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THE LEGAL ASPECTS OF CROSS-BORDER ASSET TRACING WITH SPECIFIC REFERENCE TO THE CONFLICT OF LAWS ELEMENTS OF INTERNATIONAL CIVIL FRAUD LITIGATION.

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CONTENTS.

RESTITUTION/UNJUST ENRICHMENT AND THE CHOICE OF LAW RULES

TABLE OF CASES.

Buller v. *Garrison* (1777) 2 Cowp. 565.
Canada, Weldon v. *Canadian Surety Co.*, 64 D.L.R. (2d) 735 (1966).
Canada Trust Co. and others v. Stolzenberg and others [1998] 1 All E.R. 318.
Cantiere San Rocco v. *Clyde Shipbuilding and Engineering Co.* (1923) S.C. (H.L.) 105.
Carl Zeiss Stifung v. *Herbert Smith (No.2)* [1969] 2 Ch. 276.
Carpenter v. *Marnell* (1802) 3 Bos & Pul. 39.
Carvalho v. *Burn* (1833) 4 B. & Ad. 328; 110 E.R 499 (K.B.).
Chaplin v. *Boys* [1971] A.C. 356.
Chase Manhattan Bank N.A. v. *Israel-British Bank (London) Ltd.* [1981] Ch. 105.
Cheni v. *Cheni* [1962] 3 All E.R. 873.
Chesworth v. *Farrar* [1967] 1 Q.B. 407.
Chief Constable of Kent v. *V* [1983] Q.B. 34.
Citadel General Assurance Co. v. *Lloyds' Bank Canada* (1997) 152 D.L.R. (4th) 411.
City Bank of Sydney v. *McLoughlin* (1909) C.L.R. 615.
Clarke v. *Dickson* (1859) 6 CBNS 453.
Clarke v. *Shee and Johnson* (1744) 1 Cowp. 197.
Cleaver v. *Mutual Reserve Fund Life Association* [1892] 1 Q.B. 147.
Clough Mill Ltd v. *Martin* [1984] 3 All ER 982.
Commercial Banking Co. of Sydney Ltd. v. *Mann* [1961] A.C. 1.
Continental Caoutchouc and Gutta Percha Co. v. *Klienwort, Sons & Co.* (1904) 90 L.T. 474.
Cook Industries v. *Galliher* [1978] All E.R. 945, [1979] Ch. 439.
County of Carleton v. *City of Ottowa* (1963) 39 D.L.R. (2d) 11.
Cowern v. *Nield* [1912] 2 K.B. 419.
Craven-Ellis v. *Cannons Ltd* [1936] 2 K.B. 403.
Crescent Farm Sports v. *Sterling Offices* [1972] Ch. 553.
Cruse v. *Chittum* [1974] 2 All. E.R., 940.
Cundy v. *Lindsay* (1878) 3 App. Cas. 459.
Dalrymple v. *Dalrymple* (1811) 2 Hag. Con. 54.
Daly v. *Sydney Stock Exchange Ltd* (1986) 160 C.L.R.371.
David Securities Pty Ltd. v. *Commonwealth Bank of Australia* [1992] 66 A.L.K.R. 768.
Derry v. *Peek* 14 App. Cass. 337.
Deutsche Bank v. *Beriro & Co. Ltd* (1895) 73 L.T. 669.
Devaynes v. *Noble, Clayton's Case* (1816) 1 Mer. 572.
Dies v. *British and International Mining and Finance Corp.*[1939] 1 K.B. 724.
Dungannon v. *Hackett* (1702) 1 Eq. Cases Abridgement. 289.
Edgington v. *Fitzmaurice* (1885) 29 Ch.D 459, C.A.
Edinburg United Breweries v. *Molleon* [1894] A.C. 96 (H.L.).
El Ajou v. *Dollar Land Holdings plc (No.2)* [1995] 2 All E.R. 213.
El Ajou v. *Dollar Holdings* [1993] 3 All E.R. 717.
Etler v. *Kertesz* (1961) 62 DLR 2d 209.
Euroactiveidade AG v. *Mason Investments Limited,* Unreported, 18 April 1994.
Ewing v. *Orr Ewing* (1883) 9 App. Cas. 34.
Ex parte Cooke (1876) L.R. Ch. Div 123.
Ex parte Dale & Co. (1879) 11 Ch.Div 772.
Exall v. *Partridge* (1799) 8 T.R. 308.

Falke v. *Scottish Imperial Insurance Co.* (1836) 34 Ch.D 234.
Farr v. *Newman* 4 E & E 629.
Federal Sugar Refining Company v US Sugar Equalisation Board (1946) 26 Wash. (2d) 282.
Felthouse v. *Bindley* (1862) 11 C.B. (N.S.) 869.
Firrosa Spolka Acyjna v. *Fairbain Lawson Combe Barbour Ltd.* [1943] A.C. 32.
First Wisconsin Trust Co. v. *Schround* (1990) 916 F 2d 394 (7th Cir).
Foley v. *Hill* (1848) 2 HLC, 28.
Folliott v. *Ogden* (1790) 3 Term. Rep.726 H.L.
Foster v. *Driscoll* [1929] 2 K.B. 470 C.A.
Foskett v. McKeown and other [1997] 3 All E.R. 392.
Frankfurt v. *W.L. Exner Ltd.* [1947] Ch. 629.
Gamlen Chemical Co Ltd v. *Rochem Ltd* (1979) unreported.
Gardener v. *Rowe* (1828) 5 Russ. 258; 38 E.R 1024 (L.C.).
Garthwaite v. *Garthwaite* [1964] P.356, 389 (C.A.).
Giles v Perkins (1807) 9 East. 12.
Gladstone v. *Hadwen* (1813) 1 M. & S. 517.
Gold v. *Rosenberg* (1997) 152 D.L.R. (4th) 385.
Golightly v. *Renolds* (1772) Lofft 88; 98 E.R. 47 (K.B.)).
Government of India v. *Taylor* [1955] A.C. 491.
Gower v. *Lloyds and National Provincial Foreign Bank Ltd.* [1938] 1 All E.R. 766.
Greenwood v. *Bennet* [1973] 1 Q.B. 195.
Griffin v. *Weatherby* L.R. 2 Q.B. 753
Gross v. *Lewis Hilman Ltd* [1970] 1 Ch 445.
Guinness v. *Miller* 291 Fed. 768.
Hanson v. *Dixon* (1906) 23 T.L.R. 56.
Harry Parker Ltd. v. *Mason* [1940] 2 K.B. 590.
Haseldine v. *Hosken* 1 K.B. 822.
Healey v. *Healey* [1915] 1 K.B. 938.
Higgs v. *Holiday* (1600) Cro. Elz. 746.
Hirachhand Punamchand v. *Temple* [1911] 2 K.B. 330.
Holland v. *Russel* (1863) 4 B. & S. 14.
Hollins v. *Fowler* (1875) L.R. 7 H.L. 757.
Holman v. *Johnson* (1771) 1 Cowp. 314.
Holt v. *Markham* [1923] 1 K.B. 504.
Hong Kong and Shanghai Banking Corp. v. *United Overseas Bank* [1992] 2 S.L.R. 495.
Howard v. *Jemmett* (1763) 3 Burr. 1368.
Howard v. *Wolf* (1679) 2 Lev. 245.
Howard v. *Wood* (1679) 2 Show. K.B.
Huber v Stiener (1835) 2 Bing. N.C. 202.
Hudson v. *Robinson* (1816) 4 M. & S. 475.
Hydro Electric Company of Nepean v. *Ontario Hydro* [1982] S.C.R. 347.
I.R.C. v. *Duchess of Protland* [1982] Ch. 314.
I.R.C. v. *Lysaght* [1928] A.C. 234 H.L.
ICI v. *Shatwell* [1965] A.C. 565.
Igra v. *Igra* [1951] P.404, 412.
In bonis Raffenel (1863) 2 Sw & Tr 49.

Inwards v. *Baker* [1965] 2 Q.B. 29.
Isreal Discount Bank of New York v. *Hadjipateras* [1984] 1 W.L.R. 137.
James Roscoe (Bolton) Ltd v. *Winder* [1915] 1 Ch 62.
James v. *Isaacs* (1852) 12 C.B. 791.
Kilberg v. *Northeast Airlines Inc* 9 N.Y.2d 34, 172 N.E. 2d.526 (1961).
Kirri Cotton Co. v. *Dewani* [1960] A.C. 191.
Kleinwort, Sons & Co. v. *Dunlop Rubber Co.* (1907) 97 L.T. 263.
Kleinwort Benson Ltd v. *Birmingham City Council (No.2)*; *Kleinwort Benson Ltd* v. *Southwark LBC*; *Kleinwort Benson Ltd* v. *Kensington and Chelsea RLB* [1998] 3 W.L.R. 1095.
Lamb v. *Bunce* (1815) 4 M. & S 275.
Lane v. *Dighton* (1762) Amb. 409.
Levene v. *I.R.C.* [1928] A.C. 217 H.L..
Libyan Arab Bankers' Trust Co [1989] Q.B. 728.
Libyan Arab Foreign Bank v. *Bankers Trust Company*) [1987] 2 FTLR 509.
Liggett v. *Kensington* [1993] 1 N.Z.L.R. 257.
Lipkin Gorman (A Firm) v. *Karpnale Ltd* [1991] 2 A.C. 548; 3 W.L.R. 10 (H.L.).
Liversidge v. *Broadbent* (1859) 4 H. & N. 603.
Lord Chedworth v. Edwards (1802) 8 Ves 46.
Loucks v Standard Oil Co., 224 N.Y. 99.
Lupton v. *White* (1808) 15 Ves. 432.
Lyell v. *Kennedy* (1889) 14 App. Cas. 437.
Mackinnon v. *Donaldson Kufkin and Jenrette Securities Corp* [1986] 1 All E.R. 653.
Macmillan Inc. v. *Bishopgate Investment Trust plc. (No.3)* [1996] 1 All E.R. 585; [1996] 1 W.L.R. 387.
Mahesan v Government Officers Comparative Society Limited [1979] A.C. 374.
Marsh v. *Keating* (1834) 1 Bing. (N.C.) 198.
Marston Construction v Kigass (1989) 15 Construction L.R..
Mason v. *The State of New South Wales* (1958) 102 C.L.R. 108.
Mercedes-Benz v. *Leiduck* [1995] 3 All E.R. 929.
Metal Industries (Salvage) Ltd. v. *Owners of S.T. "Harle, "* 1962 S.T.L. 114.
Michigan Central Railroad v. *State* 155 N.E. 50, 50 Ind. App. 1927.
Miller v. *Rose* (1758) 1 Burr. 452.
Ministry of Defence v. *Ashman* (1993) 66 P. & C.R. 1995, 201.
Moffat v. *Kazana* [1968] 3 All E.R. 271.
Monks v. *Poynice Pyt. Ltd* (1987) 11 A.C.L.R. 637.
Morrison v. *London County and Westminster Bank Ltd.* [1914] 3 K.B. 356.
Moses v Mcferlan (1760) 2 Burr. 1005.
Mostyn v. *Fabrigas* (1774) 1 Cowp 161.
Moynes v. *Coopper* [1956] 1 Q.B. 439; *R.* v. *Davis* [1988] Crim. L.R. 762.
Muschinski v. *Dodds* (1984-1985) 160 C.L.R. 583.
Napier and Ettrick v. *Hunter, Lord Napier and Ettrick* v. *R.F. Kershaw Ltd* [1993] A.C. 713.
National Mercontile Bank v. *Rymill* (1881) 41 L.T. 767.
Neate v Harding (1851) 6 Exch. 349.
Nissan v. *Att.-Gen* [1968] 1 Q.B. 286.
Nissan v. *Att-Gen* [1970] A.C. 179.
Nottingham Permanent Benefits Building Society v. *Thursten* [1903] Ch. 6.

Ogden v. *Folliott* (1790) 3 T.R. 326.
Ogden v. *Ogden* [1908] P.46 (C.A.).
Orakpo v. *Manson Investments Ltd.* [1978] A.C. 95.
Oughton v. *Sepping* (1837) 1 B. & Ad. 241.
Parnham v. *Hurst* (1841) 8 M.& W. 743; 151 E.R. 1239 (Exch. of Pleas).
Paul v. *National Life* 352 NE 2d 550, 533 (1986).
Paynter v. *Williams* (1833) 1 Cr. & M. 810.
Peek v Gurney (1873) 7 L.R. 377, 412.
Pennel v. *Deflell* (1853) 4 D.M. & G 372.
Peter Pan Manufacturing Corporation v. *Corsets Silhouette Ltd.* [1964] 1 W.L.R. 96.
Planche v. *Colburn* (1831) 8 Bing 14.
Plimmer v. *Mayor, & c. of Wellington* (1884) 9 A.C. 699.
Powell v. *Thomson* [1991] 1 N.Z.L.R.. 597.
Procter & Gamble Philippine Manufacturing Corpn v. *Peter Cremer HmbH* [1988] 3 All E.R. 843.
R v. *Bunkall* (1864) Le & Ca 371, 375-6.
R v. *Grant* [1979] 2 N.S.W.L.R. 478.
R v. *Grosman* (1981) 73 CAR 302.
R. v. *Gilks* 1 W.L.R. 1341.
R. v. *Shadrokh-Cigari* [1988] Crim L.R. 465.
Radford v. *Hare* [1971] Ch. 758.
Ramsden v. *Dyson* (1886) L.R. 1 H.L. 83.
Re Bonacina [1912] 2 Ch. 394 C.A..
Re Diplock [1948] Ch. 465.
Re Flynn [1968] 1 All E.R. 49.
Re Goldcorp Exchange Ltd (in Receivership) [1995] 1 A.C. 74.
Re Hallet & Co [1894] 2 Q.B. 237.
Re Kayford [1975] 1 W.L.R. 279.
Re Lloyd Evans [1947] Ch 695.
Re Rhodes (1890) 44 Ch.D. 94.
Re Tilley's W.T. [1976] Ch. 1179.
Reading v. *A-G* [1951] A.C. 507.
Reddaway v. *Banham* [1896] A.C. 199.
Regal (Hasting) Ltd. v. *Gulliver* [1942] 1 All E.R. 378.
Regazzoni v. *K.C. Sethia (1944) Ltd* [1958] A.C. 301 H.L.
Robinson v. *Bland* (1760) 1 Wm B1 234, 2 Burr 1077.
Rover International Ltd. v. *Cannon Film Sales Ltd.* [1989] 1 W.L.R. 912.
Royal Brunei Airlines v Tan [1995] 3 W.L.R. 64.
Ryall v. *Ryall* (1739) 1 Atk. 59.
S.A. de Prayon v. *Koppel* (1933) 77 S.J. 800.
Salford Corporation v. *Lever* [1891] 1 Q.B. 168.
Saul v. *His Creditors,* 5 Martin (N.S.) 569.
Scott v. *Surman* (1742) Willes 400.
Scrimshire v. *Scrimshire* [1752] 2 Hagg. Con. 395.
Seager v. *Copydex Ltd.* (No.2) [1969] 2 All E.R. 718.
Settebello Ltd v. *Banco Totta and Acores*[1985] 1 W.L.R. 1050 (C.A.).
Shah v. *Barnet London Borough Council* [1983] 2 A.C. 309.
Shamia v. *Joory* [1958] 1. Q.B. 448.

Shoolbred v. *Roberts* [1899] 2 Q.B. 560.
Siddel v. *Vickers* (1892) 9 R.P.C. 152.
Simonin v. *Mallac* (186) 2 Sw. & Tr. 67.
Sinclair v. *Brougham* [1914] A.C. 398.
Slade's case (1602) 4 Co. Rep 92a, 1072.
Smith v. *Brown & Cooper* (1706) 2 Salk 666.
Smith v. *Chadwick* (1884) 9 App. Cas. 18.
Smith v. *Land and House Property Corpn* (1884) 28 Ch.D 7.
Societete Anonyme Metallurgique de Prayon v Koppel (1933) 77 S.J. 800.
Space Investments Limited v. *Canadina Imperial Bank of Commerce Trust Co. (Bahamas) Limited* [1986] 3 All E.R. 75.
Spartan Steel and Alloys v. *Martin & Co, (Contractors)* [1973] Q.B. 27.
St. John Shipping Corp v. *Joseph Rank Ltd* [1975] 1 Q.B. 267.
Stevens v. *Head* (1993) 176 C.L.R. 433.
Stonemets v. *Head* (1913) , 248 Missouri Supreme Court Reports 243.
Suffell v. *The Bank of England* (1882) 9 q.b.d. 555.
Taylor v. *Laird* [1856] 25 L.J. Ex. 329.
Taylor v. *Plumer* (1815) 3 M. & S. 562.
Teacher v. *Galder* (1899) SC 5th Series 39.
The Manila [1988] 3 All E.R. 843.
The Trustee of Property of F.C. Jones & Sons (a firm) v. *Jones*, [1997] Ch. 159.
Third Equitable Benifit Building Society v. *Borders* [1941] 2 All E.R. 205.
Tito v Waddell (No.2) [1977] Ch. 106.
Travers v. *Holley* [1953] P. 246, 257 (C.A.).
Trevillian v. *Exeter Corporation* (1854) 5 De G M & S 828.
Union Bank of Australia Ltd. v. *McClintock* [1922] 1 A.C. 240.
United Australian Ltd. v. *Barclays Bank Ltd* [1941] A.C. 1
United States v. *Field* [1976] 532 F.2d 404.
United Mizrahi Bank v. Doherty and others [1998] 2 All E.R. 230.
Upton-on Seven Rural District Council v. *Powell* [1942] 1 All E.R. 220 (C.A.).
US Surgical Corp v. *Hospital Products International* [1983] 2 N.S.W.L.R. 157, 192.
Verrall v. *Great Yarmouth Borough Council* [1981] Q.B. 202.
Vickery v. *Richie* 88 N.E. 835 (Mass 1909).
Weatherby v Banham (1832) 5 C. & P. 228.
Webb v. *Webb* [1991] 1 W.L.R. 1410; [1994] 3 W.L.R. 801.
Westdeutsche Landsbank Girozentrale v. *Islington LBC* [1994] 4 All E.R. 890.
Whicker v. *Hume* (1885) 7 H.L.C. 124.
Whitecomb v. *Jacob* (1710) Salk. 160.
Willmott v. *Barber* (1880) 15 Ch.D. 96.
Winans v. *Att-Gen* [1910] A.C. 27.
Winch v. *Keeley* 1 D & E. 619.
With v. *O' Flannigan* [1936] 1 Ch. 575.
Wookey v. *Pole* (1820) 4 B. & Ald. 1.
Woolwich Equitable Building Society v. *Inland Revenue Commission* [1993] A.C. 70.
X AG v. *A Bank* [1983] 2 All ER 464.

TABLE OF STATUTES.

Bankruptcy Act 1914.
Civil Jurisdiction and Judgements Act 1982.
Civil Jurisdiction and Judgements Act 1991.
Common Law Procedure Act 1854.
Companies Act 1948.
Criminal Justice Act 1993.
Insolvency Act 1986.
Money Laundering Regulations 1993 SI No. 1933.
Statute of Marlborough 1267.
Statute of Pereyers 1350.
Statutum de Moneta 1292.
The Misrepresentation Act 1967.
Theft Act 1968.
Torts (Interference with Goods) Act 1977.

International Agreements.

Brussels Convention on Jurisdiction and Enforcement of Foreign Judgments 1968.
Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1988.

ABSTRACT.

The purpose of this thesis is to identify deficiencies within our system for tracing assets lost as a result of fraud in an international environment and to suggest methods by which they might be remedied. Fraud provides its central theme for several reasons. First, the subject has given rise to a plethora of academic and judicial comment in recent years, whilst generating few universally accepted proposals for improvement or reform. Second, the methods of committing fraud and moving fraudulently obtained assets have recently undergone a sea change, largely as a result of technological, economic and political developments which have reduced the importance of national and geographical borders. Finally, fraud is capable of providing a practical context in which theoretical legal issues, exemplified by the methodologies of tracing and the wider subject of restitution/unjust enrichment, can be examined.

As part of this process, this research considers fraud in a practical and theoretical context, and the changing influences upon it, before investigating how it relates to other areas of law. This is done with the specific intention of determining the practical and theoretical goals to which a system for recovering assets lost to fraud should aspire. It then considers the extent to which our present domestic system for tracing assets adequately meets these challenges. These elements are then placed in the wider context of restitution/unjust enrichment in order to consider the extent to which that developing area of law adequately explains tracing and provides a methodology for its future development. Finally, the research attempts to place these issues into an international context by examining the principles it has identified from a conflict of laws perspective.

The central conclusion of this thesis is that cross-border asset tracing is an intrinsically complex procedure which, as a result of changing political, economic

and technological factors is set to become more problematic in the near future. As a result it is argued that if our system is to remain effective, it must respond to changing circumstances by reference to a logical set of restitutionary principles. In this context the difficulties associated with such an approach are assessed and possible options for development and reform are suggested.

"Fraud affects every single member of the community and threatens the very fabric of society. Falling standards of morality, decency etc. require dramatic improvement. Fraud is inspired by greed and those responsible must be ostracised and made to suffer the consequences" (comment by a respondent to the questionnaire survey conducted as part of this study).

"Exactness may be impossible, but that is not enough to cause the mind to acquiesce in a predestined incoherence"(Cardozo, *The Paradoxes of Legal Science 3*, (1928)).

INTRODUCTION

> "We cannot change what we are, yet we are the sum of the choices we make."[1]

This work seeks to identify deficiencies within our system for tracing assets lost as a result of fraud or mistake.[2] Specifically, it suggests that cross-border asset tracing is an intrinsically complex procedure[3] which, as a result of changing political, economic and technological factors, is set to become more problematic in the near future. Therefore it is argued that if our system is to remain effective, it must respond to changing circumstances by reference to a logical set of restitutionary principles.

In support of the above proposition this paper, and the study upon which it is based examines fraud in a practical and theoretical context, before considering how it relates to other areas of law. It then critically reviews and analyses the rules, mechanisms and techniques by which we allow a plaintiff who has lost an asset due to fraud to gain recompense. Finally, it identifies the principles that should inform our choices in this area and places them into an international context. Some detailed aspects of this subject have generated much comment, whilst others have been relatively ignored.[4] More importantly the area, as a unified and interdependent whole in an international context, has, until recently been largely neglected (or perhaps more correctly, unrecognised).[5] This thesis aims, therefore, to be a synthesis of many diverse areas and is created with the intention of highlighting previously unidentified relationships and interactions within the wider subject. This, it is submitted, is a necessary prerequisite to

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[1] Grant, *Backward*, (1996).

[2] The consequences which flow from fraudulently induced asset transfers and mistaken asset transfers are often commensurate. As a result, reference to fraudulent transfers should be taken to include mistaken transfers unless otherwise stated.

[3] The reasons for this complexity will be examined in detail in the following chapters.

[4] Gutteridge, H.C. and Lipstein, K., "Conflicts of Laws in Matters of Unjustifiable Enrichment", (1941) 7 *Camb. L.J.* 80, 80; Bennett, T.W. "Choice of Law Rules in Claims of Unjust Enrichment" [1990] *I.C.L.Q.* Vol. 39, 139; Kull, A., "Rationalising Restitution" (1995) *California L.R.*, Vol. 83, 1190, 1196; Stevens, R., "The Choice of Law Rules of Restitutionary Obligations", *Restitution and the Conflict of Laws*, Ed. Rose, Mansfield Press, (1995), 180.

the formulation of a unified and structured approach to the recovery of assets lost to fraud. Given the nature of this task, an introduction that briefly identifies the parameters, principles and aims which inform the present study may be of value.[6]

Fraud, and the questions which relate to it, provide the central focus of this work for three primary reasons. First, fraud is an intrinsically important subject for any legal system: it has been estimated that reported serious fraud cases resulted in over £2 billion worth of losses in this country during the period 1992 to 1995.[7] It will be argued in Chapter Two that, in all probability, actual levels of fraud far exceed these figures.[8] Moreover, the effect of serious fraud can go beyond its reported, or even actual, value. Thus, for example, it has been suggested that the level of fraud in certain developing countries has resulted in a reduction in external investment and government aid.[9] Equally, the publicity surrounding a relatively small amount of fraud on the Internet has proved to be a large obstacle to the creation of new forms of electronic commerce.[10]

Second, the modern fraudster has proved particularly adept at exploiting changing economic, political and technological circumstances. As a result, fraudulent activity is often an exemplar of the problems which can be created by trans-national litigation. This, combined with the wide range of circumstances from which it can arise, potentially provides a useful model for the changes which other areas of law are likely to experience in the short to medium term.[11]

Finally, and perhaps most importantly, fraud litigation can act as a "litmus test" or "worst case" scenario against which the effectiveness of a range of legal techniques can

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[5] Thus, for example, the mechanisms which trigger the imposition of a constructive trust have been well considered. However, the importance of how we characterise the constructive trust in an international context is less well documented.

[6] This process will inevitably involve some overlap with what is to follow, but is a necessary precursor to an understanding of the present study's goals.

[7] KPMG, *Fighting Fraud*, Issue 5, Summer (1996).

[8] Indeed, KPMG say of their own statistics, "In view of the limited size of our sample and the reluctance or inability of many respondents to quantify their losses from fraud, this could be regarded as the tip of the international fraud iceberg." : *op. cit.* at page 1.

[9] *The Times*, 21 July 1995.

[10] "Criminals Slipping Through the Net", *The Daily Telegraph*, 5 November 1996.

[11] For example, increases in litigation with a foreign element.

be tested. The judiciary have resolutely refused to define fraud, in the belief that no workable definition could encompass the extremely wide range of circumstances which can give rise to litigation in this area.[12] Equally, there is no predetermined method for bringing civil actions arising out of fraud. As a result, a wide range of circumstances can trigger a commensurate array of legal methodologies. Moreover, many (if not all) of these civil techniques have been claimed by the "unjust enrichment theorists" to be part of the law of restitution. As a result, much of this area is in a state of flux. Further, it will be argued that restitution's international aspects have been severely neglected by both the courts and academia. The result of these converging factors is that the response to fraud could form a paradigm against which the arguments surrounding the future development of restitution, unjust enrichment, constructive trusts, tracing and a wide range of other areas can be tested. In other words, a system that can logically and justly satisfy the requirements of litigation arising from international fraud will also necessarily meet the demands of other important aspects of our domestic and international systems.[13]

The task of this study is therefore to consider the structural environment within which our civil system for settling disputes arising out of fraud operates; to identify the outcomes we expect it to deliver; to consider the extent to which these aims are presently satisfied; and to highlight the difficulties that the changing world environment is likely to cause. During the course of this discussion it will be argued that, to a greater or lesser extent, many of our legal techniques are outdated, inefficient, internally illogical, ill-defined and widely misunderstood. This being the case, the goals which our current system sets for itself can only be further compromised by the increasing internationalisation of trade in general and litigation in particular. As a result, a number of possible reforms will be propounded both with regard to narrow technical details and broader areas of policy.

In attempting to achieve these aims, the present research concentrates on two specific approaches. First, an examination, review and critique of the academic research

[12] *Stonemets* v. *Head* (1913), 248 Missouri Supreme Court Reports, 243.

currently available in this area. This is, as we have noted, an exercise in identifying hitherto unrecognised relationships and bringing together a wide range of differing subjects and materials, as no comprehensive exposition of this subject has ever been published by an English author.[14]

The second element of the research was directed at the victims of commercial crime, and consists of one of the most comprehensive questionnaire surveys ever aimed at discovering the level and nature of fraud against British companies.[15] It was intended to highlight a number of areas. First, it attempted to create a picture of the volume and value of commercial fraud in the United Kingdom. Second, it examined the changing perceptions of fraud. Finally, it considered how the business community responds to serious fraud, its priorities in the face of fraudulent activity and what it expects from the civil justice system.

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[13] For example, any system which logically recompenses the victims of complex organised and hidden fraud should *a fortiori* provide a logical solution to tracing the result of innocent mistake.

[14] This apparent neglect is a function of four coinciding factors. First, as already noted, although fraud has long been an international activity, until recently the trans-national aspects of the area were relatively unsubtle. However, political, social, economic and technological changes mean that this is no longer the case. It is now possible for every operative aspect of a fraudulent transaction to take place in different countries under the guidance of individuals in third-party states, with the proceeds being moved around the world instantaneously. The potential consequences of such activities, and the problems associated with applying rules developed in simpler times, are only now becoming fully apparent. The second factor leading to the relatively low profile-nature of this area is the novel character of restitution as a recognised subject. Although restitution in the form of quasi-contract can be traced back over several centuries, it is only recently that it has been acknowledged as a subject in its own right. Indeed, we can probably trace this directly to the publication of the seminal work of Goff and Jones in 1966. Much of the intervening period has been filled by a discussion of the core concepts of the subject. Moreover, the courts have only recently (and still controversially) started to give recognition to restitution/unjust enrichment. It is not surprising, therefore, that the more peripheral areas are yet to be fully explored. The central issues in the present study represent just such an area. The third reason is the relatively undeveloped nature of the conflict of laws in common-law systems when compared with other subjects (see, for example, the *Restatement of the Conflict of Laws* (1934), pp. xii-xiv, "...instruction in [the conflict of laws] has been far from universal and there has been no general long-continued critical study of the subject as has been given to Contract, Property and other principal subjects of the common law. Due to this pedagogical neglect the courts, confronted with questions of Conflict of Laws, have not, in many cases, brought to their solution an adequate background knowledge."; see also Blaikie, J. "Unjust Enrichment in the Conflict of laws" [1984] J.R. 112.) The fourth and final reason is the wide range of subjects such a study necessarily involves. In a domestic context it is entirely possible for the scholar to remain oblivious to the wider international implications. In the same way those involved with, for example, tracing, can (and still do) examine it in isolation from restitution. As one commentator points out, for example, many of the problems in this area are, "...primarily an incident of equity scholars' past neglect of obligations.": Barnard, L., "Choice of Law in Equitable Wrongs: A Comparative Analysis" [1992] *C.L.J.* November, 474.

[15] See, for comparison, Ernst & Young, *Fraud: the Unmanaged Risk*, (1995); KPMG, *Fighting Fraud*, Summer, (1996).

The written element of this research is structured in a way intended to provide a logical path while reflecting a practical litigation-based approach to fraud.[16] The first two chapters primarily aim to prove the proposition that tracing, as a result of fraud, is an intrinsically complex process. Chapter One therefore begins with a consideration of the legal difficulties associated with fraudulent activity, concentrating on its theoretical and practical nature and the factors which, it is argued, make fraud a unique cause of action.[17] It then moves on to examine the environment in which fraud is conducted with specific reference to the changing banking techniques and technological developments which have created both novel ways of committing fraud and, of equal import with regard to the present study, innovative ways of moving assets around the world which are both anonymous and private.[18]

Chapter Two continues the process of placing fraud into a wider context whilst demonstrating the problems associated with tracing. It does so by further examining its practical characteristics. Thus it begins with an investigation of the statistical information available concerning fraud in this country and abroad before analysing the questionnaire survey conducted as part of this study. This process is undertaken to ensure that the questions of principle discussed in this paper remain firmly related to the reality of practical disputes. The ultimate aim of the opening chapters is to develop

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[16] In this context Descarte's advice was constantly borne in mind: "The first rule was never to accept anything as true if I did not have evident knowledge of its truth: that is, carefully to avoid precipitate conclusions and preconceptions, and to include nothing more in my judgements than what presented itself to my mind so clearly and so distinctly that I had no occasion to call it into doubt. The second, to divide each of the difficulties I examined into as many parts as possible and as many as required in order to resolve them better. The third, to direct my thoughts in an orderly manner, by beginning with the simplest and most easily known objects in order to ascend little by little, step by step, to knowledge of the most complex...": Descartes, *Discourses, Philosophical Writings of Descartes*, (translated by Cottingham, Murdoch and Stoothoff), 120.

[17] These are numerous and complex but notably include the following elements:

I. The perpetrator will almost certainly have attempted to hide all aspects of his activities from their inception.

II. The judiciary have been unwilling to define fraud, thus ensuring that a wide range of factual situations can give rise to an unprecedented number of differing actions, remedies and judicial techniques (*Reddaway* v. *Banham* [1896] A.C. 199, 221).

III. Parties involved in a wide range of litigation, from product liability to air transport disasters, attempt to exploit jurisdictional and conflict of law questions in order to give rise to substantive or procedural advantages. However, fraud also gives the potential defendant ample opportunity to take part in pre-emptive as well as *ex post facto* forum shopping.

[18] This pays particular attention to new banking technology (notably the new media of "electronic cash": See Hutton, I.W. "Electronic Cash Welcome to the Future", *New Law Journal*, December 8 1995), computer fraud and the importance of the Internet (and other computer networks).

a methodology which can be used to test the propositions arising during the remainder of the study.[19]

Chapter Three moves from the fact of fraud, to the civil law's response to it. The plaintiff who has been the victim of fraud will want to achieve a number of aims. Most notably he will wish to identify the relevant assets (whether or not in the hands of the original fraudster) and establish his right to bring an action against them. He may also wish to fix the fraudster with the necessary liability to bring a personal action and, potentially, identify third parties, preferably with deep pockets (usually banks), who have dealt with the relevant assets in a manner which creates liability. These tactical aspects of his approach will be employed within the general strategic aim of bringing the legal action most likely to effect the speedy and efficient recovery of his assets or their value (potentially including any profit derived therefrom). [20]

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[19] The purpose of this Chapter is to lay the foundations necessary to allow a consideration of what issues of principle should inform the decisions of the judiciary and the legislature when considering novel situations, conflicting authorities and possible reforms in this area. It will then examine to what extent these elements can, and should, be modified by policy considerations. Its purpose is to define the principles to which an ideal civil response to fraud should aspire before attempting to construct a working model based upon these principles. This is, of course, intended only to identify basic goals: an ideal civil system could not hope to work in a less than perfect world. Bearing this caveat in mind, the Chapter attempts to ask the "skeletal" question, "what do we want our system to achieve?" At a basic level we might answer this by suggesting that the rules should allow the victim of fraud to obtain a just settlement against the perpetrator. If we refine this proposition slightly we can derive three basic requirements which our system should satisfy. Specifically:

I. It should allow the victim of fraud to identify his assets.
II. It should allow the victim of fraud to recover his assets where they are identifiable.
III. It should (where the assets are not identifiable) allow the victim to bring a personal action against those who have dealt with his assets in a way in which society believes should give rise to liability.

These building blocks are therefore to be taken as a starting point before asking:

a) What other elements would need to be incorporated within a logical system?
b) How do these simple principles need to be modified to cope with the detail and complexity of modern fraud?
c) What rules would need to be implemented in order to give legal form to these principles?

The model thus suggested would, of course, still be far removed from a system which would solve problems in the real world. It attempts to take cognisance of the values of society, but fails to recognise that such values are potentially multitudinous, difficult to define, prone to change and often conflicting. In recognition of this it is, therefore, necessary to examine what issues of policy should be included in any model: i.e. what limitations are we willing to place upon pure principle in recognition of practicality? These questions are potentially extremely complex but might include, for example, "are we willing to seek justice at any cost, or is expense a factor?"; "how are the plaintiff's rights to be balanced against the rights of the alleged perpetrator?"; "how are the plaintiff's rights to be balanced against the rights of third parties?"; "how should the treatment of innocent third parties differ from those who are culpable?"; "how are we to define culpability?"; "how are rights to be prioritised when more than one party has an interest in an asset?"; "to what extent are we willing to see national sovereignty sacrificed to the conflict of law process?"; "to what extent are we willing to see the desire for certainty override the needs of justice in a particular case?" The chapter therefore moves from the reality of fraud in the 1990s, to the goals we should apply to it, to the consideration of a system capable of working in practice but hopefully free from many of the problems associated with modern English law. In doing so it attempts to define a benchmark, which takes into consideration both the requirements of principle and the constraints of practicality, against which the effectiveness of our present system (and any proposed reforms) can be measured.

[20] Unfortunately these relatively simple requirements must be achieved within an area of law which is beset by numerous linguistic, conceptual and practical anomalies. Indeed Birks' suggestion (Birks, "The English

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Thus, this chapter concentrates on what might be described as the litigator's "front line weaponry" for achieving both these goals in the wider context of the aims encountered in Chapter Two. Its purpose is, therefore, to examine the actions, techniques and remedies open to the victims of fraud; to consider the interrelationships between them; to identify any internal and external illogicalities[21] which they may create; and to consider the extent to which these legal elements combine to satisfy the requirements of the victims of fraud and society as identified in Chapter Two.

At one time these techniques could have been examined in isolation or with some reference to the laws of property, tort, equity, contract or obligations. The rise of unjust enrichment theory following the publication of Goff & Jones' *The Law of Restitution* in 1966 has ensured that this is no longer the case. To a greater or lesser extent almost all of the legal elements that might be employed by the victims of fraud are, according to some commentators, best categorised as constituents of the law of restitution.[22] The direct effect of such a classification on the domestic use of these techniques, and the potential ancillary influences with regard to the conflict of laws, makes restitution an important aspect of the present study. As a result, Chapter Four considers the precepts which should underpin our categorisation of legal subjects. It then considers the structure of modern restitution as understood by the law of England before discussing the many difficulties concerning its details, boundaries, content and relationships with other subjects. It has been argued that we presently have a window of opportunity in which to determine how we wish to see restitution/unjust enrichment

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Recognition of Unjust Enrichment," 1993 *L.M.C.L.Q.*, 473) that, "Historically the law of restitution has been so effectively concealed by clouds of impenetrable language that its very existence has been debatable..." could easily be applied to the entire area. Thus, for example, even with regard to established subjects like tracing it is possible for Goode to state, "Despite the copious amount of literature devoted to the right to follow property and its proceeds at law and in equity, it is surprising how many underlying problems remain unresolved... In addition, the relevance of the topic as a whole to commercial and financial transactions has largely been ignored.": Goode, "The Right to Trace and Its Impact in Commercial Transactions - I" [1976] *L.Q.R.*. July, Vol. 92, page 360.

