Remedies: restitution

by Matthew Barry, One Essex Court

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A note explaining the basic principles of the law of unjust enrichment and the remedy of restitution. It provides a guide to the requirements for a claim in unjust enrichment and the different restitutionary remedies that may be available, explaining the key principles that have been developed in the case law. It also summarises the defences available to a claim in unjust enrichment.

Scope of this note

The law of unjust enrichment is concerned with situations where the defendant is enriched at the expense of the claimant in circumstances which the law recognises as unjust. Restitution is a remedy for unjust enrichment.

The law of unjust enrichment is in a state of development and is the subject of extensive judicial and academic commentary. A clear understanding of the core principles, to which this note provides an introduction, is key to assessing whether a claim in unjust enrichment may be successful. This note guides you through the elements of a claim in unjust enrichment and the key principles that have been developed in the case law, with related case examples in a digestible format. It also provides an overview of the defences to a claim in unjust enrichment (including change of position) and the restitutionary remedies that may be awarded to reverse unjust enrichment.

For more detailed information about the defence of change of position, see Practice note, Restitution: Change of position.

For detailed treatments of the topics covered in this note, see:

- *Goff & Jones: The Law of Unjust Enrichment (Sweet and Maxwell, 10th ed, 2022).*
- Graham Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 4th ed, 2024).
- Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd ed, 2011).

Overview of unjust enrichment and restitution

The law of unjust enrichment is concerned with situations where the defendant is enriched at the expense of the claimant in circumstances which the law recognises as unjust. The principle of unjust enrichment is relatively new, having been formally recognised in 1991 by the House of Lords in *Lipkin Gorman v Karpnale Ltd [1991] 2 AC 548* (*page 578*). However, claims which are now understood as being based on the principle of unjust enrichment have existed in English law for centuries.

The purpose of a claim in unjust enrichment is to correct a normatively defective transfer of value from the claimant to the defendant, usually by restoring the parties to their pre-transfer positions (*Dargamo Holdings Ltd and another v Avonwick Holdings Ltd and others [2021] EWCA Civ 1149, paragraph 54*). Unjust enrichment claims are distinct from claims in contract and tort: an unjust enrichment claim is based on the principle of unjust enrichment rather than on the existence of an agreement or the commission of a wrong.

Unjust enrichment claims can arise in a wide variety of situations including, for example, when a payment has been made by mistake, when a basis for the transfer of a benefit has failed, when benefits have been transferred under duress or undue influence, when taxes have been levied on citizens without authority, and when a person is legally compelled to discharge another person's liability. It is for this reason that the structure of

the law of unjust enrichment has been described as resembling the law of tort rather than the law of contract (*Barnes v Eastenders Cash & Carry plc [2014] UKSC 26, at paragraph 102*). It comprises a number of distinct claims which are based on the same general principle – unjust enrichment – but which each have their own specific legal requirements. It is therefore important for practitioners to understand both the general principle of unjust enrichment, as well as the legal requirements that apply to particular types of claim.

Restitution is a remedy for unjust enrichment. Restitution is not concerned with compensating the claimant for loss but with reversing an enrichment unjustly obtained by the defendant at the claimant's expense (*Benedetti v Sawiris [2013] UKSC 50, at paragraph 13*). Restitution reverses unjust enrichment by requiring the defendant to return the enrichment to the claimant, typically by way of a monetary award reflecting the value of the enrichment. Restitutionary remedies (in the sense of remedies requiring the defendant to give up a gain) can also be awarded for wrongs, including certain breaches of contract, torts and equitable wrongs. This note focuses on restitutionary remedies for unjust enrichment.

Elements of an unjust enrichment claim

In an unjust enrichment claim, the court will consider four questions:

- Has the defendant been enriched?
- Was the enrichment at the expense of the claimant?
- Was the enrichment unjust?
- Are there any defences available to the defendant?

(See *Dargamo Holdings v Avonwick Holdings, at paragraphs 55-56*; *Samsoondar v Capital Insurance Co Ltd [2020] UKPC 33, at paragraph 18*; *Barton v Gwyn-Jones [2023] UKSC 3, at paragraph 77*.)

The purpose of these questions is to provide an overarching structure for the court's analysis of the claim. They "are not themselves legal tests, but are signposts towards areas of inquiry involving a number of distinct legal requirements" (*Investment Trust Companies (in liquidation) v Revenue and Customs Commissioners [2017] UKSC 29, at paragraph 41*).

The claimant bears the burden of proof with respect to the first three questions. If the claimant establishes that the defendant has been unjustly enriched at the claimant's expense, then the claim will succeed unless the defendant can establish a defence (*Attorney General of Trinidad and Tobago v Trinsalvage Enterprises Ltd [2023] UKPC 26*, *at paragraph 18*).

Enrichment

The defendant's enrichment is an essential element of a claim in unjust enrichment. Until an enrichment is identified and valued, it is not possible to ascertain what should be returned to the claimant.

Identification of the enrichment

An enrichment can be defined as something which a reasonable person would consider to be of value (*Benedetti v Sawiris [2013] UKSC 50*, *at paragraphs 15-16*). Money (in the form of notes and coins, or sums credited to a bank account) is an obvious enrichment. As money is a universal medium of exchange, a defendant who receives money is inevitably enriched by its receipt (*BP Exploration Co (Libya) v Hunt (No. 2) [1979] 1 WLR 783*, *at page 799 paragraph F*).

Enrichments can also take the form of non-money benefits, such as:

- Goods (see, for example, *Dimond v Lovell [2002] 1 AC 384, at page 397*).
- Land (see, for example, *School Facility Management Ltd v Christ the King College [2020] EWHC 1118 (Comm)*).
- Services (*Barnes v Eastenders Cash & Carry plc [2014] UKSC 26, at paragraph 101*).
- The discharge of a liability (*Exall v Partridge (1799) 101 ER 1405*).

Where the enrichment is a service, the question may arise whether the enrichment is the service itself or the "end product" of the services. This question cannot be answered in the abstract but depends on the facts. The court should "take all the circumstances into account, including whether the parties themselves thought that the benefit being transferred was the services or their end product" (*Goff & Jones, Part 3: Chapter 5: Enrichment: Types of Benefit: Section 4: Services: (a) Identifying the Benefit, at paragraph 5-42*).

Case examples: identification of the enrichment

The following examples demonstrate how the courts have applied the principles described in Identification of the enrichment:

- A applies for planning permission to develop a property owned by B. A obtains planning permission and consequently the market value of B's property increases. A brings a claim in restitution representing the increase in the market value of B's property.

  Held: B's enrichment is the value of the services performed by A, not the increase in the value of B's property. The case is analogous to that of a locksmith who fashions a key to unlock a safe containing valuable treasure. The enrichment is the value of the service in fashioning the key, not the value of the treasure, which already belonged to the owner. (*Yeoman's Row Management Ltd v Cobbe [2008] UKHL 55, at paragraphs 40-41.*)

- A, an investment professional, provides services to B to help raise capital for a corporate start-up. A failed to raise any capital. A brought a restitutionary claim for the value of his services.

  Held: The parties mutually understood that the relevant benefit was the end product of A's services (the raising of capital) not the services themselves. As A did not raise any capital, B was not enriched. (*Gray v Smith [2022] EWHC 1153 (Ch), at paragraphs 440-451.*)

Valuation of the enrichment

General approach

Once the enrichment has been identified, it is necessary to value it. In the case of money, valuation of the enrichment is straightforward: the enrichment is the face value of the money received. Although the opportunity to use the money received might also be considered a benefit, it cannot be recovered in an unjust enrichment claim, because it is not obtained "at the claimant's expense" (see *Use value of money*).

The general approach to the valuation of non-money benefits is set out in *Benedetti v Sawiris*:

- The starting point is "the objective market value, or market price" of the benefit, which is the price that "a reasonable person in the defendant's position would have had to pay" for the benefit (*judgment, paragraph 17*) (see Objective market value).
- Once the claimant has adduced evidence of the objective market value of the benefit, the burden of proof shifts to the defendant to prove that "he did not subjectively value the benefit at all, or that he valued it at less than the market price" (*paragraph 21*). This is the principle of subjective devaluation (see Subjective devaluation).

Objective market value

In determining what a reasonable person in the defendant's position would have paid for the benefit, the court may take into account any characteristics of the defendant which would have been known to and taken into account by the market, including the defendant's:

- Credit rating.
- Age.
- Gender.
- State of health.
- Occupation.

