 C.L.C. 65. Further cases in which the case has been considered are: *Rawlinson v North East Essex Health Authority* [2000] Lloyd's Rep. Med. 54; *Kenburgh Investments (Northern) Ltd v Minton* [2000] 1 Lloyd's Rep. 736; *Ogle v Chief Constable of Thames Valley Police* [2001] EWCA Civ 598; *John v Price Waterhouse (A Firm)* unreported 11 April 2001 Ch. D., at [384]–[391]; *Gladman Commercial Properties v Fisher Hargreaves Proctor* [2013] EWHC 25 (Ch) at [143]–[147].

[82] See paras 20–70—20–73.

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them, namely that joint tortfeasors, unlike several concurrent tortfeasors, commit a single wrong, notwithstanding the procedural rule that they can be sued in separate actions.[83] Because of this, the rules governing the release of several concurrent tortfeasors differ from those which govern the release of joint tortfeasors, and there is nothing in the *Jameson* case to cast doubt on the proposition that the release of one joint tortfeasor, whether under seal or by way of accord and satisfaction,[84] automatically releases all the others, whatever the terms of the settlement agreement pursuant to which the release is granted[85]—although a covenant not to sue a joint tortfeasor does not have the same effect.[86] The same is also true of joint debtors—because they owe a single obligation, the release of one joint debtor releases all, although a covenant not to sue a joint debtor does not.[87] Less logically,[88] this is also true of joint and several debtors[89] but not of several concurrent debtors.[90]

(iii) *Contributory Negligence*

20–35 The Civil Liability (Contribution) Act 1978 s.2(3)(b) states that where a defendant's liability to a creditor is reduced by virtue of the Law Reform (Contributory Negligence) Act 1945 s.1, the defendant is not liable to pay any larger sum by way of contribution than the amount which he would have been liable to pay the third party. Where all the parties have contributed to the damage suffered by the third party, including the third party himself, any reduction in the amount of damages recoverable by the third party to reflect his contributory negligence is

[83] Cf. *Watts v Aldington*, *The Times*, 16 December 1993 per Steyn LJ: "These appeals illustrate the absurdity of the rule that the release of one of two joint and several tortfeasors operates as a release of the other. In Victorian times judges of great distinction reasoned that in a case involving joint and several liability of joint tortfeasors there is only a single cause of action and accordingly a release of one of two joint tortfeasors extinguishes that single cause of action or, as it was usually put, releases the other joint tortfeasors. The rule has been relaxed by statute. The fact that joint tortfeasors can be sued successively heavily compromised the procedural logic but the old rule apparently still survives." Note, too, that it is unsettled whether the doctrine of res judicata applies to joint tortfeasors: *Cooper Tire & Rubber Co v Shell Chemicals UK Ltd* [2009] EWHC 2609 (Comm); [2009] 2 C.L.C. 619 at [78]–[80]; considering *House of Spring Gardens Ltd v Waite (No.2)* [1991] 1 Q.B. 241.

[84] *Gardiner v Moore* [1969] 1 Q.B. 55 at 92.

[85] *Thurman v Wild* (1840) 11 Ad. & El. 453; 113 E.R. 487; *Cutler v McPhail* [1962] 2 Q.B. 292.

[86] *Duck v Mayou* [1892] 2 Q.B. 511 (CA); *Apley Estates Co Ltd v De Bernales* [1947] Ch. 217 (CA); *Gardiner* (fn.84). But cf. *Bryanston Finance Ltd v De Vries* [1975] Q.B. 703 at 723 per Lord Denning MR, describing the distinction between a release and a covenant not to sue as "an arid and technical distinction without any merits".

[87] *Hutton v Eyre* (1815) 6 Taunt. 289; 128 E.R. 1046; *Johnson v Davies* [1999] Ch. 117.

[88] Cf. *Jenkins v Jenkins* [1928] 2 K.B. 501 at 508, falling in with the view espoused in *North v Wakefield* (1849) 13 Q.B. 536 at 541; 116 E.R. 1368 at 1370, that the reason for extending the rule governing the release of joint debtors to joint and several debtors is that "otherwise the co-debtors, if not released could, by recovering contributions from the one who was released, defeat his release". As observed in H.G. Beale (ed.), *Chitty on Contracts*, 32nd edn (London: Sweet & Maxwell, 2015), para.17–017, fn.48, this reasoning "assumes what requires to be proved, *viz.* that the creditor intends to protect the debtor released against claims from co-debtors".

[89] *Nicholson v Revill* (1836) 4 Ad. & El. 675; 111 E.R. 941; *Deanplan Ltd v Mahmoud* [1993] Ch. 151 at170; *Pollak v National Australia Bank Ltd* [2002] FCA 237.

[90] *Sun Life Assurance Society Plc v Tantofex (Engineers) Ltd* [1999] 2 E.G.L.R. 135.

made before the court assesses the respective contributions of the claimant and the defendant.[91]

20–36 Can a defendant rely on the third party's contributory negligence as a defence to a contribution claim, where his liability to the third party was for breach of contract rather than tort? The best view is that at least where the defendant owed concurrent duties in contract and tort, the third party's contributory negligence can be raised as a defence to the claim for contribution.[92] But there are conflicting authorities on the point, which awaits definitive resolution by the Supreme Court.[93] The Law Commission reviewed this area of the law in 1993, and recommended that legislation should be enacted under which contributory negligence is made a defence to a claim for damages for breach of contract, and that s.2(3)(b) of the 1978 Act should be amended to take such new legislation into account.[94]

(iv) *Statutory Defences*

20–37 The Civil Liability (Contribution) Act 1978 s.2(3)(a) states that where a defendant's liability to a third party would have been limited (or even, by implication, excluded) by "any enactment", the defendant need pay no more by way of contribution than he would have had to pay the third party.[95] A trustee defending a contribution claim by another trustee where both were liable for breach of trust would therefore ask the court to reduce his contribution liability where it would have reduced his liability under the Trustee Act 1925 s.61; a director might invoke the Companies Act 2006 s.1157 with the same end in mind.