[21] By way of example, we might consider a case in which the perpetrator of a fraud gives the proceeds to a charity which then passes them on to the needy. Assuming the proceeds were transferred in the form of cash, the plaintiff could bring an action for money had and received, in which case the charity would claim the defence of change of position. If, however, the proceeds were in the form of a banker's draft, the plaintiff could bring an action in conversion to which no such defence applies. To base rights on the action used rather than principle is clearly inconsistent and potentially unjust: S. "Misdirected Funds: Problems of Uncertainty and Inconsistency" (1994) 57 *M.L.R.* 38.

[22] Birks, *An Introduction to the Law of Restitution*, Oxford, (1985).

develop or even, perhaps, to reject it completely.[23] If this choice is available domestically then, clearly, it is also available with regard to conflict of law cases.[24] The underlying purpose of this Chapter is, therefore, to determine whether restitution provides a more logical framework in which to understand tracing than other, more traditional, approaches. Ultimately Chapter Four suggests that many of the domestic problems associated with tracing may be solved by more closely embracing restitution/unjust enrichment.

However, in the modern trans-national environment a purely domestic solution is not enough. This belief is based on a simple, and it will be argued self-evident, proposition: specifically, that as a result of political, social and technological changes, commerce and economics are becoming increasingly internationalised. This can be seen in a range of recent developments[25] and has led some commentators to suggest that we are witnessing the demise of the nation state.[26] Whether or not this is the case, there is little doubt that it is now easier than ever for both legitimate businesses and criminals to operate internationally and that fraudsters have been quick to exploit these possibilities. As a result, asset tracing and restitution are subjects which cannot be examined in a purely domestic context. Therefore, the final two chapters of this study consider the extent to which restitution is susceptible to logical and just application in cases with a foreign element. Specifically, Chapter Five examines the principles which motivate our courts to take cognisance of the rules of other jurisdictions and the importance of characterisation in the context of restitutionary disputes. Categorisation is a fundamental aspect of all legal reasoning. However, it is often viewed as an

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[23] "At one extreme the very concept could be eschewed: we could (as lawyers once did) describe restitutionary liabilities without mentioning it, and rigorously avoid the words "unjust" and "enrichment"... At the other extreme, we could refer *everything* to it: we could maintain that all restitutionary liabilities must be justified by some conception of "unjust enrichment" and that any case which does not fit is either wrong or part of some other branch of law. The question is where between the extremes to place ourselves": Hedley, "Unjust Enrichment" 54(3) *C.L.J.*, 578, 585.

[24] It will be argued in Chapter Five that little conclusive authority exists in this area.

[25] For example, the general removal of exchange controls, the single European market and currency, and the North American Free Trade Zone.

[26] See generally, Toffler, A., *The Third Wave*, London, (1980); Ohmae, K., "Trade Barriers" *New York Times*, 17 April, 1983; Ohmae, K., *Beyond National Borders*, New York, (1988); Porter, M., *The Competitive Advantage of Nations*, New York (1990); "Toward a Global Regionalism" *Wall Street Journal*, 27 April, 1990; "Life in a Borderless Greenback Empire" *New York Times*, 29 April, (1990); Ohmae, K., *The Borderless World*, New York, (1990); Huntingdon, S., "The Clash of Civilisations" *Foreign Affairs*, Summer, 1993; Stock, G., *Metaman*, London, (1993); Saxenian, A., *Regional Advantage: Culture and Competition in Silicon Valley and Route 128*, Footnote Continues on Next Page:

analytical tool with little or no substantive meaning. It will be argued that this position is overly simplistic, not only with regard to international disputes but also in exclusively domestic cases.[27] Upon this basis, a number of recommendations are made with regard to characterisation of both the general and specific elements of the law of restitution.

The final chapter considers the various methodologies that a legal system can adopt in order to identify the most appropriate law to apply in restitutionary disputes. It compares the principles and aims identified in the previous chapters with those to which a conflict of laws system should aspire. It then critically examines the rules presently in use by our courts and suggests ways in which they might be refined and improved.

In summary, this study is intended to provide a comprehensive review of the techniques, actions and remedies available to the victims of fraud before an English

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Harvard University Press, (1994); Ohmae, K, *The End of the Nation State: The Rise of Regional Economics*, London, (1995).

[27] Chapter Five of this study will consider characterisation in a conflict of laws context. Characterisation is the means by which we decide what area of law a problem, set of circumstances or legal element is most closely connected with. As such its importance expands beyond the confines of the conflict of laws, indeed, it can be seen as the fundamental legal tool. The first act of any lawyer when faced with a set of circumstances is to begin the characterisation process: "is this injury aboard a train best litigated with regard to the train operator's negligence or his breach of contract?"; "is this question one of English or foreign law?; is the problem before me of a procedural or substantive nature?" In an academic sense, characterisation or classification can, broadly speaking, be used in two ways. First, we can place things into groups because they resemble each other: i.e. they share certain characteristics. Second, we can place them into categories because we believe they *should* share certain characteristics. The first method, in theory, involves an abstract grouping which should leave the various elements unchanged. The second, on the other hand, suggests that any element placed within a category should take on the moral precepts of the group. However, the line is not this clear. By putting an element into a category by description (i.e. the first method) we still potentially change its nature both because of the categorisation itself and the connotation we apply to the language associated with that category (see generally, Dummet, M., *Frege: Philosophy of Language*, 2nd ed., London (1981); McCulloch, *The Game of the Name: Logic, Language and the Mind*, Oxford (1989); Moravcsik, J.M., *Thought and Language*, London (1990); Moore, A.W. (Ed.), *Meaning and Reference*, Oxford (1993)). It is submitted that the present study will demonstrate that certain commentators (and to some extent the judiciary) have indulged in legal characterisation at a less than sophisticated level. This is partly a function of familiarity breeding contempt: the process of explicit and implicit characterisation is so common, not only in law and rational thinking, but in all aspects of human life that we often fail to notice or acknowledge its existence. Moreover, even those who explicitly employ characterisation as a tool in their work rarely subject it to the intellectual rigour it requires. Thus commentators on restitution often claim that the elements of their choice are best characterised as restitutionary as opposed to property, obligation, or whatever grouping they traditionally belong to. But such comments are rarely fleshed out to explain whether they are discussing characterisation in the descriptive or prescriptive form, or what criteria they are using. "The relevant element is more like other restitutionary rules or remedies than those with which it was traditionally associated" is a common claim of the restitutionary lawyers. But such an approach is at best incomplete and at worst misleading. It fails to prioritise categorisation and pays only lip service as to why we are indulging in the process at all. We create legal groupings not only because they contain similar rules but in order to most satisfactorily
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civil court, with specific regard to cases containing an international element. It attempts to identify the questions of policy and principle which the system should aim to uphold and the circumstances in which we are willing to derogate from those ideals.

It might be suggested that meaningful international progress in this area is too difficult to achieve and national action in isolation is necessarily ineffective.[28] It is suggested that this is an unnecessarily negative attitude, particularly when considering the potential effect of domestic changes to English law. London is, arguably, the largest financial market in the world[29] however, as one commentator noted, following a number of frauds during the 1980s:

> "Perhaps the most interesting aspect of these kinds of discoveries, however, was the lesson they provided on how attractive a centre London was for the international fraudster. The United Kingdom has lagged behind many countries in agreeing to mutual assistance treaties to facilitate the collection of evidence overseas, the interviewing of witnesses and the capture of criminals. The lack of exchange controls and the regulations on setting up a business are fundamental to its attractions. And then there is the fact that it is a major centre of finance, trade and shipping, which means that being based there gives a fraudster a higher level of credability all important in the game of international fraud."[30]

This attraction is little changed today and is unlikely to be marred by the recent highly publicised failures of the Serious Fraud Office and regulatory authorities. However, properly constituted, the civil law can provide a powerful weapon in the fight against international fraud. Unfortunately, to date, the approach of academics and the judiciary has been piecemeal and compartmentalised with little reference to the wider implications of their pronouncements. Changing circumstances, and in particular the internationalisation of economics, commerce and technology, will ensure that this

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achieve certain goals which we believe to be socially, economically or jurisprudentially desirable. Failure to appreciate this leads to results akin to calling a dolphin a fish because it lives in the sea.

[28] See, for example, Jones, H., "International Judicial Assistance: Procedural Chaos and a Program for Reform" (1953), *Yale L.J.* Vol. 62, Number 4, 515; Aitkin, "Transnational Bank Fraud," 68 *A.L.J.*, 790; Collins, "The Hague Evidence Convention and Discovery: A Serious Misunderstanding?" *I.C.L.Q.*, Vol.35, October 1986, 764.

[29] Thus in 1995 London had 520 banks; 170 foreign securities houses; £300 billion of foreign exchange was traded every day; 90% of the European trade in international equities was traded through London as was 17% of the global trade in derivatives and 60% of the primary market in international bonds: City of London Police, *Financial Fact Sheet*, (1995).

[30] Walter, H. *op. cit.* at page 119.

approach cannot be maintained: future legal developments must be undertaken with a full understanding of the wider environment in which they occur. It is the author's hope that the present study will identify the principles which should underpin our understanding of this process in a way which will facilitate the provision of a logical civil response to shifting patterns of fraudulently obtained assets.

CHAPTER ONE: MODERN FRAUD: ITS NATURE, ENVIRONMENT AND INFLUENCES.[1]

1: INTRODUCTION.

> "The Lilliputians look upon fraud as a greater crime than theft. For, they allege, care and vigilance, with very common understanding, can protect a man's goods from thieves, but honesty hath no fence against superior cunning."[2]

The genesis of fraud can no doubt be traced to the very beginnings of human trade and commerce: early civilisations criminalised fraudulent acts, and in this country laws designed to combat counterfeiting and forgery were enacted as far back as 1292.[3] However, this long history does not prevent fraud representing "...the *modern* crime *par excellence*"[4]: statistics suggest that over the last twenty years few crimes (whether measured by reported incidents, convictions or value[5]) have risen as quickly as fraud. This statistical growth has, arguably, combined with continuing media interest in a number of high profile cases[6] to also increase the perceived seriousness with which the public views fraud.[7]

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[1] During the course of this paper the following abbreviations will apply: Birks, *An Introduction to the Law of Restitution*, Oxford, (1985) will hereafter be known as Birks, *Introduction*; Burrows, *The Law of Restitution*, London, (1993) will hereafter be known as Burrows, *Restitution*; Smith, *The Law of Tracing*, Oxford (1997) will hereafter be known as Smith; Goff and Jones, *The Law of Restitution*, London, 4th ed., (1993) will hereafter be known as Goff & Jones; Matthews, P. "The Legal and Moral Limits of Common Law Tracing," *Pressing Problems in the Law*, S.P.T.L. Seminars (1994) will hereafter be referred to as "Matthews, P., "The legal and Moral Limits..."; Matthews, P., "Tracing the Proceeds of Fraud", *Pressing problems in the Law*, S.P.T.L. Seminars, 1994 will hereafter be referred to as "Matthews, P., "Tracing..."

[2] Jonathan Swift, *Gulliver's Travels.*

[3] Statutum de Moneta 1292; Statute of Pereyers 1350; Levi, M. *Regulating Fraud*, London (1987), 1.

[4] Levi, M. *Regulating Fraud*, London (1987), 1.

[5] The Royal Commission on Criminal Justice, *The Investigation, Prosecution, and Trial of Serious Fraud*, Research Study No. 14 (1993); KPMG, *Fraud Report*, (1995); Coopers & Lybrand, *Fraudstop*, (1995); KPMG, *Police Chief's Survey*, (1995); KPMG, *Fighting Fraud*, Sumner, (1996); Ernst & Young, *Fraud: The Unmanaged Risk*, (1996); KPMG, *Fraud Report*, (1995).

[6] Blue Arrow, Guinness, Maxwell, etc. See for example, Behar, R., "Skimming the Cream." *Time Magazine*, 2 August, (1992), 49; Smolowe, J., "Healthy, Wealthy and Fraudulent." *Time Magazine*, 30 August, (1993), 24; "Break in the B.C.C.I. Probe." *Time Magazine*, 24 January, (1994), 21; McLeod, J, "New Surge in Fraud" (1994) *The Gazette* 21 September, *3*; "SFO Boss to Quit After Trial Fiasco" *Sunday Times*, 21 January, 1995; Gillard and Woolf, "SFO Call Halts Over Maxwell, *The Observer*, 21 January, 1995; Ashworth, J., "Former Advisor to Asil Nadir Denies Laundering Money" *The Times*, 13 March, 1996; Marckus, M., *Countdown to Crisis: Last Days of Maxwell's Empire*, Part Two, *The Times*, 21 January, 1996; Farrelly, P., "US Fraud Actions Hit Lloyd's" *The Financial Times*, 21 January, 1996; Routledge, Ball, *et al.*, "Fraud Cases May be Tried Without Juries" *The Independent*, 21 January, 1996; Owen, R, "Olivetti Chief Fails in Bid to Overturn Fraud Conviction" *The Times*, 11 June, 1996.

[7] The Royal Commission on Criminal Justice, Research Study No. 14, *op. cit* at page 9: "One of the significant changes brought about by the Serious Fraud Office has been to bring an area of formerly private commercial misconduct - or areas that, where known about, were public only in the sense of being dealt with

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In order to view the increases in reported large-scale fraud in context, it must be borne in mind that a range of commercial considerations may militate against reporting and, as a result, many serious frauds may never come to the attention of the criminal authorities.[8] Thus, for example, the institution of criminal proceedings inevitably entails publicising the existence of the fraud. Such publicity can not only embarrass the company's management but can also damage its public image, internal morale and share price.[9] Beyond this, the company may be reluctant to bring to the public forum details of a fraud which are, perhaps, unclear and might be repeatable in certain circumstances. Anecdotal evidence also suggests that many organisations are reluctant to pass "control" of an investigation to a criminal authority which may be less well financed and organised than internal or, private external, investigators.[10] Moreover, by their nature the police will be concerned with bringing a criminal prosecution rather than recovering the relevant assets or enhancing the organisation's priorities. While subsequent civil proceedings could have a similar outcome, they will be conducted within a more controllable environment, both with regard to time scale and methodology. As a result, many large frauds may never come to the attention of the criminal authorities.

However, despite these changing statistical and perceptional trends, both criminologists and sociologists have expressed surprise and concern at the limited amount of research into the criminal aspects of fraud within the English system.[11] It is, perhaps, arguable whether this neglect is a cause or symptom of the apparent marginalisation of the criminal law in this area. There is little doubt that recent well

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by insolvency practitioners or by securities and banking regulators - into the area of the criminal courts and, thereby, into greater public visibility and debate." Thus we might compare the present public attitude with that described by Sutherland in 1945, who said, "...the public...does not think of the businessman as a criminal; the businessman does not fit the stereotype of 'criminal'": Sutherland, "Is White-Collar Crime, Crime?" *American Sociological Review*, 10, 224.

[8] "Most authorities believe that only a very small fraction of all white-collar crimes actually come to the attention of the police. Either the crime goes undetected, as in the case of a kickback, or the company itself covers up the crime because it fears that damage done to its reputation is not worth any possible benefit of prosecuting the offender.": O'Block, Donnermeyer, Doeren, *Security and Crime Prevention*, 2nd. ed., (1991), 219.

[9] Tendler, S. "Companies 'Hide' Fraud Losses from Shareholders" *The Times*, 7 November, 1995.

[10] For a general discussion of some of these issues see, Geering, I., "Key Issues in The Conduct of A Large Fraud Case", EuroForum Conference on Bank Fraud, (1995)

publicised failures by the Serious Fraud Office[12] and other criminal agencies have led to a growing lack of public confidence in their ability to adequately meet the challenge which modern fraud presents. The problem has been exacerbated by the difficulties which intrinsically face national criminal authorities when attempting to counter an increasingly international crime,[13] suggestions that juries are no-longer able to effectively determine the issues involved in serious fraud trials[14] and an apparent belief that even where convictions are achieved, prevailing sentencing policy fails to provide an acceptable deterrent or punishment.[15] Moreover, the empirical evidence presented in the following chapter suggests that the public's concern regarding the effectiveness of the criminal response to fraud is shared by its corporate victims.

Whether or not the perceived failings in the criminal system are justified, there is little doubt that many victims and commentators see the civil law as an increasingly important weapon in the fight against fraud. As Matthews notes: "If fraud is the scourge of the nineties, then tracing is the solution."[16] It is therefore particularly surprising that the academic neglect of the criminal law is mirrored, and perhaps exceeded, when one examines the English system's civil rules: the first attempt at a comprehensive study of the civil law's response to fraudulent activity in this country was published in 1997.[17] Moreover, as we shall see in chapters Five and Six, academic comment in this area has rarely raised its eyes to the wider international aspects of the subject. [18]

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[11] Levi, M. *op. cit.*.

[12] See for example, "SFO Chief Stands by Team's Record" *The Sunday Telegraph*, 21 January, 1996; Hosking, P., "I'm Not Resigning, Insists SFO Director" *The Independent*, 21 January, 1996; Tyerman, "Other Charges 'To be Dropped'" *The Sunday Telegraph*, 21 January, 1996; Gillard, M, "Flawed Squad" *The Observer* 21 January, 1996.

[13] Walter, H., *Secret Money*, London (1989).

[14] Elliot & Wastell, "Change to Law Will Reveal Jury Secrets" *The Sunday Telegraph*, 21 January, (1996); Routledge, Ball, *et al*, "Fraud Cases May be Tried Without Juries" *The Independent*, January 21, (1996).

[15] See Chapter Two.

[16] Matthews, P., "Tracing the Proceeds of Fraud", *op. cit.* at page 34.

[17] Ash & Rider (Eds.), *International Tracing of Assets*, (1997).

[18] Indeed, it might be argued that this subject, which contains many restitutionary influences, is arguably in a similar position to restitution itself in 1985 when Birks said, "In this essential work of critical simplification, not all subjects need the same balance between criticism and description. One may have a long-accepted outline and may need nothing so much as to have it challenged and brought into question. Another may lack an agreed framework, and, standing in danger of being unintelligible, may chiefly need description rather than criticism." Birks, *Introduction*, Oxford, (1985), 1.

This paper's thesis begins with the proposition that tracing following fraud is an intrinsically complex process. This chapter initiates the process of proving this proposition by examining the complexities associated with the fraud which will inevitably have a consequential influence upon tracing. Specifically, it lays the foundations for the following chapters by considering the legal aspects of fraud, its nature and the technological, economic and social factors which will influence it.

1.1: THE LEGAL NATURE OF FRAUD.

The methods by which fraud can be committed are numerous and varied. As Lord MacNaghten once noted:

> "...Fraud is infinite in variety; sometimes it is audacious and unblushing; sometimes it pays a sort of homage to virtue, and then it is modest and retiring; it would be honesty itself if it could only afford it. But fraud is fraud all the same..."[19]

As a result the courts have been extremely careful not to limit their powers or jurisdiction by creating narrow definitions.[20] However, whilst such a definition may be both undesirable and difficult to derive, it is possible to discern a number of propositions from fraudulent misrepresentation,[21] which are potentially informative in the wider context of the present study.[22] The paradigm case of fraudulent misrepresentation[23] will see the plaintiff suffering a loss[24] as a result of a mistake, which will normally have been induced by some form of dishonesty on the part of the defendant. Thus, the plaintiff will normally need to demonstrate that he suffered damage as a result of acting upon a dishonest representation made to him by the

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[19] *Reddaway* v. *Banham* [1896] A.C. 199, 221.

[20] As Lamm, J. memorably said, "Fraud is kaleidoscopic, infinite. Fraud being infinite and taking on protean form at will, were courts to cramp themselves by defining it with hard and fast definition, their jurisdiction would be cunningly circumvented at once by new schemes beyond the definition. Messieurs, the fraud-feasors, would like nothing half so well as for the courts to say they would go thus far and no further in its pursuit. Accordingly definitions of fraud are of set purpose left general and flexible, and thereto courts match their astuteness against the versatile inventions of fraud-doers.": *Stonemets* v. *Head* (1913) , 248 Missouri Supreme Court Reports 243.

[21] See also section 2(1) of the Misrepresentation Act (1967).

[22] Indeed it has been said that, "'Actual fraud' is taken by some to be synonymous with 'fraudulent misrepresentation.'": Sheridan, *Fraud in Equity*, (1952). However, "'Fraud' is not restricted to straightforward deceit but includes all forms of fraud and dishonesty, 'fraudulent breach of trust, fraudulent conspiracy, trickery and sham contrivances." *Crescent Farm Sports* v. *Sterling Offices* [1972] Ch. 553, 565, *per*, Goff. L.J.

[23] And any other action arising from fraud. It should also be noted that remedies are available for other forms of misrepresentation: see *Headley Byrne & Co. Ltd. v Heller & Partners Ltd.* [1963] 2 All E.R. 575, H.L. with regard to negligent misstatements.

[24] Thus, for example, "For servants during their employment and in breach of their contractual duty of fidelity to their master to engage in a scheme secretly using the master's time and money to take the master's customers and employees and make profit from them in a competing business built up to receive them on leaving the master's service, I would have thought that commercial men and lawyers would say that that is fraud.": *Gamlen Chemical Co. Ltd* v. *Rochem Ltd* (1979) unreported, *per*, Goulding J; Hunter, R.. "A Bank's Guide to Common Law Liability for Fraud" *Bank Fraud*, EuroForum Conference, (1995).

defendant.[25] Clearly central to these requirements is the element of dishonesty.[26] However, this can also be the most difficult factor to identify. As a result, the mental components of fraud have generally been defined in terms of knowledge or constructive knowledge of a set of circumstances. What is certain, is that for the purposes of misrepresentation an intentional[27] statement will be dishonest when it is made by a representor who knows it to be untrue[28] or is reckless as to its truth.[29] The question of honesty is to be judged, not with regard to the representor's understanding of it, but objectively[30] with regard to the effect he intended it to have:

> "The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual. If a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour. In most situations there is little difficulty in identifying how an honest person would behave. Honest people do not intentionally deceive others to their detriment..."[31]

This is a worthy statement of principle and one which when, applied to straightforward situations, provides a logical definition of dishonesty. However, as we will see in Chapter Three, a range of situations can arise in which it is difficult to determine whether a party has, for example, stepped beyond the bounds of legitimate risk-taking into perceived dishonesty. The requirement is to pinpoint when behaviour crosses the line into unacceptability, and whether the above quote, by itself, identifies this critical change is debatable.

With regard to actions arising out of misrepresentation, the plaintiff will need to show a number of elements beyond dishonesty, which represent a broad description

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[25] *Third Equitable Benefit Building Society* v. *Borders* [1941] 2 All E.R. 205.
[26] Thus for example, "...it is difficult to allege a breach of an obligation 'to be just and faithful to others' without implying also an allegation of dishonesty. I do not want to put that too high. There may be instances in which a partner could behave unfaithfully to the others without actually being dishonest, though it is not altogether easy to see how that could arise.": *Radford* v. *Hare* [1971] Ch. 758, *per*, Pennychuick VC; Hunter, R.. "A Bank's Guide to Common Law Liability for Fraud" *Bank Fraud,* EuroForum Conference, (1995).
[27] *Smith* v. *Chadwick* (1884) 9 App. Cas. 187, 201, *per* Lord Blackburne.
[28] *Bradford Third Equitable Building Society* v. *Borders* [1941] 2 All E.R. 205, 228, *per* Lord Porter.
[29] *Derry* v. *Peek* 14 App. Cass. 337, 350, *per* Lord Bramwell.
[30] 14 App. Cass. 337, 343, *per* Lord Halsbury L.C..

of the factors which are likely to be present in any fraudulent activity.[32] Thus the defendant must make a representation, which might be written, spoken or by conduct.[33] The representation may be false because it is only a "half truth" and can be made up of a number of elements taken together.[34] The representation must be one of fact,[35] not intention or opinion. However, a statement of opinion can contain an implied representation that the maker actually holds that view,[36] and a statement as to future intent can contain a similar representation that the maker has such an intention.[37] A representation made honestly may become a misrepresentation if the maker finds that it was incorrect and fails to correct it.[38] And in a similar vein, the maker may come under a duty to correct a statement which has become false as a result of changing circumstances.[39] To be actionable in this context, the misrepresentation must be made to the plaintiff.[40] This does not of course mean that the representation must be made to a specific person. It is perfectly possible to make it to a class of persons.[41] Finally, the plaintiff must show that he acted upon the relevant misrepresentation. This involves the demonstration of two elements. First, that the representation was a factor in his acting as he did[42] and, second, that he was induced into acting in the said manner. The latter requirement also has two elements: (a) that the representor intended the plaintiff to take certain action in response to his statement; and (b) that he did so act.[43]

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[31] *Royal Brunei Airlines* v. *Tan* [1995] 3 W.L.R. 64, 73, *per* Lord Nicholls.
[32] Although it should be noted that this study is fundamentally concerned with what occurs after the fraudulent act.
[33] *Gross* v. *Lewis Hilman Ltd* [1970] 1 Ch 445.
[34] *Edinburg, United Breweries* v. *Molleon* [1894] A.C. 96 (H.L.)
[35] As to recent changes with regard to mistakes of law see *Kleinwort Benson Ltd* v. *Birmingham City Council (No.2)*; *Kleinwort Benson Ltd* v. *Southwark LBC*; *Kleinwort Benson Ltd* v. *Kensington and Chelsea RLB* [1998] 3 W.L.R. 1095.
[36] *Smith* v. *Land and House Property Corpn* (1884) 28 Ch.D 7.
[37] *Edgington* v. *Fitzmaurice* (1885) 29 Ch.D 459, C.A.
[38] *Brownlie* v. *Campbell* 5 A.C. 925.
[39] *With* v. *O'Flannigan* [1936] 1 Ch. 575.
[40] *Clarke* v. *Dickson* (1859) 6 CBNS 453. Although it may be enough to show that the misrepresentation was made by the defendant to a third party who he was aware would pass it onto the plaintiff: *Barry v Croskey* 2 J&H 117; Hunter, R.. *op. cit.*.
[41] "...the class being defined by how the defendant wished others to act upon his representation...if the representation is intended to induce members of the public to take allotments of shares, in a company, it will be deemed made to potential allottees. Those who hear of it and take subsequent *sales* of the shares on the strength of the representation have no action in fraud since the representation was not directed to them.": Hunter, R.. *op. cit.* at paragraph 4.2.
[42] *Arnison* v. *Smith* (1889) 41 Ch.D 348.
[43] *Peek v Gurney* (1873) 7 L.R. 377, 412.

Beyond creating potential actions in deceit, a fraudulent misstatement will normally make a relevant contract voidable in equity, and this has important consequences for the plaintiff's ability to trace in equity. Thus, as Millett J. said, with regard to the fraud in *El Ajou* v. *Dollar Holdings* [1993]:[44]

> "If the other victims of fraud can trace their money in equity it must be because, having been induced to purchase the shares by false and fraudulent misrepresentations, they are entitled to rescind the transaction and revest the equitable title to the purchase money in themselves, at least to the extent necessary to support an equitable tracing claim."[45]

Thus, for the purpose of the present study, although damages are available for fraudulent misrepresentation, the primary importance of such activity will normally be to prevent the transfer of property or allow the plaintiff to rescind the relevant transaction, thus allowing him to trace the property or its product.

There are, of course, actions which lie beyond the scope of misrepresentation and rescission, but which also have significance for the present subject. Such actions can be seen in, for example, cases where agents or employees are bribed. In such situations, at common law the plaintiff may be able to bring an action for his losses against both his agent and the giver of the bribe, and an action for money had and received can lie against both for the amount of the bribe.[46] However, in certain circumstances, notably where the breach of a fiduciary duty is concerned, the courts have allowed the plaintiff to go beyond the limits of the common law action and pursue not only the relevant bribe, but also profits derived therefrom.[47]

The court's reach with regard to bribes is primarily a function of the judiciary's desire to ensure higher standards are applied to some areas. In this context the

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[44] *El Ajou* v. *Dollar Land Holdings plc and another* [1993] 3 All E.R. 717.
[45] [1993] 3 All E.R. 717, 734, *per* Millett J. In support of this proposition Millett J. refers to *Daly* v. *Sydney Stock Exchange Ltd* (1986) 160 C.L.R.371 at 387 - 390 *per* Brennan J."
[46] Hunter, R.. *op. cit.* at paragraph 8.3; *Mahesan* v. *Government Officers Comparative Society Limited* [1979] A.C. 374.

imposition of a strict code of liability upon fiduciaries and those who deal with trust property is one of the distinguishing features which will also inform the present study. This means that although the characteristics noted above may generally be present in any fraud, the present study cannot confine itself to this narrow area. It must instead cast its gaze somewhat wider. By way of example, we might cite the recent case of *Westdeustche Landesbank Girozentrale* v. *Islington London Borough Council*,[48] which has recently created a great deal of academic interest among restitution lawyers. In this case the parties entered into a ten year interest rate swap agreement beginning on 18 June 1987. Pursuant to the agreement, the Bank made a lump sum payment of £2.5 million and the Council made several re-payments during 1988 totalling £1,354,474.07. In November of that year the High Court held interest rate swap agreements to be *ultra vires* and, as a result, the Council made no more payments. The Bank brought a successful claim for the balance of the £2.5 million and interest thereon.

The question that finally came before the House of Lords was whether the Bank was entitled to recover compound or simple interest, and the Court came to the view that the former was appropriate. However, in arriving at this decision the question of the appropriate method by which the money could be recovered fell to be discussed specifically, whether the money was recoverable as money had and received, as money traceable in equity or by some other means. In considering this question, the House of Lords came to a number of significant conclusions concerning the use of constructive and resulting trusts in the context of restitutionary claims, and formed a new view of *Sinclair v. Brougham*[49] which has informed restitutionary theory for many years. As a result, although the full implications of this case will be fully discussed in Chapter Three, it is included at this point as an exemplar of the type of dispute which can have an influence upon cases involving fraud without themselves containing any elements of dishonesty or

[47] See generally in this regard, *Reading* v. *A-G* [1951] A.C. 507; *Boardman* v. *Phipps* [1967] 2 A.C. 46: and specifically, *A-G for Hong Kong v Reid and Others* [1993] 3 W.L.R. 1143.
[48] [1996] 2 W.L.R. 802.
[49] [1914] A.C. 389.

involuntary transfer.[50] For similar reasons, no study of fraud could fail to take cognisance of principles which have developed from cases of mistaken payment not involving dishonesty.[51] Equally, the stricter rules applying to trust/fiduciary relationships ensure that in equity it may be possible to demonstrate "fraud" without the narrow demonstration of dishonesty required by the common law. Thus, in such cases the circumstances which give rise to actions in misrepresentation are also likely to engender other remedies and actions in equity, most notably, those for knowing receipt and assistance which will give rise to constructive trusts or personal remedies analogous to the constructive trust.[52]

In light of the above, some commentators have proved more willing than the courts to flesh out a definition of fraud and its related areas. Thus, white-collar crime has been defined as, "...non-violent crime for financial gain committed by deception."[53] In a similar vein O'Block, Donnermeyer and Doeren define fraud in a criminal context as:

> "...the intentional misrepresentation of fact to unlawfully deprive a person of his or her property or legal rights, without damage to property or actual or threatened injury to persons."[54]

While embezzlement is:

> "...the misappropriation, misapplication, or illegal disposal of property entrusted to an individual with intent to defraud the legal owner or intended beneficiary. Embezzlement differs from fraud in that it involves a breach of trust that existed between the victim and the offender..."[55]

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[50] Another example would be the well-known case of *Boardman* v. *Phipps* [1967] [1967] 2 A.C. 46. which owes little or nothing to fraud or dishonesty but which can clearly have significance in cases which do.
[51] Not least, because a party who wishes to recover money lost by virtue of a mistake induced by dishonesty may well be forced to rely on techniques developed in the context of honest mistakes.
[52] These elements will be examined in detail in Chapter Three.
[53] *Teaching Offenders: White Collar Crime*, Special Report Ncj-106806 (Washington D.C.: Bureau of Justice, 1987); O'Block, Donnermeyer, Doeren, *op. cit.* at pages 217-218.
[54] *Ibid.*
[55] *Ibid.*

Whether we would make quite this distinction in an English civil context is debatable.[56] However, in the light of the above discussion the present author would accept that these quotes provide a broadly logical definition of fraud for the purposes of this study. Perhaps the most important aspect of these definitions is that they focus the study on situations in which a person is deprived of his property or legal rights associated with that property. As a result, this requires us to concentrate on tracing in the narrower sense, excluding, for example, the methods by which government agencies attempt to identify the proceeds of drug dealing. This has the twin advantages of keeping the study within acceptable logistical bounds and, more importantly, highlighting the theoretical connection between narrow tracing and fraud: i.e. fraud involves the wrongful loss of rights, whilst tracing is the methodology by which we identify where those rights now reside.[57]

Moreover, from the above discussion, we can begin to see a pattern in the elements that are likely constitute any fraud. These factors may or may not all be present. Equally, the form and nature of what the plaintiff must demonstrate could depend upon the relationship between the plaintiff and the defendant, or the plaintiff and third parties through whose hands the relevant assets have passed. Nevertheless, while these elements represent a good indicator as to whether fraud is present, they can be no more than guidelines. As a result, it is valuable to consider a number of cases which place such factors into a practical context and give an insight into the nature and complexity of modern fraud litigation. These cases will be examined in some detail as they will all be returned to many times and demonstrate many of the problems with which this study is concerned.

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[56] In a criminal context, s. 15 of the Theft Act 1968 states:
"(1) A person who by deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, shall on conviction on indictment be liable to imprisonment for a term not exceeding ten years.
(2) For purposes of this section a person is to be treated as obtaining property if he obtains ownership, possession or control of it, and 'obtains' included obtaining for another or enabling another to obtain or retain...
(4) For the purposes of this section, 'deception' means any deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including a deception as to the present intentions of the person using the deception or any other person."

The first of these cases is *Chase Manhattan Bank NA v. Israel-British Bank (London)* Ltd [1981].[58] It is included primarily to demonstrate the legal difficulties which the area can engender, even where the facts appear relatively simple. On the 3rd July 1974 the Plaintiffs (a New York Bank) mistakenly made two payments of approximately $2,000,000 (rather than one) to the Defendants (an English bank). The Plaintiffs then attempted to recover the mistaken payment on the basis that the Defendants knew or should have known of the mistake and were therefore trustees of the amount.

This case is included at this point in order to indicate some of the deficiencies present in the English system. Thus, where a mistaken payment of this kind is made, any fully developed system should be able to initiate recovery with little difficulty, and, perhaps as importantly, explain how such a procedure occurs. However, although Goulding J. was able to provide the Plaintiffs with a remedy, its nature and indeed validity remains uncertain. Thus, as we will see throughout this study, whilst a range of theories and explanations to this case have been propounded by both academics and the judiciary, none has, as yet, gone uncriticised.[59]

Unlike *Chase Manhattan, Agip (Africa)* v. *Jackson*[60] did involve fraud, and demonstrates the range of circumstances and potential defendants which can arise from such activities. The Plaintiff company maintained a US dollar account in Tunis. A senior officer of the company signed a payment in favour of a shipping company. The shipping company's senior accountant (Z) fraudulently altered the name on the cheque to that of B. Ltd, a company holding an account at Lloyds Bank in London. B Ltd had two directors and shareholders: the first defendant (a chartered accountant in partnership with the second defendant) and the third defendant (one of their employees). Z delivered the cheque to a Tunis bank that instructed Lloyds to credit B and a New York bank to credit Lloyds. Lloyds credited B Ltd five hours

[57] As we will see in Chapter Three, this definition is at best simplistic and at worst misleading, but will suffice for present purposes.
[58] [1981] Ch. 105.
[59] See for example Millett., P., "Equities Place in the Law of Commerce", Lecture to the Chancery Bar Association., June 1997, 5.

before it was reimbursed, thus taking a delivery risk. Shortly afterwards, the Tunis bank telexed Lloyds to stop or reverse the payment. B Ltd refused to refund and, at the behest of the third Defendant, Lloyds transferred all the money in the account, whereupon B Ltd went into liquidation. The money was transferred from the Defendants to their client's account and on to accounts around the world.

This case demonstrates a number of themes that will re-occur throughout this study. Thus, we can see not only the international nature of modern fraud but also the speed with which fraudulent transactions are committed. The cheque was deposited with the Tunis bank on 4th January 1984. However, although the fraud (and others) were discovered on 7th January, it proved to be too late to prevent the relevant payment taking place. The case also demonstrates how technology and banking methods can have a profound influence on the techniques and remedies available. Thus, money in an unmixed account is normally susceptible to common law tracing. However, the money in the instant case had been transferred electronically and was subject to a credit risk. Both factors, which, as we shall see in Chapter Three, arguably prevent a plaintiff from resorting to common law tracing, thus potentially diminishing his ability to recover his property notwithstanding the merits of his underlying case. Finally, this case demonstrates the range of claims and defendants which fraud can create. Thus, the Defendants found themselves potentially subject to equitable and common law tracing along with claims for money had and received, constructive trusteeship for "knowing receipt" and personal liability for "knowing assistance." With regard to the parties to the litigation, it should be noted that the defendants were not fraudsters and acted under instruction at all times. Nevertheless, they were still liable and it was even suggested that Lloyds Bank could have been placed in a similar position.

El Ajou v. *Dollar Holdings* [1993][61] was again a case of fraud, and indicates just how complex such transactions can be whilst also demonstrating some of the problems which the trans-national movement of assets can engender. The Plaintiff

[60] [1991] 1 Ch. 265.

was the owner of funds and securities under the control of a Geneva based investment manager (A). As a result of bribery, A invested the money in fraudulent share selling schemes operated through two Dutch companies by a trio of Canadian fraudsters. The proceeds of the scheme were channelled through a number of countries[62] to England, where they were invested in a London property development. The first Defendant (DLH) was a property company connected to the development. Although the individuals in control of DLH were not involved with the fraud, the fraudsters acquired the company. This acquisition was made on the advice of B, who was introduced to the fraudsters by C (a Swiss fiduciary) who also acted for them. B was the Chairman of DLH, but was not involved in its management which was undertaken by its shareholders and C, who was the managing director of a subsidiary. The fraudsters provided nearly £300,000 for a DLH subsidiary (DLH London) to use as a deposit for the purchase of property, and a further £1,030,000 to develop it.