(*Benedetti v Sawiris, at paragraphs 101 and 184.*)

When valuing a service, the court will typically award the claimant the reasonable costs of providing the services plus a reasonable profit margin, as this represents a fair approximation of what the defendant would have had to pay for the services in the market (see, for example, *Yeoman's Row Management Ltd v Cobbe [2008] UKHL 55, at paragraph 42*).

Subjective devaluation

The subjective devaluation principle protects the defendant's freedom to choose how they spend their money. It recognises that it would be unjust to order the defendant to make restitution based on the objective value of a benefit in circumstances where the defendant, if given the choice, would not have paid that much for it. A mere assertion by the defendant that they valued the benefit at less than its objective value is unlikely to be accepted by the court: there must be some "objective manifestation of the defendant's subjective views" (*Benedetti v Sawiris, at paragraph 23*).

The claimant can defeat the defendant's subjective devaluation by proving that the defendant:

- Received an incontrovertible benefit.
- Requested the benefit.

- Freely accepted the benefit.

(*Benedetti v Sawiris, at paragraph 25*.)

These scenarios are discussed in the following sections.

Incontrovertible benefit

An incontrovertible benefit is a benefit which the law regards as "unquestionable ... and not subject to debate or conjecture" (*Rural Municipality of Peel v Her Majesty the Queen in Right of Canada (1993) 98 DLR (4th) (Supreme Court of Canada), at paragraphs 140 and 159*). Money is the classic example: given that defendants desire the things which money can buy, they are invariably enriched by its receipt and cannot argue otherwise. Where the defendant is saved an inevitable expense by the receipt of a benefit, the defendant realises a benefit in money or (more controversially) where the benefit is readily realisable in money, the defendant will be held to be incontrovertibly benefited and will be unable to rely on the subjective devaluation principle.

Case examples: incontrovertible benefit

The following examples demonstrate how the courts have applied the principles described in Incontrovertible benefit:

- A's car was stolen by a thief. The thief crashed the car and sold it for £75 to an innocent purchaser, B, who spent £226 on labour and materials repairing it. A repossessed the car and sold it for £400. B brought a restitutionary claim against A for the value of the repairs.

  Held: A, having realised the value of the car, must make restitution to B for the repairs performed on the car, since otherwise A would be unjustly enriched. (*Greenwood v Bennett [1973] 1 QB 195*.)

- A provided services to B as a managing director under an agreement which was void. A brought a restitutionary claim against B for the value of the services.

  Held: B was incontrovertibly benefited because B was saved a necessary expense. Had A not performed the services, B "would have had to get some other agent to carry [them] out". (*Craven Ellis v Canons Ltd [1936] 2 KB 403*.)

Request

A defendant who expressly requests a benefit is not be able to rely on subjective devaluation, because a request is inconsistent with an assertion that the defendant did not value the benefit.

Case example: request

The following example demonstrates how the courts have applied the principles described in Request:

- A, a developer, built roads, parks and other amenities worth $1 million for B, a public authority, under an ultra vires contract. A brought a claim in restitution for the value of the works. B argued that it was not enriched by the works, because B would have to pay $40,000 a year for their upkeep.

  Held: B's argument that they did not benefit from the works was not credible, because the works were undertaken at B's request. (*Pacific National Investments Ltd v City of Victoria [2005] SCC 75 (Supreme Court of Canada), at paragraphs 17-19*.)

Free acceptance

A defendant will be precluded from relying on subjective devaluation (see Subjective devaluation) if it freely accepted the benefit. A defendant freely accepts a benefit if they fail to take a reasonable opportunity to reject it, in circumstances where a reasonable person in their position would have known that the claimant expected to be paid for it (see *Goff & Jones, Part 3: Chapter 4: Section 4: Proving and Disproving Enrichment: (c) Requested and Freely Accepted Benefits, at paragraph 4-53*).

The "free acceptance" test has been criticised on the basis that it could be satisfied where a defendant is merely indifferent to receiving the benefit. Burrows, for example, in *The Law of Restitution* (*pages 24-25*) has proposed a "reprehensible seeking-out" test, which would be satisfied where the defendant's conduct clearly showed that they valued the benefit. It is suggested that this represents the better view. Given that subjective devaluation protects the defendant's freedom of choice, to defeat it, the claimant ought to show that the defendant positively valued the benefit and was not merely indifferent.

Case examples: free acceptance

The following examples demonstrate how the courts have applied the principles described in Free acceptance:

- A asked auctioneers to sell his car, but not its personalised registration mark. By mistake, the auctioneers sold both the car and the mark to B. B was informed of the mistake, but B failed to relinquish the mark and instead registered the mark in his own name. In response to an unjust enrichment claim by A, B argued that the mark was of no value to him.

  Held: B freely accepted the mark, because "there was positive conduct aimed at the registration in [B's] name of [B's] car with the old cherished mark contrary to the known bargain. What happened involved sufficient elements of knowledge, choice and action to overcome any suggestion of indifference". (*Cressman v Coys of Kensington (Sales) Ltd [2004] EWCA Civ 47, at paragraphs 2789 and 2791.*)

- A, a police authority, provided additional policing at the home matches of B, a football club, following B's promotion. B refused to pay for the additional policing. In response to a restitutionary claim by A, B argued that it did not value the additional services; A argued that B had freely accepted them.

  Held: There was no free acceptance, as B had no choice but to accept the additional services. Had B rejected them, A would have refused to issue a safety certificate for B's home matches, resulting in their cancellation. (*Chief Constable of Greater Manchester Police v Wigan Athletic AFC [2008] EWCA Civ 1449 at paragraph 47.*)

Subjective "revaluation"

In *Benedetti v Sawiris*, the UK Supreme Court rejected an argument that a benefit could be valued at more than its objective value if this reflected the defendant's subjective views. The court held that, save perhaps in exceptional circumstances, a principle of "subjective revaluation" should not be recognised because it is not necessary to protect the defendant's freedom of choice and would in fact undermine it by requiring the defendant to pay more for the benefit than it would have needed to pay in the market (*judgment, paragraphs 29 and 195*).

Timing of valuation

The enrichment is valued at the time of receipt (*Benedetti v Sawiris, paragraph 14*). Therefore subsequent events which affect the identification or value of the enrichment should not be taken into account, although subsequent events may be relevant to whether the defendant has a change of position defence (for more information on change of position, see Practice note, Restitution: change of position).

At the claimant's expense

The second element of an unjust enrichment claim is that the defendant's enrichment was at the claimant's expense. This requirement reflects the principle that unjust enrichment is:

> "not concerned with the disgorgement of gains made by defendants, nor with the compensation of losses sustained by claimants, but with reversals of transfers of value between claimants and defendants" (*Menelaou v Bank of Cyprus UK Ltd [2015] UKSC 66, at paragraph 23*).

General principles

In *Investment Trust Companies v Revenue and Customs*, the UK Supreme Court restated the legal principles concerning the requirement that the defendant's enrichment must be at the claimant's expense, noting that the law as it then stood lacked clarity.

The court explained that:

- The "at the expense" requirement is informed by the principle that unjust enrichment is designed to correct normatively defective transfers of value (*Investment Trust Companies, at paragraph 43*).
- It means that "the defendant has received a benefit from the claimant" who has "suffered a loss through his provision of the benefit" (*Investment Trust Companies, at paragraph 43*).
- A "loss" in this context means that the claimant has "given up something of economic value through the provision of the benefit" (*Investment Trust Companies, at paragraph 45*).

The court explained that an enrichment at the claimant's expense in the sense described above

usually arises when the parties have dealt directly with one another. For example, if A pays money to B, or A provides goods or services to B, the "at the expense of" requirement is straightforwardly satisfied: B has received a benefit from A and A has given up something of economic value through providing the benefit (*Investment Trust Companies, at paragraph 46*).

However, there need not be direct dealing between the parties. The court identified six situations where the "at the expense of" requirement can be satisfied in the absence of direct dealing (*Investment Trust Companies, at paragraphs 48-49*):

- **Agency.** Where an agent of one of the parties, C, is interposed between A and B, then transactions between A and C and B and C are legally equivalent to a transaction directly between A and B.
- **Assignment.** Where A has a right of restitution against B, and A assigns that right to C, C may enforce that right against B as if C had been a party to the relevant transaction and B's enrichment was at C's expense.
- **Sham transactions.** If an intervening transaction is found to be a sham, created to conceal a transaction between A and B, then it is to be disregarded when deciding whether B was enriched at A's expense.
- **Co-ordinated transactions.** A set of coordinated transactions can be treated as a single transaction for the purpose of the "at the expense of" requirement, on the basis that considering each individual transaction separately would be unrealistic.
- **Trace property.** Where B receives property from C into which A can trace an interest, B is to be treated as through he received A's property, as the property is, in law, the equivalent of A's property.
- **Discharge of debt.** Where A pays money to C and thereby discharges a debt owed by B to C, B is enriched at A's expense, the enrichment being the discharge of B's debt by A.