(v) *Contractual Exclusion of Liability*

20–38 Under the Civil Liability (Contribution) Act 1978 s.2(3)(a), where a defendant's liability to a third party is reduced or excluded by "any agreement made before the damage occurred", the defendant need pay no more by way of contribution than the amount of his liability to the third party under the contract.

[91] *Fitzgerald v Lane* [1989] A.C. 328 at 336–345; deriving assistance from the judgment of Samuels JA in *Barisic* v *Devenport* [1978] 2 N.S.W.L.R. 111, and refusing to follow *The Miraflores and the Abadesa* [1967] 1 A.C. 826 at 846. See too *The Volvox Hollandia (No.2)* [1993] 2 Lloyd's Rep. 315; *Nelhams v Sandells Maintenance Ltd* [1996] P.I.Q.R. 52; *Henderson v Merrett Syndicates* [1996] 1 P.N.L.R. 32; *West v Wilkinson* [2008] EWCA Civ 1005.

[92] *Forsikringsaktieselskapet Vesta v Butcher* [1989] A.C. 852.

[93] *Sayers v Harlow Urban DC* [1958] 1 W.L.R. 623; *Quinn v Burch Brothers (Builders) Ltd* [1966] 2 Q.B. 370 at 380–381 (left open on appeal); *Artingstoll v Hewen's Garages Ltd* [1973] R.T.R. 197 at 201; *De Meza v Apple* [1974] 1 Lloyd's Rep. 508 (left open on appeal: [1975] 1 Lloyd's Rep. 498); *Basildon DC v JE Lesser (Properties) Ltd* [1985] Q.B. 839; *Victoria University of Manchester v Wilson* (1985) 2 Con. L.R. 43; *AB Marintrans v Comet Shipping Co Ltd* [1985] 1 W.L.R. 1270; *Tennant Radiant Heat Ltd v Warrington Development Corp* [1988] 1 E.G.L.R. 41; *Barclays Bank Plc v Fairclough Building Ltd (No.1)* [1995] Q.B. 214; *Secretary of State for the Environment, Transport and Regions v Unicorn Consultancy Services* Unreported 19 October 2000 Ch. D. at [123].

[94] Law Commission, *Contributory Negligence as a Defence in Contract* (Law Com. No.219, 1993) paras 4.38 and 5.6–5.9.

[95] Commonwealth cases to the same effect are: *Unsworth v Commissioner for Railways* (1958) 101 C.L.R. 73; *Calderwood v Nominal Defendant* [1970] N.Z.L.R. 296; *Commonwealth of Australia v Flaviano* (1996) 40 N.S.W.L.R. 199.

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20–39 *Co-operative Retail Services Ltd v Taylor Young Partnership Ltd*[96] illustrates the operation of this rule.[97] CRS entered a standard form building contract with Wimpey for the construction of offices. It also engaged TYP and HLP as architects and engineers on the project. Wimpey engaged an electrical subcontractor, Hall, under a standard form subcontract, and Hall entered a warranty agreement with CRS and Wimpey, under which it promised to exercise reasonable skill and care when carrying out the subcontract works. The main building contract excluded Wimpey from liability for damage to the works before practical completion, if this was caused by Wimpey's negligence or breach of statutory duty, and Wimpey was required to take out and maintain a joint names all-risks insurance policy for the benefit of CRS, Wimpey and the subcontractors. The main contract and the subcontract also provided that if damage was caused to the works through negligence, this should be disregarded in computing amounts payable under the contract, and that Wimpey (or Hall) would reinstate the works in full, additional time for which was to be granted, and the costs of which were to be met from the insurance moneys.

20–40 Before practical completion, a fire occurred which damaged the works. Since fire was an insured risk under the joint names policy, the insurer paid for the costs of reinstatement, and the works were reinstated by Wimpey in accordance with the main building contract. The insurer then brought subrogated proceedings in CRS's name against TYP and HLP, seeking to recover the reinstatement costs, on the ground that the fire had been caused by their negligence and breach of contract. TYP and HLP issued Pt 20 proceedings against Wimpey and Hall, seeking contribution or reimbursement on the ground that they had all been liable for the same damage suffered by CRS. This claim failed, essentially because the main contract between CRS and Wimpey excluded Wimpey and Hall's liability for damage to CRS. This being so, in Lord Hope's words[98]:

> "[A]s Wimpey and Hall are not persons from whom CRS is entitled to recover compensation in respect of the fire damage, it is not open to TYP and HLP to recover contribution from either Wimpey or Hall in respect of the fire damage for which they are said to be liable."

This result was argued to be inequitable by TYP and HLP because it left them bearing the whole cost of a disastrous fire, for which they had only been partially responsible. In Lord Bingham's view, however:

> "[T]his is the effect of the standard form contract which CRS, Wimpey and Hall made, and it is a standard form of which TYP, HLP and their professional indemnity insurers must be taken to have been aware."[99]

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[96] *Co-operative Retail Services Ltd v Taylor Young Partnership Ltd* [2002] 1 W.L.R. 1419.

[97] See too *Southern Water Authority v Carey* [1985] 2 All E.R. 1077 at 1086; *Plant Construction Plc v Clive Adam Assocs (A Firm)* (1997) 55 Con L.R. 42 at 70; *BMT Marine and Offshore Survey Ltd v Lloyd Werft Bremerhaven GmbH* [2011] EWHC 32 (Comm). And cf. *Herrick v Leonard and Dingley Ltd* [1975] 2 N.Z.L.R. 566 at 572; *Giffels Association Ltd v Eastern Construction Co* [1978] 2 S.C.R. 1346 at 1355–1356; *Orange Julius Canada Ltd v City of Surrey* [2000] BCCA 467; *Farstad Supply A/S v Enviroco Ltd* [2010] UKSC 18; [2010] Bus. L.R. 1087 (a Scottish appeal).

[98] *Co-operative* (fn.96) at 1434.

[99] *Co-operative* (fn.96) at 1423.