During this time C had also misappropriated money which the fraudsters had deposited with a company he controlled. As a result, DLH agreed to guarantee C's debt to the fraudsters. Thereafter, B purchased the fraudsters' interest in DLH at a discounted price. When he became aware of the fraud, the Plaintiff attempted to recover the money given to DLH on the basis that it was "knowingly received", or the value of the investment on the grounds that DLH knew of the fraud before the fraudsters' share was bought.

This case is included here in order to demonstrate two elements. First, the sophistication with which fraudsters operate in the international financial market. We can see that other than the initial bribe, the fraudsters' behaviour was akin to that which might be expected from any experienced international financier. Thus, they transferred the proceeds of the fraud through a range of jurisdictions and holding companies while making large-scale investments in both DLH and property development schemes. Moreover, they had the acumen to relocate their investment

[61] *El Ajou* v. *Dollar Land Holdings plc and another* [1993] 3 All E.R. 717.

before it could be traced to DLH. In this sense such fraudsters operate on (at least) an equal footing with any other international businessmen, giving them a potentially significant advantage over national criminal authorities or civil courts.

The second point to note is that the international nature of fraud can cause not only practical problems but also technical legal ones. Thus, yet again the Plaintiffs were prevented from indulging in common law tracing because the money had been mixed with funds belonging to the fraudsters, other victims and innocent third parties. They were therefore forced to rely on equitable tracing. However, the Defendants argued that because the money had moved through civil jurisdictions that do not recognise equitable ownership, such tracing was necessarily impossible. In other words, the Plaintiff would be unable to enforce his equitable rights against the money unless he could have done so at all the intermediate stages of its tortuous journey. As we shall see in Chapter Five, Millett J. was able to find a way around this problem, but his judgment has been described as "unhelpful"[63] and such difficulties begin to give an insight into the legal problems which the international movement of assets can create.

The final case in this brief group is *Lipkin Gorman* v. *Karpnale Ltd* [1991][64] which is, rightly or wrongly, considered by some commentators to be the most important restitution case to date. In this case, Cass, a partner in a firm of solicitors, removed a sum of money from the firm's bank account, much of which he gambled away at the Playboy Club. The question which came before the House of Lords was whether the money could be recovered from the casino as money had and received.

Again, we can draw out two themes, the first practical and the second theoretical. With regard to the latter, in both *Agip* and *El Ajou* we can see that parties other than the fraudster became subject to the litigation. However, in both cases this liability arose out of the defendant's actions, whether with regard to "knowing

[62] Specifically, from Geneva to Gibraltar, Panama and Geneva (again).
[63] Stevens, R., "The Choice of Law Rules of Restitutionary Obligations", *Restitution and the Conflict of Laws*, Ed. Rose, Mansfield Press, (1995) 183.

assistance" in a fraudulent design or with regard to the breach of a fiduciary duty. What *Lipkin Gorman* show, is that cases with a proprietary basis can also draw in defendants who have behaved in an exemplary manner. Specifically, in this instance the casino, which merely had the misfortune to be frequented by a dishonest solicitor. With regard to the legal questions which this case demonstrates, we can identify a theme which will run throughout this study. Specifically, the case is an exemplar of the questions which can arise out of the ambiguous characterisation of legal elements. It will be argued that such problems can be of substantial importance for the long-term development of the law, whilst also creating short-term confusion. Thus, *Lipkin Gorman* can be seen as an extension of common law tracing which is usually regarded as an identifier of property rights, or the final acceptance of restitution/unjust enrichment.[65] Equally, it has been identified as a case which incorrectly uses the language of property[66] and one which creates a new form of restitutionary property remedy.[67] It has even been suggested that although it uses the language of restitution, it is fundamentally unrelated to it.[68] As noted above, these categorical problems will provide a continuing background to the present study.

These cases demonstrate numerous features which will represent ongoing themes throughout this study. Specifically, the divergent circumstances which the area can encompass, the potential complexity of both the underlying transactions and the money laundering techniques used and the range of legal questions which can be generated. However, for the purposes of the present chapter perhaps the most notable feature which these cases share is the fact that the disputed assets (or their product) all, at some stage, originated from or passed through the banking system. Indeed, it is not unreasonable to suggest that modern banking techniques will provide the backdrop to almost all disputes involving the tracing of money. As a result, it is necessary that the law represents not only a comprehensive reaction to

[64] [1991] 3 W.L.R. 10 (H.L.); [1991] 2 A.C. 548.
[65] Birks, P., "The English Recognition of Unjust Enrichment" [1991] L.M.C.L.Q, 473.
[66] *Ibid.*
[67] Virgo, "Reconstructing the Law of Restitution" 1996 T.L.I, Vol. 10, No. 1, 20.
[68] Hedley, S., "Unjust Enrichment" (1995) 54(3) C.L.J, 578.

fraud but also a logical complement to the manner in which we presently store and transfer assets. It is submitted that this response must take cognisance of three aspects of modern banking: specifically, (a) the manner in which banks presently operate; (b) the methodologies which they will begin to incorporate in the near future; (c) the ways in which legitimate banking techniques are subverted by fraudsters to conceal the proceeds of their activities. As a result, the following section will consider these aspects of the banking system in more detail.

1.2: THE GENERAL ENVIRONMENT IN WHICH MODERN FRAUD EXISTS AND THE SPECIFIC INFLUENCE UPON IT.[69]

The study of tracing arising out of fraud will be abstracted to a meaningless extent unless it is grounded in an understanding of the practical environment in which the technique occurs. The present study is primarily concerned with the fraudulent loss of money,[70] and as a result it is reasonable to suggest that the most common link between the cases with which we are concerned is that the relevant assets (or proceeds thereof) normally pass through the banking systems. These systems (their use and misuse) are also one of the major factors making tracing, as this thesis suggests, an intrinsically complex procedure. The first test, therefore, of a civil response to fraud is how well it relates to the world of practical finance.[71] As a result, this section begins by examining the common banking techniques which are likely to be applied to money as part of, or ancillary to, a fraudulent transaction before moving on to more complex possibilities.

1.2.1: COMMON BANKING TECHNIQUES.

In 1815 Lord Ellenborough held that the identification of a plaintiff's property could be defeated by the mixing of gold coins in a bag.[72] Such a proposition was at that

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[69] We can broadly say that the purpose of this study is to suggest logical methods by which we can decide when a fact (or set of facts), "...gives rise to rights, imposes obligations, creates a legal relation, an institution or an interest in a thing.": Falconbridge, "Characterisation in the Conflict of Laws, L.Q.R. No. CCX, [1937]. However, we cannot (and should not) attempt to consider fraud and tracing in isolation from the world in which such activities occur. Thus, for example, the recovery of fraudulently lost assets is not more difficult now than fifty years ago because fraudsters are more able (although we might argue that they are) but because the methods and techniques which they can use to commit fraud (See, for example, allegations that the Russian 'Mafia' recently stole $400,000 by hacking into US bank systems: Reeves, P., "Mobs Battle for Spoils of the Old Soviet Union" *The Times,* 9 October, 1996) and conceal their gains have become more sophisticated. As a result the next section considers some of the primary elements which presently act upon the structure and nature of fraud and civil cases arising from such activity.

[70] Even in cases concerned with land and chattels it is likely that the asset will eventually be traded for money.

[71] See generally, Aitkin, J., "Transnational Bank Fraud," 68 A.L.J., 790; Goode, *Payment Obligations in Commercial Financial Transactions*, (1983); Chambost, E., *Bank Accounts: A World Guide to Confidentiality*, London, (1983); Wally and Wright, *Business of Banking,* 2nd. ed., Northcote House Publishers, (1988); Palfreman, P., *Banking: The Legal Environment,* London, (1988); Cranston, R. (Ed.), *Banks and Remedies*, (1992); Cranston, R. (Ed.), *Legal Issues of Cross-Border Banking*, (1989); Gerrard and Doyle, *Branch Banking: Law and Practice*, 3rd ed., (1993); Matthews, P., "Tracing the Proceeds of Fraud" *op. cit.*.

[72] *Taylor* v. *Plumer* (1815) 3 M. & S. 562. See Chapter Three.

time, perhaps, in a practical context, overly restrictive but not unreasonable given the fact that the courts were more concerned with money *in specie* than is presently the case. However, while the methods of trading, banking and cash transfers have changed beyond recognition in the intervening years, the basic rules of tracing and our civil response to fraud have remained relatively unchanged. Thus, for example, at one time the use of a bill of exchange was a simple process both physically and conceptually. Today, however, while a cheque transaction may remain conceptually straightforward, it can in practice involve several intermediate transactions that require multiple bank accounts, electronic cash transfers and credit risks. Any one of these factors can be detrimental to the operation of the techniques used in tracing. Many of the same problems occur with even the simplest bank cash transactions.

The first point to note in this context is that where a party pays money into a bank account, the property in that money passes to the bank. In return the customer gains a *chose in action* against the bank.[73] Thus any attempt to establish rights in the money will necessarily involve intangible assets rather than the original specific notes and coins.[74] Tracing money simply placed into a bank account will present no problems other than those normally associated with the mixing of fungible assets.[75] However, modern banking methods mean that most moneys involved in tracing will have potentially been subject to both electronic cash transfers and a range of movements between a number of different accounts.[76]

If we examine a typical set of facts which may lead to tracing, the process will begin when X (for example, as a result of Z's fraudulent misrepresentation) instructs his bank to transfer funds to Z's account. If both the parties hold accounts with the same bank branch then the process is simple: X's account is debited and Z's is

[73] *Foley* v. *Hill* (1948) 2 HLC 28, 36.
[74] Although as Chapter Three will demonstrate, the courts have often analysed bank accounts in terms of physical as opposed to intangible assets.
[75] See Chapter Three.
[76] This will be further exacerbated when the money is the subject of fraud, as it will often have been intentionally passed between a number of different accounts in order to disguise its origins.

credited with the amount due. However, if, for example, different banks[77] are involved a number of further steps will be required in order to facilitate the clearance of the payment.[78] If we take a simple example of X giving a cheque (drawn on his account at Bank 1) to Z.[79] Z will present the cheque and a relevant credit voucher[80] at his bank (Bank 2), and the relevant amount will be electronically traded to his account.[81] At the appropriate time (i.e. the end of the day's trading) Z's branch will arrive at the day's totals based upon the relevant debit and credit vouchers before they are sent to the bank's clearing department.

During day two of the clearing process, banks 1 and 2 will exchange the cheques and agree an amount, based on the relevant debits and credits, which one bank owes the other. If we assume that this process results in Bank 1 owing Bank 2 £x million, Bank 2 will instruct an intermediary bank[82] with which they both hold accounts to transfer the requisite amount from its account to Bank 2's account. On the third day of clearance the cheques will be delivered to the relevant branch. They may then be inspected to ensure that they have not been stopped and that the account upon which they are drawn has sufficient money in it to cover the cheque: the necessary account changes are then made.[83]

International transfers involve a similar procedure, but potentially with a number of extra stages. Equally, the Bacs system differs from the physical clearing techniques described above in that it makes use of information transferred not in paper form but using electronic transfer and information stored on magnetic media. Internal

[77] A similar process is used where the relevant customers maintain accounts with the same bank but different branches.
[78] In 1985 three companies under the auspices of the Association for Payment Clearing Services were set up to deal with differing clearance requirements. These companies were specifically: Bacs Limited, which deals with electronic bulk clearing; Chaps Limited (which was formally, Chaps and Town Clearing Limited), which deals with high value clearings; and the Cheque and Credit Clearing Company which deals with credit and cheque clearance. The Chaps systems allow the payer to make same-day payments. The specific purposes of the clearing systems were identified as (a) to ensure the effectiveness and integrity of clearings and (b) to create a robust and flexible structure that would remain effective and maintain efficiency despite future changes in membership, in clearing systems, in technology and in the payment industry as a whole.
[79] The specific instructions could equally be achieved by other means: e.g. bank giro.
[80] Typically, this will include Z's name, account number, the branch at which his account is maintained, the relevant account number, sort code and amount.
[81] Although at this time it will not of course be cleared for withdrawal.
[82] Which may be the Bank of England.

transactions between different branches of the same bank may involve a similar process to the one described above. However, it is also possible to use a cheque truncation procedure. This allows the information necessary for a transfer to be transmitted electronically, thus avoiding the need for the physical movement of the relevant cheque and allowing the debit/credit transaction to be carried out simultaneously. It seems likely that such a system will be the way forward for both inter-branch and inter-bank transactions, and could be extended beyond cheque payments. Such a system would involve the transmission of information inputted by the cashier alongside data electronically read from the relevant cheque.

The legal importance of these elements will be discussed in the following chapters; however, at this stage several points should be noted. The techniques which allow a plaintiff to follow an asset lost to dishonesty are generally based upon the identification of unaltered and physically identifiable assets.[84] Broadly speaking they suffer from difficulties where a physical asset cannot be identified or where fungible assets are mixed. Thus common law tracing can potentially be defeated both by electronic transfers and the mixing of money. Unfortunately, as this brief description of clearance and payment systems demonstrates, modern banking systems of necessity rely upon such techniques. We have seen that even where a payment is made from one account which originally contains only the requisite sum into a substantially empty account, the specific value will have been mixed with all the day's other transactions as part of the clearance procedure.

Equally, the clearance system is likely to develop in a way which eliminates the importance of even the "nominal" physical assets now used[85] in favour of electronic transfers. Moreover, the link between the original money and the eventual payment may be broken in other ways.[86] Thus, for example, Bank 1 may be informed by Bank 2 that it is intending to make a payment. The former Bank may decide to take

[83] This is of course a generalised example of the process which takes place.
[84] See Chapter Three.
[85] e.g. the cheque.
[86] More correctly it may be broken for the purposes of common law tracing; see Matthews, P., "Tracing the Proceeds of Fraud" *op. cit.* at pages 20-24.

a "credit" or "delivery" risk by crediting the relevant payment before it is received.[87] Such a risk may be taken by making a relevant adjustment in accounts held with Bank 1 or in accounts held by both banks at a third party intermediary bank. Equally, a bank might take a credit risk before paying the relevant sum to a third party at the instruction of the paying bank.[88]

The banking procedures discussed above are constantly changing as a result of developing technological and commercial circumstances. However, although they can cause difficulties to our present system of tracing, they are in no sense at the cutting edge of banking developments.[89] At the time of writing, that position is held by "electronic" or "digital" cash.[90] As such it will be examined in some detail as it provides a paradigm of the range of problems which our system may face in the near future.

1.2.2: ELECTRONIC MONEY.[91]

Today, our perception of economics and commerce is inexorably linked to our belief in a system of locally acceptable, government-backed notes and coins. Our familiarity with this medium of exchange is so strong that we consider past currencies based upon gold, seashells, cattle or cloth to be underdeveloped and eccentric. However, viewed objectively paper money can appear equally quaint. Currency dealers can send millions of pounds around the globe at the touch of a button and yet it can take up to ten days for a five pound cheque to clear. Central banks spend small fortunes designing and transporting paper money that has only a limited life expectancy and which can be forged, stolen or destroyed with comparative ease. Relatively low-value transactions are virtually impossible without the intervention of banks, which both increases costs and potentially removes

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[87] *Libyan Arab Bankers' Trust Co.* [1989] Q.B. 728.
[88] Matthews, P., "Tracing the Proceeds of Fraud" *op. cit.* at pages 20-24; *Agip (Africa)* v. *Jackson and Others* [1990] 1 Ch.D. 265.
[89] Other banking problems will be discussed as they arise throughout this study.
[90] For the purposes of this study, "digital cash", "electronic cash" and "e-cash" will be considered to be synonymous unless otherwise stated.
[91] For a discussion of this topic see Hutton, I.W. "Electronic Cash - Welcome to the Future", *New Law Journal*, December 8, 1995 (included in the appendices to this study) and Reed and Davies, *Digital Cash - The Legal Implications*, Centre for Commercial Law Studies, Queen Mary & Westfield College, 1996.

privacy and anonymity.[92] Moreover travelling, even within the single European market, can require a great deal of time consuming and expensive changing of notes. Nevertheless, our long acquaintance with this system often masks the fact that any medium, publicly or privately produced, which satisfies a limited number of criteria can act as money.[93]

Money can be examined either by function or in terms of desirable characteristics. With regard to the former, it serves three purposes. First, it is a medium of exchange which allows society to replace a complex system of barter transactions with a simple cash for product interchange. Second, it operates as a standard of value, allowing us to easily price one product or service against another. Finally, it is a store of value, which is more convenient to hold and transfer than many other forms of wealth. Beyond this, any medium which is to be used as money must have a number of other characteristics. First, it should contain the four "ACID" properties. Thus, it should be atomic, in that the seller's receipt of the currency and the buyer's acquisition of the relevant goods or services should be inextricably linked. Second, it should be consistent, meaning that if one party believes he has given a unit of currency, the other party should agree. Third, it should be capable of isolation, in that each transaction should be clearly identifiable. Fourth, the result should be durable, so that any breakdown in the transaction should not result in the loss of the currency. It is also desirable that trade using the currency should be both cheap and easy enough to facilitate small transactions, and yet be flexible enough to cope with large deals and an infinitely variable number of users. Finally, and most fundamentally, it should be trustworthy: people must believe that when they accept a certain amount they will be able to exchange it for goods and services perceived to be of a similar value. Any medium that, to a greater or lesser extent, satisfies these criteria can act as money. As noted above, ancient societies

[92] In this context anonymity means that the identity of one or more parties remains hidden. Privacy means that one or more elements of the transaction (e.g. physical location of the parties) remains hidden from one or both parties.

[93] "Money does not have to be created legal tender by government: like law, language and morals it can emerge spontaneously. Such private money has often been preferred to government money, but government has usually soon suppressed it." F.A. Hayek, *Denationalisation of Money - The Argument Refined,* Institute of Economic Affairs, 1978.

have used anything from seashells to spices; however, these were easily replaced by more convenient precious metal coins. When they became devalued due to clipping, forgery and debasement they were in their turn replaced by a trustworthy system of tokenised currency: i.e. bank notes and non-precious coinage. It has often been argued that the history of money tells us nothing[94] about its future, but this is incorrect, at least in one respect: new forms of money will quickly replace old if they can, even marginally, improve upon the characteristics identified above.[95]

It is arguable that electronic cash provides a number of significant advantages over its traditional counterpart. Some estimates suggest that handling cash costs UK banks and retailers well over four billion pounds per year excluding fraud.[96] E-cash on the other hand has the potential to be cheaper to hold, handle and use, whilst being more difficult to forge than paper money. It can be earmarked for specific purposes while providing either complete confidentiality or transparency. It can be used for transactions of any size, is physically convenient to store and is likely to be internationally acceptable.[97] Moreover, e-cash is likely to have significant advantages with regard to electronic commerce. Computer networks, beginning with the Internet, will bring together and expand upon all previous methods of data storage and communication, creating not only new markets but new forms of commerce. It has been estimated that electronic commerce could be worth £3.7 trillion[98] within the next ten to twenty years.[99] However, the development of electronic commerce is currently being restricted by the lack of a trustworthy

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[94] John Kenneth Galbraith, *MONEY: Whence it came, where it went,* London, (1995).

[95] Indeed it is arguable that in specialist areas we already have alternate money. For example, stamps, phone cards, luncheon vouchers, milk tokens and LETS schemes in the US.

[96] *Newsnight*, The BBC, 5 March, 1996.

[97] "...global currencies are inevitable with electronic cash and the Internet. We're in a position with the Internet where it is as easy to trade with someone who's published an article in Moscow as it is to trade with someone who's selling a newspaper at the end of your street...There's a whole range of goods and services which actually work across electronic media, so we're going to end up with a global currency...": Peter Dawes, Managing Director of Pipex, Interviewed by The BBC's *The Net*, 5 June 1995: transcript on file with author.

[98] *Newsnight*, BBC 24 June 1995.

[99] From the supply side, the provision of electronic cash seems inevitable. The Bank for International Settlement calculates that in the United States bank-facilitated consumer transactions (for example, cheques, credit card, debit card and electronic cash transfer transactions) in 1995 amounted to $60 billion. As a profit

Footnote Continues on Next Page:

method of payment: e-cash is the likely medium by which secure electronic commerce will be achieved. For all these reasons, Richard K. Crone of KPMG Peat Marwick has suggested, that we are "...in the beginning stages of the cash-replacement cycle"[100] and the Chief Executive of Mondex[101] has speculated that electronic cash could gain up to sixty percent of the traditional market within a ten to twenty year period.[102]

1.2.2.1: The Nature of Electronic Money.

All electronic cash systems will use numbers electronically stored as binary digits to represent money. These numbers are then placed onto smart cards, hard drives or other electronic storage devices before being transferred in return for goods and services. There are upward of twenty such systems under development around the world.[103] However, from a legal perspective we can usefully place them all into one of two categories.[104] First, bare instrument systems in which the e-cash can be moved between users without the intervention of a central verifier. Second, account reliant systems which operate via a central entity like a bank and require money to be moved between accounts. It would seem that the system proposed by Visa[105] is representative of the latter system while Digicash[106] and Mondex[107] represent the former. However, we can also make a distinction between systems which of necessity require specialised hardware and those which do not. Thus, for example, Mondex employs a specialised computer chip, which is charged with units of value from banks, cash dispensers, or modified home telephones. Digicash on the other

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making mechanism this pales into insignificance when compared to the $300 billion spent in consumer cash transactions.

[100] Interview in Holland and Cortese, "The Future of Money", *Business Week*, June 12, 1995.

[101] Perhaps the most advanced e-cash system currently under development.

[102] Interviewed by The BBC's *The Net*, 5 June 1995: transcript on file with author.

[103] Visa, Mondex, and Digicash are among the most prominent.

[104] However, it should be remembered that these are highly simplified classifications. From a legal and general point of view it is perhaps more useful to divide e-cash into those implementations which are capable of facilitating confidential/anonymous transactions and those which are not. This will be discussed in more detail below.

[105] Visa and Microsoft announced their intention to jointly develop an "electronic purse" on the 22 of March 1995. A move partly prompted by the Justice Department's blocking of Microsoft's bid for financial software maker Intuit. Some leaked internal reports (published on the Internet) suggest that Microsoft hope to capture 15% of the world banking market in the next ten years.

[106] Digicash (the name of the currency and the relevant company) is being developed by David Chaum, one of the world's leading cryptographers (based at the Institute of Exact Sciences in Amsterdam); See Chaum, D. "Achieving Electronic Privacy" *Scientific American*, 1992.

hand can be implemented using standard computers running proprietary software. This factor, combined with Digicash's high state of development, its intrinsic usability on electronic networks, and its ability to provide absolute confidentiality and anonymity of payment makes Digicash a natural place to start any exploration of the forms of e-cash now available.

We might begin this consideration by trying to imagine how we could design a simple form of electronic money, one which meets both the technical requirements of money and is also easy and convenient enough to convince the public to use it. Such a system, at its simplest, might work in the following manner. Alice[108] would open a bank account in the normal way. She would provide all the usual identification data and the bank would issue her with an account number. When she wished to make a withdrawal she would contact the bank by telephone or computer network, providing the account number and a form of identification.[109] The bank would then send the money, as a computer file, which Alice could then store on her hard drive, smart card or other electronic media.[110] When she wished to buy something from Bob she would simply pass the file over to him, he would in turn pass it to his bank. In such an implementation each individual might have a number of representatives for various purposes in the same way that we presently have different accounts or credit cards.[111]

Unfortunately such a system could only hope to work in a simple, uncomplicated and most importantly honest environment. In the real world a great deal of time, expense and effort is spent making paper money unique and consequently as difficult to forge as possible. Everything from the design, to the watermark, to the ink and paper are selected with a view to making copying impossible. However,

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[107] Currently being developed by the National Westminster Bank.
[108] Alice (User) and Bob (Merchant) are the favourite characters of cryptographers.
[109] Probably similar to the identification used by modern phone bank systems.
[110] Which Digicash know as a "representative."
[111] The basic representative would be a smart card containing a computer chip and memory. Digicash would prefer the card to contain its own display and keyboard. This has the advantage of giving the user full control over the transaction and thus preventing fraud. For example, it would stop a merchant showing one "price to the customer and another to the card." However, whether such a device will be cost effective remains to be seen.

network transactions, whether facilitated by the passing of credit card numbers or electronic cash, will consist of no more than binary digits: like any digital media, from compact discs to computer software, they can therefore be copied with complete accuracy. If the number can be seen, then any observer armed with simply a pen and paper can make a perfect forgery. Thus for the above system to work we must find some way of preventing any dishonest observer from ever getting a look at our electronic cash. The easiest way to achieve this is by only ever sending it in a reliably encrypted form. Unfortunately, until recently all codes were susceptible to being broken if enough time or computing power was applied. Modern attempts to overcome this can be traced back to Whitfield Diffie's proposal for a digital signature system in 1976.[112] This technique uses two passwords, a private key used to code messages and a second key, which can be placed on public databases or given only to designated parties. If, for example, Alice wishes to send a secure message she uses her private key to encrypt it; this can then only be unencoded by applying her public key. Thus the system provides not only a way of securing messages but also a method of verifying the sender's identity.[113]

With a little imagination we can see how these algorithms could be used to improve upon our simple electronic cash implementation. Thus in our new system Alice opens her account in the same way as above. When she wishes to withdraw cash, she generates a random number. This would need to be large enough to make the chances of it being used by another party remote. She then adds a signature encoded with her private key and sends the result to the bank. The bank verifies the signature by applying Alice's public key before removing it. It then returns the number, along with a signature encoded with its own private key, and debits the user's account.[114] When Alice wishes to spend the cash it is transferred to Bob who

[112] Hellman, M.E. "The Mathematics of Public-Key Cryptology" *Scientific American*, August, 1979.
[113] Programs for performing these tasks are now commonly available. Indeed perhaps the most popular (*Pretty Good Privacy)* is available free over the Internet and yet is capable of providing encoding routines which are so sophisticated that they are considered to be virtually unbreakable.
[114] The bank can use different private keys to represent different values.

can verify its authenticity by applying the bank's public key before paying it into his account.[115]

We now have a system which makes the copying of our electronic cash extremely difficult because it remains coded at all times and is constantly verifiable by encoded signatures. These cryptology techniques also mean that receipts confirming the transaction and any relevant bank documents can also be signed with unforgable signatures providing complete and potentially unarguable confirmation of all transaction details.[116] Unfortunately, we have not yet solved all our problems. First, anyone who does manage to copy a note will be able to spend it, because it is self-verifying. This means that we must place a great deal of reliance on our cryptography techniques. David Chaum claims that such reliance is fully justified[117] and expert opinion appears to accept the assumption that modern encryption techniques are comprehensive enough to defeat even the most determined counterfeiter or fraudster.[118] Indeed, banks presently use similar techniques to move large amounts of money around the globe.[119] However, using cryptology does present other problems. Specifically, how fully can we secure private keys themselves? Should a customer's private keys become available to an unauthorised party, that party would be able to remove the entire contents of the relevant account. As we will discover below, this cash would be untraceable and, unlike the loss of physical cash or credit cards, the loss of private keys may not be immediately

[115] Or spending it with another merchant (although this appears to be a relatively complex procedure, to Alice and Bob it will, like the use of credit/debit cards or ATM machines, be fully automated).

[116] In this way, as David Chaum points out, the system provides, "...security for all three parties. The signatures at each stage prevent anyone from cheating either of the others: the shop cannot deny that it received payment, the bank cannot deny that it issued the notes or that it accepted them from the shop for deposit, and the customers can [not] deny withdrawing the notes from her account...": Chaum, D., "Achieving Electronic Privacy" *Scientific American*, 1992, 96.

[117] "...conditional information theoretic...is perfectly secure and we can prove mathematically that no matter how much computing power you use, it's impossible to learn anything about the information which is hidden by these unconditionally secure systems.": Interview on the BBC's *The Net*, 5 June, 1995: transcript on file with author.

[118] "Digicash's counterfeit-preventing techniques rely on several assumptions: both assumptions about the complexity of certain cryptographic operations and the privacy of the cryptographic key. Under these assumptions, Digicash is secure against counterfeiting. How believable are these assumptions? It is well within current practise to accept the cryptographic complexity assumptions.": Camp, Sirbu, Tygar, "Privacy, Anonymity and Reliability in Electronic Cash Transactions" Carnegie Mellon University, January 1, 1995: published electronically, copy on file with author. However, recent reports do suggest that double key codes have been broken: Hawkes, N., "Breaking Into the Net" *The Times*, 18 March, 1996.

[119] "Bankers Go Scrambling for Security." *The Times*, 10 July, 1996.

apparent. The loss of a bank's private keys would potentially have more devastating consequences. Indeed it would be the digital equivalent of losing the keys to Fort Knox (but without the need to physically remove the gold).[120] As noted above, trust is the fundamental quality of any currency. The loss of a bank's private keys or even the suggestion of such a loss could destroy confidence in electronic cash and lead to serious systemic problems, not only for the relevant e-cash system but also for related financial institutions.

The second major problem with the system we have so far developed involves double spending. Thus, for example, suppose that after Alice buys a motorbike from Bob she then goes next door to John's Car Yard and buys a Ford Fiesta using the same notes (i.e. numbers). Neither merchant will be any the wiser until they bank the cash. We might overcome this by including a unique serial number in each note and then requiring merchants to call the bank in order to verify that it has not yet been spent before they accept it. Unfortunately, this in turn leads to other difficulties; most specifically, it provides detailed data collection possibilities: the bank knows the details of every note spent.

As a result, cryptographers, and specifically Chaum and his associates,[121] have developed a method of creating a blind, rather than identifiable, signature. Using this technique means that the original number is multiplied by a random factor before being sent to the bank. The bank therefore verifies it without knowing anything about it other than its value and the fact that it contains Alice's signature.

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[120] Or perhaps more accurately the equivalent of the Royal Mint losing its printing plates, presses, paper and ink. As Camp, *et al* point out, "...assumptions about the privacy of cryptographic keys are problematic...it seems unreasonable to assume the cryptographic keys can also be held private at the electronic bank. Just as physical banks cannot prevent occasional embezzlement, it does not seem reasonable to assume that Digicash banks can always protect cryptographic keys. What is the extent of the damage that will be done if the security of keys is violated? An adversary who gains even brief access to a cryptographic key can generate counterfeit tokens that are indistinguishable from valid tokens. These tokens can be generated in any amount desired, so it would be necessary to completely replace all tokens in circulation. Like the failure of a dam, system failure is a low probability but high cost of damage event.": Camp, Sirbu, Tygar, *op. cit.*; Partridge, C., "Virtual Assets are in Need of Protection" *The Times*, 30 April, 1997.

[121] Chaum, Fiat and Naor, "Untraceable Electronic Cash" Crypto 88 Conference: published electronically, copy on file with author.

When it is returned to Alice she divides it by the original factor and can then spend it as before.[122] Chaum claims that the notes:

> " are "unconditionally untraceable" that is, even if the shop and the bank collude, they cannot determine who spent which notes. Because the bank has no idea of the blinding factor, it has no way of linking the note numbers that Bob deposits with Alice's withdrawals. Whereas the security of digital signatures is dependent upon the difficulty of particular computations, the anonymity of blinded notes is limited only by the unpredictability of Alice's random number."

Thus we can now prevent double spending while preserving absolute anonymity and privacy. The bank will keep a record of all the numbers spent. Thus if Bob rings up to see whether Alice's note has already been spent, the bank will be able to give him a definite answer, but will be unable to link the transaction to Alice as they have never seen the note before.[123]

Digicash have added one final sophistication in order to deter those still tempted to double spend. This technique allows Bob to interrogate Alice's card by issuing a range of random numbers. Alice's card will answer by giving enough information to verify the cash plus a certain amount of information regarding Alice's identity. This data will be retained, but will at the time be meaningless. If Alice then tries to spend the same money with John, he will do the same, but because his random interrogational numbers will be different he will obtain extra information about Alice. When this is put together with the information from the original transaction, it will reveal Alice's identity to the bank. Thus the e-cash note remains untraceable when first spent but reveals full information on itself and Alice should she attempt

[122] Assuming that we accept the cryptographers' view that this provides a secure and untraceable form of electronic cash then the mathematics are not important; they are, however, included here as a matter of information. Alice generates the number which is to represent her cash, x. She then applies her private key, f; before this is sent to the bank she multiplies the result by a random number (r) to the power 1/3. The number sent is therefore, f(x)*r^3. The bank then performs the calculation r*f(x)^(1/3) (although it does not know r or f(x) and sends it back. She then divides the result by r. Alice now has a note which could only have been created by the bank but which they will not recognise when it is spent.

to spend it again. Indeed it provides, in effect, a confession automatically verified by Alice's unique encoded signature. Thus immediate verification is not absolutely necessary. The double spending will come to light when the merchant banks the e-cash. This system, it is suggested, has the advantage of instilling confidence in the business community, who can accept Digicash secure in the knowledge that if it has been double spent they will be recompensed by the bank who will then take action against Alice.

Nevertheless as an "after the event" measure it is still problematic, especially when one considers the possibility of (a) the potentially limitless transactions which would be possible via e-cash, and (b) its ability to make an almost infinite amount of small transactions. As a result, Digicash have enabled the representative to contain a separate chip (an observer) which in Chaum's words would act as a "notary" and certifies the behaviour of a representative in which it is embedded."[124] The observer would therefore prevent the representative spending any note more than once.[125] This possibility does, however, restrict the ability of Digicash to be seen as a software-based system.[126]

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[123] This also allows Alice to reveal her original numbers to the bank if she wishes to stop the cash being used, if for example, she has lost her card. This provides Digicash with a major advantage over other forms of e-cash.

[124] Chaum, David, "Achieving Electronic Privacy" *op. cit.* at pages 96-101.

[125] Beyond this it is possible to add further security elements. For example, the representative could demand the input of a user's personal identification number (PIN) and encoded receipts before any transaction could be completed. This would have the beneficial effect of making use by thieves more difficult. One could also use varying degrees of security. Thus a short personal identification number could be used for small transactions and a more complex one for large amounts. It would even be possible to create a PIN to alert the authorities that the card was being used under duress.

[126] There are one or two more points which might be made about Digicash. The system of e-cash which eventually becomes popular should be the one which offers the most utility to the public. It might well be that Digicash holds a winning hand in this area. If we can create encoded money which is absolutely verifiable then we can do the same with almost any other information. Thus a Digicash card could contain a vast amount of other useful data: for example, driver's licences, academic qualifications, medical records or voter registration details. Each would be unforgably verified by the issuing authority and yet be cheap to produce and easy to carry. Today databases are so arranged that if we reveal even a limited amount of information every time we use a merchant they are able to collect a vast amount of data about us. Using the Digicash system we could provide the information we wish to, but no more. Thus one could provide the medical record that shows fitness sufficient to take flying lessons without providing unnecessary details of one's childhood illnesses. The second point of note is that systems like Digicash, at their simplest, can amount to no more than a piece of encryption software. The effect of this is that they are potentially beyond the control of national governments (the American government has attempted to control the use of encryption software within its borders and has thus far failed).

Thus, Digicash has a number of advantages not only over notes and coins but also other forms of centrally verified e-cash: it is cheap to implement, secure, flexible, and likely to prove popular with network users. However, the history of technological development shows that the most advanced solutions to a problem often lose out to the ones with the most powerful backers. As yet, unlike other systems, Digicash does not have the backing of any of the major financial organisations.[127] This is perhaps less than surprising, as it offers potentially the greatest challenge yet to their market dominance this century.[128]

As we have noted, Mondex does not require central verification but is reliant upon specialised hardware. Its financial backing may ensure that it will become popular. However, it is unlikely to have a significant influence upon the area currently under discussion because its developers have determined that each Mondex card will be capable of holding only a limited amount of value[129] and Mondex transactions are unencrypted.[130] Equally, although centrally verified systems may create serious data protection problems,[131] their nature means that they are unlikely to have an effect

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[127] The most developed Digicash implementation was established at the headquarters of the European Commission in Brussels. The CAFE (Conditional Access For Europe) project is part of the European Community's ESPRIT program (Number 7023) and started in December 1992. This involves thirteen partners throughout Europe.

[128] As J. Richard Fredericks, Managing Director Montgomery Securities, has noted, "Banking is essential to the world economy, banks are not.": Holland and Cortese, *op. cit.*. More stridently, Eric Hughes, President of Open Financial Networks, suggests that, "The retail banking market will collapse and give way to global competition.": *Ibid.*

[129] During the present author's interview of the Public Relations Director of Mondex (conducted as part of this study) a figure of £500 was suggested.

[130] "I don't see Mondex posing difficulties for government agencies wanting to control commerce or other classes of interconnection across electronic networks...[because] a Mondex transaction that's travelling across a network is "in clear"...If you were to look at it...you'd see the identity of the sending purse...the receiving purse...the amount, the currency code. If society allows this to happen, that agency would see the telephone address that the money's coming from and the telephone address that the money's going to. We use crypto in Mondex to protect that data by doing a digital signature on the end of that string of data - we don't use it to jumble up the data and hide what's going on.": Tim Jones, Managing Director of Mondex, Interviewed by The BBC's *The Net*, 5 June 1995: transcript on file with author.

[131] These systems will generate an unprecedented amount of information every time we make even the smallest purchase. Modern data processing techniques will facilitate comprehensive record keeping on where we go, the books we read, the clubs we join and the people with whom we associate. As Camp, *et al* note, "The hazards posed by electronic currency, such as data surveillance, have not been fully considered. Technical mechanisms exist to provide anonymity by preventing data collection in electronic financial systems, but no statutory requirements to use these techniques exist. In fact, current statutory reporting requirements could be interpreted as prohibiting the use of such techniques. Statutory limits on disclosure are inadequate given the ease of transmission and aggregation of machine-readable date.": Camp, Sirbu, Tygar, *op. cit.*. Equally, May suggests, of Visa's implementation, "Make no mistake this is not digital cash...This gives the credit agencies and government(s) complete traceability of all purchases, automatic reporting of spending patterns, automatic reporting of about-to-be-outlawed businesses, and invasive surveillance of all

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upon asset tracing any more significant than traditional credit/debit cards.[132] The confidentiality difficulties created by Digicash-type systems will now, therefore, be considered in a little more detail.