Where there is no direct dealing between the claimant and the defendant, and none of the above situations is relevant on the facts, it is likely to be difficult to satisfy the requirement that the enrichment was at the claimant's expense (*Investment Trust Companies, at paragraph 51*).

The court also made clear that the "at the expense of" requirement is not approached by asking whether there is a connection between the claimant's loss and the defendant's gain as "a matter of economic or commercial reality" (*Investment Trust Companies, at paragraph 59*). The court observed that economic reality is a "somewhat fuzzy concept", which is difficult to apply with rigour or certainty, or consistently with the purpose of reversing defective transfers (*Investment Trust Companies, at paragraphs 59-60*).

For a recent application of the principles in *Investment Trust Companies* in the context of international bank transfers, see *Tecnimont Arabia Ltd v National Westminster Bank plc [2022] EWHC 1172 (Comm)* and *Terna Energy Trading DOO v Revolut Ltd [2024] EWHC 1419 (Comm)*, considered in Legal update, APP fraud claim against receiving PSP: High Court refuses to strike out claim for unjust enrichment.

Case example: at the claimant's expense - general principles

The following example demonstrates how the courts have applied the principles concerning at the "at the claimant's expense" requirement described in General principles.

- C paid investment managers for their services, inclusive of VAT, which the managers paid to HMRC after making deductions. In fact, no VAT was owed to HMRC either by C or the managers. The managers reclaimed the VAT they paid to HMRC and paid it to C, but this was less than the VAT which C paid to the managers. C brought a claim in unjust enrichment against HMRC for the shortfall.

  Held: HMRC's enrichment was not at C's expense. There were two transfers of value: from C to the managers and from the managers to HMRC. The two transfers could not be collapsed into a single transfer from C to HMRC:

  – the managers did not act as C's agents;

  – C's payments to the managers could not be traced into the payments made by the managers to HMRC; and

  – there was no question of the transactions being a sham.

  C therefore had no right to restitution against HMRC, but only against the managers.

  (*Investment Trust Companies v Revenue and Customs, at paragraphs 71-73.*)

Incidental benefits

The requirement that the claimant must suffer a loss "through the provision of the benefit" means that benefits received by a defendant that are merely incidental or collateral to the claimant's actions will not normally be regarded as being at the claimant's expense (*Investment Trust Companies v Revenue and Customs, at paragraph 52*). The concept of an incidental benefit is illustrated by the example given by Lord Dunedin in *Edinburgh and District Tramways Co Ltd v Courtenay 1909 SC 99* (*at pages 105-6*):

> "One man heats his house, and his neighbour gets a great deal of benefit. It is absurd to suppose that the person who has heated his house can go to his neighbour and say,—"Give me so much for my coal bill, because you have been warmed by what I have done, and I did not intend to give you a present of it.""

The incidental benefits bar is intuitive but the basis for it is difficult to pin down. It is suggested that it is best understood as a rule of policy to the effect that, where the claimant acts in the pursuit of its own interests, the claimant will not ordinarily be entitled to seek restitution from third parties who happen to have benefitted from the claimant's actions.

Case examples: incidental benefits

The following examples demonstrate how the courts have applied the principles described in Incidental benefits:

- A incurred expenses in putting a ship into a dock so that it could be repaired. While the ship was in dock, B, the owners, had the ship surveyed for the purposes of renewing its Lloyd's classification. A claimed a contribution from B for its dock expenses, on the basis that B had benefited from the ship being in dock.

  Held: The claim was rejected. "[T]here is no principle of law which requires that a person should contribute to an outlay merely because he has derived a material benefit from it". (*Ruabon Steamship Co Ltd v London Assurance [1900] AC 6.*)

- A brought legal proceedings against C to recover a debt. The court found that the debt was in fact due to B, who then recovered the debt from C. A brought a claim in unjust enrichment against B, on the basis that B had benefitted from the legal proceedings brought by A. B applied for summary judgment.

  Held: The Court of Appeal held that the claim could not be summarily dismissed (*TFL Management Ltd v Lloyds TSB Bank Plc [2013] EWCA Civ 1415*), but the UK Supreme Court has held that *TFL* was wrongly decided:

  > "At best, B had received an incidental benefit as the result of A's pursuit of its own interests. The facts of the case, so far as the 'at the expense of' question is concerned, were not materially distinguishable from those of Lord Dunedin's example of the householder whose heating warms his neighbour's house". (*Investment Trust Companies v Revenue and Customs, at paragraph 57.*)

Use value of money

If A pays a sum of money to B, B is enriched at A's expense in the amount that B has received. However, it could be said that B is enriched, not only by the amount of money received, but also by the consequent opportunity to use the money, for example by making investments or paying down debts.

In *Sempra Metals Ltd v Inland Revenue Commissioners [2007] UKHL 34*, the House of Lords held that the opportunity to use money can be an enrichment at the claimant's expense. In that case, the claimant paid tax to HMRC by mistake. Lord Nicholls held that the benefits transferred to HMRC comprised both the mistakenly paid tax and HMRC's opportunity to use the money. The first benefit was to be reversed by the repayment of the tax and the second was to be reversed by an award of compound interest. However, *Sempra* was decided before the UK Supreme Court restated the law on "at the expense of" in *Investment Trust Companies v Revenue and Customs* (see General principles).

In *Prudential Assurance Co Ltd v HMRC [2018] UKSC 39*, the UK Supreme Court disapproved the reasoning in *Sempra* on the basis that it was incompatible with *Investment Trust Companies*. The court explained that:

- The purpose of unjust enrichment is to reverse normatively defective transfers of value.
- The benefit must be provided directly to the defendant.
- A mere "causal connection" between the claimant's loss and the defendant's gain was not enough to establish a transfer of value.

(*Paragraph 69.*)

Applying those principles, the court held that the opportunity to use money mistakenly paid is not a benefit obtained at the claimant's expense: although the payment of the money is a transfer of value, the recipient's "consequent opportunity to use it" is not a distinct and additional transfer of value (*paragraph 71*).

It follows from *Prudential* that a claimant who has paid money by mistake is not entitled to restitution, in the form of an award of compound interest, in respect of the use value of the money. The claimant is only entitled to restitution of the face value of the money it paid. However, as the defendant's obligation under the law of unjust enrichment to repay the money is a debt, the claimant can be awarded simple interest on the debt under section 35A of the Senior Courts Act 1981, from the date the unjust enrichment claim accrued (*paragraphs 72-74*). (As to when a cause of action in unjust enrichment accrues, see Limitation).

Unjust factors

The third element of an unjust enrichment claim is that the benefit was received by the defendant in circumstances which the law recognises as unjust. The question for the court is not whether the defendant's enrichment was "unjust" in a general sense. Rather, there are discrete factual situations ("unjust factors") which English law recognises as calling for restitution (*Swynson Ltd v Lowick Rose LLP [2017] UKSC 32, at paragraph 22*).

As the UK Supreme Court observed in *Investment Trust Companies v Revenue and Customs*:

> "A claim based on unjust enrichment does not create a judicial licence to meet the perceived demands of fairness on a case-by-case basis: legal rights arising from unjust enrichment should be determined by rules of law which are ascertainable and consistently applied" (*paragraph 39*).

(See also *Dargamo Holdings v Avonwick Holdings, at paragraph 59*.)

The unjust factors recognised by English law mainly concern circumstances in which the claimant did not intend the defendant to have the benefit in the circumstances. Unjust factors in this category include:

- Mistake.
- Failure of basis.
- Duress.
- Undue influence.

These factors are discussed in the following sections.

Other unjust factors (see Other unjust factors) can be characterised as policy-oriented, for example, the principle established in *Woolwich Equitable Building Society v Inland Revenue [1993] AC 70* that a citizen has a right to restitution of the payment of unlawfully levied tax (see The principle in Woolwich).

The claimant must plead and prove an unjust factor (*Samsoondar v Capital Insurance, at paragraphs 18-21*) (see Pleading an unjust enrichment claim).