20–41 Insurance policies sometimes contain a clause cancelling cover in the event that there is another insurance covering the same loss. The question has arisen, what the effect of such a clause might be where an insured is covered by two policies, both of which contain the clause. The answer is that the clauses cancel each other out, leaving the insured to recover in full against either insurer, assuming that there is no limit on their respective liabilities, and leaving the insurers to their rights inter se.[100]

(vi) *Contractual Limitation of Liability*

20–42 If a defendant's liability is not excluded by his contract with the third party, but is limited to an agreed amount, then again the Civil Liability (Contribution) Act 1978 s.2(3)(a) comes into play. In this situation, several methods could be used to apportion liability between the parties. The Law Commission used the following example to illustrate them in its report which led to the enactment of the statute.[101] Suppose that the amount of damages payable to the third party is £1,000, that a clause in the contract between the third party and the defendant sets a ceiling of £400 on any claim which the third party might make for breach of contract, and that the defendant and the claimant are equally responsible for the third party's damage. Method 1 is to find the defendant liable for £400 and the claimant liable for £500, the balance to be irrecoverable by the third party.[102] Method 2 is to apportion only the common extent of liability between the claimant and the defendant—in this example, £400—and to leave the claimant liable for the balance. Applying this method to the example, the defendant is liable for £200 and the claimant for £800. Method 3 is to apportion the total amount of the damage between the claimant and the defendant, but then to limit the defendant's liability to the extent provided for in his contract with the third party. This produces the result that the claimant is liable for £600 and the defendant for £400. The Law Commission favoured this final method and recommended that provision should be made for it in the 1978 Act.[103] However, s.2(3)(a), which follows the wording of the Law Commission's draft clause, neither requires that Method 3 be used nor precludes the adoption of another method.

20–43 In *Nationwide Building Society v Dunlop Haywards (DHL) Ltd*,[104] Christopher Clarke J applied Method 3, as he thought that "... in implementing the Commission's draft Bill ... [Parliament] must be taken to have intended to adopt the policy option favoured by the Commission",[105] but he doubted that this was the fairest outcome. The Law Commission rejected Method 2 as "... unduly favourable to [the defendant, since] he has caused £1,000 worth of damage for

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[100] *Waddell v Road Transport General Insurance Co Ltd* [1932] 2 K.B. 563; *National Employers' Mutual General Insurance Association Ltd v Haydon* [1980] 2 Lloyd's Rep. 149; *Poland v Zurich Insurance Co* Unreported 21 November 1983 QBD (Comm Ct).

[101] Law Com. No.279 (fn.54) paras 71–73.

[102] This method is proscribed by the Irish Civil Liability Act 1961 s.35(1)(g).

[103] Law Com. No.279 (fn.54) para.74. Cf. Scottish Law Commission, *Report on Civil Liability—Contribution* (Scot. Law Com. No.115, 1988) para.3.67, where the same conclusion is drawn.

[104] *Nationwide Building Society v Dunlop Haywards (DHL) Ltd* [2009] EWHC 254 (Comm); [2010] 1 W.L.R. 258.

[105] *Nationwide* (fn.104) at [60].

which he was ready to assume liability up to £400 but at the end of the day his liability is further reduced to £200." In the judge's view, however "... the fact that [the defendant] was ready to assume liability to the [third party] for up to £400 is no good reason for requiring him to pay up to that sum in contribution proceedings" in cases where the claimant's liability to the third party is greater than the defendant's on account of his own deceitful conduct, for example because the remoteness rules governing his liability in deceit are more favourable to the third party than the rules governing the defendant's liability in negligence.[106]

20–44 Finally, note that indemnity insurers often insert rateable proportion clauses into their policies, which provide that if the insured risk is also covered by another policy, the insurer is liable only for a rateable proportion of any loss or damage.[107] In *Legal and General Assurance Society Ltd v Drake Insurance Co Ltd*,[108] the Court of Appeal held that where an insured loss is covered by two such policies, the insured can recover no more than a rateable proportion from each insurer, so that neither can sue the other for contribution, because neither is obliged to pay the insured for more than its own share of the loss. This case was distinguished in *Drake Insurance Plc v Provident Insurance Plc*,[109] on the ground that the claimant insurer had protested against the defendant insurer's refusal to contribute both before and after paying the insured. It is hard to see why this made a difference. Many cases hold that contribution and reimbursement claims do not lie unless the claimant pays under a legal liability, and since the claimant owed no liability in respect of the defendant's share, that should have determined the case. Matters might have been different if the claimant had made a mistake but it seems to have been aware of its legal position.

(vii) *Expiry of Limitation Periods*

20–45 In *George Wimpey & Co Ltd v British Overseas Airways Corp*,[110] the House of Lords held that a claimant could not recover a contribution under the Law Reform (Married Women and Tortfeasors) Act 1935 s.6, where the defendant had previously been sued by a third party and had escaped liability because the claim was time-barred. Illogically, however, it was decided in other cases that a claim lay under the 1935 Act where the third party had never sued the defendant but

[106] *Nationwide* (fn.104) at [69]–[70]. These were essentially the facts of *Nationwide*, although it was the claimants who could rely on the limitation clause and the defendants whose fraud meant that they owed a much more extensive liability to the third party. See paras 20–62—20–63 for further discussion.

[107] In Australia clauses of this kind are invalidated by the Insurance Contracts Act 1984 (Cth) s.45, considered in *Speno Rail Maintenance Pty Ltd v Metals & Minerals Insurance Pte Ltd* [2009] WASCA 91; (2009) 226 F.L.R. 306; affirmed sub nom. *Zurich Australian Insurance Ltd v Metals & Minerals Insurance Pte Ltd* [2009] HCA 50; (2009) 240 C.L.R. 391.

[108] *Legal and General Assurance Society Ltd v Drake Insurance Co Ltd* [1992] Q.B. 887. Cf. *NFU Mutual Insurance Society Ltd v HSBC Insurance (UK) Ltd* [2010] EWHC 773 (Comm); [2011] Lloyd's Rep. I.R. 86 (no double insurance where one policy contains rateable proportion clause and another contains excess clause).

[109] *Drake Insurance Plc v Provident Insurance Plc* [2003] EWCA Civ 1834; [2004] 2 All E.R. (Comm.) 65 at [123]–[127] and [158].