1.2.2.2: Privacy and Anonymity.[133]

It is not unreasonable to suggest that many of the problems involving electronic cash resolve into a single issue: confidentiality. It is a question of whether we want a system of money which can provide a central authority with intimate information concerning every detail of our lives, or alternatively whether we believe that a system providing complete anonymity and privacy is acceptable. At present we have a legal system which attempts to strike a balance between confidentiality and transparency. Small cash transactions are often intended to be private while larger bank transactions are, as a rule, transparent. However, these precepts are at best simplistic: cash can be used for large transactions in order to increase privacy while money laundering techniques can be used to hide the true nature of bank-based transactions. It is likely that e-cash will further blur these distinctions.

Take the simple example of the cash purchase of a newspaper. Such a transaction can create a vast amount of information, most of which generally goes unmonitored. First, each party becomes aware of details by which they might be able to identify the other. This is unlikely to include their names, but would potentially include physical descriptions including gender, race, class, occupation and certainly the vendor's location. Equally, any observer would gain the same information. Other data generated includes the date, time, value and the type of product bought.[134] Only if the identity of one or more of the parties is hidden from one or more of the other parties is the transaction said to be anonymous. If one of

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inter-personal economic transactions.": May, C.T. *Cyberpunks-list 6929*, published electronically, copy on file with the author.

[132] Some computer commentators have suggested that systems like the one developed by Visa are intended to kill off "true" e-cash systems and thus maintain the dominant position of the traditional financial institutions: May, C.T. *Cyberpunks-list 6929*, published electronically, copy on file with the author.

[133] "Civilisation is the progress toward a society of privacy. The savage's whole existence is public, ruled by the laws of his tribe. Civilisation is the process of setting free, men from men.": Rand, A., *The Fountain Head*, (1943).

[134] Camp, Sirbu, Tygar, *op. cit.*.

the other features is hidden from one or more of the parties, it is said to be private.[135]

The amount and type of information actually generated will depend upon a number of factors including the currency used. Thus, while a cash transaction provides observational information, the cash itself contains no useful data, and no information[136] is likely to be recorded remotely. On the other hand, a person-to-person cheque or credit/debit card purchase will create observational data plus remotely recorded information: the date of purchase, place of purchase, possibly the type of purchase and most importantly the identity of the card holder. Some of this can be made unavailable by making a remote purchase (e.g. over the telephone) using a debit/credit card, but again the name of the card holder will become available. Both cash and notational payment systems are capable of providing anonymity and some level of privacy through the use of an intermediary. However, this requires the purchaser to take the risk of that intermediary acting contrary to his instructions and may still not provide full confidentiality. Thus every transaction is capable of yielding a large range of information or, potentially, none at all. The primary point to note regarding e-cash and confidentiality is that, in effect, it provides a synthesis between paper cash and notational systems. In other words, it is capable of providing remote purchases/transactions which prevents the collection of observational data, and yet does not require central verification or the user to have a bank account[137] and therefore does not generate the remote information associated with traditional credit/debit cards.[138]

In summary, therefore, e-cash will be potentially simple to implement[139] and extremely difficult to regulate.[140] By design it is likely to be internationally

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[135] *Ibid.*

[136] Beyond that available to the observer.

[137] Although we have said that the original purchaser of the e-cash will need to use a traditional bank account, it is possible that third party users will not be so constrained.

[138] It is important to remember that here we are discussing e-cash in general and not a particular system.

[139] At its simplest representing no more than encryption software.

[140] Arguably, even though a financial organisation or system is based overseas, its activities within our shores can be controlled by national regulation. However, proponents of this position might like to consider recent reports that unauthorised financial service providers have been breaching section 57 of the *Financial*

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acceptable, easily transferable over electronic networks, capable of storing large sums on a smart card,[141] cheaper than alternatives[142] and provide anonymity and privacy of transaction. Not only will the relevant software be difficult to control,[143] but it even raises the possibility that states will no longer be able to regulate the supply of money[144] and will have significant consequences for the ability of government to raise taxes.[145] For this reason it has been described as "...another revolution similar to the industrial revolution."[146] and "...a mass experiment that

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Services Act by advertising on the Internet. When questioned on the subject, the Securities and Investment Board are reported to have said, "the Internet, what's that then?" The journalist involved in that exchange concluded, "...[the SIB] actually had no idea what the Internet was, no knowledge of the amount of financial services advertising on it and no policy on the subject. Although...it was obvious that they agreed with our analysis of the situation - that the Act was being broken...": *Internet Magazine*, "Inner City Crime", May 1995.

[141] Indeed, it is not unimaginable that a party could simply carry the relevant numbers in their memory.

[142] "There's a difference between debit and credit cards and cash, the principal one being that there's a third party involved...That third party will also typically skim some money off the top for that transaction: every time you use your credit card the merchant will be paying to VISA something in the order of 5% of that transaction, so by having that third party there the only thing they're adding is some money into their pocket and what I would argue is noise. So...I think that debit and credit cards will disappear with electronic money.": Peter Dawes, Managing Director of Pipex, Interviewed by The BBC's *The Net*, 5 June 1995: transcript on file with author.

[143] "... governments...[may]...say well we don't like e-cash, we're going to ban it. And that would force e-cash to move underground and since it's only software it can probably exist even if it's banned, just like other encryption software has existed in the past...If e-cash is outlawed and pushed out...then, yes, the technology could exist in cyberspace and be basically unstoppable and unregulatable.": David Chaum, interviewed by The BBC's *The Net*, 5 June 1995: transcript on file with author.

[144] For example, those backed by large companies and financial organisations rather than states. As the head of the Adam Smith Institute has noted, "...anybody can issue a currency. In fact in Britain up to 1844 the Scottish banks issued their own currency which was free floating against English pounds. And in America in the 19th century, several banks issued their own currencies; sometimes they were currencies which people felt confident in circulating at a premium against the standard US dollar, sometimes it was one that people weren't confident about and they wouldn't take it at face value. But anyone can issue a currency..." Eamonn, Butler, The Adam Smith Institute, Interviewed by The BBC's *The Net*, 5 June 1995: transcript on file with author. For this reason, David E. Saxton, Executive vice-president of Net1, has suggested that, "Digital cash is a threat to every government on the planet that wants to manage its currency.": Interview in Holland and Cortese, *op. cit.*

[145] "...I think it is completely impossible to police this. I think there's going to be so much money floating around as people buy and sell services over the networks and the information is going to be so complex and so diffuse that it's going to be impossible for any national, or even international, authorities to track down these transactions and to eliminate fraud, but also of course to collect income tax. It's the ultimate global back pocket economy - it can't be traced, you just download the money onto your own card and then you go away and spend it. No tax authorities can keep on top of that.": Eamonn, Butler, The Adam Smith Institute, interviewed by The BBC's *The Net*, 5 June 1995: transcript on file with author. Peter Dawes, Managing Director of Pipex makes a similar point when he says, "Electronic cash as entered across something like the Internet, knows no boundaries. It is secure, it is private, and as a result the only people who will know of a transaction are the two parties involved in the transaction. Thus it's totally unrecollatable, so we're going to have monetary anarchy...we'll be in a total cash society. There will be no cheque stubs, no receipts, no place for the tax man to check whether you should have paid tax on a transaction. So this hits tax revenue very quickly. It also hits the checks on money laundering, because again it's private and polite. It's not a happy situation in many respects but it is inevitable.": Interviewed by The BBC's *The Net*, 5 June 1995: transcript on file with author. For this reason some EC officials have suggested a blanket tax on all data transmission (a so called "byte tax") to make up for tax lost via electronic transactions: The BBC's *The Money Programme*, 14 December, 1996.

[146] Crone, R.K., Manager KPMG Peat Marwick, interviewed in Holland and Cortese, *op. cit.*.

could...shake the foundations of global financial systems and even governments."[147]

There is little doubt that some e-cash systems do have the ability to bring about such consequences. However, it is submitted that many of them may not come to fruition. National governments and large financial organisations have a common goal in wanting to bring in a less flexible but more regulatable form of e-cash which will limit the dangers noted above. The confluence of these interests is likely to mean that such systems can dominate the market despite their disadvantages in terms of flexibility, cost and confidentiality.[148] If this comes about we are likely to see national governments move against those e-cash systems which can offer confidentiality, on the basis that only those who have something to hide would use them.[149] Indeed, we have recently seen a move by governments on both sides of the Atlantic to require all encryption keys to be registered with national governments.[150] However, this happy scenario (from the point of view of national governments) is by no means certain. Moreover, even if it does come about, the above discussion serves to illustrate the type of technological developments which will challenge the environment for fraud in the near future. The purpose of the present study is in no small measure to recommend methods by which our system can respond to such changes as a matter of principle, rather than by reference to traditional and inflexible rules.

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[147] *Ibid.*

[148] " I don't see many versions of electronic money coming to the market and staying in the market. Right now, we're at the early stage of an emerging market and therefore you'd expect there to be a number of competing initiatives. But if we look to the history of the credit and charge card market, after the market settles down you'll see three or four major brands, VISA, Mastercard, American Express, Diner's...That's what I see happening with electronic money as well...one has to say is there really space, because most markets in this sector have traditionally matured down to two or three major players.": Tim Jones, Managing Director of Mondex, Interviewed by The BBC's *The Net*, 5 June 1995: transcript on file with author.

[149] This is of course not without its own difficulties, David Chaum argues that by embracing all forms of e-cash, "...governments would...be able to control the bridgehead from the conventional payments world to cyberspace. Through the control over that bridgehead they'd be able to extract appropriate taxes and monitor against the various kinds of abuse. So it's only if they push it into a sort of grey black market kind of situation that it will become unregulatable....": Interviewed by The BBC's *The Net*, 5 June 1995: transcript on file with author.

[150] Grayson. I., "The Key to Privacy" *The Independent*, 27 May, 1997.

1.2.3: MONEY LAUNDERING.

It has been calculated that $80 billion of drugs profits are laundered in the United States every year,[151] and the National Criminal Intelligence Service has estimated the total figure for money laundered in the US is $150 billion per year and in Europe $22 billion.[152] However, such figures are both potentially inaccurate and misleading. They are misleading (as is the term money laundering) because they tend to look only to criminal activities.[153] However, it is entirely possible that a party will wish to "launder" money which he legitimately owns or, for example, which we would consider to be legitimate even though a foreign state may disagree.[154] Nevertheless, the "clean" market for money laundering is important with regard to the present discussion because the existence of legitimate trade in any asset or service makes illegal abuse of such systems potentially easier.

We can define money laundering as the process by which the true origins or ownership of money is disguised, usually in order to mask its criminal origins and to prevent its identification by the criminal authorities or recovery by civil means. Robinson identifies five typical elements of the laundering process and three specific stages.[155] The former are:[156] concealment of ownership; concealment of source; change of form; removal of audit trails and strong control of the relevant stages of the process.[157] The three stages are as follows. First is the immersion of the money into a legitimate conduit. This can be an extremely difficult task. Thus, for example, drugs dealers are known to employ small armies of people to place money into bank accounts in amounts small enough to avoid reporting

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[151] Willcock, J., "A Cancer at the Heart of World Banking" *The Times*, 9 October, 1996.
[152] Gilmore, W., *Dirty Money: the Evolution of Money Laundering Countermeasures*, Council of Europe Press, Holland, (1995).
[153] See, for example, Gleason's (Gleason, "The Involuntary Launderer: The Banker's Liability for Deposits of the Proceeds of Crime" in *Laundering and Tracing*, London, (1995)) defines money laundering as "...rendering the proceeds of crime unrecognisable as such."
[154] Walter, H., *op. cit.*.
[155] Robertson calls these stages "immersion", "layering or laundering" and "repatriation and integration" while Hinterseer (Hinterseer, K. "Laundering and Tracing of Assets" in Rider and Ashe (Eds.), *International Tracing of Assets*, London, (1997)) calls them "sorting and refining", "laundering" and "reintegration."
[156] Robinson, J., *The Laundrymen*, London, (1994).

mechanisms. It is interesting to note that e-cash systems could in theory be programmed to accomplish such a task automatically. Second, is the actual laundering process. This involves the movement of the money through a range of transactions in order to hide any possible audit trail. Typically the launderer will attempt to hide the money's origins by changing it into other assets, mixing it with clean money and moving it through various bank accounts, companies and jurisdictions. In the final stage the laundered money is brought back into the legitimate financial system.

In recent years it has become apparent to many western states that attacking crime at the money laundering stage is potentially more effective than attempting to tackle it at source. As a result we have seen a spate of legislation and international agreements. In this country the primary source of rules relating to money laundering is to be found in the Money Laundering Regulations 1993 (SI No. 1933) which is supplemented by a number of statutory provisions aimed at specific areas.[158] A detailed examination of the legislation surrounding laundering, or indeed laundering itself, is outside the scope of the present study. However, in the context of asset tracing, several points should be borne in mind. Specifically, (a) the techniques currently used, particularly by drugs dealers, are of a level of sophistication which matches those used by legitimate financial institutions; (b) when used by fraudsters, these techniques will ensure that the relevant sums may be passed through many hands, bank accounts, companies and jurisdictions; equally, (c) they will almost certainly ensure that the disputed amount will become mixed with untainted money belonging to third parties; (d) money launderers have become adept at exploiting new forms of technology; and, (e) legislation which requires parties to report suspicious transactions may also alter our view of the state of mind and/or state of knowledge necessary to fix a third party with liability for knowingly handling another's property.

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[157] As Robinson notes, such control is necessary because those involved are aware that theft of the money will not result in the involvement of the criminal authorities (although other sanctions may be available).

[158] See, Prevention of Terrorism (Temporary Provisions) Act 1989, Criminal Justice (International Co-operation) Act 1990, Criminal Justice (Confiscation) (Northern Ireland) Order 1990, Northern Ireland (Emergency Provisions) Act 1991, Drug Trafficking Act 1994.

1.2.4: THE INTERNATIONALISATION OF THE WORLD ECONOMY.

Having examined some of the specific elements which are likely to influence tracing and fraud in the near future we will now briefly note a more general influence which may have a dramatic impact upon fraud: specifically, greater economic internationalisation. This topic is of a magnitude beyond the scope of this, or perhaps any individual study. Nevertheless, some points can be highlighted to useful effect.

It is submitted that the world is, for a multitude of reasons, becoming increasingly internationalised: as a result the methods by which we attempt to achieve justice can only be effective if they take cognisance of, and adapt to, this changing environment. This is true with regard to most, if not all, areas of law. However, it is submitted (a) that these changes are particularly prominent and pressing with regard to fraudulently obtained assets, and (b) that a consideration of this subject can provide important insights into the problems which other legal areas will face in the near future.[159]

With regard to the first element of this proposition, economic, social and technological advances are presently combining to ensure that national barriers are of decreasing importance. The transportation of money,[160] people,[161] drugs,[162] information[163] and almost all other assets of economic worth[164] are today constrained less by national frontiers than logistics and market forces. Moreover, this is a situation that will develop with increasing pace.[165] We might argue that these changes are at most contextual and represent an on-going development no

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[159] For example, the greater internationalisation of litigation in general.
[160] Walter, H., *Secret Money,* London (1989); "Tracing the Flight of Latin Capital" *International Herald Tribune,* 9 May 1986; "Capital Flight from Developing Countries" *Finance and Development,* March 1987; "Electronic Cash Will Do Nicely, Sir" *Financial Times,* 8 January, 1997.
[161] This is true both of the legal and illegal movement of people: Smith, Athens, *et al,* "People-Smugglers Make a Mint out of Misery" *The Observer*, 12 January 1997.
[162] "Seychelles Forced to Drop Drug-Dealers' Charter After Outcry" *The Sunday Times*, 21 January, 1995.
[163] Stock, G., *Metaman*, London, (1993).
[164] International Business Conferences, *No Hiding Place: The International Tracing of Assets*, (1995).

more fundamental than, for example, the invention of the telephone or the popularisation of air travel. However, we might equally contend that this internationalisation is a change in the structure of society rivalled only by the industrial and agricultural revolutions.[166] Today we see nationhood as the foundation upon which we base much of our cultural, political and indeed personal identity. Nonetheless, it is at least arguable that the rise of national culture (and the nation-state itself) was no more than a function of the need to increase market size brought about by the industrial revolution. This has led some commentators to suggest that the information/communications developments which now allow economic entities to trade trans-nationally and globally, may create market conditions which will result in the fall of the nation-state just as surely as the industrial revolution sealed the fate of regional and local governance. Some believe that these changes will lead to the creation of trans-national "super states", others to a massive diminution in the importance of traditional political power, bringing with it the creation of new forms of government:

> "The nation-state...is being squeezed by vice-like pressure from above and below. One set of forces seeks to transfer political power downwards from the nation-state to sub-national regions and groups. The others seek to shift power upwards from the national to trans-national agencies and organisations."[167]

Some of the most pressing questions facing the global community, from the utility of the North American Free Trade Zone and the European Single Currency to the extent to which Eastern Europe and China should embrace the social and economic precepts of capitalism, are a practical embodiment of these changes.[168] It is arguable that a review of these developments suggests that greater internationalisation will,

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[165] Ohmae, K. The End of the Nation State: The Rise of Regional Economics, London, (1995).

[166] See generally, Toffler, A., *The Third Wave*, London, (1980); Ohmae, K., "Trade Barriers" *New York Times*, 17 April, 1983; Ohmae, K., *Beyond National Borders*, New York, (1988); Porter, M., *The Competitive Advantage of Nations*, New York (1990); "Toward a Global Regionalism" *Wall Street Journal*, 27 April, 1990; "Life in a Borderless Greenback Empire" *New York Times*, 29 April, (1990); Ohmae, K., *The Borderless World*, New York, (1990); Huntingdon, S., "The Clash of Civilisations" *Foreign Affairs*, Summer, 1993; Stock, G., *Metaman*, London, (1993); Saxenian, A., *Regional Advantage: Culture and Competition in Silicon Valley and Route 128*, Harvard University Press, (1994); Ohmae, K. *The End of the Nation State: The Rise of Regional Economics*, London, (1995).

[167] Toffler, A., *op. cit.*.

at least in the industrialised western states, indeed result in a fundamental re-evaluation of our economic and social structures, which may logically lead to (or be analogous with) the collapse of the nation state. If this is the case, then there is little doubt that Ohmae is correct to suggest that:

> "...so powerful are these effects that, once the genie is out of the bottle - and it is certainly out of the bottle now - there can be no turning back. Against this kind of current, no traditional strategy, no familiar line of policy, and no entrenched form of organisation can stand untouched...traditional policies based upon traditional principles simply cannot provide an adequate guide to the borderless world...so long as old principles continue to shape policy, the century-long gap between intention and result cannot be closed by better execution or implementation. Nothing can close it. The principles themselves have to change."[169]

This raises the importance of the second element of the proposition noted above. Specifically, that even if we do not accept Ohmae's cataclysmic view of world change, it is difficult to doubt that our laws must be constantly reviewed if we are to avoid what he describes as the "gap between intention and result" extending to the point at which our systems of justice become unacceptably compromised. In other words, at their most limited, these changes will present a powerful challenge to the institutions which we presently associate with nationhood.

During this process, many important structural changes will occur naturally as a result of the confluence between greater communications, technology and market forces. Thus, for example, any working practice which provides a significant competitive advantage will inevitably be exported over diminishing national borders. The creation of the European Community suggests that a similar process may be occurring with regard to socio-political structures. History, however, demonstrates that law is the most isolated and idiosyncratic of human institutions. It is unlikely that we will see significant movement toward a comprehensive development of

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[168] See for example, "Beyond the Wealth of Nations" *Asian Wall Street Journal*, 29 July, 1992.

[169] Ohmae, K., *The End of the Nation State..., op. cit.*, Preface. Or as Bacon would have it, "It is idle to expect any great advancement...from the superinducing and engrafting of new things upon old. We must

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trans-national legal systems in the near future. As a result, if our legal structures are not to become outdated, we must be willing to accept that domestic rules should develop in a way which is sensitive to the changing international environment. In this context it should be noted that greater internationalisation affects not only the methods used by the fraudster but, potentially, also the technical way in which the English law views a dispute. Thus, for example, we will see in the coming chapters that it is arguable that asset recovery which would be easily facilitated in a domestic context is defeated by its cross-border movement.[170] As a result, it is submitted that we cannot, or should not, accept an understanding of English rules which does not adequately respond to cases with a foreign element.

The fact that we are developing a domestic system to satisfy the needs of greater internationalisation, rather than trying to create a new international system, is both advantageous and problematic. Its advantage lies in the fact that, to some extent, it circumvents the difficulties associated with significant international agreements. The contrary argument is that it requires lawmakers, traditionally concerned with narrow domestic issues, to take a more diverse and complex view. Most specifically, we will need to review the extent to which changing circumstances (a) alter what we wish our legal rules, techniques and structures to achieve, and (b) require them to be changed and reformed in order to maintain their ability to deliver these aims.

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begin anew from the very foundations, unless we would revolve forever in a circle with mean and contemptible progress.": Bacon, F., (Robertson Ed.), *The Philosophical Works of Francis Bacon*, 280.

[170] See, for example, *Macmillan Inc.* v. *Bishopgate Investment Trust plc.* (No.3) [1996] 1 All E.R. 585.

1.3: CONCLUSION.

In looking at banking transactions, electronic cash and, to a lesser extent, money laundering, we have identified three specific elements which will have a powerful effect upon the methodology by which fraud is committed, and the ways in which the proceeds of fraud are transported, stored and hidden.[171] These elements are also illustrative of the influence which other changes in technology and techniques will have. However, we must bear in mind that these developments will occur within a widespread framework of social and economic change. As noted above, it is beyond the scope of the present study to pursue the developments to their final conclusion. Equally, there must be doubt as to the value of such a debate: the predictions of futurologists are notoriously inaccurate. However, the changes which can accurately be predicted must lead us to expect an increase in the ease with which we can transport assets internationally and a decrease in the importance of national borders.[172] Even the briefest consideration of the recent history of Britain, it is submitted, will confirm this. Thus in the last thirty years, we have seen our entry into the EEC, the general removal of exchange controls, the creation of a single European market, the removal of border controls in mainland Europe, the creation of the Internet and the beginning of international electronic commerce (including the creation of virtual banks, casinos and financial service providers). Equally, it is increasingly likely that in the next few years (and possibly sooner) we will see the UK entering a single European currency.

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[171] "The pace of science forces the pace of technique. Theoretical physics forces atomic energy on us; the successful production of the fission bomb forces upon us the manufacture of the hydrogen bomb. *We* do not choose our problems, we do not choose our products; we are pushed, we are forced - by what? By a system which has no purpose and goal transcending it, and which makes man its appendix.": Erich Fromm, *The Sane Society*, (1955) Chapter 5.

[172] See generally, Toffler, A., *The Third Wave*, London, (1980); Ohmae, K., "Trade Barriers" *New York Times*, 17 April, 1983; Ohmae, K. *Beyond National Borders*, New York, (1988); Porter, M., *The Competitive Advantage of Nations*, New York (1990); "Toward a Global Regionalism" *Wall Street Journal*, 27 April, 1990; "Life in a Borderless Greenback Empire" *New York Times*, 29 April, (1990); Ohmae, K., *The Borderless World*, New York, (1990); Huntingdon, S., "The Clash of Civilisations" *Foreign Affairs*, Summer, 1993; Stock, G., *Metaman*, London, (1993); Saxenian, A., *Regional Advantage: Culture and*
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Whether these, and other changes, will see the disappearance of the nation state as some have argued is a matter for debate.[173] What is certain is that they will potentially have a considerable influence over the methodology of tracing. It is equally certain that, throughout history, the first instinct of the fraudster has always been to remove himself and the proceeds of his crime from the country in which the fraud was committed.[174] Unfortunately for the fraudster of yesteryear, while the commission of a particular fraud might have been comparatively easy, attempting to remove the relevant assets from the jurisdiction could be extremely problematic.[175] Today, however, the changes discussed above have made this process relatively simple.[176] As Millett has noted extra-judicially:

Competition in Silicon Valley and Route 128, Harvard University Press, (1994); Ohmae, K, *The End of the Nation State: The Rise of Regional Economics*, London, (1995).

[173] The present author would suggest that this is a very real possibility; it is not, however, the most radical scenario which has been seriously considered by commentators. Some have gone so far as to argue that new technology is allowing humans around the world to behave as a single organism, "...the thin planetary patina of humanity and its creations is actually a living organism. It is a 'super-organism', that is, a community of organisms so fully tied together as to be a single entity...We are accustomed to viewing the world at a human scale, so we tend to see such things as air travel, telecommunications, and even rubbish collection, in terms of how they serve people. But just as the activities of an animal's individual cells mesh to serve the needs of the animal as a whole, human activity has organised itself into large functional patterns that join to sustain the entirety...": Stock, G., *Metaman*, London, (1993). This is, perhaps, somewhat speculative; it may, however, provide an interesting model for the study of how information technology has altered the way we behave. In other words we may not be creating a single organism, but the realisation that humanity may be beginning to act in a manner similar to a single organism in the way it finds, develops, uses and abuses resources is a potentially useful analogy. In this context it is worth noting that Stock spent much of his career, "...designing computer software for electronic banking networks..." Equally, it might be noted that Stock is not the only commentator to see a new relationship between humans and technology. Thus, for example, Adams argues that we now measure civilisation in terms of our technological development (Adams, M., *Machines as the Measure of Men: Science, Technology and Ideologies of Western Dominance*, New York; (1998), Chapter 3, "Global Hegemony and the Rise of Technology as the Main Measure of Human Achievement.") and Professor Steve Jones goes to the extent of suggesting that, "What makes us humans are our machines." (Professor S. Jones, *The Acid Test,* BBC Radio Five, 24 January, 1997).

[174] Thus, for example, 70% of all cases investigated by the City of London Police Fraud Investigation Department involve contact with foreign law enforcement agencies: City of London Police, *Financial Fact Sheet,* (1995). The reasons for this can be relatively complex; however, we can identify three primary motivations. First, the fraudster will wish to remove himself and the relevant assets from the jurisdiction most likely to take action against him, i.e. the one in which the fraudulent act was committed (*Mercedes-Benz* v. *Leiduck* [1995] 3 All E.R. 929). Second, he will wish to take advantage of any jurisdictional and/or choice of law issues that are likely to limit his liability. Finally, he will wish to create a chain of events and/or transactions that will obscure his identity, the identity of the assets and any fraudulent connection between the two: "The difficulties surrounding the securing of evidence abroad are such as to confound any general practitioner not experienced in such matters. Even to one who has the necessary experience, the delays and red tape involved in an effort to secure such evidence create a formidable psychological barrier in the prosecution of a litigation.": Heilpern, "Procuring Evidence Abroad, 14 Tulane L.Rev 29 (1989).

[175] *Taylor* v. *Plumer* (1815) 3 M. & S. 562; 2 Rose 415.

[176] As McCormack notes, "It is something of a paradox that modern technology may have increased rather than decreased the possibility of mistaken payments being made": McCormack, G., "Mistaken Payments and Proprietary Claims" [1996] Conv., March-April, 86.

> "International fraud is a growth business. Electronic transfer of funds; the widespread use of nominee companies and offshore accounts; the increased sophistication of legitimate financial transactions; and the reluctance of bankers and professional men to inquire into their clients' affairs; all contribute to the ease and speed with which fraudsters can transfer substantial sums from one country to another and conceal their sources and the identity of those who control them."[177]

As a result, the modern fraudster is likely to avoid the physical transportation of his gains and indulge in sophisticated, computer-based, money laundering techniques instead.[178] These factors can clearly result in some plaintiffs being unjustly denied reasonable recompense. However, they also mean even when the dispute between the parties is extremely simple (i.e. was A defrauded by B of asset X) and will eventually be resolved, the international aspects of the case can allow the defendant to create a mass of litigation around the world (potentially paid for by the disputed

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[177] Millett P.J. "Tracing the Proceeds of Fraud" 107 L.Q.R., 71; New technology is not only creating new ways of committing fraud and anonymously moving fraudulently obtained assets, but also new sources of information on such subjects. By way of a prosaic example, until recently few people would have had the necessary knowledge to deal in an off-shore tax haven without involving financial professionals, who in this country are under a duty to inform the authorities of suspicious transactions. (Parts II - IV of the Criminal Justice Act 1993 and the Money Laundering Regulations 1993 SI No. 1933) Today, however, anyone with a computer terminal, a modem and $50 can open a Cayman Island bank account over the Internet from anywhere in the world. New opportunities like this are opening up for the hi-tech fraudster almost daily (See Hutton, I.W. "Electronic Cash - Welcome to the Future", *op. cit.*.). Beyond this, a large number of experts on off-shore asset preservation, cryptology and new financial technology from around the world have begun to publish electronically. Many of these specialists are working on the fringes of legality within their respective jurisdictions (Thus, for example, Phil Zimmerman, the publisher of the leading Internet encryption program, is currently undergoing prosecution in the United States: *The Times*, 20 January 1995). As a result writers are willing to provide information only on the basis that it is heavily encoded to protect both their identity and location. This increasing internationalisation combined with legal neglect is of course not a new development (although the rate of change is growing) or one which is limited to fraud. As Moses noted in 1935, "The tremendous technical progress in our means of communication and transportation cannot but result in a steady increase and intensification in personal relations between nationals of different countries. What does that mean to the lawyer?...it means that he is apt in his practice to be concerned to an ever-widening extent with foreign interests of his clients...But little, if any, thought has been given to the eminently practical, eminently pressing problem of how to handle cases which may be pending in our courts, but where one or other party is a foreigner or where the transaction or part of it took place abroad or where actual questions of foreign law arise...": Moses, F., *International Legal Practice*, 4 Ford L. Rev. 244 (1935).

[178] As Hoffmann has noted, even when caught, the fraudster, "...will cheerfully swear a disclosure listing his sole assets within and without the jurisdiction as a building society account in Lewisham which is 10 pounds in credit and a bank account in Guernsey which is modestly in overdraft. He does not disclose the Liechtenstein trust of which the named settlor is an accountant in Hong Kong who contributed $10 and the sole named beneficiary is Cancer Research, but the trustees have the power to nominate additional beneficiaries and hold in their safe a letter from the defendant expressing his wishes as to how they should act. Asked to explain his continuing affluent lifestyle, he says that he is living on the charity of friends.": Hoffmann, "Changing Perspectives on Civil Litigation" (1993) 56 M.L.R. at 302-303.

sums) which can prevent even the successful plaintiff from gaining relief for many years.[179] In such cases, justice delayed can literally amount to justice denied.

In conclusion, the chapter is intended to begin the examination of why the tracing of assets following fraud is an intrinsically difficult task. This process was initiated by highlighting the problems associated with fraud itself. Thus, we have seen that fraud is a potentially nebulous concept which is both wide-ranging and intentionally ill defined. This can, in certain circumstances, make the task of deciding how and when a party's rights have been compromised problematic and has inevitable consequences for asset recovery. We have also touched upon the range of legal techniques, causes of action and remedies which fraud can engender. Beyond this we have seen that the banking techniques and new technologies applied to the proceeds of fraud both intrinsically complicate the tracing process and are potentially open to misuse by the fraudster. Indeed, whether we examine the specific[180] or the general[181] we can discern a pattern which suggests that legal and illegal, legitimate and illicit assets can now be moved across borders with greater ease than ever before and that this trend will continue. Moreover, we have seen that legal techniques which view cash transactions as analogous to the transfer of movable assets are increasingly divorced from the way in which such transactions actually occur. These factors, combined with the advantages open to the fraudster who operates internationally necessarily, means that an effective civil response to fraud must take into account the problems associated with modern cross-border financial activity. However, these are not the only issues complicating the tracing process, and the next chapter will examine the nature and environment of fraud in further detail, paying particular attention to the views of those, perhaps, most affected by fraud: its victims.

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[179] Perhaps the perfect example of this is to be seen in *Arab Monetary Fund* v. *Hashim* which, although arguably concerning simple questions of merit, has generated a mass of jurisdictional, evidence gathering and choice of law litigation for the best part of ten years.

[180] E.g. electronic cash, money laundering.

[181] E.g. changing trade patterns.

CHAPTER TWO: THE PRACTICAL NATURE AND CHARACTERISTICS OF FRAUD WITH REFERENCE TO THE AIMS OF A MODERN CIVIL RESPONSE TO FRAUDULENTLY OBTAINED ASSETS[1]

2.0: THE NATURE AND CHARACTERISTICS OF MODERN FRAUD.

A.A. Milne once suggested that for every person who wants to make £50,000 there are 50,000 who want to inherit it. He might have added that there are usually another 50,000 wanting to dishonestly get their hands on the inheritance. Some commentators have claimed that fraud is the most serious form of crime affecting modern societies.[2] Whether we would accept this is clearly open to debate[3] however, it is certainly arguable that merely by virtue of volume, fraud is a serious problem for most economic entities. By their nature, many frauds may not come to the attention of even their victims and those that do may not be reported.[4] Anecdotal evidence suggests that management teams often feel that the damage done to a company's morale, share price and attractiveness to other fraudsters may outweigh any benefits which accrue from bringing the fraud into the open.[5] Moreover, fraud may have hidden costs which are not even apparent to those directly concerned:

> "We suspect that many management teams do not appreciate the full cost of fraud to their business. The costs are not *just* the assets lost to the fraudster. Often there are 'hidden' costs which can be even more damaging to the business, adversely affecting its prospects and even its survival."[6]

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[1] "Long experience has, however, taught me not always to believe in the limitations indicated by purely theoretical considerations. These - as we all know - are based on insufficient knowledge of all the relevant factors.": Marconi, G., "Radio Communication by Means of Very Short Electric Waves", Proceedings of the Royal Institute, Great Britain, (1932) 509.

[2] Ermann and Lundman (Eds.), *Corporate and Government Deviance*, Oxford University Press, 1978.

[3] Some support for this view is demonstrated by the Attorney General of Jersey's willingness to use his powers to assist in the investigation of serious fraud cases because of the crime's public impact, while refusing to extend the same facilities to those investigating other forms of financial wrongdoing: The Royal Commission on Criminal Justice, Research Study No. 14, *op. cit.* at page 11.

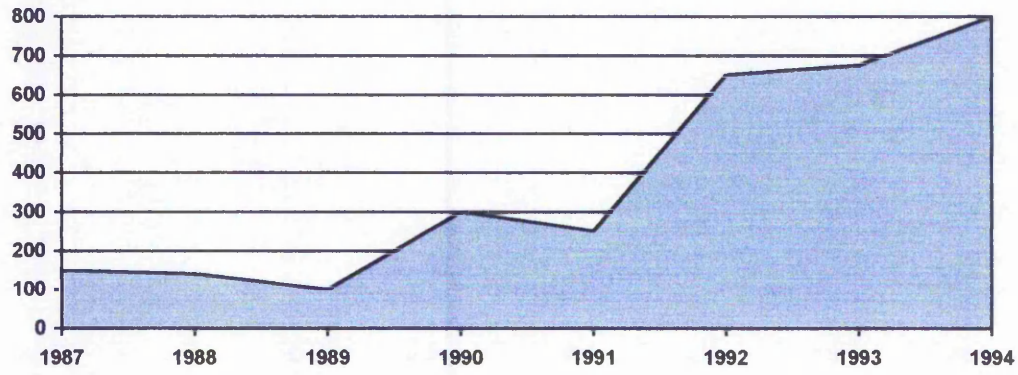
[4] Thus, for example, one respondent to the questionnaire study conducted as part of this study suggested, "...Much fraud is hidden in bad debt."

[5] See the comments by Robert Hunter below.

[6] David Sherwin, National Head of Ernst & Young' Fraud Investigations and Risk Management, quoted in *Fraud - The Unmanaged Risk*, Ernst and Young (1993), 1.

These include, "...Loss of impetus in managing the business, loss of business, loss of customer and bankers' confidence, adverse movement in the share price and even impaired health and performance of the management team."[7] Such indirect costs are probably incalculable, and are certainly so with any sense of accuracy, as is the cost of unreported fraud. However, more surprisingly, the cost of direct losses to reported fraud is relatively difficult to quantify. In 1985 the Fraud Squad estimated the cost of fraud in Britain to be £2 billion[8] while a different survey put the cost at £3 billion[9] in 1986. In 1993 Ernst & Young estimated that this figure had risen to £9 billion per year, or more than £25 million per day.[10] Working on reported fraud, rather than an extrapolated estimate, KPMG Peat Marwick put the 1993 figure at £700 million and £446 million in 1995. In a similar vein, in 1990 the Serious Fraud Office investigated 21 cases involving estimated losses of over £50 million each,[11] and in 1994 it was suggested that the value of all cases handled by the Serious Fraud Office and the Crown Prosecution Service was £10 billion.[12]

Chart I. *Total value of fraud charges in the United Kingdom measured in £M.*



Source: KMPG, *Fighting Fraud*, Issue No.4, 1995.

The level of fraud in this country is mirrored and indeed exceeded abroad. Thus, for example, as far back as 1974 the US Chamber of Commerce suggested that the

[7] *Ibid.*
[8] Bose and Gunn, *Fraud*, (1989), 1.
[9] *The Economist*, 4 October, 1986.
[10] *Ibid.*
[11] The Royal Commission on Criminal Justice, *The Investigation, Prosecution, and Trial of Serious Fraud*, Research Study No. 14 (1993), 11.
[12] City of London Police, *Financial Fact Sheet*, (1995).

cost to the US economy of all white-collar crime was $40 billion per year,[13] while the cost of fraud to seven federal agencies was said to be $25 billion in 1978.[14] In 1979 the American Management Association estimated that fraud cost US businesses $3.7 billion.[15] Equally, it has been suggested that fraud against US insurance companies adds 10% to the cost of insurance premiums.[16] In Canada, KPMG's fraud survey estimated that $121 million worth of fraud had been reported by their respondents in 1995 and that 55% of Canada's top 1000 companies reported that they had suffered fraud,[17] while in Ireland 39% of businesses admitted to being victims of fraud in the years 1993/5.[18] World-wide, the International Chamber of Commerce has estimated that $6 million per day is lost through the use of false financial instruments alone[19] while the European Commission estimates that £150 million is lost yearly as a result of customs duty fraud.[20] Equally, in a survey of over 5,000 companies in eleven countries, Ernst & Young suggested that 40% of businesses had suffered more than five frauds in the five years preceeding 1995 and 25% had lost more than $1 million in that period.[21]

It was noted above that the public perception of the seriousness of fraud has largely been framed by a series of high-profile crimes. Nevertheless, the volume of smaller fraud bears comment. Thus, for example, in 1991 the West Yorkshire Fraud Squad investigated 168 cases of fraud involving an average loss of £509,174.[22] Half a million pounds is not a large figure when compared with the amounts involved in,

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[13] Chamber of Commerce, *A Hand Book on White Collar-Crime: Everyone's Problem, Everyone's Loss*, Washington, 1974; Meier and Short, "The Consequences of White-Collar Crime", in Edelhertz and Overcasr (Eds.), *White Collar Crime: An Agenda for Research*, Toronto, 1985, 24.