Mistake

If the claimant transfers a benefit to the defendant because of a mistake, then the claimant is prima facie entitled to restitution (*Barclays Bank Ltd v WJ Simms & Cooke [1980] QB 677, at page 695*). Both mistakes of fact and of law are actionable (*Kleinwort Benson v Lincoln City Council [1999] 2 AC 349*).

The reason why a mistake calls for restitution is that it vitiates the claimant's intention to transfer the benefit. A claimant who transfers a benefit by mistake does not intend the defendant to have the benefit and so, subject to any defences, the defendant must return the benefit to the claimant.

In an unjust enrichment claim based on mistake, it is necessary to consider three questions:

- Has the claimant made a mistake?
- Did the mistake cause the claimant to transfer the benefit?
- Is the claimant nevertheless barred from recovery?

Meaning of mistake

The case law establishes four key principles about the meaning of mistake in the law of unjust enrichment:

- A mistake is an incorrect belief or assumption.
- A mistake is not a misprediction.
- A mistake can be a mistake of law.
- A mistake can be negatived by doubt.

These principles are discussed in the following sections.

Mistake is an incorrect belief or assumption

A mistake exists when a person "erroneously thinks that one state of facts exists when, in reality, another state of facts exists" (*Roles v Pascall & Sons [1911] 1 KB 982, at page 987*). A person is not mistaken merely if they are ignorant of the true facts: they must hold an incorrect belief or assumption about the facts (*Farol Holdings Ltd v Clydesdale Bank plc [2024] EWHC 593 (Ch), at paragraph 354*).

In practice, distinguishing between mere ignorance on the one hand, and an incorrect belief or assumption on the other, is not straightforward. As Lord Walker observed in *Pitt v Holt [2013] UKSC 26*: "Forgetfulness, inadvertence or ignorance is not, as such, a mistake, but it can lead to a false belief or assumption which the law will recognise as a mistake" (*paragraph 105*). Lord Walker added that the court should not shrink from inferring a belief or assumption when there is evidence to support it (*paragraph 109*).

Mistake is not a misprediction

A person is not mistaken if they have made a misprediction, that is, if they believed or assumed that a state of affairs would come into existence but that belief or assumption turned out to be wrong. As the Privy Council explained in *Dextra Bank & Trust Co Ltd v Bank of Jamaica [2002] 1 All ER (Comm) 193*, quoting Birks:

> "[R]estitution for mistake rests on the fact that the plaintiff's judgment was vitiated in the matter of the transfer of wealth to the defendant. A mistake as to the future, a misprediction, does not show that the plaintiff's judgment was vitiated, only that as things turned out it was incorrectly exercised. To act on the basis of a prediction is to accept the risk of disappointment. If you then complain of having been mistaken you are merely asking to be relieved of a risk knowingly run."

Although a misprediction is not capable of being a mistake, the claimant may nevertheless be able to argue that that the benefit was transferred to the defendant on a basis which has failed, provided that the basis was shared by the defendant (see Failure of basis).

Case example: mistake is not a misprediction

The following example demonstrates how the courts have applied the principles described in Mistake is not a misprediction:

- A was asked by C to loan money to B. A gave C a cheque for the requested sum and told C to give it to B in exchange for a promissory note. Instead, C exchanged the cheque with B for cash, which C kept for its own benefit. A sought restitution from B on the ground that it mistakenly believed it was making a loan to B.

  Held: A is not entitled to restitution. A did not make a mistake but a "misprediction as to the nature of the transaction which would come into existence when the ... cheque was delivered to [B]". (*Dextra Bank & Trust Co v Bank of Jamaica, at paragraph 193.*)

Mistake can be a mistake of law

In *Kleinwort Benson v Lincoln City Council*, the House of Lords abolished the rule that a claim for restitution could not be brought on the basis of a mistake of law. Accordingly, if the claimant transfers a benefit to the defendant because it believes or assumes that the law is X, but the law is in fact Y, then the claimant is prima facie entitled to restitution.

However, difficult questions can arise where the law is changed retrospectively: if the claimant transfers a benefit to the defendant because it believes or assumes that the law is X, but the law is subsequently held by a court to have been Y, can it be said that the claimant was mistaken?

In *Kleinwort*, the House of Lords held that such a claimant could be mistaken. In that case, A paid money to B, a local authority, under a swaps contract. Subsequently, the House of Lords decided (in *Hazell v Hammersmith and Fulham LBC [1992] 2 AC 1*) that swaps contracts of the kind entered into by A and B were ultra vires the local authorities and void. In light of that decision, A brought a restitutionary claim to recover its payments to B, on the basis that they were made under a mistake of law. By majority, the House of Lords upheld the claim. Lord Goff observed at (*page 379*):

> "The payer believed, when he paid the money, that he was bound in law to pay it. He is now told that, on the law as held to be applicable at the date of the payment, he was not bound to pay it. Plainly, therefore, he paid the money under a mistake of law, and accordingly, subject to any applicable defences, he is entitled to recover it."

Lord Hoffmann and Lord Hope reasoned to similar effect.

A difficulty with this view, highlighted by the minority in *Kleinwort*, is that, at the date it made the payments, A's perception of the law as it then stood was not mistaken. As Lord Browne-Wilkinson observed (*page 359*):

> "[A]lthough the decision in *Hazell* is retrospective in its effect, retrospection cannot falsify history: if at the date of each payment it was settled law that local authorities had capacity to enter into swap contracts, [A] [was] not labouring under any mistake of law at that date. The subsequent decision in *Hazell* could not create a mistake where no mistake existed at the time."

In *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners [2006] UKHL 49*, Lord Hoffmann accepted that the majority's reasoning in *Kleinwort* involved "deeming" A to have made a mistake, but he emphasised that the reasoning was based on "practical considerations of fairness and not abstract juridical correctitude" (*paragraph 23*). The decision in *Kleinwort* remains controversial, but it has not been challenged in subsequent authorities; see, for example, *Test Claimants in the FII Group Litigation v HMRC [2020] UKSC 47* (*at paragraph 145*).

Changes to the law are also made by legislatures: if the claimant transfers a benefit to the defendant when the law is X, but the legislature subsequently changes the law retrospectively to Y, can the claimant be said to have been mistaken? In *Kleinwort*, Lord Hoffmann observed, obiter, that a claimant can, in principle, be deemed to be mistaken by virtue of a retrospective legislative provision, although this would always depend on the construction of the statute in question (*page 400*). Lord Goff reasoned to similar effect (*page 401*).

Mistake can be negatived by doubt

The claimant may hold a belief or assumption as to the facts or the law but at the same time harbour doubts about whether the facts or the law are as the claimant believes them to be. If the claimant transfers a benefit to the defendant in that state of doubt and the claimant's doubts turn out to be well-founded, can the claimant bring a claim in unjust enrichment on the ground of mistake?

In *Kleinwort Benson v Lincoln City Council*, Lord Hope suggested that such a claimant would not have a claim: "A state of doubt is different from that of mistake. A person who pays when in doubt takes the risk that he may be wrong – and that is so whether the issue is one of fact or one of law" (*page 410*). However, in *Deutsche Morgan Grenfell v Inland Revenue*, he said that this proposition was "capable of further refinement" and that the question is "what degree of doubt is compatible with a mistake claim" (*paragraph 65*). Lord Hoffmann also expressed the view that a state of doubt is not necessarily inconsistent with a mistake (*paragraph 26*).

In *Marine Trade SA v Pioneer Freight Futures Co Ltd BVI [2009] EWHC 2656 (Comm)*, Flaux J (as he then was) considered the judgments in *Kleinwort* and *Deutsche Morgan Grenfell* and observed that, on the current state of the law: "a payer can still be said to be under a mistake, even if he has doubts, provided that he paid concluding that it was more likely than not that he was liable to pay" (*paragraph 76*).

This formulation of the law has been endorsed by *Goff & Jones* (*Part 5: Chapter 9: Section 2: The Nature of a Mistake: (c) Doubt, Suspicion and "Risk-Taking": (ii) Did the Claimant Make a "Mistake"?, at paragraph 9-25*) and cited with approval in the subsequent authorities. In *BP Oil International Ltd v Target Shipping Ltd [2012] EWHC 1590 (Comm)*, Andrew Smith J observed that "mere passing uncertainty … does not amount to doubt of the kind that might preclude recovery" (*paragraph 233*). In *Jazztel plc v Revenue and Customs [2017] EWHC 677 (Ch)*, Marcus Smith J observed that "provided the level of subjective doubt remains below the 50% threshold, a mistake can still exist" (*paragraph 30(ii)*).