[110] *George Wimpey & Co Ltd v British Overseas Airways Corp* [1955] A.C. 169.

had lost the right to do so by the time the contribution claim was made by reason of a time bar.[111]

20–46 The rule established by the *Wimpey* case was abrogated by the Civil Liability (Contribution) Act 1978 s.1(3), which provides that:

> "[A] person shall be liable to make contribution [under the 1978 Act] notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, unless he ceased to be liable by virtue of the expiry of a period of limitation or prescription which extinguished the right on which the claim against him in respect of the damage was based."

Thus, a defendant cannot escape liability for contribution on the ground that the third party's remedy against him has become time-barred by the time of the contribution claim, but he can escape liability for contribution if the expiry of a limitation period has extinguished the underlying right upon which the third party's claim is based.[112] In most cases the third party's underlying right is preserved despite the fact that his remedy has become statute-barred, but there are a few exceptions to this general rule: under the Limitation Act 1980 s.3(2), the owner's title to a chattel is extinguished six years after its conversion; and under the Limitation Act 1980 s.11A, a tort victim's right to sue for damage caused by a defect in a product is extinguished 10 years after the "relevant time" defined in the Consumer Protection Act 1987 s.4(2).

(viii) *Discharge of Co-Sureties*

20–47 If a surety pays a principal debt, then he may have the right to recover contribution from co-sureties in addition to his right to be reimbursed by the principal debtor. If he wishes to recover contribution from his co-sureties, however, then he must take care not to prejudice *their* rights to reimbursement by the principal debtor, as if he does so, the courts may absolve them from liability to pay contribution. So, if one of several sureties pays off the principal debt, and is entitled to be treated as though he has acquired the creditor's rights against the principal debtor via subrogation, then he may decide to release the principal debtor.[113] But if he does this, his co-sureties will be discharged from liability to pay him contribution, as he will have prejudiced their rights to be reimbursed by the principal debtor.[114] The same principle applies where the surety fails to

[111] *Morgan v Ashmore, Benson, Pease & Co Ltd* [1953] 1 W.L.R. 418; *Harvey v R.G. O'Dell Ltd* [1958] 2 Q.B. 78; *Fortes Service Areas* v *Department of Transport* (1985) 31 Building LR 1 at 12–13. These decisions rested on the premise that the phrase "if sued", as used in s.6, meant "if sued at any time", contrary to Lord Reid's obiter view in *Wimpey* that the words "if sued" must refer to a hypothetical action brought by the third party against the defendant at the time of the contribution claim. Lord Reid's view has since been preferred in *Dormer v Melville Dundas & Whitson Ltd*, 1990 S.L.T. 186 at 189, when a similar question of construction arose with regard to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 s.3(2).

[112] *Nottinghamshire Health Authority v Nottingham CC* [1988] 1 W.L.R. 903 at 911–912; *Société Commerciale de Réassurance v Eras International Ltd* [1992] 1 Lloyd's Rep. 570 at 601; *Feest v South West Strategic Health Authority* [2015] EWCA Civ 708; [2016] Q.B. 503 at [22]–[45]; *Bloomberg LP v Sandberg (A Firm)* [2015] EWHC 2858 (TCC); (2015) 162 Con. L.R. 260.

[113] *Griffiths v Wade* (1966) 60 D.L.R. (2d) 62 at 68.

[114] *Sword v Victoria Super Service Ltd* (1958) 15 D.L.R. (2d) 217; *Griffiths* (fn.113).

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preserve any securities over the principal debtor's property, to which the other sureties are also entitled.[115]

3. THIRD PARTY MAY NOT ACCUMULATE RECOVERIES

20–48 If a third party can accumulate recoveries from the claimant and defendant, and the claimant pays his own liability, this will have no effect on the defendant's liability, and no question can arise of the defendant having been enriched at the claimant's expense. When deciding whether the creditor can accumulate recoveries, the court must consider whether the liabilities owed by the claimant and defendant are assumed or imposed. Where they were assumed by agreement with the third party, the court must look to the terms of the agreements to decide whether accumulation is acceptable. Where their liabilities are imposed by law, the court must ask whether it would be consistent with the policy underpinning their liabilities to allow the third party to accumulate recoveries.

(a) *Assumed Liabilities*

20–49 Where a claimant and a defendant have both assumed their liabilities by agreement, the courts' starting point when deciding whether to let the third party accumulate recoveries should be the terms of the parties' agreements. If a third party lends money to a claimant and a defendant in separate and unconnected transactions, then he can obviously recover from both of them in accordance with the terms of the two loans. But if he lends them money in a single transaction, pursuant to an agreement under which they undertake joint, or joint and several, liability to repay him, then the third party cannot recover more than the amount of the debt.

20–50 Similarly, where two sureties guarantee different debts, or distinct parts of the same debt, the creditor can recover from both of them and a contribution claim will not lie between them.[116] But where they guarantee the same debt, but to different limits, the creditor cannot recover more than the amount of the debt by suing both of them, and a contribution claim will lie between them to the extent that their liabilities overlap.[117]

20–51 Similarly, where two insurers have provided coverage in respect of different risks, both of which materialise, the insurers must both pay in full.[118] It is only

[115] *Greenwood v Francis* [1899] 1 Q.B. 312 at 322 and 324.
[116] *Coope v Twynam* (1823) T. & R. 426 at 429; 37 E.R. 1164 at 1166; *Pendlebury v Walker* (1841) 4 Y. & C. Ex. 424 at 441–442; *Ellis v Emmanuel* (1876) 1 Ex. D. 157 at 162; *Molson's Bank v Kovinsky* [1924] 4 D.L.R. 330 .
[117] *Ellis* (fn.116) at 162; *Cornfoot v Holdenson* [1932] V.L.R. 4 at 6–7.
[118] *Glasgow Provident Insurance Society v Westminster Fire Office* (1887) 14 R. 947 at 964; affirmed (1888) 15 R. 89; *Boag v Standard Marine Insurance Co Ltd* [1937] 2 K.B. 113 at 123. Cf. *Collyear v CGU Insurance Ltd* [2008] NSWCA 92; (2008) 227 F.L.R. 121.