[14] Meier and Short, "The Consequences of White-Collar Crime", in Edelhertz and Overcasr (Eds.), *White Collar Crime: An Agenda for Research*, Toronto, 1985, 24.

[15] "In Hot Pursuit of Business Crime" *Crime Prevention World Report*, 23 July, 1979, 59; O'Block, Donnermeyer, Doeren, *Security and Crime Prevention*, 2nd. ed., (1991), 170.

[16] McBee, J., "Insurance Related Crime" *Crime Prevention Press*, Winter, 1988-89, 10.

[17] KPMG, *Fraud Survey*, (Canada), 1995.

[18] KMPG, *Fraud In Irish Business*, 1995.

[19] *The Times*, 1 March, 1996.

[20] KPMG, "Fraud in the Community", *Fighting Fraud*, Issue 5, Summer, 1996; "Fraudsters Milked EU in Shuttle Trip Scam" *The Times*, 1 March 1996. Passas and Nelken (Passas and Nelken "The Thin Line Between Legitimate and Criminal Enterprise: Subsidy Frauds in the European Community in Nelken, D., (Ed.) *White-Collar Crime*, Dartmouth Publishing Co., (1994), 231, 233) identify a number of reasons why fraud against the EC is difficult to combat: specifically, lack of enthusiasm among member states; political tensions between member states; collusion among officials; desire to avoid trade disruption; desire to increase farm exports (an area particularly susceptible to fraud); and the tendency to put the interests of member states above those of the Community.

[21] Ernst & Young, *Fraud: the Unmanaged Risk*, (1995).

[22] The Royal Commission on Criminal Justice, *The Investigation, Prosecution, and Trial of Serious Fraud*, Research Study No. 14 (1993), 11.

for example, the Barings, Maxwell and BCCI cases. However, as the Royal Commission noted, this figure is put into context by the fact that only "123 robberies, 419 burglaries and 819 thefts" worth over £50,000 were investigated in the whole of England and Wales during 1990.[23] Equally, the fact that relatively small frauds can add up to significant losses is illustrated by the statistic showing that mobile telephone fraud[24] amounted to £100,000,000 in the year 1994/5 and constituted 1% of Vodaphone's turn-over.[25] Taking these trends in both serious and small-scale fraud together, Levi argues that we can identify not only an absolute, but a relative increase in fraud during this century, and the relevant criminal figures would appear to support this: thus in 1898 fraud represented 0.5% of indictable crime while by 1968 this figure had risen to 4.6%.[26]

Nor can we suggest that the cost of fraud is limited to the value of lost assets or consequential business costs. Thus, for example, the defence teams in some serious fraud cases have spent more than the Serious Fraud Office's annual budget[27] and it is not unknown for these sums to be met by the public purse.[28] However, it is not unreasonable to suggest that the greatest hidden cost of fraud is in public and business[29] confidence.

Unfortunately, it is submitted that many factors[30] combine to ensure that the above figures can be considered to be little more than educated guestimates.[31] To some extent reported crime figures are more informative, representing as they do fraud upon which official action has been taken, and in this context the City of London Police statistics presented in Table I are of interest.

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[23] *Ibid.*
[24] Which will generally be made up of numerous frauds each with a relatively small unit value.
[25] Stansell, J., "How the Phone Firms Keep Fraud off the Line" *The Times*, 23 July, 1996. Equally, in the US 3% of respondents in a survey of a rural community reported that they had been the victim of fraud in the last twelve months: Donnermeyer, J., *et al*, *Crime, Fear of Crime and Crime Prevention, An Analysis Among the Elderly*, Ohio State University, (1983), 74. O'Block, Donnermeyer, Doeren, *op. cit.* at page 170.
[26] Levi, M., *op. cit.* at page 4.
[27] Although it has been suggested that this figure is, for various reasons, misleading: The Royal Commission on Criminal Justice, Research Study No. 14, *op. cit.* at pages 9-10.
[28] *Ibid.*
[29] "US Fraud Actions Hit Lloyd's" *Financial Times*, 21 January, 1996.
[30] e.g. differing research methods, lack of openness among victims, lack of awareness among victims, etc.
[31] Thus, for example, it seems unlikely, as the above figures suggest, that the whole of American business suffered less fraud in 1979 than seven federal agencies suffered a year before.

Table I: *City of London Police, serious fraud statistics, 1994/95*

	1994/95	1st Qtr 1994	1993	1992	1991	1990
New crime investigations	90	28	88	85	105	62
Crime investigations carried over[32]	174	-	139	116	81	57
Miscellaneous enquiries[33]	168	29	164	163	225	191
Arrests	139	55	135	129	155	119
Money obtained[34]	40,300,588	13,405,777	34,301,272	57,766,348	60,785,395	40,767,820
Money recovered	19,582,749	12,111,263	26,283,754	36,206,834	50,085,191	23,819,618
Money attempted to be obtained	154,817,783	180,311,464	165,056,226	456,892,506	886,054,142	417,529,658
Total[35]	195,118,371	193,717,241	199,357,538	514,658,854	946,839,537	458,297,487
Money recovered and saved[36]	174,400,532	192,442,727	191,340,020	493,099,340	936,139,333	450,349,276

Source: City of London Police Annual Report 1994/95

Nevertheless, for reasons which will be considered below, it is likely that much fraud is never reported to the police. Thus, we can confidently state that by whatever measure we use, the value of fraud in this country and abroad is extremely significant but specific figures are, perhaps, impossible to discern. As a result if we are to understand fraud, it is more profitable to concentrate on its nature, rather than its volume.

As we have noted above, fraud remains undefined within our systems. We can, however, identify a range of methodologies:[37] for example, Ponzi schemes;[38]

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[32] To following year.
[33] On behalf of other agencies.
[34] All financial figures do not include the following enquiries: Maxwell, BCCI, Baring Brothers, Walter Smith Trust. All figures in pounds sterling.
[35] Money obtained and attempted to be obtained.
[36] From attempted fraud.
[37] For a discussion of recent high-profile British cases see, The Royal Commission on Criminal Justice, Research Study No. 14, *op. cit.*, Appendix B. Many of the examples below (and others) can be found in Smith, *Secret Money*, *op. cit.*.

misrepresentation of asset values, liabilities or company results;[39] forgery; cheque fraud;[40] insurance fraud; computer fraud; bankruptcy fraud;[41] the dishonest sale of worthless or undervalued assets;[42] and tender fixing. In this context KPMG have conducted informative research into internal fraud in Canada which is summarised in the following chart.

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[38] Here the fraudster offers interest rates (or rates of return) above current market returns. Existing clients can only be paid off by using the cash of newly attracted investors. One might assume that the offer of something for nothing would be enough to forewarn potential investors, but this is rarely the case. As a result Ponzi schemes have been extremely popular in recent years (although this has often been the product of bad investors attempting to make back their losses rather than the result of malice aforethought). An example can be seen in the case of J. David & Co. (Muir, F.M., "Can Investors Get Any of $150 million from J. David & Co.", *Wall Street Journal, 29 October 1984*). J. David & Co. offered investors 40% annual return on their investment along with absolute financial confidentiality. Most of the money went into financing the extravagant life style of the company's founder J. David Dominelli (six houses, three jets and over twenty luxury cars). It is apparent that the regulatory authorities may have suspected fraud, but the nature of the inter-bank foreign exchange market made the allegations very difficult to substantiate (particularly as earnings were routed through tax havens including Guernsey and Montserrat). When the fraud eventually came to light the company had assets of $600,000 compared to liabilities of $150 million and its founder unsurprisingly absconded to Montserrat. It is unclear whether the scam was a straight Ponzi scheme or whether it began as an attempt to recoup losses suffered on the international markets.

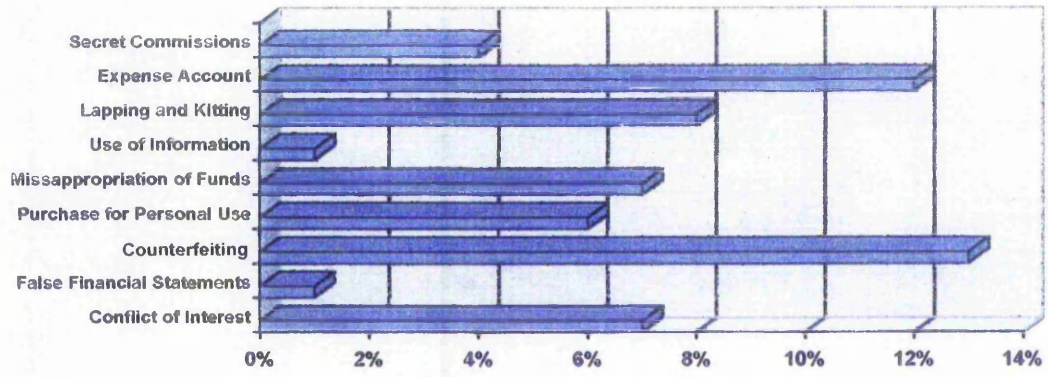
[39] Thus for example, in the early 1980s eight banks made loans totalling $45 million to Liechtenstein companies owned by Spanish businessman J. Ballestero who had previously gained a 68% stake in Safco, the largest fruit exporter in Chile. The money was to be used to create a holiday development and as fresh capital for Safco. It was secured by the deposit of precious stones owned by Ballestero and valued at $90 million by Belgian expert Franz-Maurice Verbruggen. When Safco filed for bankruptcy two years later it was discovered that Verbruggen has been involved in a number of dubious valuations and that the gems in this case were in fact worth only $4.5 - $9 million. One of the factors demonstrated by this case is that the amounts involved are potentially so great that apparently honest parties often become willing participants (in the above case the valuation had been confirmed by the Professor of Mineralogy at a major West German university). Smith, *Secret Money*, *op. cit.*.

[40] An interesting scheme was developed in Hong Kong which involved acquiring advances from one bank against uncleared cheques from a second bank. By writing cheques faster than the banks could clear them the perpetrator received, in effect, an interest free loan. These activities netted $153 million in 5 years and led to the failure of a number of deposit-taking institutions and one bank. After investigation it turned out that Citibank, one of the world's largest financial institutions, had contributed significant assistance in the perpetration of the crime: Wong, J. "Hong Kong Kitting Probe Looks at Citibank", *Wall Street Journal,* 13 May 1986.

[41] O'Block, Donnermeyer, Doeren, *op. cit.* at page 222.

[42] Thus, for example, Equity Management Trust, Falcontrust Financial Ltd, Prudenttrust Financial SA of Switzerland and Ketter Investment Finanz AG of Liechtenstein were apparently legitimate financial institutions which were used to directly sell financial services throughout Europe, Asia, Africa and South America during the 1980s. Their techniques were easily as professional as those of the legitimate investors: professional salesmen operating in over twenty countries; high quality supporting publications with names like *Strategy for Investors, Swiss Analyst,* and *Invest New.* Some investors were encouraged to part with their money in return for "blue chip" investments before being introduced to more speculative securities. Some were sold shares in companies which had already ceased trading. Others parted with cash and in return received optimistic profit forecasts but not the share certificates they expected. The fraud only came to light after an unprecedented group action by law enforcement agencies from Switzerland, France, Germany and Interpol. They discovered an extremely professional operation which had defrauded 5000 investors of over $250 million. This case highlights not only the sophistication of such schemes but also the high possibility that organised crime will be involved. Indeed it seems likely that this operation was originally set up with the intention of laundering dirty money. As one investigator noted, "If you buy shares with dirty money, selling them to pigeons allows you to have clean money.": Templeton, J. and Comes, F., "Euroscam: A Stock Scandal Mushrooms", *Business Week,* 22nd August 1988; Dullforce, W., "Charges in $150 Million Fraud Case", *Financial Times,* 4th August 1988; Protzman, F., "Too Good to be True: A 20 Nation Scam", *International Herald Tribune,* 20th August 1988; Kamm, T. "Shell Game", *Wall Street Journal,* Greenhouse, S., "Swiss Ask S.E.C for Help in Stock Enquiry", *New York Times*, 18th August 1988; Smith, *Secret Money*, *op. cit.*.

Chart II: *Occurrences of internal fraud by type.*



Source: KPMG, *Fraud Survey*, (Canada), 1995.[43]

Accountancy Age (see Chart II) conducted a similar survey with regard to those factors which companies expected to be the greatest causes of fraud over the next five years.[44] In the context of the present study, it is interesting to note that 40% of respondents indicated concern over computer fraud.[45] The significance of this form of fraud is reinforced by a number of other sources. Thus, empirical research conducted as part of this study found that 54% of those expressing an opinion believed that fraud against their company had increased in the last five years as a result of the greater use of information technology. In a similar vein *Accountancy Age*'s research showed that 26% of respondents believed that increased complexity of, and reliance on, computers was responsible for an increase in fraud.[46] Ernst & Young discovered that 78% of their respondents felt that computer fraud had

[43] The survey found "other" forms of fraud accounted for 22% of losses while petty cash theft accounted for 18%.

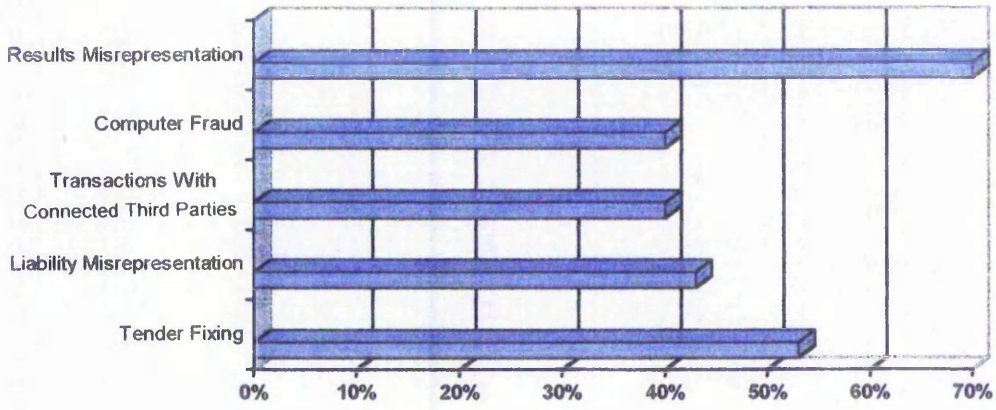
[44] Generally speaking, if we bear in mind the intrinsic elements of fraud and the environment in which it occurs, the importance of the detailed methodology of any particular fraud can be limited for the purposes of this study.

[45] KPMG have identified several general forms of computer fraud which can be broadly categorised as "input-related fraud" (which can be further subdivided into (a) the duplication of valid input; (b) the creation of invalid input; (c) the deletion of valid input; and, (d) the adjustment of valid input.); "output-related fraud"; and, "program related fraud": KPMG, *Fighting Fraud*, Summer, (1996).

[46] "Fraud Trends Set to Escalate, Say Auditors" *Accountancy Age*, 13 February, 1997. The increase in computer fraud is, it is suggested, primarily a function of the greater use and understanding of computers in society generally. However, it seems likely that it may also be prompted by an apparently justified belief that the police are inadequately equipped to deal with such crimes: "We have the Computer Crimes Unit at Scotland Yard and a small forensic team at Greater Manchester, but they're both badly under-resourced and

increased in the last five years and 80% blamed a lack of understanding of computer systems among company directors for this rise.[47]

Chart III: *Types of fraud that will have the greatest impact on UK companies over the next five years.*



Source: "Fraud Trends Set to Escalate, Say Auditors" *Accountancy Age*, 13 February, 1997.[48]

These findings appear to be confirmed by other surveys and statistics both in this country and abroad. Thus, the European Committee on Crime Problems has noted that as far back as 1980 a Local Government Audit Commission report found that 21% of surveyed companies had suffered computer-related crime in the last five years;[49] in 1984 the American Bar Association found that 48% of responding companies had suffered computer crime in the last year, resulting in losses estimated at between $145 million and $370 million;[50] in 1988 APSAIRD[51] estimated that computer-related crime in France had increased by 18% in two years; and official German figures show that 2,777 cases of computer fraud were

there's little interest in, or support for, investigating computer crimes in other forces.": "Criminals Slip Through the Net" *The Daily Telegraph*, 5 November, 1995.

[47] Ernst & Young, *Fraud: the Unmanaged Risk*, (1995).

[48] "Computer fraud" relates specifically to the manipulation of programs, and "tender fixing" includes similar procurement fraud.

[49] *The Times*, June 5 1994.

[50] Pattakos, A., "Some Basic Bytes on Keeping Computer Thieves Out of Your System" *Security Management*, February 1985, 31.

[51] Assemblée pléniére des sociétés d'assurance contre l'incendie et les risques divers.

reported in 1987.[52] It would appear that these figures are reflected in business concern: thus, for example, 72% of respondents to a survey carried out by Barclays Bank said they were worried about security on the Internet.[53]

In the quest to understand the modern nature of fraud, the survey used in the present study was aimed at discovering the views of those companies in this country who are likely to be the victims of serious corporate fraud. Specifically, it targeted the 750 largest (by turnover) companies in Britain[54] and is thought to be one of the most comprehensive surveys on this subject carried out in the United Kingdom.[55] Its intention was to test the propositions indicated by the other elements of the research and to highlight possible areas for post-doctoral study. Specifically, it focused on: the levels of fraud suffered by British companies over the last five years; their experience of the criminal and civil legal responses to fraud; the process of asset recovery in an international context and the business perceptions which surround these elements. In this regard the survey is particularly concerned with the importance which companies place upon fraud; the manner in which fraud affects their business; the priorities which inform their responses to fraudulent activity; their beliefs about future trends in the growth or otherwise of fraud and the underlying factors which they believe influence fraud in general and the law's response to it in particular.

The survey was compiled in the full awareness that fraud is a highly sensitive area for most companies. Indeed, many are unwilling to fully admit to the level of fraud

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[52] *Computer-Related Crime,* European Committee on Crime Problems, Council of Europe, Strasbourg, 1990. A profile of computer criminals based on a study of cases examined by the US Bureau of Justice Statistics demonstrates some of the reasons why such crimes are particularly difficult to detect. "AGE: 15-45 (usually male), PROFESSIONAL EXPERIENCE: ranges from the highly experienced technician to a minimally experienced professional, CRIMINAL BACKGROUND: often no previous or known record, PERSONAL TRAITS: bright, motivated and ready to accept a technical challenge, FEARS: he or she is concerned with exposure, ridicule and loss of status, ROLE: mostly one-person...but cases involving conspiracies are increasing, ORGANISATIONAL POSITION: often in position of trust; with easy access to the computer system, COMPUTER SECURITY: often lax or non-existent, JUSTIFICATION: minimises his or her criminal behaviour by viewing it as 'just a game.'": Bequai, A., "Management Can Prevent Computer Crime", *Security Systems Administrator,* Vol. 14, No.2, February 1985, 23; O'Block, Donnermeyer, Doeren, *Security and Crime Prevention*, 2nd. ed., (1991), 260.

[53] Dawe, T., "Bankers Go Scrambling for Security." *The Times*, 10 July, 1996.

[54] Drawn from *The Times* "One Thousand" list of Britain's largest businesses for the year 1997: *The Times One Thousand*, London, (1997).

[55] See for comparison, Ernst & Young, *Fraud: the Unmanaged Risk*, (1995); KPMG, *Fighting Fraud*, Summer, (1996).

within or against their organisations.[56] This lack of openness can be motivated by a number of relatively obvious reasons: notably a resistance to disclosing information which may (a) prove valuable to fraudsters and competitors; (b) suggest that management control or response is lacking; and (c), in certain circumstances, be damaging to the company's reputation and/or share price.[57] As a result it was recognised from the survey's inception that the response rate could fall short of that which might be expected from a questionnaire concerned with less sensitive business practices. In light of this, and the influential nature of the relevant sample,[58] the survey's response rate of just over 29%[59] is considered extremely satisfactory.[60] Moreover, it is submitted that the nature of the research ensures that a lower rate of response would still have provided a useful insight into how companies view the problem of fraud. In other words, a relatively small number of major companies will, in practice, represent a disproportionately large number of the victims (or potential victims) of fraud[61] and therefore those who will, or may, litigate against fraudsters and those who assist them.

At the relevant time[62] the smallest respondents, by employees, had under 500 workers. In contrast the largest by turnover did between £5-10 billion of business in the previous year, while the largest by workforce employed over 75,000 people. The respondent companies undertake a range of commercial activities; however, most identifiable responses were in the financial services, food and leisure and construction categories.[63] These figures must be treated with caution because companies in different sectors will not only suffer varying rates of fraud, but will

[56] Indeed, one questionnaire respondent took the confident stance that, "Fraud is not a question which is applicable to this company."
[57] See, for example, "SFO launches Regan Inquiry" *The Times*, 30 May 1997.
[58] i.e. the relevant sample represents the vast majority of British companies which can, as a matter of definition, be subjected to serious corporate fraud.
[59] Specifically, 29.7%. Of these 5.7% refused to answer specific questions on this subject. The reasons for this ranged from confidentiality, to the belief that no fraud had been experienced, to questions of policy and cost. For a variety of reasons (for example, because the company had ceased trading) 1% of questionnaires were returned unread.
[60] See, for example, a similar survey conducted by Ernst & Young: Ernst & Young, *Fraud: the Unmanaged Risk*, (1995).
[61] Thus, for example, one company had experience of over 1000 serious frauds against its interests in the last five years.
[62] Early 1997.
[63] 60% of cases investigated by the Serious Fraud Office in 1995 involved crimes against banks and financial institutions: City of London Police, *Financial Fact Sheet*, (1995).

also have differing motives for wishing to maintain anonymity with regard to such activities.

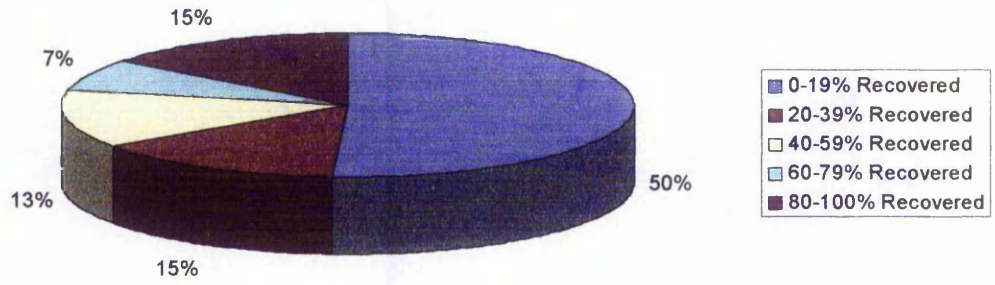
Of the companies expressing an opinion, 46%[64] had suffered fraud which they considered to be serious in the last five years and 35% had suffered such fraud in the last year. Given the relatively high proportion of companies suffering serious fraud, it is interesting to note that 96% of respondents to the relevant question had specific systems to prevent fraud, and 75% believed that they had taken all reasonable steps to combat it.

Many firms were (as would be expected) unwilling or unable to identify either the value of the worst single fraud committed against them in the last five years, or the cumulative total of all such frauds. Of those companies who did respond to these questions, the highest single fraud cost £30,000,000 and the largest loss over five years was £100,000,000. More generally, while the majority of those responding to the relevant question had suffered less than £250,000 of losses over the last five years, 24% had suffered over £1,000,000. 61% of companies said they had suffered only 1-4 serious frauds in the last five years; however, one insurance company believed it had suffered over 1000, whilst a utilities company pointed to over 200 and a bank to 215. Again, given the high level of sensitivity surrounding this information and its potential unavailability, it is likely that such figures are markedly below the real value and number of such frauds.

38% of those companies who had suffered fraud, and responded to the relevant question, had recovered less than 5% of their losses (other than by recourse to insurance) while 72% had recovered less than 50%. Only 10% had recovered more than 90% of their losses. The following chart summarises these responses.

[64] Figures in text rounded up if above 0.5.

Chart IV: *Proportion of assets lost to fraud subsequently recovered by legal action or other means.*[65]



Base: Those companies expressing an opinion.[66]

These figures clearly demonstrate that only a limited amount of the value lost to fraud is ever recovered. They do not, however, tell us why. It may be that the legal mechanisms for recovery are faulty, that fraudsters are more ingenious than those involved in asset recovery, that companies place limited emphasis on asset recovery, or a combination of these and other factors. During the remainder of this discussion we will attempt to discern the significance of, and balance between, these elements.

Turning from the quantity of fraud to its quality and nature, over 95% of all respondents considered fraud to be an important problem for their businesses[67] while only 5% believed it to be less than important.[68] This response may be a result of the fact that 36% of respondents who expressed an opinion believed that fraud against their company had increased in the last five years, while only 22% believed it had decreased. Table II demonstrates the reasons given by those who believed fraud had increased, while Table III details the reasons given by those who felt it had decreased.

[65] Not including insurance.
[66] Source: survey conducted as part of the present study.
[67] Very Important, 54%; Quite Important, 13%; Important, 29%.

Table II: *Reasons given for the increase in fraud during the last five years.*

Fall in society's standards of honesty	**45%**	**External economic circumstances (e.g. recession)**	**21%**
Increase in complexity of business	**53%**	**Increased trade abroad**	**8%**
Lack of internal controls	**26%**	**Fall in employees' standards of honesty**	**32%**
Inefficient criminal/police authorities	**21%**	**Lack of criminal sanctions (e.g. low sentences, worse rates of detection)**	**45%**
Greater use of information technology	**54%**	**Greater use of technology (other than information technology)**	**21%**
Increased volume of trade	**34%**	**Lack of awareness of problem by management**	**34%**

Base: Percentage of those who believed fraud had increased in the last five years and expressed an opinion as to why (multiple answers allowed).

Table III: *Reasons given for the decrease in fraud during the last five years.*

Rise in society's standards of honesty	**0%**	**Greater use of information technology**	**62%**
Better internal controls	**95%**	**Increased efficiency of police/criminal authorities**	**0%**
Decreased volume of trade	**0%**	**External economic circumstances**	**5%**
Decreased trade abroad	**0%**	**Decrease in business complexity**	**0%**
Increased management awareness	**86%**	**More effective criminal sanctions**	**14%**
Rise in employees' standards of honesty	**0%**	**Greater use of technology (other than information technology**	**33%**

Base: Percentage of those who believed fraud had decreased in the last five years and expressed an opinion as to why (multiple answers allowed).[69]

A cynical interpretation of these figures might suggest that those companies who believe that fraud has increased feel that it has done so due to reasons beyond their control, whilst those who believe it has fallen are more than willing to take the credit. In this context KPMG's survey of Canadian police chiefs provides an

[68] This can be compared to the response to KPMG's 1996 survey in Canada where 30% said that it was a major problem and 63% said it was not: KPMG, *Fraud Survey*, (Canada), 1995.
[69] Source: survey conducted as part of the present study.

interesting contrast to these figures from the viewpoint of the investigators rather than the victims.[70]

Table IV: *Reasons why white-collar crime will increase.*

Lack of government intervention	**23%**
Staff downsizing	**32%**
Lack of emphasis by victims on prevention and detection	**50%**
More sophisticated criminals	**81%**
Weakening of society's values	**45%**
Lack of prosecution	**35%**
Other	**21%**

Source: KPMG, *Canadian Police Chiefs' Survey*, (1995).

In a similar vein, 49% of respondents to the instant survey who expressed an opinion believed that fraud with a foreign element[71] had increased in the last five years,[72] and 23% believed that fraud against their foreign interests was more serious than that perpetrated against their UK interests.[73] Perhaps for these reasons 41% of those who expressed an opinion said that there were some countries in which they would not trade as a result of concerns about fraud[74] and 33% of those who had suffered fraud in the last five years[75] were aware that some lost assets had been moved abroad. No doubt agreeing with the fraudsters involved, 96% of those who expressed an opinion believed that such actions would make recovery more difficult.

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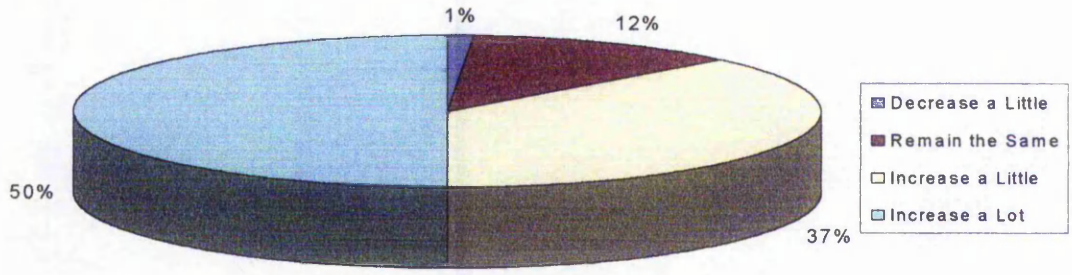
[70] Ernst & Young's 1993 (Ernst & Young, *Fraud: The Unmanaged Risk*, (1993)) survey found the following reasons why fraud had increased, Recession: 27%, Computerisation: 32%, Publicity: 7%, Greater Complexity: 7%, Loss of Business Ethics: 7%, International Communications: 7%.
[71] For example, perpetrated by foreigners, or against foreign interests or in which assets were moved abroad.
[72] 6% believed it had decreased.
[73] 10% believed it was less serious.
[74] Of these Nigeria was the most often cited.
[75] And expressed an opinion.

These perceptions combined to ensure that 38% of those companies expressing an opinion believed that fraud against them would increase over the next five years.[76] These figures are somewhat more optimistic than the findings of *Accountancy Age*[77] which, in December 1996, surveyed its readers and produced the responses summarised in Chart V.[78]

Chart V: *Will incidence of fraud increase or decrease in the future?*



Source: "Fraud Trends Set to Escalate, Say Auditors."[79]

It has already been noted that although this study is concerned with asset tracing, this may not be the sole or even primary concern of the corporate victims of fraud. This being the case, it is necessary to be aware of these other priorities, if we are to formulate rules which satisfy the requirements of both society in general and the victims of fraud in particular. The following table summarises the priorities which companies indicated were most important to them upon the discovery of a serious fraud.

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[76] 14% believed it would decrease, while 47% believed it would remain the same. This might be compared with the KPMG survey of Canadian Police Chiefs, 89% of whom believed that white-collar crime would increase: KPMG, *Police Chiefs' Survey,* (1995).
[77] "Fraud Trends Set to Escalate, Say Auditors" *Accountancy Age*, 13 February, 1997.
[78] We might suggest that these differences are the result of differing survey samples and/or improving economic conditions, but without further information this can be no more than supposition.
[79] *Accountancy Age*, 13 February, 1997.

Table V: *Priorities upon discovering fraud.*

	Very High Importance	High Importance	Important	Low Importance	Very Low Importance
Identify the perpetrator	**76%**	**14%**	**10%**	**0%**	**0%**
Stop further losses	**94%**	**5%**	**1%**	**0%**	**0%**
Recover the lost assets	**42%**	**31%**	**26%**	**1%**	**0%**
Terminate the employment of an internal fraudster	**74%**	**18%**	**7%**	**1%**	**0%**
Ensure the bringing of criminal charges	**31%**	**22%**	**34%**	**13%**	**0%**
Control the dissemination of information about the fraud	**31%**	**39%**	**30%**	**0%**	**0%**
Prevent similar fraud being committed by other fraudsters	**92%**	**6%**	**2%**	**0%**	**0%**

Base: Companies responding to the relevant question (multiple answers allowed). [80]

These responses demonstrate the range of priorities, over and above the recovery of assets, which concern the victims of fraud.[81] It will be noted that some of these priorities necessarily involve the active participation of the criminal authorities[82] while others, it might be assumed, could be hindered by their involvement.[83] It is not therefore surprising that differing opinions were expressed as to whether there were any circumstances in which the respondents would consider not informing the police of a fraud against them. Specifically, 54% of those companies who expressed an opinion said that there were circumstances in which they would consider not informing the criminal authorities of a fraud against them, but 74% had in fact reported the last fraud they suffered.[84] However, this relative vote of confidence for the criminal authorities can be contrasted with the views of

[80] Source: survey conducted as part of the present study.

[81] An interesting example of this can be seen in the case of F.E. Hutton, at the time the fifth largest brokerage firm in the United States. They operated a fraud in which the cheque clearing system was manipulated in order to provide interest-free loans amounting to approximately $250 million per day. The scam was perpetrated against 400 banks and netted $8 million in two years. One of the most interesting aspects of the case is that although F.E. Hutton were ordered to pay restitution, not all the banks claimed it. This was partly because doing so would have involved expensive calculations and largely because the banks did not wish to damage their relationship with the company. Smith, *Secret Money*, *op. cit.*

[82] For example, the bringing of criminal charges.

[83] For example, the control of information.

[84] One respondent to the questionnaire suggested, "Fraud is regarded as a victimless crime (particularly by many serving police) and until society is made to realise this simply is not so, it will continue...There must be co-operation and exchange of information between all institutions, including police."

professional litigators[85] canvassed as part of the present study, who almost uniformly expressed the belief that involving the criminal authorities was a potentially damaging step. Interviewed by the present author, Robert Hunter,[86] summarised this view by saying:

> "...civil remedies for fraud...will go no faster or slower than the courts indicate...I can abandon the action at any point, I can have advance notice of what the defence will be...and I can...take steps which...preserve my reputation. If...I invite P.C. Plod...in...a number of consequences will occur. First, rather than a friendly firm of solicitors investigating in a gentle tactful way, these people have got a job to do, a job to do quickly...they will offend the staff. Second, if I persuade P.C. Plod...there is a good case...he will pursue it. I will not be in a position to stop him...Third, if the defendant decides...to go down with all guns blazing at trial...I...have no control over...[any]...allegation...and the police have no interest...in preserving the reputation of my company. They want the scalp, they don't care how painful it is for third party bystanders...he who rides the tiger cannot dismount. You mount the tiger when you set in train a criminal prosecution...It's a rare client who will contemplate going to the Police." [87]

The strength of these views may lead us to believe that although 46% of companies said that they would always report a fraud to the criminal authorities, this figure might be considerably reduced by reflection and legal advice. The three most popular reasons for not involving the criminal authorities were the belief that their involvement: (a) is likely to increase adverse publicity;[88] (b) is likely to use an unreasonable amount of the company's resources;[89] and (c) may lessen the chances of recovering the lost assets.[90] In this context it might be noted that 67% of

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[85] It may also be somewhat misleading. Thus one questionnaire respondent suggested, "The [criminal justice] system is ineffective but we would still report." It may also be true that the police are involved only in a controlled manner. Thus another respondent suggested, [We would inform the criminal authorities] after we had investigated it to satisfy our needs: if the police are involved immediately it is impossible (often) to find out exactly what happened for months, so remedial action (to plug the control weaknesses etc.) is impossible."

[86] Partner, Allen & Overy.

[87] Equally, as Michael Tugenhat Q.C. pointed out during an interview carried out as part of this study, it may be that the prospective plaintiff has not himself behaved with absolute probity.

[88] In this context one respondent to the questionnaire suggested, "Many companies avoid disclosure of fraud due to the risk of adverse publicity – leaving fraudsters to strike again. There should be a legal obligation to disclose and a right of access to information on disclosures."

[89] One respondent stated, "It is difficult to provide the evidence for a conviction, therefore evidence rules too complex. For a minor fraud, not worth the effort."

[90] The specific reasons given were, Involvement of the authorities is likely to increase adverse publicity: 65%; Involvement of the authorities is likely to use an unreasonable amount of the company's resources: 45%; Involvement of the authorities may lessen the chances of recovering the lost assets: 28%; Belief that the criminal system is inefficient: 22%; Belief that the police/criminal authorities are ineffective: 15%; The company has a policy of not reporting frauds under a certain value: 15%. Greater confidence in the

Canadian police chiefs indicated that they had seen an increase in "private policing."[91]

Of course, as these answers demonstrate, the desire to inform the police is not merely a function of the company's priorities, it will also be affected by their perception and experience of the criminal authorities' methodology and effectiveness. Thus, 23% of those who had had reported a fraud to the police in the last five years, and responded to the relevant question, were less than satisfied by their response[92] whilst that figure for the Serious Fraud Office was 25%.[93] In the context of these figures it is interesting to note that those suggesting that they would be more likely to report a future fraud as a result of their experience of the criminal authorities in the last five years (12.5%) were almost perfectly balanced by those saying they were less likely to do so (11%), with 76% stating that it had had no effect. However, this does not appear to be reflected by any great faith in the effectiveness of the criminal justice system as a whole. Thus, nearly half of those expressing an opinion said that their last reporting of fraud had not led to a criminal conviction.[94] Of those expressing an opinion, a very significant 65% believed that sentences in fraud cases were either too lenient or much too lenient.[95] These, and other factors, have combined to create a negative view of the criminal law's effectiveness which is summarised in the following chart.

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effectiveness of internal investigators: 12% (multiple answers allowed). These can be contrasted with the results produced by Ernst & Young's 1993 survey (Ernst & Young, *Fraud: The Unmanaged Risk*, (1993)) which found the reasons for not reporting fraud to be, Recovered all the money: 15%, Recovered less than lost, but all that is likely: 13%, Too much management time is tied up by reporting: 22%, Publicity embarrassing: 18%; Offender already left the company: 15%, Police not competent: 3%, Relevant non-police regulators not competent: 2%, Offender did not deserve punishment by the courts: 6%, Courts are too soft on fraud: 5%.