Even if the claimant's doubts are not sufficient to negative the mistake, the claimant may nevertheless be denied recovery on the basis that, owing to the claimant's doubt, the mistake did not cause the payment, or the claimant assumed the risk of being mistaken and is therefore barred from recovery (see Causation and Bars to recovery.)

Case example: mistake can be negatived by doubt

The following example demonstrates how the courts have applied the principles described in Mistake can be negatived by doubt:

- B served a demand on A for payment of $5 million under a contract. A suspected that B was affected by an event of default, with the result that A owed no money to B. However, A decided to pay the $5 million under protest, to avoid the risk of an early termination of the agreement by B. A later sought restitution of the $5 million on the ground of mistake.

  Held:

  "A case where the payer makes the payment thinking that it is more likely than not that he is not liable to pay, such as the present case, cannot properly be described as a case of mistake at all. ... [A] thought that it was more likely than not that [B] was affected by an Event of Default and that was indeed the position." (*Marine Trade v Pioneer Freight Futures, at paragraphs 79-80.*)

Causation

The claimant must prove that, but for the mistake, they would not have transferred the benefit to the defendant (see *Kleinwort Benson v Lincoln City Council, at page 399D*; *Deutsche Morgan Grenfell v Inland Revenue, at paragraph 59*; *Marine Trade v Pioneer Freight Futures, at paragraph 78*; *Test Claimants in the FII Group Litigation v HMRC, at paragraph 182*; *Jazztel plc v Revenue and Customs, at paragraph 29(ii)*).

If the claimant would have transferred the benefit to the defendant in any event, they are not entitled to restitution. In *Marine Trade*, Flaux J held that, even if A was mistaken, the mistake did not cause the payment to B (see *Case example: mistake can be negatived by doubt*). A's principal concern was to avoid the risk of B's early termination, irrespective of whether the money was in fact due to B. Thus, the mistake was not causative of A's payment (*paragraphs 79-80*).

Bars to recovery

A claimant who proves that they transferred a benefit because of a mistake may nonetheless be denied recovery if either:

- The defendant is legally entitled to the benefit.
- The claimant assumed the risk of being mistaken.

These situations are discussed in the following sections.

Defendant's legal entitlement to benefit

A claimant who mistakenly transfers a benefit to the defendant will be denied recovery to the extent that the defendant is legally entitled to the benefit. This reflects a general principle in the law of unjust enrichment that "an unjust factor will not override a valid and subsisting legal obligation of the claimant to confer the benefit on the defendant" (*Dargamo Holdings v Avonwick Holdings, at paragraph 70*; *DD Growth Premium 2x Fund (in liqudation) v RMF Market Neutral Strategies (Master) Ltd [2017] UKPC 36, at paragraph 62*).

As Lord Hope observed in *Kleinwort Benson v Lincoln City Council* (*page 408*):

> "the payee cannot be said to have been unjustly enriched if he was entitled to receive the sum paid to him. The payer may have been mistaken as to the grounds on which the sum was due to the payee, but his mistake will not provide a ground for its recovery if the payee can show that he was entitled to it on some other ground."

Accordingly, if the benefit is due to the defendant under a valid contract, it cannot be recovered under the law of unjust enrichment unless the contract itself is void for mistake or rescinded by the claimant (*Barclays Bank v WJ Simms & Cooke, at paragraph 695*). Similarly, if the defendant is entitled to the benefit under a statute, the claimant cannot recover it under the law of unjust enrichment (*Test Claimants in the FII Group Litigation v Revenue and Customs [2008] EWHC 2893 (Ch), at paragraph 257*). To the extent that the mistaken payment exceeds that to which the defendant is legally entitled, the claimant may in principle recover the excess under the law of unjust enrichment (*Fairfield Sentry Ltd (in liquidation) v Migani [2014] UKPC 9, at paragraph 18*).

In *Deutsche Morgan Grenfell v Inland Revenue,* Lord Scott expressed the view that where the claimant

transfers a benefit to the defendant intending to make a gift, then the claimant may not recover that benefit in a claim for unjust enrichment unless the gift is set aside (*paragraph 87*). In *Pitt v Holt*, the UK Supreme Cout held that equity's jurisdiction to rescind a mistaken gift may only be exercised where there is a causative mistake of "sufficient gravity", which will normally be satisfied only when there is a mistake as to the legal character or nature of the transaction or as to some matter of fact or law which is basic to the transaction (*paragraph 122*). Whether these principles apply to unjust enrichment claims to reverse mistaken gifts has not been settled in the authorities. For a discussion, see *Goff & Jones: Part 5: Chapter 9: Mistake*.

Assuming the risk of error

A claimant who mistakenly transfers a benefit will be denied recovery if the claimant "took the risk" of being mistaken (*Deutsche Morgan Grenfell v Inland Revenue, at paragraph 26*; *Pitt v Holt, at paragraph 114).* This reflects a general policy in the law of unjust enrichment against awarding restitution to "risk-takers".

The fact that the claimant had doubts when they transferred the benefit is not conclusive of whether they took the risk. Whether the claimant should be treated as having taken the risk depends upon "the objective circumstances surrounding the payment" (*Deutsche Morgan Grenfell, at paragraph 27*).

A key consideration in deciding whether the claimant took the risk is whether the claimant undertook reasonable investigations in response to their doubts before transferring the benefit.

Case examples: assuming the risk of error

The following examples demonstrate how the courts have applied the principles described in Assuming the risk of error:

- After obtaining legal advice from an expert in Norwegian law, A, a bank, decided to enter into a novel financial transaction with B, a Norwegian local authority. The transaction was in fact ultra vires B's powers and void under Norwegian law. A sought restitution from B; B argued that A "took the risk" that the transaction was invalid.

  Held: A is not barred from recovery:

  "It is a most unlikely conclusion that a bank which has doubts over the validity of a proposed loan ... and takes legal advice in order to resolve those doubts can properly be regarded as thereafter taking the risk that it is mistaken as to the validity of the transaction." (*Haugesund Kommune v Depfa ACS Bank [2009] EWHC 2227 (Comm), at paragraph 148.*)

- A, a developer, contractually agreed to pay B, a builder, its "build costs" in relation to a development. At B's request, A made interim payments to B, which were within a budget agreed by the parties, without ascertaining B's build costs. A's payments in fact exceeded the build costs. A sought restitution of the overpayments on the ground of mistake.

  Held: A knowingly took the risk of being mistaken and is therefore barred from recovery.. The court considered this to be a classic case of C voluntarily making a payment to D knowing that it may be more than he owed but choosing not to ascertain the correct amount. Therefore, C was not entitled to recover the overpayment. (*Leslie v Farrar Construction Ltd [2016] EWCA Civ 1041, at paragraph 56.*)

Failure of basis

If the claimant transfers a benefit to the defendant on a basis, shared with the defendant, which fails, then the claimant is prima facie entitled to restitution. The reason why the failure of basis calls for restitution is that the claimant's intention to transfer the benefit was qualified by a condition (the "basis") and that condition failed. The failure of the condition means that the claimant did not, in the event, intend the defendant to have the benefit and so, subject to any defences, the defendant must return it to the claimant.

Historically, this unjust factor was referred to as "failure of consideration". This terminology is liable to invite confusion with the concept of "consideration" in the law of contract. It is therefore preferable to use the terminology of "failure of basis" but the legal content of the two expressions is the same (*Barton v Gwyn-Jones, at paragraph*

231; *Dargamo Holdings v Avonwick Holdings, at paragraphs 77-78*; *Barnes v Eastenders Cash & Carry, at paragraph 104*). Failure of basis may be relied upon as an unjust factor in claims for restitution of money and non-money benefits (*Barnes, at paragraph 108*).

In every unjust enrichment claim based on failure of basis, it is necessary to consider two questions:

- What was the basis for the transfer of the benefit?
- Did the basis fail?

Meaning of "basis"

The case law establishes the following basic principles:

- The basis must be shared between the parties.
- The basis must be ascertained objectively.
- The basis need not be promised counter-performance.
- There may be more than one basis.

These principles are discussed in the following sections.

Basis must be shared between the parties

The basis on which the benefit was transferred must have been shared by both parties (*Dargamo Holdings v Avonwick Holdings, at paragraph 79*; *Swynson v Lowick Rose, at paragraph 30; Spaul v Spaul [2014] EWCA Civ 679, at paragraphs 47-48*).