where one or more insureds decide[119] to buy coverage from different indemnity insurers in respect of the same risk[120] to the same interests[121] in the same subject matter,[122] that they are forbidden to recover in full from both insurers, pursuant to the:

> "... well-established principle that in a case where there are two promises of indemnity in respect of the same liability the promisee can only recover once and not twice."[123]

Note, though, that if an insured takes out two contingency policies (i.e. policies such as life policies, under which the insurer promises to pay a fixed sum on the happening of an event regardless of the actual loss suffered), then he can accumulate recoveries provided that he does not recover more than the amount of his insurable interest.[124]

20–52 Note, too, that the "nature of the obligation undertaken by an original tenant and his assignees" when they give separate contractual undertakings to pay the rent:

> "... is that they will perform in so far as the [obligation is] not performed by any other party", and it follows that "payment (or deemed payment) of the rent by any one of them prevents the landlord from suing any of the others."[125]

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(b) *Imposed Liabilities*

20–53 Where a claimant or defendant owes a liability to a third party which has been imposed by law, the courts must look to the underlying policy of the law, to determine whether it would be consistent with this policy to allow the third party to accumulate recoveries.

[119] There is nothing to prevent an insured from taking out as many insurances as he chooses against the same risk, and in the absence of any rateable proportion clause, he may claim payment from the insurers in any order he pleases: *Godin v London Assurance Co* (1758) 1 Burr. 489 at 492; 97 E.R. 419 at 420–421; *Newby v Reed* (1763) 1 W. Bl. 416 at 416; 96 E.R. 237 at 237; *British & Mercantile Insurance Co v London, Liverpool & Globe Insurance Co* (1877) 5 Ch. D. 569 at 583 and 587; *Bank of British North America v Western Assurance Co* (1884) 7 O.R. 166; *Albion Insurance Co Ltd v Government Insurance Office (NSW)* (1969) 121 C.L.R. 343 at 348.
[120] *American Surety Co v Wrightson* (1910) 27 T.L.R. 91; *State Government Insurance Commission v Switzerland Insurance Australia Ltd* (1995) 8 A.N.Z. Ins. Cas 61–267; *ACE INA Insurance v Associated Electric & Gas Insurance Services Ltd* [2013] ONCA 685; (2013) 27 C.C.L.I. (5th) 169.
[121] *Scottish Amicable Heritable Securities Association Ltd v Northern Assurance Co* (1883) 11 R. 287; *Nichols v Scottish Union* (1885) 2 T.L.R. 190; *Andrews v Patriotic Assurance Co of Ireland (No.2)* (1886) 18 L.R. Ir. 355; *Port Avon Cinema v Price* [1939] 4 All E.R. 601.
[122] *British & Mercantile* (fn.119); *Wrightson* (fn.120).
[123] *Commercial & General Insurance Co Ltd v Government Insurance Office (NSW)* (1973) 129 C.L.R. 374 at 380 per Barwick CJ. Cf. *Godin* (fn.119) at 1 Burr. 492; 97 E.R. 421; *British & Mercantile* (fn.119) at 581.
[124] *Hebdon v West* (1863) 3 B. & S. 579; 122 E.R. 218; *Simcock v Scottish Imperial Insurance Co* (1902) 10 S.L.T. 286 (both applying the Life Assurance Act 1774 s.3).
[125] *Sun Life* (fn.90) at 136–137; considering *Deanplan* (fn.89). Under the Landlord and Tenant (Covenants) Act 1995 ss.3 and 5, the original tenant of a lease granted after 1995 is now generally released from covenants in the lease once it has been assigned. But it can happen under the scheme of the 1995 Act that two parties are bound by the same covenant to a landlord, in which case they are deemed to owe him a joint and several liability by s.13.

recovering twice over, Scott V-C would have ordered it to account to the appellant firm for the fruits of its action against the borrowers, to the extent that it would otherwise make a profit.[135]

20–61 Scott V-C's "mutual discharge" test has been applied in several cases, including *Eastgate Group Ltd v Lindsey Morden Group Inc*,[136] where a vendor of company shares was sued for breach of warranty by the purchaser when there turned out to be a difference in the value of the company's business as warranted and the value of the business in fact. The vendor joined the purchaser's accountants as Pt 20 defendants, claiming a contribution under the 1978 Act, and the question arose whether they were liable for the "same damage". Longmore LJ held that they were, because the vendor's liability on the warranty was not a liability in debt, but a liability to compensate the purchaser for loss actually suffered, and so it would have been discharged if the purchaser had been paid by the accountants.

20–62 A different point arose in *Nationwide Building Society v Dunlop Haywards (DHL) Ltd*,[137] where a building society lost some £21 million on loans made in reliance on fraudulently overstated valuations of property. It sued its valuers for deceit and its solicitors for negligence. The solicitors settled the claim against them for £5 million, relying on a contractual limitation clause, and could also have reduced their liability by invoking rules on remoteness and contributory negligence that could not have been invoked by the valuers. The solicitors then sought a contribution from the valuers, which argued that the damage for which the parties had been commonly liable was the whole £21 million loss. The point of this argument was that the contribution payable would be reduced if it could be shown that the solicitors had only paid a small, rather than a large, part of the damage for which the parties had been commonly liable.

20–63 The valuers' argument was rejected by Christopher Clarke J, who held that any category of loss for which only one of the parties was liable should be ignored when identifying the "same damage". The remoteness rules meant that the solicitors would have been liable only for £13.2 million, and the contributory negligence rules would further have reduced their liability to £6.5 million. The judge held that the latter rules should be taken into account when identifying the "same damage" because the only reason why the valuers could not also have invoked them was that their liability lay in deceit. Ignoring them for the purpose of the contribution proceedings would therefore be:

[135] *Howkins* (fn.132) at 641.