[91] KPMG, *Police Chiefs' Survey*, (1995); "...the SFO budget is tiny compared with (i) the size and complexity of the losses it is required to investigate (totalling some £4.5 billion 'at risk' in 1991) and (ii) the funds available to some of the corporations and individuals it is investigating.": The Royal Commission on Criminal Justice, *The Investigation, Prosecution, and Trial of Serious Fraud*, Research Study No. 14 (1993), 9. One respondent to the questionnaire survey conduced as part of the study suggested, "Companies should employ professional investigators who can sell a case to the police and can do all the preliminary investigative work."

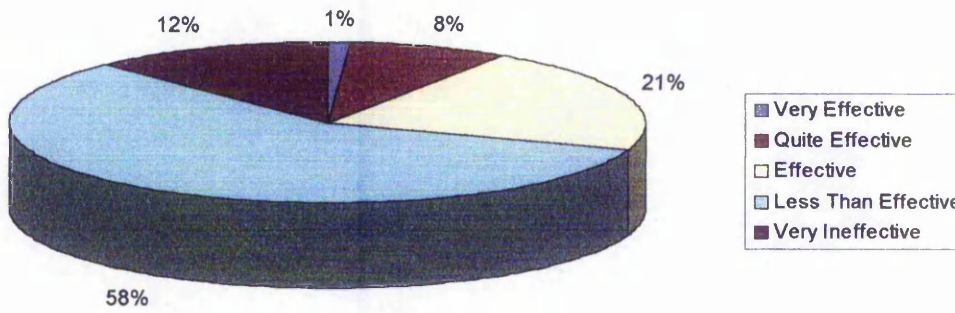
[92] Specifically, Extremely Satisfied: 4%, Quite Satisfied: 27%, Satisfied: 36%, Quite Unsatisfied: 18%, Very Unsatisfied 5%.

[93] However, it must be noted that few respondents had experience of the SFO.

[94] 47%.

[95] Specifically, Much Too Lenient: 17%, Too Lenient: 48%, About Right: 31%, Too Severe: 1%, Much Too Severe: 2%.

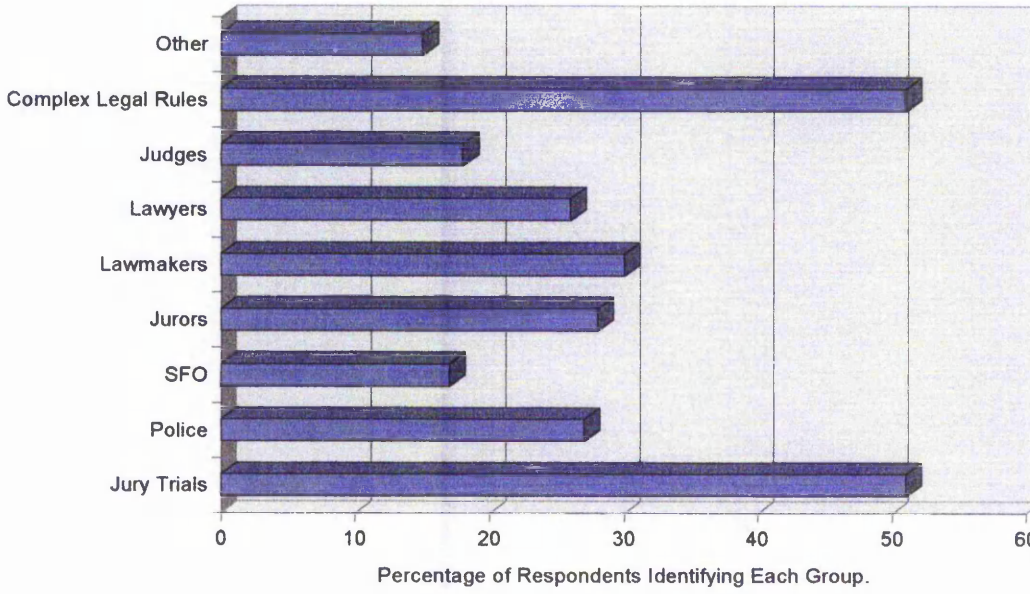
Chart VI: *How effective is the criminal law in combating fraud?*



Base: Those respondents expressing an opinion.[96]

However, it would appear that the corporate victims of fraud are highly unwilling to hold the police alone responsible for this lack of effectiveness. Indeed, the three most popular culprits were complex legal rules,[97] lawmakers and jurors.

Chart VII: *Who or what is to blame for the criminal law's lack of effectiveness?*

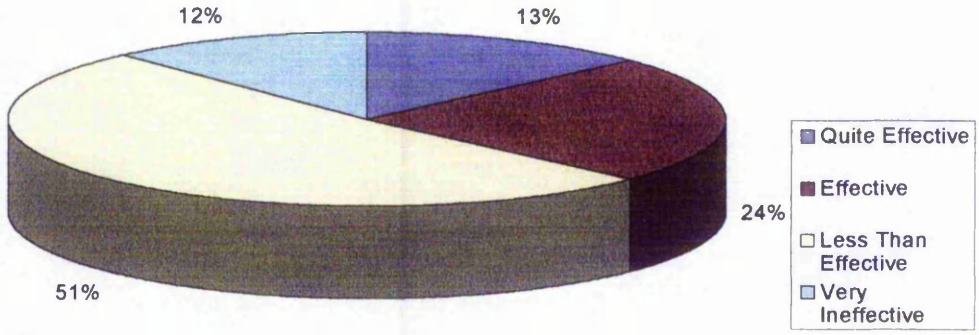


Base: Those respondents who believed the criminal law was ineffective and expressed an opinion as to who or what was to blame (multiple answers allowed). [98]

[96] Source: survey conducted as part of the present study.
[97] One respondent suggested, "Trials should be about seeking the truth as opposed to appearing to be a game played to rules which often preclude the facts being known. Legislation should attempt to simplify the definition of offences and take on board the effects of new technology."
[98] Source: survey conducted as part of the present study.

Unfortunately, the civil system fared little better than its criminal counterpart, with 63% of those who expressed an opinion believing that the civil courts were not an effective means of recovering assets lost to fraud, and no respondents considering it to be a very effective response.[99] These responses are summarised in the following chart.

Chart VIII: *How effective is the civil law as a means of recovering assets lost to fraud?*



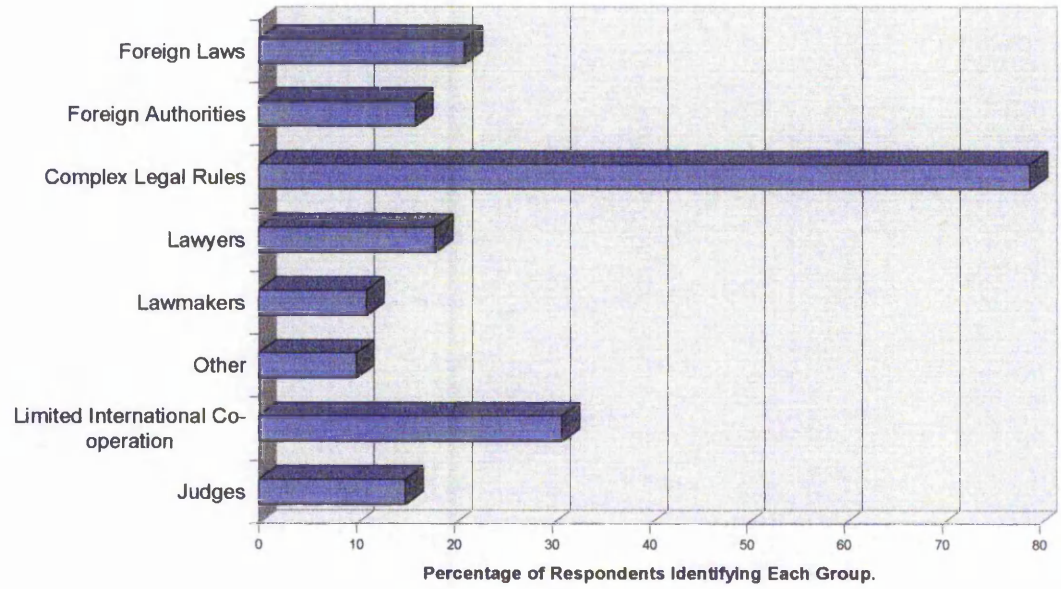
Base: Those respondents expressing an opinion.[100]

Given the figures noted above, with regard to the level of asset recovery these views are, perhaps, understandable. There was perhaps more unanimity among those expressing an opinion with regard to who was to blame for this situation than found with regard to the criminal law, and the most popular culprits were "English legal rules too complex," "limited international co-operation," "foreign laws intended to prevent recovery" and judges. These figures are summarised in Chart VII.

[99] For a discussion of some of the factors affecting such views, see Meier and Short, "The Consequences of White-Collar Crime", in Edelhertz and Overcasr (Eds.), *White Collar Crime: An Agenda for Research*, Toronto, 1985, 24.; Levi, M., "Fraudulent Justice? Sentencing the Business Criminal" in Nelken, D., (Ed.) *White-Collar Crime*, Dartmouth Publishing Co., (1994).

[100] Source: survey conducted as part of the present study.

Chart IX: *Who or what is to blame for the civil law's lack of effectiveness in recovering assets?*

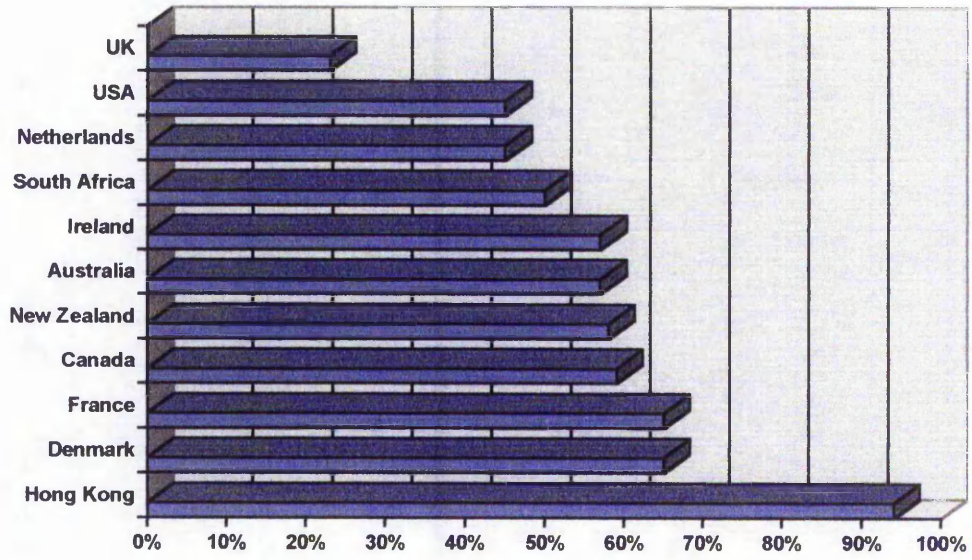


Base: Those respondents who believed the civil law was ineffective and expressed an opinion as to who or what was to blame (multiple answers allowed). [101]

It is perhaps surprising that the civil law fares relatively well in comparison with the criminal law. Thus, for example, at its simplest the criminal law need only identify the culprits and prove the relevant case against them.[102] The civil law is generally attempting to identify not only the initial fraudster but also a party who has behaved in a culpable manner and has the wherewithal to meet the relevant claims. As such the chain of causation can be both longer and more complex. Moreover, once the relevant parties are identified, the process of recovery adds another level of complexity. However, even taking these problems into account it is interesting to note that Ernst & Young found that of all the respondents to their survey, UK companies had the least faith in their courts to understand serious fraud.

[101] Source: survey conducted as part of the present study.
[102] Albeit to a higher standard of proof.

Chart X: *Respondents believing courts understood major fraud.*

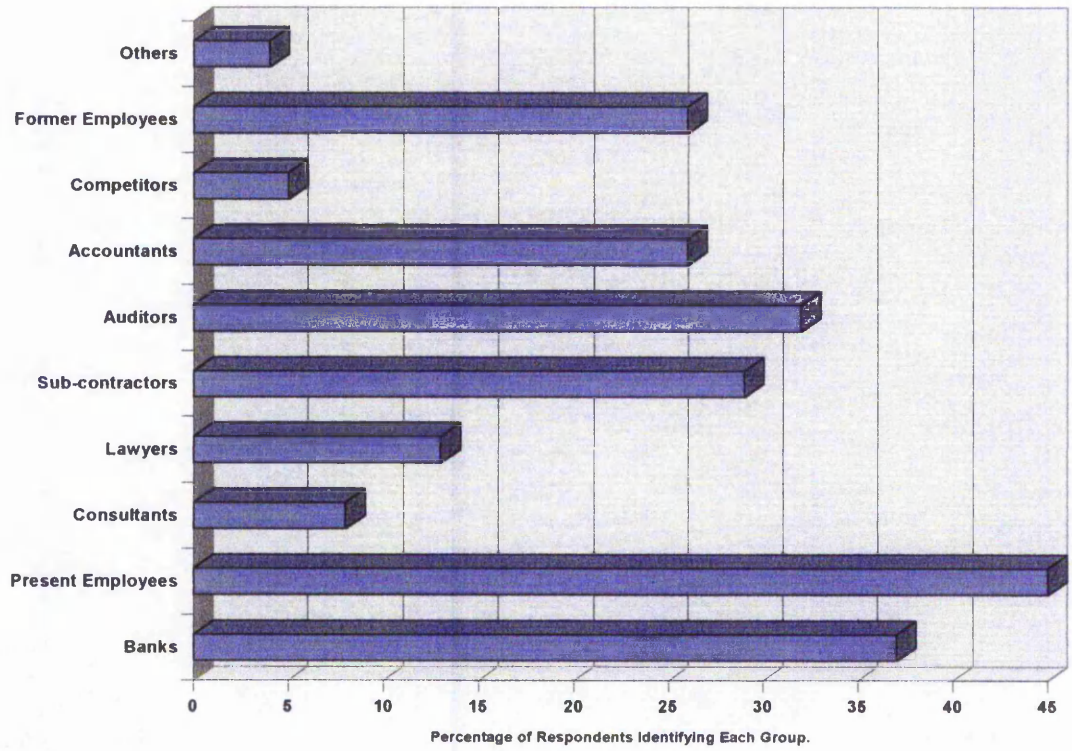


Source: Ernst & Young, *Fraud: The Unmanaged Risk*, (1996).

It is equally interesting to note that 42% of those respondents to the present survey expressing an opinion, said that third parties other than the fraudster were partly responsible for their losses. Of these, present employees and banks[103] were the most commonly cited. The responses to this question are summarised in the following chart.

[103] A case during the 1980s provides a good international example of the apparent negligence which respondents object to. Chase Manhattan Bank and Manufacturers Hanover Trust Company of New York made a $47.2 million loan to the Colombian Government to facilitate the purchase of equipment and supplies for the Colombian military and police. $13.5 million of the money (kept at Chase's London branch) was ordered to be transferred to an account at the Morgan Guaranty Trust Company in New York and then on to the Zurich branch of Bank Hapoalim (a major Israeli bank). The relevant account was owned by Robert Russell, a Texan financier and arms dealer. The problem arose when the Colombians claimed that no order to transfer had ever been sent and normal formalities had been ignored (a story given further credence by the fact that the transfer request contained a number of spelling mistakes and that the telex security system was seriously flawed). Russell claimed that he had been asked to act as middle man in the sale of German arms to Argentina and this was his only connection to the cash. The money's location was lost after it entered the realms of Panamanian banking secrecy. A number of people with information regarding the transactions died mysterious deaths. The case illustrates two main points. First, the fact that these cases often include elements which we assume only exist in fiction: professional assassination, high level corruption, million dollar arms deals contracted on the back of napkins, etc. Second, it shows how extremely negligent banks and respected financial organisations can be (in this case they failed to even ring Bogota to confirm the badly constructed request before parting with $13.5 million). The main reason why the banks retain public confidence appears to be their willingness to settle such cases before they become public. For this and other examples, see Smith, *Secret Money*, *op. cit.*.

Chart XI: *Which third parties were partly responsible for losses suffered due to fraud?*



Base: Those respondents who believed that third parties were partly responsible for their losses and identified the relevant parties (multiple answers allowed). [104]

Clearly being "partly responsible" does not in itself, suggest that respondents believed that those third parties should also have been financially liable. However, a range of comments contained within the questionnaires would suggest that a significant number of victims of fraud believed that third parties should be legally responsible for losses suffered.

The survey provides a detailed picture of fraud in this country and opens up numerous avenues for further research. However, in the context of the present discussion we can highlight several points of importance. Thus, we have seen that fraud in this country is perceived by companies as an important problem which despite their efforts has, according to a majority, increased in the past and is set to

[104] Source: survey conducted as part of the present study.

do so in the future (as will fraud with a foreign element). Of equal import is that much of the value lost to fraud was unrecovered. Moreover, a majority believed that fraud with a foreign element had increased in the last five years and that moving assets abroad made their recovery more difficult.

We have also seen that companies have a range of priorities on discovering a fraud, but that over 70% see the recovery of the assets as an important priority. In this context, the fact that 63% of those expressing an opinion believed that the civil courts provide an ineffective means of recovering assets is clearly a serious condemnation of our present system. As is the fact that over three quarters of those expressing an opinion blamed this situation on the excessive complexity of legal rules. Finally in this brief review of the survey we should note that 42% of those expressing an opinion believed that third parties, other than the fraudster, were responsible for their losses.

In conclusion therefore, the above survey highlights a number of issues. Perhaps most striking is the complexity of both fraud and the perceptions and priorities which surround it. Many of these themes will resurface throughout this study. However, for now we can conclude that much of the value lost to fraud is never recovered and the victims believe that this is because the courts are inefficient and the legal rules too complex. Moreover, these problems are exacerbated when the relevant fraud is assisted by a third party and/or includes a foreign element. It is not unreasonable to suggest that much of the remaining study will be devoted to finding solutions to these, and related, problems.

2.1: THE AIMS OF A MODERN CIVIL RESPONSE TO FRAUD. PRIORITIES FOR RESEARCH AND CHANGE.

Before moving on, it is necessary to briefly consider the broad methodology which this study will use, and some of the initial precepts which these techniques raise. It is, perhaps, human nature to compare the world as it is with the world as we believe it should be. This reflectivity often provides the necessary basis for both religion and philosophy. Equally, as Cook points out in his seminal work "The Logical and Legal Basis of Conflict of Laws",[105] it can also be seen as the *originating* principle underlying scientific study: the "[human] mind was already in possession of fixed truths, universal principles, preordained axioms...only by their means could contingent, varying particular events be truly known."[106] However, as Cook goes on to note, in truth, what proved to be a necessary basis of subjects concerned fundamentally (and almost exclusively) with ethics, morality and aesthetics proved to be an unsatisfactory foundation for science. The failures this approach engendered only ended when:

> "...men trusted themselves to embark upon the uncertain sea of events and were willing to be instructed by changes in the concrete. The antecedent principles were tentatively employed as methods for constructing observations and experiments, and for organising special facts: as hypotheses."[107]

We might argue that the problems associated with applying deductive methodology to areas requiring inductive thought can be seen in the reaction of some established religions to, for example, the works of Galileo and Darwin. This divided thought process leads Cook to argue that:

> "Upon the basis of this second, or experimental, method the imposing structure of modern physical science has been erected; and the attempt to arrive at the truth about particular events by pure deduction from

[105] Cook., W. "The Logical and Legal Basis of Conflict of Laws" (1924), 33 Yale, L.J. 457.
[106] Dewey, J., *Human Nature and Conduct* (1922), 242; quoted by Cook, W. *op. cit.* at page 457.
[107] Montague, *On the Nature of Induction* (1906) 3 *Journal of Philosophy, Psychology and Scientific Method*, 281, quoted by Cook, W. *op. cit.* at page 457.

> general principles assumed to be true has been definitely and finally abandoned."[108]

In this context, he identifies a similar conflict at work within legal thought. Thus, for example, he notes that Dicey makes a division between the systems which he identifies as "theoretical method" and "positive method".[109] Dicey explains the former procedure in the following terms:

> "...fundamental principles of private international law can be ascertained by study and reflection, and the soundness of the rules of law maintained, say in England, as to the extra-territorial recognition of rights, can be tested by their conformity to, or deviation from, such general principles."[110]

Cook, on the other hand, disparages this approach and argues for a methodology which moves from observation of what has actually been done, to generalisations as to what the law can do and thence, presumably, to what it might or should do.[111] With the greatest respect to both these pillars of the conflict of laws, neither approach is exclusively and absolutely correct. Law is not simply another "field of science" (or indeed purely an exemplification of moral philosophy). For an area to be adequately explained and described by scientific methodology, it must necessarily have to some extent set, unchanging phenomena which can be observed and which give rise to logical hypotheses. Law, however, is a set of human rules which can, in theory, be changed or developed in any way we choose.[112] It is true that they are based upon underlying moral, economic and practical precepts, but even these foundations are not fundamentally fixed.[113] This should not be taken to mean, however, that at any single point in time a particular view will not be of overwhelming importance. Therefore, just as deferring to one

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[108] Cook, W., *op. cit.* at page 458.
[109] Dicey, *The Conflict of Laws* 3rd. ed. (1922).
[110] Dicey, *op. cit.* at page 18.
[111] "In the present discussion it is proposed, instead of following the *priori* method, to adopt the approach, the procedure, which has proved so fruitful in other fields of science, viz. to observe concrete phenomena first and to formulate generalisations afterwards. We shall therefore undertake to formulate general statements as to what the 'law' of a given country 'can' and 'cannot' do in the way of attaching legal consequences to situations and transactions by observing what has actually been done.": Cook, W., *op. cit.* at page 460.
[112] This is not to suggest that there is no benefit in approaching the law in a manner which sees it as analogous to science, merely that its true nature should at all times be borne in mind.
[113] Clearly we might argue that some precepts of human rights or natural justice can be considered to be so important as to be of general and continuing applicability. It is, however, submitted that such rules, if they exist, are of such abstraction as to have little influence on a detailed examination of the present study.

principle or group of principles[114] can hinder scientific study, a failure to do so can hinder legal study. This is not to suggest that strict adherence to either method cannot provide insights into either the practical or theoretical aspects of law, merely that exploiting both is more effective.[115] Indeed, this pragmatism was to some extent accepted by Cook himself[116] and in recognition of these factors, the present study will attempt to identify the principles which the courts and society are likely to wish to uphold in the area of fraud, and to compare these to the ways in which the courts in reality behave when faced with complex civil litigation.[117]

The next question must therefore be, "What then are the principles to which our systems should aspire, and how do we identify them?" There is no doubt that with regard to the instant subject the "devil is in the detail" and much of this discussion must wait until those details have been considered in the chapters to follow. Equally, as we have seen, principle is entwined with practice and the actuality of the court's response must again wait for further comment. We do, however, need a methodology which allows us to map out some basic objectives as a starting point. In doing so we must emphasise that these objectives are only a *starting point*, and that few will remain intact as they are exposed to the rigours of the real world throughout this study. Thus we might begin with the proposition, "all assets lost to fraud should be returned to the victim." But in the real world the questions, "What happens if the specific assets cannot be found?", "What happens if innocent third parties also have a claim to the assets?", "What if the victim himself has behaved dishonestly?" and many others will soon exert an influence upon our simple goals, as will broader questions of policy and practice. As a result, our methodology must also be able to test the justice of these situations. In other words, it must help us to

[114] e.g. the sun moves round the earth; the earth is flat; the world was created in seven days.
[115] "A conception of justice cannot be deduced from self-evident premises of principle; instead, its justification is a matter of the mutual support of many considerations, of everything fitting together.": Rawls, J., *A Theory of Justice*, Oxford, (1972).
[116] "It must however be noted that the writers of neither school have succeeded in adhering consistently to their main point of view. Thus, both Story and Dicey do at times, without being fully conscious of it, revert to the theoretical method which professedly they had abandoned; and on the other hand, no writer of the theoretical school has actually failed to spend a great deal of his time in examining the actual decisions of the country in which he lived and wrote.": Cook, W., *op. cit.* at page 460.
[117] In this regard it will constantly be borne in mind that Cook was undoubtedly correct when he suggested that when observing the courts, "...it is necessary to focus our attention on what courts have *done*, rather than upon the description they have given for the reasons of their actions.": Cook, W., *op. cit.* at page 460; "By contrast with the continental system, the law in the Anglo-Saxon system is not what I *say*, but what I *do*. So if English

understand: (a) which principles (if any) are immutable; (b) which can be compromised in favour of other priorities; and (c) when and how such compromises are best effected.

It is not suggested that any one legal approach is unquestionably superior: all have defects. For our present purposes, however, it is submitted that the bargain made by members of society placed in the "original position" suggested by Rawls[118] is closely suited to the task in hand. Most specifically, because, unlike some areas, we are dealing with a subject which will *rarely* be immutable, compromises in the face of competing priorities are inevitable. In this context it is submitted that Rawls' approach is well suited to the task of marrying a highly technical system to questions of competing principle.[119]

The central precept of Rawls' approach is to ask what bargains would be made by free and rational members of society. This question is asked of parties in the "original position" who are said to be behind a "veil of ignorance" in order to ensure that any agreement is concluded with the intention of maximising the benefit to society rather than for personal gain.[120] The contract or bargains which members of such a society make must represent a logical assessment of justice as between the various parties. It will be noted that this system requires the members of society to be free and rational. Rationality in this context must require knowledge of the relevant facts and circumstances along with a particular way of acting in response to these factors. Rawls, taking his view from economic philosophy, argues that rationality in this context will mean that parties will follow the most efficient route to their given ends.[121] By following this methodology, it is

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judges produce a *result* at odds with the previous law, it often amounts to a change in the law": Matthews, P., "Tracing the Proceeds of Fraud" *op. cit.* at page 5.

[118] Rawls, J., *op. cit.*; Rawls' work is undertaken primarily with regard to social justice, but nevertheless provides a useful model for our present purposes. Indeed, Rawls himself identifies, for example, "...the legal protection...of private property..." as part of his understanding of social justice: Rawls, *op. cit.* at page 7.

[119] Rawls' approach is eloquently enunciated in his own writings and is not far removed from other well known works of philosophy. As a result, it will be examined only to the extent necessary to make its use within the present study intelligible.

[120] "...no one knows his place in society, his class position or social status. Nor does he know his fortune in the distribution of natural assets and abilities, his intelligence, strength and the like. I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities...This ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance of the contingency of social circumstance.": Rawls, *op. cit.* at page 12.

[121] Rawls, *op. cit.* at page 14.

argued that we could not only identify absolute concepts (if such things exist) but also rank competing ideas of justice in any given circumstances.[122] It is clear that Rawls' approach has similarities with classical utilitarianism,[123] which itself has often been applied to the law.[124] At a fundamental level, however, it is submitted that Rawls is correct in the view that these similarities are potentially illusionary.[125] The detailed reasons for this view are not specifically relevant to the present study, and it is sufficient to note that the present author would accept that Rawls' approach does not suffer from one of utilitarianism's primary defects.[126] Specifically:

> "The nature of the decision made...is not...materially different from that of an entrepreneur deciding how to maximise his profits...In each case there is a single person whose system of desires determines the best allocation of limited means. The correct decision is essentially a question of efficient administration. This view...is the consequence of extending to society the principle of choice for one man, and then, to make this extension work, conflating all persons into one through the imaginative acts of the impartial sympathetic spectator. Utilitarianism does not take seriously the distinction between persons."[127]

In summary therefore, the present study will attempt to examine the present rules, and suggest changes and reforms broadly with regard to the bargain which a rational and free party, unaware of his personal attributes or position in society, would make with other members of society. As we have noted above, many of the problems associated with this area are concerned with detail. There are, however, some broad objectives which can initially be identified by applying this methodology to the statistical trends, survey results and comments found in the earlier sections.

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[122] "Conceptions of justice are to be ranked by their acceptability to persons so circumstanced. Understood in this way the question of justification is settled by working out a problem of deliberation: we have to ascertain which principles it would be rational to adopt given the contractual situation. This connects the theory of justice with the theory of rational choice.": Rawls, *op. cit.* at page 17.
[123] Sedwick, *The Methods of Ethics*, 7th ed., London, (1907).
[124] Bentham, *The Principles of Morals and Legislation*, (1789).
[125] Rawls, *op. cit.* at pages 22-27.
[126] This is not to suggest that utilitarianism is not a rational tool for the consideration of wide issues of social justice, merely that it is less suitable to the questions of detail with which the present study is concerned.
[127] Rawls, *op. cit.* at pages 27.

An initial point which should be made is that, as already noted, the forms of fraud and the circumstances in which it occurs are varied in the extreme. For this reason, the judiciary have been unwilling to define what amounts to fraud. It is suggested that authority, common sense and the range of views expressed within the above survey confirm the validity of this position. As a result it is suggested that a usable definition beyond those noted in Chapter One is (a) impossible and (b) would be a potentially damaging step. Bearing this in mind, and using Rawls' methodology, what can we broadly expect our response to fraud to achieve?

First, we can expect it to determine when property in an asset has passed from one party to another.[128] This will largely be a matter of intent, and the specific questions in this area will centre on the issue of when the passing of property has been prevented by fraud or mistake. The nature of our system ensures that we may need to make a distinction between the circumstances in which equitable and legal property will pass. Equally, we might (and probably will) believe that some forms of property[129] or relationships[130] should give rise to different and/or stricter rules. Once we have determined when property has not passed, our system should allow the owner to point to an asset in the hands of the defendant and say, "That is mine." This should not be a difficult task and it should not defeat the simplest system. However, sometimes assets change form (e.g. money is paid into a bank account) or are mixed together or are destroyed. If we examine the "original position" discussed above, it is suggested that most rational and free men would agree that a victim of fraud who retains property in an asset, which is directly swapped for another, should be able to point to the substitute asset and claim it as his. But this point is more complex. The traditional rules regarding the passing of property become more strained. What if the exchange is not direct but goes through a number of stages? Can he only act against the substitute in the hands of the fraudster or can he also follow the original asset (or indeed the substitute) into the hands of third parties? Is this question affected by the behaviour of those third parties? In a similar vein, what if there is not a direct, but a causative link between

[128] The present study has not concerned itself with the question of whether the traditional English law view of property is moral, just or ethically defensible; it is assumed to be so.
[129] For example, trust property.
[130] For example, fiduciary relationships.

the two assets[131] or if the disputed asset is mixed with other assets which are legitimately held? These are problems on which the rational member of society would need a wide and detailed amount of information before he could arrive at a logical answer.

A similarly complex problem can occur in another common set of circumstances. Fraudsters, being less than reliable, may be insolvent (or apparently insolvent) by the time their victim eventually brings them to court. As a result, our system must also be capable of assigning rights to the fraudster's remaining assets between the original holder of the asset and secured and unsecured creditors. The questions of insolvency, mixing and substitution might, therefore, suggest to parties in the "original position" that they should construct a social contract that would allow a party not only to identify his specific asset in the hands of another, but also the circumstances in which a party who has wrongfully lost an asset should be allowed to point to a different asset and say that the "asset is now mine or should be treated as if it were mine." Equally, the defendant may have used the relevant asset to make a profit, and we might wish to define the circumstances in which the defendant should have a right to make a claim against that sum. From the survey results discussed above, we can see that the victims of fraud often believe that third parties, other than the fraudster, are responsible for the losses they have incurred. For this reason we might wish to incorporate into our goals a methodology for deciding when a party (who may not be the primary fraudster) has behaved in a way that society believes should lay him open to a claim for recompense by the victim.

Thus far, we have discussed this question from what might broadly be described as a property-based perspective: the fraudster holds an asset owned by another party, or which represents an asset once owned by another party, in circumstances which create an actionable connection. However, because of the technical nature of the rules of property combined with the wide range of circumstances in which fraud can occur, we might want our system to go beyond these boundaries. Thus, we

[131] For example, the fraudster sells the asset and lives on the proceeds, which allows him to save enough to buy a car.

might want to incorporate logical rules which define the circumstances in which a victim could bring an action even though property in the relevant asset had passed or where the original asset or its product no longer existed. Moreover, that plaintiff's interest in the original asset may fall short of ownership[132] and we must understand what rights he can enforce.

At this point in the construction of any social contract or bargain, rational men in the "original position" would, it is submitted, be beginning to appreciate the detailed and technical problem which they had set themselves. Just as a definition of fraud proved impossible, narrow rules designed to meet all the legal circumstances which flow from fraud, while necessary, seem inadequate. Thus, they might wish to develop an overall philosophy as to why the plaintiff should be able to recover, and when. This conception would allow them not only to deal with cases which fell outside the narrow rules, but also to provide a framework in which those rules could develop. A wide range of possibilities for such a framework might present themselves (the preservation of property rights, the prevention of harm, the prevention of unjust enrichment, the enforcement of implied promises or reasonable expectations) and the system favoured by the present study will be discussed in Chapter Four. However, if our goals are to develop logically, it is suggested that not only must such a conception exist, but that it must be fully understood and rigorously applied.

Finally, in this brief examination of priorities, it will be noted from the above survey, and the comment which goes with it, that fraud often involves a foreign element. This will, in many cases, necessarily require the potential involvement of foreign courts or the application of foreign rules. The factors which should inform our response to such cases will be discussed in detail in chapters Five and Six. However, those in the "original position" might agree some basic priorities. Thus we might expect that, unless exceptional circumstances apply, a foreign element should not defeat the priorities already noted. This in turn suggests that we should seek a uniformity of approach: where possible, a party's rights should not be dependent upon where his case is heard. Equally, we might suggest that a system

[132] e.g. a right to possession.

should promote international trade and commerce while paying respect to the views of the parties concerned and promoting their reasonable expectations.

Thus we might summarise some basic and simplistic goals to which our system should aspire: (a) all rules and techniques should be referable to, and develop in accordance with, an underlying philosophy of rights and duties; (b) this philosophy should be compatible with, and complementary to, other such methodologies; (c) the system should clearly define[133] the circumstances in which equitable and legal property passes from one party to another; (d) where property has not passed, it should allow the plaintiff to identify and recover his property in the hands of the defendant; (e) where the defendant has exchanged the asset for, or mixed it with, other assets it should clearly identify the circumstances in which the original owner is allowed to bring an action against the relevant substitute; (f) in reference to points (c)-(e) the system should identify the circumstances in which the plaintiff should have priority over unsecured creditors in the absence of an identifiable asset; (g) where no asset is identifiable, personal rights to damages should be clearly delineated; (h) where third parties have behaved with regard to the relevant property in a manner which society believes is culpable, the system should define the ways in which the plaintiff can gain recompense; (i) where the asset has come into the hands of an innocent third party, the system must logically define what rights the plaintiff may have both personally and against the property; (j) where the defendant has made a profit from an asset owned by the plaintiff (or over which he has rights), our system should clearly and rationally define the circumstances in which the plaintiff can make a claim against such gains; (k) where the plaintiff's rights in the asset fall short of ownership, the system should determine what personal actions are available; (l) it should define the circumstances in which the nature of the property, relationship between the parties or general circumstances should modify any of the above rights, duties and responses; (m) when a case involves a foreign element, our system should indicate which national rule should apply in a manner which engenders universality and predictability and, where possible, promotes the goals already identified.

[133] In this context, the words "clearly define" (and similes) should be taken to mean that the rules should be logically identifiable, predictable and rational with regard to the methodology examined above.

These precepts are, of course, both simplistic and often idealised. All will, to a lesser or greater extent, require modification in the light of facts and circumstances which will be identified in the coming chapters. Equally, they represent generalities in an area which demands detail, and must be joined by other goals as this study moves forward. Moreover, we are not starting from an "original position" but within a developed commercial and legal world: this being a study rooted in practical litigation, the major factor preventing us starting from scratch is the existence of a large and complex body of case-and statute-based authority. Nevertheless, these basic principles, combined with the methodology described above, do provide us with a framework against which we can test the effectiveness and rationality of our present system and also allow us to identify which principles are immutable.[134] In this way we can develop new and less generalised priorities by which our present system can, where necessary, be reformed with regard to present disputes and grow in the context of changes which we can expect in the near future. This process of synthesising practice with theory in order to develop new principles will be the task of the following chapters.

[134] And which we are willing to derogate from and why.

2.2: CONCLUSION.

The purpose of chapters One and Two has been to establish an understanding of modern fraud and the questions of tracing that flow from it, which will provide the foundation for the discussion which will be conducted in the following chapters. They have identified several factors which are of importance to the present study. Whilst these elements have been explored in some detail and do not require repetition, two points should be emphasised. First, although reliable figures concerning fraud are difficult to discern, those which do exist demonstrate that fraud is widespread, extensive, costly and apparently increasing. As a result we can say with some authority that fraud represents a potentially significant problem for all economic entities. From a business perspective, its importance is not only in the direct cost to businesses and shareholders but in the indirect costs of management time, impaired confidence, recovery costs and a range of other expenses.[135] From society's perspective, perhaps the most important cost of fraud is the loss of confidence which can be damaging not only to the economic welfare of a particular business or industry, but on occasion to whole economies.

Second, we have identified a range of factors which ensure that fraud presents a particularly difficult problem for any system of civil justice. Most specifically: (a) fraud is undefined; (b) it can result from an almost infinite variety of circumstances; (c) it can give rise to the use of a diversity of legal actions, techniques and remedies; (d) fraudsters are apt to operate internationally, whereas civil authorities do so only with difficulty; (e) perhaps uniquely in activities giving rise to civil litigation, fraud will have been planned from its inception with a view to confounding the authorities; (f) fraudsters (and criminals in general) have proved particularly adept at exploiting changing circumstances to their advantage; and (g) such changes are becoming increasingly prevalent and complex.

The last two factors are perhaps the most important and provide a central motivation to the present study. Flexible working practices, lack of regulation and

[135] Although the present study is primarily concerned with direct costs, if a civil system can make fraud less attractive then indirect costs will, in all probability, also fall.

the ability to operate internationally means that criminals can respond to changing economic, social and technological circumstances more swiftly than legitimate business or even governments: it has been suggested that within weeks of supermarket loyalty cards being introduced on a wide scale, fraudsters had found ways to exploit them. This ability to respond to change coincides with an unprecedented internationalisation of the world economy, to ensure that fraudsters are constantly being presented with new methods, not only of committing fraud, but also of hiding and transferring their gains.