If the claimant transfers a benefit on a basis known only to them and that basis fails, no claim in unjust enrichment arises, because the claimant in these circumstances assumes the risk that the basis might fail. However, if both parties know that the transfer is being made on a particular basis, the objection that the claimant was a risk-taker falls away and it is appropriate for the defendant to make restitution if the basis fails, subject to any defences the defendant may raise (*School Facility Management v Governing Body of Christ the King College, at paragraph 419).*

Case example: basis must be shared between the parties

The following example demonstrates how the courts have applied the principles described in Basis must be shared between the parties:

- A and B contributed to the purchase price of a house, which they held on an express trust as joint tenants. A believed that he would marry B and they would live in the house together but B had no intention of marrying A and intended to live independently in the house. A brought a resulting trust claim on the ground that the basis for the express trust had failed.

  Held:

  "[I]t seems ... impossible to say that there has been a total failure of consideration ... where a trust is created by two people and where there is a failure of purpose for which one of them created the trust but which he did not communicate to the other party and which the other did not share." (*Burgess v Rawnsley [1975] Ch 429, at page 442.*)

Basis must be ascertained objectively

The basis must be ascertained objectively by reference to the parties' words and conduct. Their uncommunicated subjective thoughts are irrelevant (*Giedo Van der Garde BV v Force India Formula One Team Ltd [2010] EWHC 2373 (QB), at paragraph 286*). The objective approach to the identification of the "basis" is very similar to that employed in the interpretation of contracts and the same general principles apply (*BP Oil International Ltd v Vega Petroleum Ltd [2021] EWHC 1364 (Comm), at paragraph 208*).

Basis need not be promised counter-performance

Unjust enrichment claims on the ground of failure of basis often arise where the claimant transfers a benefit to the defendant under a contract on the basis that the defendant will provide counter-performance to the claimant under the contract. However, the "basis" for the transfer need not be contractual counter-performance. Any event or state of affairs which was contemplated as the basis or reason for the transfer can be a "basis" for the purposes of the law of unjust enrichment (*Patel v Mirza [2016] UKSC 42, at paragraph 13*; *Barnes v Eastenders Cash & Carry, at paragraphs 106-107*; *Dargamo Holdings v Avonwick Holdings, at paragraph 80*).

Case example: basis need not be promised counter-performance

The following example demonstrates how the courts have applied the principles described in Basis need not be promised counter-performance:

- On an application by B, A was appointed by the Crown Court as a receiver of two companies suspected of fraud. It was mutually understood by A and B that A would have a lien over the companies' assets to secure the payment of A's remuneration and expenses. Subsequently, the Crown Court set aside the order appointing A as receiver, with the result that the lien was unenforceable. A sought restitution from B for its remuneration and expenses.

  Held: A is entitled to restitution:

  "[A] agreed to accept the burden of management of the companies on the basis that he would be entitled to take his remuneration and expenses from the companies' assets, and that state of affairs which was fundamental to the agreement has failed to sustain itself." (*Barnes v Eastenders Cash & Carry, at paragraph 114.*)

There may be more than one basis

A claimant may transfer a benefit to the defendant on more than one basis and the failure of any one of the bases will entitle the claimant to restitution (*School Facility Management Ltd v Governing Body of Christ the King College, at paragraph 421*). Accordingly, if the claimant transfers a benefit to the defendant on the basis that the defendant will provide counter-performance and the defendant does so, the claimant may nonetheless be entitled to restitution if there is another basis for the transfer which failed.

Case example: there may be more than one basis

The following example demonstrates how the courts have applied the principles described in There may be more than one basis:

- A purchased a car from B. The car was delivered to A and he used it for several months. The police then seized the car on the ground that it had been stolen from the true owner. A sought restitution of the purchase price from B on the ground of failure of basis.

  Held: The transfer had two bases:

  – A would obtain possession of the car.

  – A would obtain title to the car.

- The second basis failed and therefore A was entitled to restitution:

  "It is true that a motor car was delivered to [A], but [B] had no right to sell it, and therefore [A] did not get what he paid for – namely, a car to which he would have title" (*Rowland v Divall [1923] 2 KB 500, at page 504.*)

"Failure" of basis

A "failure" of basis means that the basis or reason for the transfer "has failed to materialise or, if it did exist, has failed to sustain itself" (*Barnes v Eastenders Cash & Carry, at paragraph 107*; *Barton v Gwyn-Jones, at paragraph 232*). A failure of basis may therefore be:

- Immediate (in the sense that it never existed to begin with).
- Subsequent (in the sense that it did exist but failed to sustain itself).

It is well established that the basis must totally fail: if any part of the basis for the transfer is fulfilled, then no claim in unjust enrichment arises (*Dargamo Holdings v Avonwick Holdings, at paragraph 102*). For example, if A pays money to B on the basis that B will provide contractual counter-performance, A will be precluded from claiming restitution from B if B "has performed any part of the contractual duties in respect of which payment is due" (*Stocznia Gdanska SA v Latvian Shipping Co [1998] 1 WLR 574, at page 588D*).

In practice, the requirement that the basis must totally fail is of reduced significance. This is because the courts are prepared, where it reflects commercial reality, to treat the defendant's performance as severable, so that a claim for

restitution will be available where there has been a total failure of any severable part of that performance (*Barnes v Eastenders* Cash & Carry, *at paragraph 114*; *Dargamo Holdings v Avonwick Holdings, at paragraph 103*).

Case examples: "failure" of basis

The following examples demonstrate how the courts have applied the principles described in "Failure" of basis:

- A loaned money to B secured by a mortgage over B's property. A did not repay the principal but made interest payments. The mortgage was found to be void and A sought restitution of the principal sum on the ground of failure of basis.

  Held: A was entitled to restitution of the principal sum, even though B had made interest payments to A. The obligation to pay interest was "separate and distinct" from the obligation to pay the principal sum. Further, even if B had repaid part of the principal sum;

  "the law would not hesitate to hold that the balance of the loan outstanding would be recoverable on the ground of failure of consideration; for at least in those cases in which apportionment can be carried out without difficulty, the law will allow partial recovery on this ground". (*Goss v Chilcott [1996] UKPC 17, at paragraph 10*.)

- A, an aspiring race car driver, entered into a contract with B, an F1 racing team. A paid $3 million to B and, in return, B promised A 6,000 km of test driving and the opportunity to test the car at Grand Prix meetings and act as a reserve driver. B only gave A 2,270 km of test driving. A sought restitution of the portion of the $3 million attributable to the withheld kilometres of test driving.

  Held: A is not entitled to restitution. Absent any indication in the contract as to how much of the $3 million was attributable to the opportunity to test the car at Grand Prix meetings and act as a reserve driver, it was impossible to attribute an identifiable part of the $3 million to the withheld kilometres of test driving. (*Giedo van der Garde BV v Force India Formula One, at paragraphs 365-367*.)

Role of the parties' contract

Unjust enrichment claims on the ground of failure of basis often arise where the relevant benefit is transferred under a contract between the parties. For example, A may pay money to B under a contract on the basis that B will provide contractual counter-performance or on the basis of some other jointly understood condition. If the basis for the payment fails, can A bring a claim for unjust enrichment to recover the benefit, or are A's rights in this situation governed exclusively by the law of contract?

Where there is a valid and subsisting contract between the parties, an unjust enrichment claim will not be allowed if the claim would be inconsistent with the contract or with the contractual allocation of risk. For example, if, on the proper construction of the contract, the defendant is entitled to retain the benefit, then no unjust enrichment claim will lie. This reflects the general principle that the law of unjust enrichment is complementary to the law of contract and should therefore not be used to undermine or cut across the law of contract (*Dargamo Holdings v Avonwick Holdings, at paragraph 76*). As Etherton LJ said in *MacDonald Dickens & Costello [2011] EWCA Civ 930* (*paragraph 23*):

> "The general rule should be to uphold contractual arrangements by which parties have defined and allocated and, to that extent, restricted their mutual obligations, and, in so doing, have similarly allocated and circumscribed the consequences of non-performance. That general rule reflects a sound legal policy which acknowledges the parties' autonomy to configure the legal relations between them and provides certainty, and so limits disputes and litigation."

(See also *Barton v Gwyn-Jones, at paragraphs 88-96*; *Dargamo Holdings v Avonwick Holdings, at paragraphs 65-76*.)