[136] *Eastgate Group Ltd v Lindsey Morden Group Inc* [2002] 1 W.L.R. 642 at 648–651. See too *Hurstwood Developments Ltd v Motor & General & Andersley & Co Insurance Services Ltd* [2002] Lloyd's Rep. I.R. 185; *Hotchin v New Zealand Guardian Trust Co Ltd* [2016] NZSC 24 at [169]–[171]. But cf. *Royal Brompton Hospital NHS Trust v Hammond* [2002] UKHL 14; [2002] 1 W.L.R. 1397 at [28] where Lord Steyn thought that the usefulness of the "mutual discharge" test might vary with the circumstances of individual cases. On the same general point see also *Greene Wood & McClean LLP v Templeton Insurance Ltd* [2009] EWCA Civ 65; [2009] 1 W.L.R. 2013 especially at [21]–[23]; further proceedings [2010] EWHC 2679 (Comm); [2011] 2 Costs L.R. 205 esp. at [67]–[79].

[137] *Nationwide Building Society v Dunlop Haywards (DHL) Ltd* [2009] EWHC 254 (Comm); [2010] 1 W.L.R. 258. See too *Bank of Ireland v Faithful & Gould Ltd* [2014] EWHC 2217 (TCC); [2014] P.N.L.R. 28 at [226]–[242].

"... to visit on [the solicitors] the approach taken by the court, partly for reasons of deterrence, against fraudsters, when [they were] innocent of any fraud."[138]

Reluctantly, however, the judge thought that he was bound to ignore the contractual limitation because this had been the intention of the Law Commission when drafting the clause of the bill that later came to be enacted in the 1978 Act as s.2(3)(a).[139]

4. THIRD PARTY CAN RECOVER IN FULL FROM CLAIMANT OR DEFENDANT

20–64 Where a third party is forbidden to accumulate recoveries from a claimant and a defendant, English law usually gives him the right to recover from either party in full, to maximise his chances of recovery. In this part we describe some situations in which a third party is given such a right. We also consider why English law generally operates a system of joint and several liability, rather than a proportionate liability system which would limit the amount payable by the claimant and defendant to their proper shares.

(a) *Joint and Several Liabilities*

(i) *General Incidents of Joint and Several Liability*

20–65 Two points must be made at the outset regarding the consequences of characterising liabilities as joint and several. One is that where liabilities are several, or joint and several, the party to whom they are owed can choose whether to sue all of the liable parties in one set of proceedings, or to bring separate proceedings against one or more of them, suing each for the whole of the relevant debt or damage, until he recovers in full.[140] In contrast, where contractors are jointly liable to a promisee he must generally join them all to proceedings to enforce their joint promise,[141] and one might have expected that this rule would also apply to joint tortfeasors, since they also owe a single, joint obligation. However, English law has long held that the victims of joint torts can sue any or all of the

[138] *Nationwide* (fn.137) at [71].

[139] See paras 20–42—20–43.

[140] *Isaacs & Sons v Salbstein* [1916] 2 K.B. 139 at 143 (CA); *Bucknell v O'Donnell* (1922) 31 C.L.R. 40; *Freshwater v Bulmer Rayon Co Ltd* [1933] Ch. 162; *United Australia Ltd v Barclays Bank Ltd* [1941] A.C. 1. For further cases on joint and several contracts, see G. Williams, *Joint Obligations* (London: Butterworth, 1949), p.60, fn.2, but note that in the case of a joint and several contract, the promisee cannot treat the promise as joint by suing some but not all of the promisors in a single set of proceedings without also joining the others: see cases cited by Williams, above, p.61, fn.3.

[141] *Kendall v Hamilton* (1879) 4 App. Cas. 504; *Wegg Prosser v Evans* [1895] 1 Q.B. 108 at 111; *Norbury, Nazio & Co Ltd v Griffiths* [1918] 2 K.B. 369. There are some exceptions to this rule, which does not apply in the county court: County Courts Act 1984 s.48. For earlier cases, and general discussion, see Williams (1949) (fn.140) pp.51–60.

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tortfeasors, at their option, and for this reason the courts often say—confusingly—that joint tortfeasors are jointly *and severally* liable to their victims.[142]

20–66 The second point to note is that the Civil Liability (Contribution) Act 1978 s.3, which replaced and extended the Law Reform (Married Women and Tortfeasors) Act 1935 s.6(1)(a) and (b),[143] abrogates the common law rule that recovery of judgment against any one of a number of joint tortfeasors[144] or joint contractors[145] bars further action against the others, even where the judgment has not been satisfied.[146] However, in *Morris v Wentworth-Stanley*,[147] the court held that s.3 does not apply to a judgment obtained by consent against a joint debtor, where the consent judgment embodies a release by accord and satisfaction (rather than a covenant not to sue), because an accord and satisfaction with one joint debtor releases the others from liability. Consistently with this, the Court of Appeal held in *Crooks v Newdigate Properties Ltd*,[148] that where a consent judgment embodies a covenant by the claimant not to sue the defendant, while retaining the right to sue some other party, the consent judgment does not release this other party from liability, save to the extent that recovery from him would leave the claimant more than fully satisfied.

(ii) *Debt*

20–67 When two parties join together in making a promise to a third, their promise may be joint, or it may be joint and several. If it is a joint promise, then the parties make only one promise which is binding on them both: together, they owe a single liability.[149] If it is a joint and several promise, then again the parties make one promise which is binding on them both, but each also makes a separate promise which is binding on him alone: together, they owe a single liability but each also owes another liability of his own. If the parties wish to characterise their liabilities as joint and several rather than joint, then they must use express words, as English law presumes that when two parties join in making a promise

[142] See e.g. *Wah Tat Bank Ltd v Chan Cheng Kum* [1975] A.C. 507 at 516; *CBS Songs Ltd v Amstrad Consumer Electronics Plc* [1988] A.C. 1013 at 1058; *McCullagh v Lane Fox & Partners Ltd* [1996] 1 E.G.L.R. 35 at 42; *Kuwait Oil Tanker Co SAK v Al-Bader* [2000] 2 All E.R. (Comm.) 271 at 317; *Baxter v Obacelo Pty Ltd* (2001) 205 C.L.R. 635 at [25]. Earlier examples are in Williams (1951) (fn.47), p.50, n. 4; and earlier authorities for the propositions (i) that joint tortfeasors can be joined as co-defendants, (ii) that the victim can instead sue one only, and (iii) that the victim can instead sue some but not all of them in a single set of proceedings, are in Williams (1951) (fn.47), pp.49–50 fnn.1, 2, and 3.