If we are to respond to these changes, we must have a very clear understanding of what we wish to achieve. As a result, the second half of this chapter has used the empirical evidence generated by the present study, along with information from other sources to set out general guidelines which should inform our civil response to fraud and to determine a methodology by which these guidelines can be developed (and new ones formulated) in response to the requirements of the real world. The task of the following chapters will be to subject these, admittedly simplified, prerequisites to greater scrutiny, to examine how they must be modified in the face of competing domestic and international priorities, to ask whether our present system satisfies these requirements, and to recommend methods by which it can be reformed to bring the goals of principle and practice into greater alignment.

CHAPTER THREE: THE ENGLISH CIVIL RESPONSE TO FRAUDULENTLY OBTAINED ASSETS.

3.0: INTRODUCTION.

Having examined some of the primary factors that help to make tracing intrinsically complex, the present chapter considers how well traditional authority meets these difficulties.[1] Specifically, it is an examination and critical analysis of the legal rules and techniques available to the plaintiff who has suffered the loss of an asset as a result of fraud. It concentrates on these mechanisms in a predominantly domestic context, while the following chapter will consider their use in the international environment.

It has been noted in the previous chapters that the circumstances which can give rise to civil litigation for fraud, the causes of action which flow from it and the remedies which may ensue are potentially extremely wide and varied. As a result the present discussion must of necessity be placed under relatively strict limitations if it is to be of value. This limitation process has been carried out by focusing on those elements which: (a) a detailed review of English litigation conducted during the last fifty years would suggest are most likely to arise out of fraudulent activity; (b) research suggests are generally ill-defined,[2] misunderstood, contradictory or possessed of inherent internal illogicalities; and (c) are likely to have a significant influence on any litigation arising out of fraud with a foreign element.[3]

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[1] Or perhaps, in some instances, exacerbates them.

[2] "Nothing has been, nothing will be, nothing ever can be done on the subject of Law that deserves the name of Science, till that universal precept of Locke, enforced, exemplified and particularly applied to the moral branch of science by Helvetius, be steadily pursued, 'Define your words.'": Bentham, *A Comment on the Commentaries (Collected Works)*, 346.

[3] These three criteria will often lead to the identification of the same or overlapping rules and techniques and cannot be taken as more than an indication as to which factors will be of importance in a particular case. However, taken together, it is suggested that they represent a rational guide as to those legal rules and techniques that the present study should logically focus upon. This being the case, it is submitted that these criteria augur for a consideration of those elements which arise either from the ownership of, or an interest arising from a right in, the original asset upon which the litigation is centred. In particular this points to the necessity of concentrating upon the rules, techniques and principles concerned with: (a) common law tracing; (b) equitable tracing; (c) claims arising out of the knowing receipt of trust property; (d) claims arising out of

Footnote Continues on Next Page:

This chapter's primary objective is to identify the flaws and defects to which our system is subject. Such defects are broadly of two related types which can be identified by the application of two critical methods. The first asks to what extent our system is in line with the requirements of logic and rationality,[4] and is used to identify internal contradictions.[5] Such questions can be discussed without reference to the wider intentions of the particular rules or the system to which they belong. Once the internal workings of the system have been considered, the second element of this critical review is to examine the results that our techniques achieve, and the extent to which they satisfy the goals of a reasonable, efficient and principled system of justice. This is achieved by the process of comparing the practical workings of our system with the principles, goals and aims: (a) identified in chapters One and Two; (b) identified in the present chapter in the light of the empirical research, methodology and conclusion enunciated in Chapter Two. The present chapter therefore lays the groundwork that will allow tracing arising from fraud litigation to be placed within a domestic, and then intentional, context.[6]

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knowing assistance in the breach of a trust; (e) constructive trusts; (f) subrogation; and (g) rights in property (while taking cognisance of other legal elements where necessary).

[4] i.e. the "original position" bargain discussed in Chapter One.

[5] Examples of such problems (which are relatively common in the present area of discussion) can be seen in situations where the outcome of a case is determined by the cause of action or technique used rather than the justice of the case or where what appears to be a logical outcome is defeated by a legal requirement which has become outdated.

[6] This discussion is intimately connected to our understanding of rights in property and how they pass. As a result a brief consideration of this topic is included in the appendices to this study.

3.1: COMMON LAW AND EQUITABLE TRACING: INTRODUCTION.[7]

When a party holds, receives or deals with an asset in a manner which contravenes another's legal or equitable rights in, or title over, that asset, the law will provide the latter with a remedy either *in personam* or *in rem*. In the majority of cases the plaintiff will be sufficiently recompensed by bringing a personal action for damages. However, in certain circumstances he may wish to obtain the return of specific property. Beyond this, the assertion of proprietary as opposed to personal rights may create a number of advantages.[8] Bringing either a personal or proprietary remedy against a defendant who is solvent and still holds the original asset should present few problems. However, where the form, nature or holder of the asset has changed, the situation can become more complex.[9] At its simplest and narrowest, tracing is the legal process by which a plaintiff may identify where his claims in respect of property (which may have been transmuted or mixed) now abide.[10]

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[7] "There is a pressing need for a rational just and comprehensive restitutionary remedy with clear rules which prescribe the circumstances in which the money can be recovered and which identify the persons who can be made liable to repay it.": Millett P.J., "Tracing the Proceeds of Fraud" 107 L.Q.R., 71.

[8] First, such actions will give the plaintiff priority over other creditors where the defendant has insufficient resources to meet all the claims against him. Second, where an income-producing asset is involved, a proprietary remedy will carry the income from the day the defendant received the asset as opposed to the date of judgment (Hanbury and Martin, *Modern Equity*, 14th. ed. (1993), Chapter 22; *Re Diplock* [1948] Ch. 465). Third, the plaintiff may be able to take advantage of any changes in the value of an asset or even of a mixed fund (*Re Tilley's W.T.* [1976] Ch. 1179.). Finally, it has been suggested that in certain situations a proprietary action may be successful despite the lack of an appropriate personal remedy (*Sinclair* v. *Brougham* [1914] A.C. 398; Hanbury and Martin, *op. cit.*).; see also Smith, *op. cit.* at page 49.

[9] Thus for example, A obtains B's car, in a manner contrary to some operative rule of law, and exchanges it for C's boat. Where do B's rights now reside; in the car, in the boat, in both, or against B and C personally? Alternatively, A takes B's money and mixes it with his own or C's. How do the courts discern who owns what and against whom a personal action is possible? Where do the relevant and potentially divergent rights in the various assets now dwell?

[10] This is a simplified description which will suffice for the time being. However, the distinction, discussed elsewhere in this chapter, between following and tracing should be borne in mind. It should also be remembered that this narrow description is in no way a definitive or universally accepted definition. Moreover, "tracing" is often used in a number of wider senses. For example, the term has recently been used to cover the whole raft of techniques used for locating and recovering assets. These would range from the technical legal methods discussed in this chapter, to questions of jurisdiction, discovery, pre-emptive interlocutory actions, banking secrecy and the international enforcement of national court orders. Thus the word tracing can be used to cover both the legal techniques of identifying rights in property and those intended to facilitate the identification, location and recovery of said assets. This multiplicity of uses, while potentially confusing, is no more than a recognition of the fact that the identification of one's legal rights in an asset is, in practice, necessarily wedded to one's ability to physically find and recover it.

One might assume that, as stated, tracing would be a relatively simple process both conceptually and practically. Unfortunately, this area clearly demonstrates the law of England's preference for building a piecemeal system based upon solutions to specific problems rather than an overriding logical infrastructure of principle.[11] As a result the area is riddled by conceptual and terminological inexactitudes[12] and contradictions[13] which necessarily create a number of academic and practical difficulties.[14] Moreover, these problems are not merely of academic interest. It will be remembered that a majority of respondents in the survey conducted as part of this study believed that the complexity of legal rules was the main factor making the English civil courts an ineffective means of recovering assets. As a result, there are severe doubts as to whether the rules of tracing (even with regard to equity) which were developed, to a large extent, in the eighteenth and nineteenth centuries can adequately deal with modern techniques of fraud, international trade, banking,

[11] Indeed it, perhaps, exemplifies O'Connell's belief that, "The analytical character of English jurisprudence has been cursed by an undue emphasis placed on the accumulation of decisions and dicta, so that in many aspects the common law would seem to be an amalgam of factual dicta rather than an epitome of values.": O'Connell, "Unjust Enrichment", (1956) 5 Am. J. Comp. L., 2, 3; "The pressures, and consequently the opportunism, of adversarial litigation are such that, left to itself, case-law grows without much regard for principle or for the coherence of one piece of law to another": Birks, *Introduction op. cit.* at page 1; See generally, Matthews, P., "Tracing the Proceeds of Fraud" *op. cit.*.

[12] "Despite the copious amount of literature devoted to the right to follow property and its proceeds at law and in equity, it is surprising how many underlying problems remain unresolved...in addition, the relevance of the topic as a whole to commercial and financial transactions has largely been ignored.": Goode, "The Right to Trace and Its Impact in Commercial Transactions - I" 92 L.Q.R., 360; Equally, Goff and Jones describe the tracing rules as, "...highly technical and often irrational." Goff and Jones, *op. cit.* at page 86.

[13] "No two judges, and certainly no two commentators, are agreed on the correct classification of the various situations that can arise, let alone on the requirements for recovery in each. The duality of our common law and equitable systems, with their differing language and possibly differing rules for dealing with similar situations, adds to the complication.": Millett P.J., *op. cit.* at page 71. These problems are particularly acute with regard to common law tracing as a function of the limited number of relevant cases which come before the courts. As McNichol notes, "...the fact remains that while equity remains so useful in this area and the superior courts have neither the necessity nor the inclination to give an authoritative decision on the position with regard to the common law, equity will continue to be used in preference thereof." McNichol, "Tracing: Its History, Development and Modern Application" (1990) *Trust Law International*, July, 7, 9; "The reason is that the commonest area in which the matter arises is bankruptcy. This is an area in which, even before the Judicature Acts, the courts of common law would recognise the existence of a trust and apply the rules of equity relating to it.": Pearce, R.M., "A Tracing Paper" (1976) 40 Conv. (N.S.) 277, 278.

[14] There is doubt as to whether tracing can, in the correct circumstances, ever be described as a personal or proprietary remedy or whether it is always a procedural technique or indeed something else; "It is not easy to describe what tracing and subrogation are. They are plainly not grounds for restitution and, although commonly thought of as remedies, they are more accurately described as a means of getting to particular remedies themselves.": Burrows, *op. cit.* at page 57). Equally, tracing's relationship to the laws of property and restitution remains unresolved. The usefulness of common law (and even equitable) tracing in a modern commercial environment is debatable. The convergence between the history of tracing, the attempt to develop simple rules and the complexity of modern commerce necessarily creates problems (As Walker J. has noted (*El Ajou* v. *Dollar Land Holdings plc (NO. 2)* [1995] 2 All E.R. 213, 219), "...tracing in equity is (to say the least) a complicated subject and although the ideal would have been simple rules of general application, the fact is that the court's approach has, understandably and rightly, been influenced by the context in which the

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money laundering and electronic communication. If they cannot, then the need for a viable alternative can only be increased by imminent developments in computer commerce and the introduction of electronic money. These questions are of fundamental importance because tracing is the primary route by which the victim of fraud may recover his losses, and as Matthews points out, in many cases, it is the *only* method by which the law of England[15] might hope to do justice:

> "Where frauds are perpetrated, there are three main reactions provoked: (i) everyone wants someone caught and punished; (ii) victims want their money back; and (iii) society demands extra rules to prevent it ever happening again. We all know that (iii) is unobtainable. However hard we try, fraud will always find a way. Catching someone is not always possible, but even when that happens the experience of the Serious Fraud Office shows that punishing them is another matter. For the victims to get their money back - even in the absence of (i) and (ii) is something, and for that the law of tracing may take most of the credit."[16]

tracing problem arises."). Finally, the "fiduciary relationship" and "proprietary requirement" found in equitable tracing are increasingly controversial.

[15] Civil or criminal.

[16] Matthews, P., "The Legal and Moral Limits..." *op. cit.* at page 34.

3.2: COMMON LAW TRACING.[17]

3.2.1: INTRODUCTION.

For anyone who has examined the terminological, definitional and conceptual problems associated with restitution in general and, perhaps, tracing in particular, it will come as no surprise to find that a generally accepted definition of common law tracing is difficult to discover.[18] Matthews uses the following formulation, "... 'tracing' is a term applied to a set of rules for identifying property to which, or to a share in or a charge over which, a claim is made."[19] He expanded upon this, writing with Kurshid, when he said, "...common law tracing means having a right to sue in tort (usually in conversion) or in money had and received, *i.e.* actions *in personam* following interference with proprietary rights, and nothing more."[20] Unfortunately, such simple explanations cannot be accepted with complete assurity. Thus, it is clear that even in these concise and limited definitions, Matthews is addressing two different legal elements. In the first he appears to suggest that common law tracing is no more than a procedural evidential technique.[21] In the second, he equates it with a cause of action.[22] This confusion (or lack of precision) is in no measure

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[17] See generally, Scott, "Tracing at Common Law" (1965-1966) 7 W.A.L.R. 436; Pearce, *op. cit.*; Goode, R.M., "The Right to Trace..." *op. cit.*; Kurshid and Matthews, *op. cit.*; Millett, *op. cit.*; McNichol, D., *op. cit.*; Mountford, A.G., "Tracing: An Examination of the Applicability of Tracing Principles Today" (1996) A.L.J., Vol. 70, 54.

[18] "...linguistic confusion...bedevils the law of restitution - necessitating laborious definitions before anyone can understand what you are talking about...": Kull, A., "Rationalising Restitution" (1995) California L.R., Vol. 83, 1191 at 1191. The present author would (with reservations) recommend Pearce's definition, although it should be noted that some of its clarity comes by way of a determination to describe what narrow tracing does rather than attempting to examine what it fundamentally is: "Tracing is a way by which a plaintiff is able to assert a right of property in some asset which has come derivatively into the hands of another. The foundation of the right to trace is that a claimant who is able to point to specific property in the hands of the defendant and say 'that is my property' is entitled to recover it. Property is traced when it is followed unchanged from the hands of one person into those of another; and when it is followed through changes of form into its exchange product": Pearce, *op. cit.* at page 277.

[19] Matthews, P., "The legal and Moral Limits..." *op. cit.* at page 10.

[20] Kurshid and Matthews, *op. cit.*; Moriarty uses the following terms, "...'tracing' is the mechanism...which forestalls these affronts to common sense by providing...for a person's remedies in respect of his property to endure, notwithstanding their placement, or mixing, of his original asset with other property.": Moriarty, S., "Tracing, Mixing and Laundering", *Pressing Problems in the Law*, S.P.T.L. Seminars (1994), 1.

[21] Indeed, they go on to say, "...strictly speaking it is not in itself a claim, or (at least at common law) a cause of action": Matthews, P., "The legal and Moral Limits..." *op. cit.* at page 10.

[22] The disparity in these quotes is not reproduced in order to suggest that Matthews is wrong in either specific usage. It is merely intended to demonstrate the difficulty within the prevailing legal environment (and in the context of decided authority) of placing any one definition upon tracing or accurately identifying its nature. Moreover, with regard to the differential between procedure and substance, as Matthews himself points out, the dividing line can be difficult to identify, "This emphasis on results points up the importance of

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unique. Indeed, Millett refers to common law tracing as a remedy, an identification process and a cause of action all in the space of one article.[23] Moreover, for example, Hanbury and Maudsley[24] disagree with Matthews' formulation, because they believe that true tracing must be capable of giving priority in bankruptcy.[25] Equally, Birks[26] (and others) draw the line somewhat wider than Matthews, suggesting that common law tracing covers not only identification for the purpose of making a claim over, or with regard to, any part of the asset still held[27] but also with regard to personal actions for the value received.[28] This wider interpretation was given apparent judicial approval by Millett L.J. in *Boscawen* v. *Bajwa, Abbey National plc* v. *Boscawen* [1995].[29] It might be argued that this definition is somewhat confused by its proprietary tone, but its acceptance of tracing's purpose with regard to identifying not only the plaintiff's property, but also the transactions and parties which have connection to that property is, it is submitted, an accurate modern judicial consideration of how the technique is presently used by English courts.[30]

However, even this definition is relatively generalised, and the history of tracing suggests that there is no certainty that it will be followed in subsequent cases. This lack of uniformity, combined with common law tracing's long history of case-by-case incremental development, ensures that the technique can only be fully

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procedure to the Anglo-Saxon method. Since the results *were* the substance, how you got your results controlled that substance": Matthews, P., "The legal and Moral Limits..." *op. cit.* at page 3.

[23] Millett, *op. cit.*

[24] Hanbury and Maudsley's, *op. cit.* at page 564.

[25] This argument will be discussed in more detail below.

[26] Birks, *Restitution-The Future*, (1992), 111; Birks, *Introduction*, *op. cit.* at page 361.

[27] Known in Birks' terminology as the second measure of restitution.

[28] The first measure of restitution.

[29] "...[it] is not confined to the case where the plaintiff seeks a proprietary remedy; it is equally necessary where he seeks a personal remedy against a knowing recipient or knowing assistant. It is the process by which the plaintiff traces what has happened to his property, identifies the persons who have handled or received it, and justifies his claim that the money which they handled or received (and if necessary which they still retain) can properly be regarded as representing his property.": *Boscawen* v. *Bajwa, Abbey National plc* v. *Boscawen* [1995] 4 All E.R. 769, 776, *per* Millett L.J.

[30] With regard to terminology, it should be noted that some commentators (particularly in other common law jurisdictions) make a distinction between what they describe as "tracing" and "following." Thus Smith states, "The victim of a car thief tries to find the car...Alternatively, the plaintiff might find that the original thing has been used to acquire a new asset. In these two cases, the techniques by which the plaintiff identifies an asset to which he will make a claim are very different. The first process involves finding the original asset. In this paper, it will be called 'following.' The second process involves identifying a new asset that was acquired in exchange for the original thing. That process is called 'tracing.'": Smith, D., "Tracing into the Payment of a Debt" [1995] C.L.J., 54(2), 290; Smith, *op. cit.* at page 6. Generally, this terminology

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understood by what computer scientists describe as reverse engineering. In other words, one cannot start from a universal definition or even underlying rationale, but must begin by detailed examination of the circumstances in which it is used and what it can and cannot achieve, before working back to first principles.

3.2.2: THE NATURE OF COMMON LAW TRACING.

Although it is difficult to make definitive statements in this area, we may state with some confidence that the majority view sees common law tracing as no more than an identification technique.[31] However, one might question even this simple proposition. It could be argued that Millett's suggestion that common law tracing is merely a way of showing where common law rights reside, does not seem to entirely match its nature or the way in which it is often used. As we shall see, common law tracing allows the plaintiff, in certain circumstances, to gain priority in bankruptcy. Moreover, if one accepts "exchange product" theory[32] then under some logically defensible interpretations, common law tracing allows the plaintiff to claim as his own asset, property in which no party (including the plaintiff) intended to pass to him. In other words one can, at least, argue that rights are created or altered.[33] If this is the case, it is difficult to maintain that common law tracing is merely an evidential technique in a narrow sense.[34] This is an argument which will

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has not been fully embraced by English Lawyers: as a result it will be difficult to fully maintain this differential throughout the present chapter.

[31] "Tracing at common law, unlike its counterpart in equity, is neither a cause of action nor a remedy but serves an evidential purpose.": Millett, P.J., *op. cit.* at page 72: "Tracing at common law enables the defendant to be identified as the recipient of the plaintiff's money and the measure of his liability to be determined by the amount of the plaintiff's money he is shown to have received": *Agip (Africa) Ltd* v. *Jackson* [1990] 1 Ch. 265, *per* Millett J. at page 285. Nor it appears does Millett confine this view to the common law, "Equity lawyers habitually use the expression 'the tracing claim' and 'the tracing remedy' to describe the proprietary claim and the proprietary remedy which equity makes available to the beneficial owner who seeks to recover his property *in specie* from those into whose hands it has come. Tracing property so called, however, is neither a claim nor a remedy but a process." *Boscawen* v. *Bajwa, Abbey National plc* v. *Boscawen* [1995] 4 All E.R. 769, 776, *per* Millett L.J.

[32] See below; and also Kurshid and Matthews, *op, cit.*.

[33] "If the plaintiff traces at law, logically, if his property has been exchanged for some other asset, for example if the money is used to buy a painting, the right to trace should be lost. The vendor of the painting will have legal title to the cash, and the defendant, having used the plaintiff's money in the purchase, will have legal title to the painting. However, the logical view is largely ignored in the authorities, which regularly hold that there is a right to follow through a "change in form": Band, C., "The Development of Tracing Rules in Commercial Cases" [1997] L.M.C.L.Q., 65.

[34] In reality this apparent difficulty is arguably explained by the failure of some commentators to make a distinction between property rights and personal remedies potentially based upon property rights. Thus it is more normally correct to say that "exchange product" theory gives the plaintiff the right to treat property as "representing his property" in a way which could result in damages rather than the right to the particular asset.

be discussed later in this chapter. For the moment, however, the subject will be approached from the traditional point of view, before examining the validity of this orthodoxy.

With regard to money,[35] the specific cause of action giving rise to common law tracing will normally be a personal action[36] for money had and received[37] the remedy sought being an order for "account and payment." As money can also be treated as a chattel, it would be possible to bring one of the tort actions for money *in specie*.[38] However, this is an inherently problematic course: money is difficult to identify and its negotiability[39] means that property in it will normally pass to a *bona fide* third-party purchaser/recipient for value.[40] Indeed, the nature of money means that in most circumstances property will pass to the original transferee unless the transferor evinces an intention that it should not, thus preventing an action based upon the return of the original notes and coins. With regard to chattels which have been used in a manner inconsistent with another's rights,[41] the action will normally be in tort for interference with goods,[42] which if successful will result in damages or specific restoration at the court's discretion.

Both actions, as noted, are personal. Unfortunately, a personal action will not normally give priority in bankruptcy, the very circumstances in which tracing is

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[35] Money includes notes and coins: *Millet* v. *Race* (1758) 1 Burr 452; *Wookey* v. *Pole* (1820) 4 B. & Ald. 1; *Suffell* v. *The Bank of England* (1882) 9 q.b.d. 555. See also Mann, *The Legal Aspects of Money*, 5th ed., (1992).

[36] *Lipkin Gorman (A Firm)* v. *Karpnale Ltd* [1991] 2 A.C. 548, 572, *per* Lord Goff. This would suggest that should the defendant become bankrupt the plaintiff will stand in no better position than other creditors.

[37] Historically it would also be possible to bring an action for trover where the money is identifiable: *Miller* v. *Race* (1758) 1 Burr. 452, 457- 458, *per* Lord Mansfield; in *The Trustee of Property of F.C. Jones & Sons (a firm)* v. *Jones*, *The Times*, [1996] 4 All E.R. 721, 724 Millett, L.J. rejected the notion that no other action was possible, "...I do not accept the main submission of counsel that the only action at law which was available to the trustee was an action against Mrs Jones for money had and received." Unfortunately he failed to fully explain the nature of this alternative action.

[38] *Golightly* v. *Reynolds* (1772) Lofft 88.

[39] *Miller* v. *Race* (1758) 1 Burr 452.

[40] *Higgs* v. *Holiday* (1600) Cro. Elz. 746; *Miller* v. *Rose* (1758) 1 Burr. 45; *Agip (Africa) Ltd* v. *Jackson* [1991] Ch. 547; *Lipkin Gorman (A Firm)* v. *Karpnale Ltd* [1991] 2 A.C. 548.

[41] Torts (Interference with Goods) Act 1977, s.1 and RSC Order 29, rule 2A. It should be noted that the common law chattel torts are available to equitable owners: *Healey* v. *Healey* [1915] 1 K.B. 938.

[42] Matthews notes five sub-categories to this scenario, specifically: (1) where the asset is wrongly taken; (2) where it is innocently taken (which will not affect the legal aspects of the action); (3) where the defendant obtains the asset due to the defendant's negligence (in which case the defendant may be able to counter claim for any loss sustained); (4) where the asset was taken with consent; and (5) where the plaintiff has pledged

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likely to be attempted. Goode points out that it might be assumed that priority could be achieved on the basis that the trustees in bankruptcy are mere volunteers.[43] However, as he goes on to note, trustees and liquidators labour under a statutory duty to collect and take possession of all the bankrupt's assets,[44] the result being that no personal remedy based only upon a right to possess can be brought against the trustee or liquidator. This, it will be remembered, is the very criticism that Hanbury makes of Matthews' definition of common law tracing with which this section opened. Thus we have one body of opinion which suggests that tracing must give priority in bankruptcy and another which holds that common law tracing, as a function of its personal nature, is incapable of doing so. To ascertain the true situation, it is necessary to make a division between actions in which A's claim is based merely upon a right to possess[45] and those in which A can demonstrate a real right to the asset by virtue of legal title or because B held the asset for him on trust. In the latter case,[46] it appears that he will be able to bring an action against either trustees or liquidators. The effect, as Pearce points out, is that common law tracing in these circumstances, "...remains proprietary. The limitation has resulted merely in an inability to compel the return of the property *in specie*."[47] This, in effect, means that where B becomes bankrupt while in possession of A's property,[48] title in such property does not pass to his trustees in bankruptcy. Should the trustees come into possession of the property they can be sued personally for its return or damages:[49] they will be in no better position than B.[50] Should they have converted the property into money, they will be liable in an action for money had and received which will

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the asset as security (in which case his property rights will be defeated by the defendant's until the plaintiff fulfils the relevant obligations): Matthews, P. "The Legal and Moral Limits..." *op. cit.* at page 40.

[43] Goode, *op. cit.* at page 401.

[44] Bankruptcy Act 1914 s.48; Companies Act 1948, ss. 243 (1), 303 (1) (b).

[45] In which case the position will be as suggested by the above quote.

[46] Where A has a real right to the property either as the legal or beneficial owner (Bankruptcy Act 1914 s.38 (1)). It should be noted that the right to trace at common law cannot be based upon the equitable beneficial interest (although, as the discussion below suggests, it may be based upon the recognition of this interest).

[47] Pearce, *op. cit.* at page 284: there is little doubt that the idea of a proprietary action which is incapable of requiring the return of the property seems, at a fundamental level, to be inconsistent. However, the arguments underpinning this position are logical and will be discussed in more detail (in a slightly different context) below; see *The Trustee of Property of F.C. Jones & Sons (a firm)* v. *Jones*, [1997] Ch 159.

[48] Legal or beneficial.

[49] Kurshid and Matthews, *op. cit.*.

[50] *Clough Mill Ltd* v. *Martin* [1984] 3 All ER 982 (failed on facts).

not abate in bankruptcy.[51] Thus, Matthews responds to Hanbury's criticism by saying, "...this objection seems to us to be based on a misapprehension of the effect of bankruptcy on personal claims founded on proprietary rights..a result akin to priority in bankruptcy is achieved using the common law actions."[52] This position is logical where the plaintiff has both the legal and equitable title. However, where he is merely a beneficial owner the position may be more problematic: can common law courts give priority in bankruptcy to a party with no more than an equitable title? This question, and common law tracing in general, has recently been placed into a historical context by a number of commentators, and this new research suggests that Matthews is correct. Thus Smith notes,[53] that the common law courts of the sixteenth and seventeenth centuries had the ability to take a number of different approaches with regard to assets which the bankrupt held for someone else, either as bailee or as trustee. With regard to the bankruptcy of a bailee, the legal and equitable title resided at all times with the bailor and this was necessarily unaffected by the bailee's bankruptcy: his possession was not enough to pass any rights to his assignee. When the bankrupt holds as trustee, however, the possibilities are different. The courts could hold either that the legal title (but obviously not the equitable rights) to the property passed to the assignees, or that it remained with the bankrupt.[54] It should be noted that both courses would prevent the asset being distributed among the creditors, but that the former methodology would potentially require the intervention of the courts of equity. Nevertheless, one might expect the common law courts to take the former view: to do otherwise would require them to take cognisance of, and act upon, a trust.[55] Nevertheless, Matthews, Kurshid and Smith (in particular) make a powerful argument to suggest that, in an early drive for efficiency in the civil justice system, this is what happened.[56] Thus in the case of

[51] Scott, M., (1966) 7 W.A.L.R. 463, 481; Goff and Jones, *op. cit.*; *Giles v Perkins* (1807) 9 East. 12; *Scott* v. *Surman* (1742) Willes 400; Hanbury and Martin, *op. cit.* at page 648.
[52] Kurshid and Matthews, *op. cit* at page 78.
[53] Smith, L. " Tracing in *Taylor* v. *Plumer*: Equity in the Court of the King's Bench", May [1995] L.M.C.L.Q., Part 2, 240.
[54] Smith, L., *op. cit.* at page 241.
[55] Long before the sea changes which began in 1873 (Supreme Court of Judicature Act 1873: Supreme Court of Judicature Act 1875).
[56] This argument will have a significant bearing on the discussion below and will therefore be considered in some depth.

Scott v. *Surman* (1742)[57] Willes, C.J. had suggested that where a plaintiff could gain relief at equity, the courts should, in order to save trouble and expense, endeavour to give him relief at law where to do so would not offend against the rules of the court.[58] A proposition which led him (although not the rest of the court) to believe that the legal title to the asset should remain with the bankrupt.[59]

Smith convincingly provides a large amount of authority which suggests that, following this case, the proposition gradually became accepted currency in the common law courts.[60] And, perhaps most importantly, that it was favoured by Lord Ellenborough,[61] notably in *Gladstone* v. *Hadwen* (1813).[62] Thus, from a consideration of the nature of modern tracing and its historical development, it is possible to conclude that a defendant will not have a right of priority over other creditors if his action is based upon no more than a right to possession. However, where he has a real right based upon legal or beneficial ownership he will achieve priority, even though this is achieved through what is normally referred to as a personal action. In fact it may be more correct to say that the relevant action is of a

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[57] *Scott* v. *Surman* (1742) Willes 400; 125 E.R. 1235 (C.P.).

[58] "We all agree that the equity of the case is with the plaintiffs; and that therefore if the law were against the plaintiffs they would certainly be relieved in equity...And wherever the equity of the case is clearly with the plaintiff, I will always endeavour if I can and if it be in any way consistent with the rules of law, to give him relief at law. And I found my resolution on a maxim in law, that the law will always avoid circuitry of action if possible, to prevent trouble and expense to the suitors; and for the same reason I think *a fortiori* we ought to endeavour, if possible, to prevent suits in Courts of Equity.": *Scott* v. *Surman* (1742) 400, 401-402; 125 E.R. 1235, 1236 (C.P.), *per* Willes, C.J.; quoted by Smith, L., *op. cit.*.

[59] "...there is a notion, I own...of which my brothers are doubtful...My notion is that the assignees under a commission of bankrupt are not to be considered as a general assignee of all the real and personal estate of which the bankrupt was seized and possessed, as heirs and executors are of the estates of their ancestors and restators; but that nothing vests in these assignees even at law but such real and personal estate of the bankrupt in which he had the equitable and legal interest, and which is to be applied for the payment of the bankrupt's debts. And I found this is my opinion both on the reason and justice of the case, and likewise on the several statutes made concerning bankrupts which relate to this point. As to the reason of the case, I rely here again on the rule concerning circuitry of action. For I think it would be very absurd to say that any thing shall vest in assignees for no other purpose but in order that there may be a bill in equity brought against them by which they will be obliged to refund and account, and according to the case of *Burdett* v. *Willet* will likewise have costs decreed against them, and so the effect of the bankruptcy which ought to be applied to the discharge of his debts will be wasted to serve no purpose whatever". *Scott* v. *Surman* (1742) 400, 402; 125 E.R. 1235, 1236-1237 (C.P.), *per* Willes, C.J.: for a full explanation of this and related cases see, Smith, L. *op. cit.* at page 240.

[60] *Howard* v. *Jemmet* 3 Bur 1369; *Winch* v. *Keeley* 1 D & E. 619; *Parnham* v. *Hurst* (1841) 8 M.& w. 743; 151 E.R. 1239 (Exch of Pleas); *Boddington* v. *Castelli* (1853) 1 El. & Bl. 879; 118 E.R. 665 (Exch. Ch.); Smith, L., *op. cit.*.

[61] This is of particular relevance with regard to the argument, which will be discussed below, that the case of *Taylor* v. *Plumer* (1815) 3 M. & S. 562 was concerned not with common law tracing but with its equitable counterpart.

[62] *Gladstone* v. *Hadwen* (1813) 1 M. & S. 517; *Gladstone* v. *Hadwen* (1813) 1 M. & S. 517, 525-527, *per* Lord Ellenborough.

proprietary nature but results in a personal remedy.[63] Therefore common law tracing is, arguably, at the very least, an identification technique which in certain circumstances will provide the plaintiff with advantages in the event of bankruptcy.[64]

3.2.3: THE RELATIONSHIP BETWEEN EQUITABLE AND COMMON LAW TRACING.

Some commentators have suggested that the rules of common law and equitable tracing can be seen as totally different and unrelated entities. Whether one considers them to be functionally different or not is, to a large extent, a matter of personal taste and will make little substantive difference. To consider them as unrelated is, however, more dangerous. Even if they are divergent techniques, there is little doubt that each (and particularly the rules of equity) has developed, partly, as a result of the defects in the other, and an approach which ignores this factor is necessarily flawed.

Nevertheless, historically, the development of separate rules of tracing by equity and the common law may well have been inevitable. Perhaps the primary influence in this process, as in many others, was the common law's inability to recognise the rights of beneficiaries[65] and to award specific recovery for detinue[66] before 1854.[67] In *Re Diplock*[68] Lord Greene M.R. compared the rules of common law and equity and identified a number of limitations to be found in the latter's cannon.[69] These

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[63] *The Trustee of Property of F.C. Jones & Sons (a firm)* v. *Jones*, [1997] Ch. 159.
[64] However, as we shall see below it may, depending on one's point of reference, be a great deal more than this.
[65] Maitland, *Equity*, 2nd ed., (1936), 220.
[66] Although detinue has now been abolished, the discretionary power has been retained in section 3 of the Torts (Interference with Goods) Act 1977.
[67] Common Law Procedure Act 1854 s.78.
[68] *Re Diplock* [1948] Ch. 465.
[69] "(1) The common law did not recognise equitable claims to property...Sovereigns in A's pocket either belong in law to A or they belong in law to B. The idea that they could belong to A and that they should nevertheless be treated as belonging to B was entirely foreign to the common law...
(2) The narrowness of the limits within which the common law operated may be linked with the limited nature of the remedies available to it...In particular, the device of a declaration of charge was unknown to the common law and it was the availability of that device which enabled equity to give effect to its wider concept of equitable rights.
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limitations will be considered in more depth below, and it will be argued that Lord Greene's view is not necessarily consistent with principle or authority. Nevertheless, partly as a result of these problems, a number of commentators have recently suggested that the common law rules have been superseded by the rules of equity and that the former are therefore redundant in all but the simplest cases.[70] However, the recent case of *The Trustee of Property of F.C. Jones & Sons (a firm)* v. *Jones* (1996)[71] clearly demonstrates that relatively complex cases can develop in which the equitable rules are impotent, most specifically, due to the lack of a fiduciary relationship.[72] Moreover, despite their separate development, the two systems are inextricably linked by the circumstances which might give rise to a tracing claim in either area.[73] With regard to equitable tracing, the claimant's action will be based upon equitable rights: created either by the parties, or by the courts (possibly) via a constructive trust.[74] In the former case, where equitable rights arise out of the acts of the parties, it is unnecessary to emphasise that it will result in a relationship unknown to the common law.[75] Moreover, the equitable relationship between the parties is one which can logically exist in isolation to the common law. On the other hand in the latter case, even though the constructive trust is a beast unknown to the common law, the circumstances which are capable of bringing it into existence are, in practice, likely to involve the very relationships which will enable a party to

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(3) It was the materialistic approach of the common law coupled with and encouraged by the limited range of remedies available to it that prevented the common law from identifying money in a mixed fund.": *Re Diplock* [1948] Ch. 465, 518, 20, *per* Lord Greene M.R.

[70] "...the common law's remedies are inadequate and its jurisprudence defective." Millett, *op. cit.* at page 71; "...tracing at common law is not very important. Just as the common law action of account was displaced by the equitable equivalent because Chancery had better machinery for taking account, so here common law tracing is displaced by the equitable rules for identifying surviving enrichment, since equity can do all that the common law does in the case of clean substitutions but can also keep a marker on money as it passes through a mixed fund.": Birks, *Introduction*, *op. cit.* at page 360.

[71] *The Trustee of Property of F.C. Jones & Sons (a firm)* v. *Jones*, [1997] Ch 159; "Although equity was the first to develop rules of tracing, the early development of the principles of tracing in equity is closely intertwined with that of the common law. The rules of the two bodies of law evolved side by side...": Pearce, *op. cit* at page 284.

[72] Equally, it has, probably correctly, been argued that, "In *Lipkin Gorman* ([1991] 2 A.C. 548, 573), Lord Goff was adamant that an action for restitution by subtraction cannot succeed unless the plaintiff can trace the money of which he was deprived into the defendant's hands according to the common law rule." Although it should be noted that, "The...ratio of *Lipkin Gorman* v. *Karpnale* on this point is unclear: Lord Templeman adopts a rather different approach...and the other three judges agree with both the main speeches.": Fennel, S. "Misdirected Funds: Problems of Uncertainty and Inconsistency" (1994) 57 M.L.R. 38, 42.

[73] Goode, *op. cit.* 372; The specific nature and role of the constructive trust will be discussed below.