Case examples: role of the parties' contract

The following examples demonstrate how the courts have applied the principles described in Role of the parties' contract:

- A contracted with B to purchase shares for $950 million. A and B understood that $82.5 million of the consideration was attributable to some additional assets that B would transfer to A. However, the contract expressly stated that the $950 million was "the consideration for the sale of the shares" and made no mention of the other assets.

After B refused to transfer the additional assets to A, A brought a restitutionary claim against B for $82.5 million.

Held: The unjust enrichment claim failed because it was inconsistent with the contract:

"The bargain that [A and B] consciously chose to strike was one by which they agreed that all that [B] was obliged to transfer in return for the payment of US$950 million was the shares ... [A's] unjust enrichment claim can be seen to interfere impermissibly with the parties' contractual allocation of risk". (*Dargamo Holdings v Avonwick Holdings, at paragraphs 112 and 126.*)

- A agreed to pay £1.2 million to B if A sold its property for £6.5 million to a buyer introduced by B. B introduced a buyer to A who offered £6.5 million for the property but the property was sold for only £6 million at completion. B brought a restitutionary claim against A for the market value of his services on the ground that he had provided them on a basis (that the property would be sold for £6.5 million) which had failed.

  Held: The unjust enrichment claim failed because it was inconsistent with the contract, which only obliged A to pay B if the property sold for £6.5 million:

  "When parties stipulate in their contract the circumstances that must occur in order to impose a legal obligation on one party to pay, they necessarily exclude any obligation to pay in the absence of those circumstances; both any obligation to pay under the contract and any obligation to pay to avoid an enrichment they have received from the counterparty from being unjust." (*Barton v Gwyn-Jones, at paragraph 96.*)

Situations where failure of basis commonly arises

The categories of failure of basis are not closed. In principle, a failure of basis claim can arise whenever the state of affairs contemplated by the parties as the basis for the transfer of a benefit has failed. However, it is worth noting that failure of basis claims often arise in the situations outlined in the following sections.

Failure of contractual counter-performance

If A transfers a benefit to B under a contract but does not receive the promised counter-performance from B, then, in principle, A may bring a claim in unjust enrichment to recover the benefit from B (*Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1943] AC 32*). However, if the unjust enrichment claim would be inconsistent with the contract or would undermine the contractual allocation of risk, then the unjust enrichment claim will not be allowed (see Role of the parties' contract).

Anticipated contracts that do not materialise

If A does work at the request of B in anticipation that a contract will come into existence between the parties but the hoped-for contract does not materialise, then, in principle, A may bring a claim in unjust enrichment against B to recover the value of the work done, because the basis for the provision of that benefit (that the contract would come into existence) has failed (*Llupar v Valencia [2012] EWCA Civ 396, at paragraph 47*; *British Steel Corp v Cleveland Bridge & Engineering Co Ltd [1984] 1 All ER 504, at page 511*; *Fenchurch Advisory Partners LLP v AA Ltd (formerly AA Plc) [2023] EWHC 108 (Comm), at paragraphs 306-311*).

Void contracts

If A transfers a benefit to B under a contract but it turns out that the contract is void, then, in principle, A is entitled to bring a claim in unjust enrichment against B to recover the benefit, even if B provided full counter-performance to A under the contract (*Guinness Mahon & Co Ltd v Kensington and Chelsea RLBC [1999] QB 215*; *School Facility Management Ltd v Governing Body of Christ the King College, at paragraph 421*). When a party enters into a contract, it typically does so on the basis that:

- Their counter-party will provide counter-performance.
- They will have a legal right to insist on counter-performance by their counter-party.

The failure of the second of those bases is sufficient to justify restitution (see There may be more than one basis).

Other unjust factors

In addition to mistake and failure of basis, English law recognises a range of other unjust factors, including;

- The principle in *Woolwich v Inland Revenue*.
- Legal compulsion.

- Duress.
- Undue influence.

These unjust factors are discussed in the following sections.

The principle in *Woolwich*

If a person pays a public authority pursuant to an ultra vires tax or levy, they are prima facie entitled to restitution. This unjust factor is based on the principle that taxes should not be levied without parliamentary authority (*Woolwich v Inland Revenue, at paragraph 172*; *FII Group Test Claimants v Revenue and Customs Commissioners [2012] UKSC 19, at paragraph 173*). The *Woolwich* principle is not confined to taxes imposed by the revenue and can extend to charges levied by other public authorities (*Ipswich Town Football Club Co Ltd v Chief Constable of Suffolk [2017] EWHC 375 (QB), at paragraph 72*). The claimant must establish that the relevant charge was ultra vires the public authority but there is no requirement that the claimant must first seek judicial review before bringing a claim in unjust enrichment (*British Steel plc v Customs and Excise Commissioners [1995] 2 All ER 366*).

Legal compulsion

If the claimant discharges a liability of the defendant owed to a third party (X) under legal compulsion, then the claimant is in principle entitled to restitution from the defendant (*Re D&D Wines International Ltd (in liquidation) [2016] UKSC 47, at paragraph 16(4)*). Restitution is called for in these circumstances because the claimant is compelled by law to pay a liability which, wholly or partly, should have been borne by the defendant. This unjust factor can arise in variety of situations, including where:

- The claimant and the defendant are under a common liability to X but as between the claimant and the defendant, the defendant is primarily liable to X. If the claimant discharges the liability by paying X, then the claimant may bring a claim in unjust enrichment against the defendant to recover the payment to X (*Brook's Wharf and Bull Wharf Ltd v Goodman Bros [1937] 1 KB 534*).
- The claimant and the defendant are under a common liability to X, and neither is primarily liable to X. If the claimant discharges the liability by paying X, then the claimant may bring a claim to recover that part of the liability which the defendant should bear. Depending on the circumstances, the claim may be brought as a common law unjust enrichment claim or as a claim under the *Civil Liability (Contribution) Act 1978* (see *Goff & Jones: Part 5: Chapter 19: Secondary Liability: Overview*).

Duress

If the claimant transfers a benefit to the defendant as a result of illegitimate pressure exerted by the defendant, then, in principle, the claimant may bring a claim in unjust enrichment to recover the benefit. Examples of illegitimate pressure include:

- Duress of the person (actual or threatened violence).
- Duress of goods (wrongful seizure or detention of property).

Economic pressure may also amount to duress, provided that the economic pressure can be characterised as illegitimate, and the claimant had no reasonable alternative to giving into the pressure. For an overview of duress, see Practice note, Contracts: invalidity: Duress.

Undue Influence

If the claimant transfers a benefit to the defendant while under undue influence (in the sense that they were not able to exercise free and independent judgment), then, in principle, the claimant may bring a claim in unjust enrichment to recover the benefit. Undue influence may be proven on the facts or with the aid of a rebuttable presumption of undue influence which arises in the context of certain relationships. For an overview of undue influence, see Practice note, Contracts: invalidity: Undue influence.

Defences

If the claimant establishes that the defendant has been unjustly enriched at its expense, then the claimant is prima facie entitled to restitution, subject to any defences that the defendant may raise. The defences to a claim in unjust enrichment include:

- Change of position.
- Estoppel.
- Limitation.

These defences are discussed in the following sections.

Change of position

The change of position defence is an important defence for defendants to claims in unjust

enrichment. It is concerned with the situation where the defendant's position has detrimentally changed as a result of receiving the enrichment, so that it would be inequitable for the defendant to be required to make restitution in full. The defence operates *pro tanto*, to the extent of the defendant's change of position.

For an overview of the change of position defence, see Practice note, Restitution: Change of position.

Estoppel

If the claimant makes a representation to the defendant that the defendant is entitled to the benefit and the defendant reasonably relies on that representation to its detriment, then the claimant may be estopped from asserting that the defendant is unjust enriched (*Avon CC v Howlett [1983] 1 WLR 605*).

In contrast to the change of position defence (see Change of position), estoppel is generally understood to be a complete defence, operating as a rule of evidence which prevents the claimant from asserting that the defendant is unjustly enriched (*Lipkin Gorman v Karpnale*). However, in *Avon*, Slade LJ made the following observation (*at pages 624-625*):

> "... in some circumstances the doctrine of estoppel could be said to give rise to injustice if it operated so as to defeat in its entirety an action which would otherwise lie for money had and received. This might be the case for example where the sums sought to be recovered were so large as to bear no relation to any detriment which the recipient could possibly have suffered."