[143] The 1978 provision extends the 1935 provision because: (1) it applies not to tortfeasors, but to "any person liable in respect of any debt or damage"; and (2) it makes it clear that the provision applies not only to successive actions but also to a single action against two or more persons, confirming the view taken of the 1935 provision in *Bryanston Finance* (fn.86) at 722.

[144] *Brinsmead v Harrison* (1872) L.R. 7 C.P. 547; *London Association for the Protection of Trade v Greenlands Ltd* [1916] 2 A.C. 15 at 21; *Ash v Hutchinson & Co (Publishers) Ltd* [1936] Ch. 489; see also the cases collected in Williams (1951) (fn.47), p.36 fn.2.

[145] *King v Hoare* (1844) 13 M. & W. 494; 153 E.R. 206; *Kendall v Hamilton* (1879) 4 App. Cas. 504; *Parr v Snell* [1923] 1 K.B. 1. For discussion, see Williams (1949) (fn.140), pp.94–103.

[146] See too *Shapland v Palmer* [1999] 1 W.L.R. 2068 at 2071.

[147] *Morris v Wentworth-Stanley* [1999] Q.B. 1004.

[148] *Crooks v Newdigate Properties Ltd* [2009] EWCA Civ 283. See too *Watts v Aldington*, *The Times*, 16 December 1993; *Johnson v Davies* [1999] Ch. 117; *Baxter* (fn.142) especially at [51]–[55]; *Itek Graphics Pty Ltd v Elliott* [2002] NSWCA 442 at [173]–[182].

[149] *King* (fn.145) at 13 M. & W. 505; 153 E.R. 210; *Re Hodgson* (1885) 31 Ch. D. 177 at 188.

to a third they intend to create a joint liability.[150] Joint promises are now much less common than joint and several promises, but where two parties join in making a promise to a third, it remains a question of construction whether their words are sufficient to create a joint and several liability.[151]

20–68 It often happens that several parties assume different contractual liabilities to the same person,[152] but for present purposes, it is more significant that several parties can also separately assume liabilities to the same creditor for the same debt, in circumstances where he may not recover twice. For example, the "nature of the obligation undertaken by an original tenant and his assignees" when they give separate contractual undertakings to the landlord that the rent will be paid "is that they will perform in so far as the [obligation to pay rent is] not performed by any other party liable to do so".[153] Hence the landlord cannot recover from all of them in full. Again, two sureties may separately agree to guarantee the same principal debt,[154] or two indemnity insurers may separately agree to indemnify the insured in respect of the same loss—and in these circumstances, the creditor or the insured[155] can choose which of them to sue but may not recover twice over.[156]

(iii) *Breach of Contract*

20–69

> "If two or more defendants have each committed breaches of the same or different contracts with the plaintiff and as the result of each defendant's breach the plaintiff has suffered the same damage he may recover the whole amount of it from any of the defendants."[157]

So, in *Woolford v Liverpool CC*,[158] the defendant public authorities jointly and severally warranted that they would take out personal accident insurance for participants in a venture course. They all failed to do this, and damages for

[150] *Levy v Sale* (1877) 37 L.T. 709; *White v Tyndall* (1883) 13 App. Cas. 263; *The Argo Hellas* [1984] 1 Lloyd's Rep. 296 at 300; *Johnson v Davies* [1999] Ch. 117 at 127.

[151] The words "we promise jointly and severally" suffice for this purpose, and indeed any other express statement that the parties' liabilities are joint and several: *Leggatt v National Westminster Bank Ltd* [2001] 1 F.L.R. 563 at 565; *AIB Group (UK) Plc v Martin* [2002] 1 W.L.R. 94. For general discussion, see Williams (1949) (fn.140),pp.38–41.

[152] Different parties also sometimes assume different contractual liabilities in the same document, e.g. Lloyd's slips: *General Reinsurance Corp v Forsakringsaktiebolaget Fennia Patria* [1983] Q.B. 856 at 864; *Touche Ross & Co v Baker* [1992] 2 Lloyd's Rep. 207 at 209. See too Lloyd's Act 1982 s.8(1).

[153] *Sun Life* (fn.90) at 136–137, considering *Deanplan* (fn.89). Under the Landlord and Tenant (Covenants) Act 1995 ss.3 and 5, the original tenant of a lease granted after 1995 is now generally released from covenants in the lease once it has been assigned. But it can happen under the scheme of the 1995 Act that two parties are bound by the same covenant to a landlord, in which case they are deemed to owe the landlord a joint and several liability by s.13.

[154] *Legal and General* (fn.108) at 900.

[155] Marine Insurance Act 1906 s.32(2)(a).

[156] Since an insured cannot recover more than a full indemnity for his loss under an indemnity policy, he will not usually intend to buy more than one policy to cover the same risk, although if he obtains "layered" coverage from separate insurers then they will be liable for different parts of his loss and so their liabilities will not overlap. However he may find himself doubly insured by coincidence: e.g. where the driver of another person's car is covered by the owner's policy and his own.

[157] *Victoria University of Manchester v Hugh Wilson & Lewis Womersley (A Firm)* (1985) 2 Con. L.R. 43 at 87; considering *Burrows v The March Gas and Coke Co* (1870) L.R. 5 Exch. 67.

[158] *Woolford v Liverpool CC* [1968] 2 Lloyd's Rep. 256. See too *Heaton* (fn.81).

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breach of contract were awarded against them jointly and severally in favour of a participant who was accidentally injured and had no insurance cover.

(iv) *Tort*

20–70 The law governing joint liability for torts is difficult and obscure. The courts have used language when describing this liability which makes it hard for them to distinguish two issues. The first is a question of substantive law: is there a sufficient connection between two defendants to justify holding one liable for damage that has been tortiously caused by the other? The second is a procedural question: must two tortfeasors who have caused the same damage be sued together in a single set of proceedings or can the victim sue them separately?