Eveleigh LJ also suggested that the estoppel defence should not operate the extent that it is "unconscionable" for the defendant to retain the enrichment (*pages 611-612*). This "unconscionability" exception has been applied in subsequent cases, where the estoppel defence has operated only to the extent that the defendant changed its position in reliance on the representation (*National Westminster Bank plc v Somer International (UK) Ltd [2001] EWCA Civ 970*; *Scottish Equitable plc v Derby [2001] EWCA Civ 369*). The defences of change of position and estoppel are therefore converging, although they remain distinct (*Officeserve Technologies Ltd (in liquidation) v Annabel's (Berkeley Square) Ltd [2018] EWHC 2168 (Ch), at paragraph 54*).

Case examples: estoppel

The following examples demonstrate how the courts have applied the principles described in Estoppel:

- C mistakenly paid D £1,000 of sick pay. D asked C whether the payments were correct and C informed D that they are. C later discovers the mistake and brings an unjust enrichment claim against D.

  Held: C is not entitled to restitution: "The conditions for the operation of an estoppel have in my opinion all been satisfied. ... [S]uch estoppel bars the whole of [C's] claim". (*Avon CC v Howlett*.)

- C mistakenly overpaid D £170,000 under a life insurance policy and informed D that the payment was correct. D spends £9,000 of the proceeds on improving his lifestyle. C later discovers the mistake and brings an unjust enrichment claim against D.

  Held: The operation of estoppel as a complete defence would be unconscionable on the facts. D is only entitled to raise the estoppel defence to the extent of his change of position (£9,000). (*Scottish Equitable plc v Derby*.)

Limitation

A claim in unjust enrichment is treated as a claim founded on simple contract for the purposes of section 5 of the Limitation Act 1980. Accordingly, the limitation period for a claim in unjust enrichment is six years from the date on which the cause of action accrued (*Test Claimants in the FII Group Litigation v HMRC, at paragraphs 7 and 141*).

A claim in unjust enrichment accrues when all the requirements for an unjust enrichment claim are satisfied. An unjust enrichment claim on the ground of mistake accrues when the defendant receives the relevant benefit (*Kleinwort Benson v Lincoln City Council, at pages 386 and 409*). However, the limitation period will not begin to run until the claimant discovered the mistake or could with reasonable diligence have discovered it (*section 32(1)(c), Limitation Act 1980*).

An unjust enrichment claim on the ground of failure of basis (see Failure of basis) cannot accrue unless the basis has failed. Where the basis fails

immediately, the claim in unjust enrichment will accrue upon the receipt of the benefit. Where the basis fails subsequently, the claim will accrue not when the defendant receives the benefit but only when the basis subsequently fails (*Anron Bunkering DMCC v Glencore Energy UK Ltd [2023] EWHC 295 (Comm), at paragraph 39*).

Restitutionary remedies

Personal restitutionary remedies

The standard response to unjust enrichment is a monetary restitutionary award to reverse the defendant's enrichment (*Menelaou v Bank of Cyprus UK*). The monetary restitution award will correspond to the value of the defendant's enrichment, ascertained in accordance with the principles summarised in Valuation of the enrichment and subject to any defences that the defendant may establish, such as change of position (see *Change of position*).

Proprietary restitutionary remedies

In certain circumstances, the court may reverse the defendant's unjust enrichment by awarding a proprietary remedy, that is, a right which is enforceable not only against the defendant but against third parties. The law on proprietary remedies for unjust enrichment is in a state of development and is complex and controversial. The case law has identified two proprietary remedies that may be awarded to reverse unjust enrichment, *trusts* and subrogation, as described the following sections.

Trusts

There is a line of authority which suggests that, if A pays money to B by mistake, then B may be liable to A as a constructive trustee. In *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd [1981] Ch 105*, Goulding J said (*at page 119D-E*):

> "a person who pays money to another under a factual mistake retains an equitable property in it and the conscience of that other is subjected to a fiduciary duty to respect his proprietary right."

In *Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1996] AC 669*, Lord Browne-Wilkinson disapproved of this reasoning, observing that the mere receipt of money paid by mistake does not give rise to a constructive trust. However, Lord Browne-Wilkinson went on to say that, if the recipient learns of the mistake, then this may well give rise to a constructive trust, on the basis that the recipient's conscience is thereby affected (*pages 715B-C*). This dictum has been applied in subsequent cases to afford proprietary remedies to unjust enrichment claimants (see, for example, *Commerzbank AG v IMB Morgan plc [2004] EWHC 2771 (Ch), at paragraph 36*; *Ali v Dinc [2020] EWHC 3055 (Ch), at paragraphs 222-223*) but it remains controversial.

Where money is transferred to the defendant on a basis which subsequently fails, a constructive trust is unlikely to arise. In *Re D&D Wines International*, Lord Sumption said (*at paragraph 30*):

> "The exact circumstances in which a restitutionary proprietary claim may exist is a controversial question which has given rise to a considerable body of judicial comment and academic literature. For present purposes it is enough to point out that where money is paid with the intention of transferring the entire beneficial interest to the payee, the least that must be shown in order to establish a constructive trust is (i) that that intention was vitiated, for example because the money was paid as a result of a fundamental mistake or pursuant to a contract which has been rescinded, or (ii) that irrespective of the intentions of the payer, in the eyes of equity the money has come into the wrong hands, as where it represents the fruits of a fraud, theft or breach of trust or fiduciary duty against a third party. One or other of these is a necessary condition, although it may not be a sufficient one."

Lord Sumption went on to say that the right to restitution for money paid on a basis which has failed gives rise to "purely personal obligations" because a failure of basis does not vitiate the claimant's intention to transfer the beneficial interest in the money (*paragraph 30*).

For a detailed overview of trusts as a potential response to unjust enrichment, see *Goff & Jones, Part 7: Chapter 38: Proprietary Remedies: Trusts and Liens*.

Subrogation

Where A discharges a liability owed by B to a third party, X, in circumstances which the law recognises as unjust, one means of reversing B's enrichment is to order B to pay a monetary sum to A representing the value of the discharged liability. However, another means of reversing B's enrichment is to permit A to enforce the rights which X formerly held against B. This is the equitable remedy of subrogation.

In *Banque Financière de la Cité v Parc (Battersea) Ltd [1999] 1 AC 221*, Lord Hoffmann explained that the term "subrogation" can be used to describe a contractual arrangement of subrogation (as often seen in the insurance context; see Practice note, Subrogation in insurance) but that the term "is also used to describe an equitable remedy to reverse or prevent unjust enrichment" (*page 231*). In the light of Lord Hoffmann's speech in *Banque Financière*, it is now accepted that the case law on equitable subrogation is to be understood as being based on the principle of unjust enrichment (*Menelaou v Bank of Cyprus UK, at paragraph 50*).

Equitable subrogation is typically awarded in cases where the claimant discharges the defendant's liability on the basis of an agreement or expectation that the claimant will obtain a security interest in the defendant's assets, which the claimant fails to obtain (*Swynson v Lowick Rose, at paragraph 19*; *Menelaou v Bank of Cyprus UK, at paragraph 21*). The remedy reverses the defendant's unjust enrichment by treating the claimant as though it were the assignee of the paid-off creditor's rights against the defendant, including any proprietary rights (*Banque Financière, at page 236*).

For a detailed overview of subrogation as a remedy for unjust enrichment, see *Goff & Jones, Part 7: Chapter 39: Proprietary Remedies: Subrogation to Extinguished Proprietary Rights*.

Pleading an unjust enrichment claim

In *Samsoondar v Capital Insurance* (*paragraphs 18-20*), the Privy Council provided the following guidance for pleading a claim in unjust enrichment:

- The claimant should indicate that the claim is for restitution of unjust enrichment.
- The claimant should identify facts that satisfy each of the three elements necessary to establish liability, that is:
  - that the defendant has been enriched;
  - that the enrichment was at the claimant's expense; and
  - that the enrichment was unjust.
- The claimant must identify the unjust factor on which it relies.

See also *Attorney General of Trinidad and Tobago v Trinsalvage Enterprises, at paragraph 19*).

The claimant must also specify the remedy it seeks to reverse the defendant's unjust enrichment (*Civil Procedure Rule 16.2(1)(b)*).

For example letters and statements of case, see:

- Standard document, Letter before claim: restitution (mistake or failure of consideration).
- Standard document, Restitution: letter requesting return of mistaken payment.
- Standard document, Particulars of claim: restitution (mistake or failure of consideration).
- Standard document, Defence: restitution (mistake or failure of consideration).