20–71 Using the term "joint tortfeasors" to denote parties who are sufficiently connected with one another to justify holding one liable for the damage tortiously caused by another, we can follow Glanville Williams in distinguishing such joint tortfeasors from "several concurrent tortfeasors" and "several non-concurrent tortfeasors".[159] Joint tortfeasors are all deemed to be liable for the same damage because one or more of them causes this damage by his tortious actions or omissions, and they are all connected by some relational or participatory link. Together they are deemed to commit a single wrong resulting in a single injury. Several concurrent tortfeasors each cause the same damage by their tortious actions but they are not connected in a way that could lead to a finding of joint tortfeasance. Each commits a different wrong, but their different wrongs cause a single injury.[160] Several non-concurrent tortfeasors each cause different damage by their tortious actions, perhaps to the same victim, but perhaps not, and they are not connected in a ways that would make them joint tortfeasors. Each commits a different wrong, and their different wrongs cause different injuries.

20–72 Several concurrent tortfeasors cannot be joined as defendants to one action because they are severally liable "on separate causes of action",[161] and a fortiori this rule also applies to several non-concurrent tortfeasors. It is tempting to assume that joint tortfeasors must all be joined as defendants to a single set of proceedings, because this is the procedural rule which generally applies to parties who owe a single joint liability. But this is not the case: joint tortfeasors can be sued jointly in a single set of proceedings, but they can also be sued separately, and recovery of judgment against one does not operate as a bar to proceedings against the others. This is why the liability of joint tortfeasors is commonly but confusingly said to be "joint and several", and this is why Lord Denning MR said in *Egger v Viscount Chelmsford* that "no tortfeasors can truly be described solely as joint tortfeasors [because they] are always several tortfeasors as well".[162]

20–73 Where several non-concurrent tortfeasors have caused different damage to the same victim, the victim can recover from each tortfeasor in full, and payment by

[159] Williams (1951) (fn.47), especially Ch.1. "Concurrent" effectively means "liable in respect of the same damage". Hence joint tortfeasors might equally well be described as "joint concurrent tortfeasors", but in practice this term is not used as joint tortfeasors can only ever be liable in respect of the same damage, and so the word "concurrent" is taken as read.
[160] Cf. *Thompson v Australian Capital Television Pty Ltd* (1996) 186 C.L.R. 574 at 580.
[161] *Sadler v Great Western Railway Co* [1896] A.C. 450 at 454, quoted with approval in *Baxter* (fn.142) at [25].
[162] *Egger v Viscount Chelmsford* [1965] 1 Q.B. 248 at 264.

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one does not affect the position of the others. In contrast, in the case of both joint tortfeasors and several concurrent tortfeasors, "each tortfeasor is liable in full to compensate the [victim] for the whole of the damage",[163] but the victim cannot recover more than the full amount of his loss by accumulating recoveries from both of them.[164] Hence, if the victim recovers the whole of his loss from one tortfeasor, his rights are exhausted and he can recover nothing more from the others.[165]

(v) *Unjust Enrichment*

20–74 Claims in unjust enrichment are usually brought against a single defendant who alone receives a benefit from the claimant. But it can happen that a single benefit is received by more than one defendant—for example, where a payment is made into a joint bank account,[166] or where a debt owed by several debtors is discharged.[167] In such cases, the law generally holds that all the defendants are jointly and severally enriched, with the result that a claim for the whole amount of the enrichment lies against any or all of them, but the principle against double recovery prevents the claimant from recovering from each defendant in full.[168]

20–75 An obligation to pay contribution is itself usually a several obligation. So, for example, if there are three joint debtors, and one discharges the debt in full, the court will not fix each of the others with a joint and several liability to pay a contribution of two-thirds of the debt, but will instead make each of them severally liable to pay a contribution of one third.[169] However, there seems to be an exception to this rule. Suppose that a claimant and two defendants are all liable to a third party, and that the defendants have received benefits from the third party, while the claimant has not. This fact may lead the court to apportion liability between the parties in a way which prevents the defendants from continuing to enjoy the benefits at the claimant's expense, and the court may also fix them with joint and several liability to pay contribution to the claimant, as a

[163] *Rahman v Arearose Ltd* [2001] Q.B. 351 at 361. But cf. *Barker v Corus (UK) Plc* [2006] UKHL 20; [2006] 2 A.C. 572, discussed below at para.20–81. Note that the principle stated in the text overrides the general duty owed by tort victims to mitigate their loss; i.e. where a victim claims the whole loss from one of several tortfeasors, it is no answer that he should have mitigated his loss by claiming against one or more of the others: *Steamship Enterprises of Panama Inc v Owners of the SS Ousel, The Liverpool (No.2)* [1963] P. 64; *International Factors Ltd v Rodriguez* [1979] Q.B. 351; *London and South of England Building Society v Stone* [1983] 3 All E.R. 105; *Standard Chartered Bank v Pakistan National Shipping Corp* [2001] EWCA Civ 55; [2001] 1 All E.R. (Comm.) 822; *Peters v East Midlands Strategic Health Authority* [2009] EWCA Civ 145; [2010] Q.B. 48.
[164] See cases cited at para.20–54, fn.126.
[165] *D'Angola v Rio Pioneer Gravel Co Pty Ltd* [1979] 1 N.S.W.L.R. 495 at 499.
[166] *Euroactividade AG v Moeller* unreported 1 February 1995 CA; *OEM Plc v Schneider* [2005] EWHC 1072 (Ch).
[167] *Filby v Mortgage Express (No.2) Ltd* [2004] EWCA Civ 759 at [45]; *Brasher v O'Hehir* [2005] NSWSC 1194.
[168] *Trustor (No. 1)* (fn.127) at [63]–[66]. See too *Smith v Moneymart Co* (2006) 266 D.L.R. (4th) 275; *Tracy v Instaloans Financial Solution Centres (BC) Ltd* [2008] BCSC 699; (2008) 293 D.L.R. (4th) 60; affirmed [2009] BCCA 110; (2009) 309 D.L.R. (4th) 236.
[169] *Cowell v Edwards* (1800) 2 Bos. & Pul. 268; 126 E.R. 1275; *Earl of Mountcashell v Barber* (1853) 14 C.B. 53; 139 E.R. 23; *Benson v McKone* (1919) 45 D.L.R. 83 at 91.