[74] Whether equitable tracing is an independent technique or necessarily triggered by a constructive trust will be considered below.

engage in common law tracing.[76] In other words, parties who find themselves in an equitable trustee/beneficiary relationship by virtue of a constructive trust may also discover that the common law is willing to find that a relationship giving rise to a duty to account exists between them: for example, agent/principle or bailee/bailor.[77] In these circumstances equity and the common law are in no sense competing or exclusive avenues but potentially complementary weapons in the injured party's arsenal.[78] Moreover, with regard to the present study, to concentrate only on the rules of equity, as some commentators suggest,[79] necessarily forces one to ignore factors which facilitate the understanding of both codes.[80]

3.2.4: RULES OF COMMON LAW TRACING.[81]

With regard to the technique's primary purpose, all assets can be put on a scale of identifiability. At one end will be the most straightforward scenario in which the original asset is retained in the hands of the original recipient. In these circumstances the tracing rules are unlikely to be required. At the other end of the scale is the asset which is entirely unidentifiable, for example, because it no longer exists.[82] Between these boundaries will be a number of possible situations in which a party holds an asset, but, for various reasons, doubt exists as to whether the plaintiff has rights in, or over, or flowing from that particular piece of property. The

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[75] Although as we have seen this does not necessarily mean that the common law is incapable of taking cognisance of such a relationship.

[76] Goode, *op. cit.* at page 372.

[77] *Ibid.*

[78] However, it is important to remember that in the aforementioned relationships, "...what attracts the common law remedy is not the constructive trust as such but the fact of the defendant receiving an asset in circumstances such that he attracts a duty to account for it to the plaintiff at common law. To treat the beneficiary's equitable right to possession under a constructive trust as of itself, grounding a possessory claim at common law would be to confuse common law and equitable rights and remedies and to create an illegitimate hybrid right derived partly from equitable principles and partly from the rules of common law.": Goode *op. cit.* at page 372.

[79] Millett, *op. cit.* at page 71; "Common law tracing has, however, proved inadequate in fraudulent transactions involving complex banking transactions and to this extent the future does lie in equity": Mountfort, A.G., *op. cit.* at page 59.

[80] Not the least of which, is the influence that the common law's failings have had on the development of equity's rules (and perhaps vice versa).

[81] "There is no lack of rules; no want of authority. It is their abundance that causes the difficulty. While the magnitude of the problem is new, the problem itself is not. It is as old as fraud itself.": Millett, L.J. *op. cit.* at page 72.

[82] The underlying principle of tracing being, "...That the property to be traced can be identified at every stage of its journey through life": *Borden* v. *Scottish Timber* [1981] Ch. 25, 46, *per* Buckley L.J. However, if one accepts Birks' definition of "tracing", the technique may be used in these circumstances to identify the

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most prominent of these situations occurs where the original asset has been substituted for, or mixed with, another. As a result the rules of tracing must, at least initially, be judged on their ability to identify the plaintiff's assets in these complex circumstances.

3.2.4.1: Substitution of Assets.[83]

Perhaps the most common circumstances in which the identification rules come into play occur when the original asset is exchanged for another. For example, B obtains A's car and exchanges it for C's boat. Traditional learning suggests that the common law allows the plaintiff to trace his assets into the hands of C, and indeed (under some interpretations) into the hands of subsequent parties.[84] Moreover, it has been the traditional view that,[85] following Lord Ellenborough's judgment in *Taylor* v. *Plumer* (1815),[86] the plaintiff should be able to bring an action against a new or exchanged asset in the hands of the original recipient.[87] This is known as "exchange product" theory.[88]

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destination of the value representing the original asset (i.e. value received rather than value surviving): Birks, *Introduction*, at page 361.

[83] See generally, Smith, *op. cit.* at Chapter 4.

[84] "Each movement of the asset from one recipient to another thus brings into existence a distinct personal right of O (O representing the original claimant) against that recipient and a distinct new duty to account by the recipient to O; and since the recipient, having once incurred a personal duty by his receipt of the asset, cannot therefore shuffle it off by dealing inconsistently with O's rights but on the contrary will infringe such rights by that dealing, it follows that O's personal rights against the successive recipients are not alternative but cumulative.": Goode, *op. cit.* at page 370.

[85] *R* v. *Bunkall* (1864) Le & Ca 371, 375-6; *Sinclair v Brougham* [1914] A.C. 398, 419; Millett, *op. cit.* at page 73; *R* v. *Grant* [1979] 2 N.S.W.L.R. 478, 483; *Lipkin Gorman* v. *Karpnale Ltd.* [1991] 2 A.C. 548, 573; Ashburner's Principles of Equity, 2nd. ed. 1933, 87; Smith & Hogan, *Criminal Law*, 1st. ed. 1965, 376; Scott (1966) 7 U.W.A.L.R. 463, 481; Lawson, *Remedies of English Law*, 2nd. ed. 1980, 148-149; Keane, *Equity and the Law of Trusts in Ireland*, (1988), para. 20.01; Stoljar, *The Law of Quasi-Contract*, 2nd. ed.. (1989), 172-3; Birks [1992] C.L.P. 69, 92-93; Palmer, *Bailment*, 2nd ed. (1991), 288-290; Pettit, *Equity and the Law of Trusts*, 12th ed. (1993), 506; Hanbury and Martin, *op. cit.* at pages 643-644.

[86] "It makes no difference in reason or law into what other different forms from the original, the change may have been made, whether it be into that of promissory notes for the security of the money which was produced by the sale of the goods of the principle, as in *Scott* v. *Surman*...or into other merchandise, as in *Whitecomb* v. *Jacob*...for the product of, or substitute for the original thing still follows the nature of the thing itself...": (1815) 3 M. & S. 562, 575; Thus, where one asset is cleanly substituted for one or more other assets the substitutes can, under this interpretation of the case, be treated as subject to the plaintiff's rights and he can obtain appropriate relief. It should be noted that following this decision it has been suggested that the plaintiff has title to the asset to be followed: that it belongs to him. As the analysis of personal and real property (see appendices) arguably suggests the word "belong" should be taken to connote a right to possess rather than an existing real right. As a result following an asset at common law is a question of asserting a personal claim against another party whether that claim is purely personal or possessory: it is not a question of identifying legal ownership. However, as the quote from Matthews and Kurshid (above) shows, this is a distinction which some commentators fail to make.

[87] The central figure in *Taylor* v. *Plumer* was Benjamin Walsh, a broker and Member of Parliament. As a result of his financial impecuniosity, Walsh decided to defraud one of his clients, Sir Thomas Plumer K.C.

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A development of this underlying idea can be seen at work in the case of *Banque Belge pour l'Etranger* v. *Hambrouck* [1921].[89] In that case Hambrouck fraudulently obtained a number of cheques purporting to be drawn by his employer from the plaintiff's bank. These were then paid into his account upon which he drew cheques which he paid to his mistress for no consideration (or illegal consideration) which she then paid into her account. The plaintiff brought an action to recover this money. Aitkins L.J. stated:

> "The question was, 'Had the means of ascertainment failed?...If, following the principles laid down in *re Hallet's Estate*, it can be ascertained either that the money in the bank, or the commodity which it has bought, is the product of, or substitute for, the original thing', then it still follows ' the nature of the thing itself'. On these principles it would follow that as the money paid into the bank can be identified as the product of the original money, the plaintiff has the common law right to claim it, and can sue for money had and received".[90]

(An ambitious target: he was, at the time, the Solicitor General).[87] Walsh (with the defendant's permission) sold an amount of Plumer's stock. He received over £20,000 but told Plumer that the transaction would not go through for up to a week. In the meantime he used some of the purchase price to buy gold coins and US government bonds. At the appropriate time Plumer transferred the original stock to Walsh and told him to invest it in different stock while also giving him a cheque (again for over £20,000) for the purchase of Exchequer Bills. He used only a proportion of the money for this purpose (the Bills were delivered to Plumer's bank), the rest being turned into cash, gold and stock. He then set off for the New World; unfortunately (from his point of view) he made it no further than Falmouth before being detained by agents in the service of Plumer. Following Walsh's bankruptcy his assignee attempted to recover the assets, claiming that they had a right of possession flowing from their title as assignees in bankruptcy: (Bankruptcy Act 1623 21 Jac. 1, c. 19). The relevant question being whether Plumer could show that the investments belonged to him by virtue of their substitution for his money.

[88] A term coined by Matthews and Kurshid, who explain it in the following way, "...where A owns property which B without authority exchanges for cash or other property from C, A can claim that cash or property...either as owner or at least having a sufficient right to immediate possession to enable him to maintain conversion.": Kurshid and Matthews, *op. cit.* at page 79. The use of the phrase "as owner" should be noted with care as this is one of the primary causes of confusion in this area. Nevertheless, as a matter of principle the ability to act against a substitute is perfectly reasonable, "If property is misappropriated in circumstances where title to it can be asserted by the victim, by most people's standards it would mock common-sense for the remedies otherwise available in respect of that property...to be thwarted solely by the substitution of that asset for some other" (Moriarty, S., *op. cit.* at page 1). Generally, we will be discussing the situation in which an asset owned by one person is swapped for another asset. Other more difficult situations can, however, arise. Thus, for example, money co-owned by two parties could be spent to buy a new asset. In such a situation the present author would accept Birks' analysis in Birks, "Mixing and Tracing" *op. cit.* at pages 79. Specifically with regard to the above example Birks argues that if all the money is spent on the new object then that object can be seen as being co-owned by the parties. If, however, only some of the money is used then the common law will be unable to identify whose money has been removed from the mixture. Although this may be an accurate description of the law one might ask whether it is a satisfactory situation.

[89] [1921] 1 K.B. 321. This case should be treated with a certain amount of caution. Some commentators have suggested that it is capable of being all things to all men; "There have been various attempts at explaining the rationale of this case (none of which are entirely satisfactory)...": McNichol, *op. cit.* at page 9.

Burrows interprets *Banque Belge* in the following terms, "...the bank...was able to trace...property in the money in the employer's account belonging to the bank...through the chose in action underpinning Hanbrouck's account. And because no other money was paid into that account, it was then entitled to trace through that chose in action into its product, namely the money handed by Hambrouck to Mlle Spanoghe..."[91] As we shall see below, this chose in action analysis can be used to suggest that mixing in a bank account is not in fact a mixing problem but an exchange product problem, and should therefore not defeat common law tracing. However, the acceptance of such an approach is, again as we will see below, open to doubt. Birks on the other hand suggests the case can be explained on the grounds that common law tracing can take advantage of equitable techniques.[92] However, despite the potential desirability of the position, it is one which is no longer tenable in the face of recent cases.[93] As a result, it has been argued that the underlying rationale of the case is difficult to determine.[94]

Some doubt was thrown onto the traditional interpretation of *Banque Belge* by Fox L.J. in *Agip (Africa)* v. *Jackson.*[95] However, it has gained recent support from the House of Lords in the leading case of *Lipkin Gorman* v. *Karpnale* [1994].[96] As we saw in Chapter One, in that case a dishonest partner in a firm of solicitors drew money from the firm's account before gambling it away at a casino. Upon his bankruptcy the solicitors brought an action to recover the money from the casino. Relying on a number of cases[97] the House of Lords found that:

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[90] [1921] 1 K.B. 321, *per* Atkins, L.J., at page 335-336.
[91] Burrows, *Restitution, op. cit.* at page 62.
[92] Birks, *Introduction, op. cit.* at pages 361-362.
[93] *Agip (Africa) Ltd.* v. *Jackson* [1990] Ch. 265; *The Trustee of Property of F.C. Jones & Sons (a firm)* v. *Jones*, [1996] 4 All E.R. 721; [1997] Ch 159.
[94] McKendrick (1991) L.M.C.L.Q. 378.
[95] [1991] Ch 547, 565-566, *per* Lord Templeman.
[96] [1994] 2 A.C. 548.
[97] *Miller* v. *Race* (1758) 1 Burr. 452; *Clarke* v. *Shee and Johnson* (1744) 1 Cowp. 197; *Aubert* v. *Walsh* (1810) 3 Taunt. 277; *Hudson* v. *Robinson* (1816) 4 M. & S. 475; *Bainbridge* v. *Browne* (1881) 18 Ch.D. 188; *Shoolbred* v. *Roberts* [1899] 2 Q.B. 560; *Black* v. *S. Freedman & Co.* (1910) 12 C.L.R. 105. In *Hudson* v. *Robinson* (1816) Lord Ellenborough C.J. said, "An action for money had and received is maintainable wherever the money of one man has, without consideration, got into the pocket of the defendant; and the question is whether this has been without any consideration...the absence of any consideration entitles the plaintiffs to maintain this action, and still more so where the money has got in to the defendant's pocket through the medium of fraud" at page 478, quoted by Lord Templeman at page 564.

> "...in a claim for money had and received by a thief, the plaintiff's victim must show that money belonging to him was paid by the thief to the defendant and that the defendant was unjustly enriched and remained unjustly enriched."[98]

This was precisely what had happened (according to the court) in the instant case. Lord Templeman, although pressed to do so, refused to distinguish or overrule *Union Bank of Australia Ltd.* v. *McClintock*[99] and *Commercial Banking Co. of Sydney Ltd.* v. *Mann*[100] which, he argued, showed:

> "...where a banker's cheque payable to a third party bearer is obtained by a partner from a bank which has received the authority of the partnership to pay the partner in question who has, however, unknown to the bank, acted beyond the authority of his partners in so operating the account, the legal property in the banker's cheque thereupon vests in the partner. The same must *a fortiori* be true when it is not such a banker's cheque but cash which is so drawn from the bank by the partner in question."[101]

This was clearly problematic for the plaintiffs, but Lord Templeman was able to develop a solution using a traditional interpretation of *Taylor* v. *Plumer*. His Lordship noted that the solicitors could have no property in the money in the bank account which at all times being in credit represented a debt owed by the bank to the plaintiffs. However, the relevant chose in action was a "species of property"[102] and as such represented "...legal property belonging to the solicitors at common law."[103] This being the case his Lordship was willing to accept that the plaintiffs could trace their property into the hands of the casino.[104] This principle has been held to be equally true where the asset has been converted into money and that

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[98] [1994] 2 A.C. 548, 560, *per* Lord Templeman.
[99] *Union Bank of Australia Ltd.* v. *McClintock* [1922] 1 A.C. 240.
[100] *Commercial Banking Co. of Sydney Ltd.* v. *Mann* [1961] A.C. 1.
[101] [1994] 2 A.C. 548, 573, *per* Lord Templeman.
[102] *Ibid.*
[103] *Ibid.*
[104] "There is in my opinion no reason why the solicitors should not be able to trace their property at common law in that chose of action, or any part of it, into its product, i.e., cash drawn by Cass from the client account at the bank. Such a claim is consistent with their assertion that the money so obtained by Cass was their property at common law...the solicitors as owners of the chose in action constituted by the indebtedness of the bank to them in respect of the sum paid into the client account, could trace their property in that chose in action into its direct product, the money drawn from the account by Cass. It further follows...that the solicitors can follow their property into the hands of the respondents when it was paid to them at the club.": [1994] 2 A.C. 548, 574, *per* Lord Goff; in reaching this conclusion his Lordship found support in the case of *Marsh* v. *Keating* (1834) 1 Bing. (N.C.) 198.

money has in turn been converted into another asset.[105] Thus traditional learning[106] (and recent authority[107]) suggests that the claimant can enforce his rights against a substituted or exchanged asset. Indeed, the Court of Appeal have (according to Nourse L.J.) recently extended the "exchange product" theory.[108]

Lipkin Gorman is undoubtedly one of the most important cases decided in the area of tracing and restitution in the last decade. As a result it will be comprehensively analysed during the course of this study. At this point, however, it should be noted that although their Lordships emphasised the debtor/creditor relationship between the solicitors, and the bank, they appear to have placed less importance than might have been expected on the fact that Cass had the right to withdraw money from the relevant account.[109] Goode has argued[110] that common law tracing is based on a right to possess: "If the plaintiff has no right to possession, he cannot bring a restitutionary action against anyone who subsequently acquires the value of the chose in action."[111] Unfortunately their Lordships did not specifically address the issues which flow from this argument. Moreover, despite the House of Lords' acceptance in *Lipkin Gorman* of "exchange product" theory, a more detailed examination of the process suggests that it still, potentially, presents a number of legal problems. The first and, perhaps, simplest is termed, by Birks' "the multiplication problem": in the absence of a *bona fide* purchaser rule "exchange product" theory would appear to suggest, with regard to the example used

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[105] It should be noted that there are a number of factors which can potentially influence the right to trace (beyond the considerations regarding liquidator and trustees in bankruptcy which were considered above): Goode, *op. cit.* at pages 400.

[106] Scott, M. "The Right to Trace at Common Law", (1966) 7 U.W.A.L.R. 463; Cuthbertson, "Tracing at Common Law - Myth or Reality?" (1967) 8 U.W.A.L.R. 402; Babafemi, "Tracing Assets" (1971) 34 M.L.R. 12; Birks, *Introduction*, *op. cit.*; Millett, *op. cit.*; Goff and Jones, *op. cit.*; Hanbury and Martin, *op. cit.*.

[107] *Agip (Africa) Ltd.* v. *Jackson* [1990] Ch. 265; *Lipkin Gorman* v. *Karpnale* [191] 2 A.C. 548

[108] "I recognise that our decision goes further than the House of Lords in *Lipkin Gorman* v. *Karpnale*...in that it holds that the action for *money had and received* entitles the legal owner to trace his property into its product, not only in the sense of property for which it is exchanged, but also in the sense of property representing the original and the profit made by the defendant's use of it.": *The Trustee of Property of F.C. Jones & Sons (a firm)* v. *Jones*, [1996] 4 All E.R. 721; [1997] Ch 159; for comment on this case see Hutton I., "Extending Common Law Tracing" [1996] *The Litigator*, September, 312, 314 (included in the Appendix to the study).

[109] "Cass himself must have been in the position of a creditor *vis-à-vis* the bank. When the withdrawal was made, the legal title to the debt, and the legal title to the notes and coins handed over, must have vested on Cass himself. The solicitors were the beneficial owners in equity; but, at law, they should have had no interest which they could follow into the hands of the club.": Fennel, S. *op. cit.* at page 43.

[110] See Appendix 1.

[111] *Ibid.*

above,[112] that B has a claim over both the car and the boat. In effect, he appears to have doubled his rights. In order to avoid this problem, Birks suggests that the plaintiff has only a "power in rem" over the exchange product until he makes a determination as to how he will proceed.[113] This methodology appears to have been accepted in *Lipkin Gorman* v. *Karpnale,*[114] and is a common-sense approach to the "multiplication problem."[115] Unfortunately, whether it is based upon any existing legal theory or principle remains unclear.[116] Moreover, the court gave little or no indication of how the right should work on a technical level[117] and this approach has been described as a, "...significant departure from the common law rules of the acquisition and loss of title to property."[118]

Indeed, the "multiplication problem" is merely symptomatic of more fundamental difficulties, the most pressing being the way in which the courts insist on treating common law tracing as an identification process while also apparently accepting

[112] i.e. A obtains B's car and exchanges it for C's boat.

[113] It is, in effect, a, "species of proprietary interest but not one which is imperfect in the sense that it is both transitional and suspended. It means that [I have no] immediate interest in the substitute asset but [am] able to alter the property status of that asset.": Birks, [1992] C.L.P. 69, 89.

[114] "...a decision by the owner of the original property to assert his title to the product in place of his original property.": [1994] 2 AC 548, 573, *per* Lord Templeman. His Lordship continues, "This is sometimes referred to as ratification. I myself would not so describe it, but it has in my opinion, at least one feature in common with ratification, that it cannot be relied upon so as to render an innocent recipient a wrongdoer (cf. *Bolton Partners* v. *Lambert* (1889) 41 Ch.D. 295, 307, *per* Cotton L.J.: 'an act lawful at the time of its performance [cannot] be rendered unlawful, by the application of the doctrine of ratification.').

[115] Burrows explains it in the following terms, "...while the plaintiff may continue to own the original property, he has the power triggered by the unauthorised substitution of his property - to transfer his ownership to the substitute product." Burrows, *Restitution*, *op. cit.* at page 66.

[116] A number of possibilities have been raised, which Matthews generally demonstrates to be inadequate: Matthews, "The Legal and Moral Limits..." *op. cit.* at pages 44-45. Thus, he notes that the plaintiff is ratifying the transaction between the original recipient and the third party, but this is not the reality of the situation nor did the original recipient purport to act as the plaintiff's agent in the transaction (*Lipkin Gorman* v. *Karpnale* [1991] 2 AC 548, *per* Lord Goff.). Alternatively, one could argue that a common law election was involved (*United Australia Ltd* v. *Barclays Bank Ltd* [1941] AC 1, 29, *per* Lord Atkin), "there is for example, an election at common law to retake property obtained from me by fraud, but that concerns revesting in me something I once had, where a potentially vitiating element exists to upset my consensual passing of property. *This* would be an election to take property I never had from another...who received it from a third party": Matthews, "The legal and Moral Limits..." *op. cit.* at page 44. Equally, "...it is not really an equitable election...you have not given me the second [asset] by will or deed; indeed you have not given it to me at all...It is also difficult to see why any available election should be mine rather than, say, that of the innocent third party": Matthews, "The legal and Moral Limits..." *op. cit.* at page 44. In similar vein Burrows notes one way out of this difficulty is to say that while the plaintiff may technically own both the original and the products, he cannot assert his ownership rights at more than one point in the tracing chain: that is, once he has elected (and had satisfied) his remedy, ownership in the other properties passes to the recipients. But this is to, "place an artificial restriction on normal rights of ownership.": Burrows, *Restitution*, *op. cit.* at page 58.

[117] *Ibid.*; This approach does, however, yet again, demonstrate that the courts in this area have often been willing to tinker with practical solutions around the fringes of the subject without admitting to doing so, or beginning to consider the more fundamental issues involved.

that it has the ability to change the assignment of rights in property. Thus with regard to the car and boat, B has not given up the property in the car to A: A may have intended to pass the title to C but cannot do so because he lacks the necessary authority.[119] On the other hand we may assume that C intended the property in the boat to pass to B. Thus we can see the basis on which B could bring an action against a third party, but under what legal principle does "exchange product" theory hold that B gains the right to an asset which C intended to belong to A?[120] Or to examine another aspect of this problem, is Goode correct when he says:

> "It is sometimes suggested, in reliance on *Taylor* v. *Plumer*...that if B receives money as a result of an unauthorised disposition to T of an asset to which O had legal title, O acquires title to the money so received. But...if T intended to pass property to B, it is B, and not O, who becomes the legal owner, and O has at best an equitable interest under a constructive trust".[121]

Or to approach the question from yet another angle, what is the legal principle, beyond convenience, which prevents property which a party does not hold beneficially passing to trustees in bankruptcy?

To some extent these problems can be over-emphasised. Thus Matthews says of the "multiplication problem," "If you steal my bicycle and exchange it for a compact disc collection, can I claim *both* the CDs and the bicycle?"[122] However, it should be remembered that we are considering the common law. Arguably, nothing within this area gives a party the right to claim either item: it gives merely a right to recompense in damages. It is technically incorrect to say that the tracing process gives the defendant the right to treat the asset as his own, rather it should be regarded as allowing him to treat the asset as "representing his property."[123]

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[118] *Ibid.*

[119] *Cundy* v. *Lindsay* (1878) 3 App. Cas. 459.

[120] Goode, *op. cit.* at page 367. In Goode's terminology O is the person asserting the right to trace, B is the person who is or was in possession of the original asset by consent of O, and is in possession or has rights over property given to him by T in exchange for the original asset.

[121] Goode, *op. cit.* at footnote 27; Matthews, "The Legal and Moral Limits..." *op. cit*; Matthews, P., "Tracing..." *op. cit.*.

[122] Matthews, P., "Tracing..." *op. cit.* at page 10.

[123] *Boscawen* v. *Bajwa, Abbey National plc* v. *Boscawen* [1995] 4 All E.R. 769, 776, *per* Millett L.J; This point, with a slightly different emphasis (and with a nod to *Lipkin Gorman*) is made by Burrows when he says, "... 'following one's property' is an adequate but imprecise description of tracing into a substitute for

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Unfortunately, this point, while putting some of the problems in this area into context, does not completely resolve them. In particular it fails to answer Goode's assertion that the plaintiff should have no more than an equitable interest.

Nevertheless, it is possible to put forward a number of arguments in favour of the "exchange product" theory. For example, as Matthews points out, it could be suggested that "exchange product" theory comes into play in situations where B's rights were compromised without his consent.[124] Unfortunately, as he also notes, although this may be a moral argument of some weight, it is an unlikely legal basis.[125]

A second possibility is to interpret Lord Ellenborough's judgment (and others in this area) as suggesting that A's rights are based upon causation. Thus A has a right to the boat because B came into possession of it as a causal effect of his wrongful dealing with A's car. Matthews rejects this argument on the basis that it is unknown in equity or any other area of English law.[126] Perhaps, the suggestion that equity's failure to adopt causation theory necessarily militates against the common law's likelihood of doing so places an unwarranted value on consistency in this area. However, Matthews makes a stronger argument against causation when he notes that:

> "...if this principle is correct...it is both too much and not enough. It is too much, because if you commit a non-chattel tort (even fraud) against me which causes you to obtain property from a third party, no-one that I am aware of has ever suggested that *I* have a claim against you for that property. I may have a personal claim...but that is different. It is not enough, because if, in exchange for my bicycle

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which the best explanation...is that the owner of the original property exercises a power to transfer his title, retrospectively, from the original property to the substitute product.": Burrows, *Restitution*, *op. cit.* at page 58.

[124] Matthews, P., "Tracing..." *op. cit.* at page 33.

[125] "...the old common law often contemplated a property claim becoming a personal one without the owner's consent, as where I left my property on your land, and your landlord lawfully distrained upon it for unpaid rent." (Matthews also points out that a number of statutes and the doctrine of reputed ownership seem to suggest that no such general principle exists): *Ibid.* Nevertheless, we will see below that this is close to Birks' most recent analysis.

[126] "I know of no principle in English law linking causation to property in this way. Indeed, the English courts have constantly rejected a version of this argument in equitable tracing, (*Re Hallet & Co.* [1894] 2 Q.B. 237; *James Roscoe (Bolton) Ltd* v. *Winder* [1915] 1 Ch 62; *Bishopsgate Investment Management Ltd* v. *Homan*, The Times July 14, 1994) so there is even less reason to suppose it would be adopted at law.": *Ibid.*

> from you, the third party passes property in the second bicycle to a *fourth* party that is no basis for my claiming the second bicycle from the fourth party."[127]

If therefore, *Taylor* v. *Plumer* relies on legal principles which do not apparently exist, is it possible that the case is either mistaken or has been misinterpreted?[128] A growing number of commentators have accepted this possibility.[129] Thus, it has often been assumed that had the assignees in that case gained possession of the assets, then Plumer could have brought an action against them: i.e. the circumstances of the case gave rise not only to a defence but also a cause of action.[130] However, Kurshid and Matthews[131] assert that this premise is based on a fundamental misunderstanding of the law being applied in that case. They suggest that Plumer would have only been able to invoke a tortious remedy in the name of his trustee: specifically in this case the stockbroker in whom the legal title was vested. As a result they believe that Plumer could only have brought an action in equity. Moreover, they go further and claim that the case was in fact based upon rights in trust property.[132] In other words, the commentators are suggesting that the

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[127] *Ibid.*

[128] A number of commentators have noted that "exchange product" theory raises various practical problems. Thus, for example, one might question whether at common law the plaintiff could trace profits made from a disputed asset (under some possible interpretations *The Trustee of Property of F.C. Jones & Sons (a firm)* v. *Jones*, [1997] Ch. 159 would suggest that this may indeed be possible); is it possible to trace into debts paid off with the proceeds from the original asset?; If not how does this position differ, as a matter of principle, from that found in *Lipkin Gorman* v. *Karpnale*: Kurshid and Matthews, *op. cit.;* Matthews, P., "The Legal and Moral Limits..." *op. cit.* at page 33.

[129] Most notably see, Kurshid and Matthews. *op. cit.*; Pearce, R..A., *op. cit.*; Fitzgerald, B. "Tracing at Law" [1994] Univ. Tasmania L.R. 116; Smith, L. " Tracing in *Taylor* v. *Plumer...*" *op. cit.*.

[130] As Scott puts it, "Suppose the case had been otherwise, and it had been the assignee who caught up with the broker and seized the property. The result would have been the same. They would not have been allowed to retain it as against the principle; and had they refused to deliver it to him, would have been *personally* liable in detinue or conversion." Scott, 7 U.W.A.L.R. 463, 418; Kurshid and Matthews, *op. cit.*at page 80.

[131] Kurshid and Matthews, *op. cit.* at page 80.

[132] In support of this they quote Lord Ellenborough's view that, "[I]ndeed, upon a view of the authorities, and consideration of the arguments, it should seem that if the property in its original state and form was covered with a trust in favour of the principle, no change in that state and form can divest it of such trust, or give the factor, or those who represent him in right...more valid claim in respect to it, than they respectively had before such change. An abuse of trust can confer no rights on the party abusing it, nor on those who claim in privaty with him. The argument which has been advanced in favour of the plaintiffs, that the property of the principle continues only so long as the authority of the principle is pursued in respect to the order and disposition of it, and that it ceases when the property is tortiously converted into another form for the use of the factor himself, is mischievous in principle and supported by no authorities of law.": (1815) 3 M. & S. 562, 574; The authors do concede that Lord Ellenborough made certain statements which appear to argue against their proposition. Thus, for example, he stated that, "...the assignees cannot in this action recover that which, if an action were brought against the assignee by the Defendant, they could not have effectively retained against him..."((1815) 3 M. & S. 562, 579). However, they point out his Lordship seems to qualify

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case is based not upon common law tracing but on equitable principles. Smith (among others) has taken up the baton of this argument and convincingly demonstrated its validity. His position is based upon two primary foundations. The first suggests that the common law courts at the time of *Taylor* v. *Plumer* were willing to take cognisance of equitable principles and to act in a manner which would support a trust, where doing so would not contradict the common law rules. The second suggests that when *Taylor* v. *Plumer* was decided, no other common law authority for the "exchange product" theory existed. The first pillar of this argument was explored and accepted earlier.[133] With regard to the second proposition, Smith, in particular, is dismissive of cases which others have suggested might give support to common law "exchange product" theory. Two of these, *Scott* v. *Surman*[134] and *Whitecomb* v. *Jacob*,[135] are of particular interest as they were specifically mentioned by Lord Ellenborough in the passage which is thought to give authority for the theory. [136]

In the former case Richard Scott took delivery of a consignment of tar from the Plaintiffs with the intention that he should sell it for them. Part of the price was paid by the repayment of a debt the buyer owed to Scott, part by the delivery of two promissory notes and part was to be paid at a later date. Scott became bankrupt and the promissory notes came into the possession of his assignees in bankruptcy along with the balance of the purchase price and a government subsidy. However, he also incurred considerable expenses associated with the transaction. The Plaintiffs claimed the remainder, plus the amount paid over in satisfaction of the debt. The

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these sentiments by continuing the sentence in the following vein, "...inasmuch as it was trust property of the Defendant, which, as such, did not pass to them under the commission...": (1815) 3 M. & S. 562, 579.

[133] With regard to the court's willingness to accept the fact that the legal title to trust property should remain with a bankrupt in order to save the trustee the expense and trouble of enforcing his rights in the court of equity.

[134] *Scott* v. *Surman* (1742) Willes 400; 125 E.R. 1235 (C.P,).

[135] *Whitecomb* v. *Jacob* (1710) 1 Salk. 160; 91 E.R. 149 (L.C.).

[136] "...the Plaintiffs had been impoverished by the loss of their debt, while the assignees had been enriched by the receipt of money which their office gave them a right to receive. So the Plaintiffs' claim in money had and received was identical to the type of case where the defendant receives the fees of the plaintiff's office or the rents of the plaintiff's land." It was not based on the establishment of any proprietary interest but on the unjust enrichment of the assignees..": Smith, L. " Tracing in *Taylor* v. *Plumer*..." *op. cit.* at page 249; It seems equally clear that Smith is correct when he suggests that *Whitecomb* v. *Jacob* (1710) 1 Salk. 160; 91 E.R. 149 (L.C.) can also be explained without recourse to "exchange product" theory (*Ibid.*) (although it is not well reported and the reasons behind the judgment are obscure) as can a number of other cases which Footnote Continues on Next Page:

court found in favour of the Plaintiffs, but said that with regard to the sum of the debt they would have to prove as creditors. A close reading of the case does clearly support Smith's assertion that the court was working on traditional principles and found no reason to resort to common law "exchange product" theory.

As a final piece to his argument, Smith takes cognisance of the criminal proceedings against Walsh[137] which took place three years before the civil action. At his original trial Walsh was found guilty of fraudulently taking cheques from Plumer. However, on appeal[138] it was argued *inter alia* that Plumer had freely given not only possession but also ownership of the cheques to Walsh, thus making it impossible for him to steal them.[139] There is little doubt that the previous relationship between the two, and the freedom of action given to Walsh, strongly suggested the latter possibility. All the judges who heard the argument[140] agreed that Walsh should be pardoned. Unfortunately, the judges gave no reason for their decision and although a report of the case does exist,[141] it is ambiguous enough to prevent it being fully embraced as authority for Smith's arguments.[142] However, this should not be taken to suggest that he is wrong, and that the criminal action can shed no light on the principles laid down in the subsequent civil trial. Three of the four judges in that case had also sat in the criminal case. It seems to stretch credibility to suggest that those same judges accepted, without comment, that Plumer was the legal rather than beneficial owner of the assets without making specific reference to such a finding when they were acutely aware from the earlier trial that this was a central

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have been put forward in support of the theory over the years. See for example, *Miller* v. *Rose* (1758) 1 Burr. 452; *Howard* v. *Jemmett* (1763) 3 Burr. 1368; *Golightly* v. *Renolds* (1772) Lofft 88; 98 E.R. 47 (K.B.)).

[137] (1812) 4 Taunt. 258.

[138] Before twelve judges.

[139] "...he was authorised to operate on account, as opposed to taking the cheque as a bailee.": Smith, L. " Tracing in *Taylor* v. *Plumer*..." *op. cit.* at page 253. This is not of course to suggest that Walsh held the legal title free of incumberments.

[140] Ten of the original twelve.

[141] Russ & R. 220; 168 E.R. 770.

[142] Specifically that, "...his acquittal as to the cheque was at least partly based on a conclusion that Plumer was not the owner of the cheque. Even if it be presumed that Walsh was acquitted of stealing the cheques because of the argument that it was of no value in Plumer's hands, we must ask why Walsh was acquitted of stealing the banknotes. Clearly, the judges rejected the prosecution's argument that Plumer was the legal owner of those notes as soon as Walsh obtained them. It seems likely that they rejected the argument because they agreed with Walsh's Counsel that Walsh was authorised to operate on account, and so Walsh owned the notes. Alternatively, they might have concluded that the only ownership Plumer could have had was equitable ownership, again making Walsh the legal owner of the notes. We cannot know; but it seems

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and contentious point. If, on the other hand, they (and everyone in the court) knew that the previous case had found that Walsh was the legal owner of the property albeit in the absence of a full and accurate report the omission of such a discussion, as Smith suggests, becomes entirely rational. Moreover, the judges specifically refer to the assets as trust property: this has until recently been dismissed as a loose use of the terminology, but in the light of Smith's view of the previous decision it is clearly appropriate.

These arguments, taken together, suggest that Smith is correct when he opines that (a) at the time of *Taylor* v. *Plumer* no clear authority for the existence of the "exchange product" theory existed; (b) that the common law courts were, in certain circumstances, willing to take cognisance of equitable principles; (c) that upon bankruptcy only property to which the bankrupt was beneficially entitled passed to his assignees in bankruptcy; and, (d) as a result *Taylor* v. *Plumer* was decided with regard to equitable tracing principles and provides no authority one way or the other with regard to common law tracing.

Smith's interpretation of *Taylor* v. *Plumer* has now been given judicial approval in *The Trustee of Property of F.C. Jones & Sons (a firm)* v. *Jones.*[143] In that case Counsel for Mrs Jones correctly claimed that no equitable proprietary action could be brought for the relevant profit as no fiduciary relationship existed between Mrs Jones and the trustee. The court agreed; however, they allowed the money and the profit to be traced at common law. Millett L.J. accepted that *Taylor* v. *Plumer* had

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incontrovertible that the conclusion was reached that Plumer was not the legal owner of those bank notes.": Smith, L. *op. cit.* at page 255.

[143] *The Trustee of Property of F.C. Jones & Sons (a firm)* v. *Jones*, [1997] Ch 159; F.W.J. Jones was a partner in a failing potato growing business. In 1984 a supplier obtained judgment against the firm and, having committed an act of bankruptcy, in due course the partners were declared bankrupt. However, before the declaration (but after the act of bankruptcy) Mr. Jones gave his wife cheques to the value of £11,700, drawn on their joint account at the Midland Bank. These cheques were deposited by Mrs Jones with a firm of commodity brokers in order to facilitate her dealings on the London Potato Futures Market. Mrs Jones was clearly more accomplished at dealing in potatoes than her husband was at growing them, as she received cheques to the value of £50,760 from the brokers which she paid into a call deposit account with R. Raphael & Sons Plc. The Official Receiver brought an action to recover the money, Raphaels interpleaded and the money was paid into court: the relevant issues were directed to be tried with the trustee in bankruptcy as the Plaintiff. After an unexplained delay of nine years the case finally came before the High Court. The trustee claimed that the original £11,700 had vested in him at the date of the act of bankruptcy by virtue of section 37 of the Bankruptcy Act 1914. This meant that Mrs Jones had no title in the original money and that, as a result, she was also liable for the profit (for a full discussion of this case see Hutton I., "Extending Common Law Tracing" [1996] *The Litigator*, September, 312, (included in the Appendix to the study)).

indeed been decided on equitable principles.[144] However, he went on to find that our system of binding precedent ensures that this mistake is now firmly established as part of the law of England.[145] Moreover, as noted above, Lord Nourse was happy to extend the principles laid down in *Lipkin Gorman.*[146] It is difficult or impossible to disagree with Millett L.J.'s pronouncement. However, the recognition of the mistakes found within tracing as a result of historical confusions has not, as yet, done anything to rectify the problems caused by the application of such mistakes over more than two centuries.

For the present, therefore, several features should be noted. We can logically assume that the traditional authority for common law tracing's ability to trace into an exchanged product does not exist. *Taylor* v. *Plumer* is almost certainly based upon equitable principles and has nothing to say about the common law. What authority does exist is, therefore, based upon a mistake and, is often confused as a result. Moreover, it is difficult to find a legal basis for common law "exchange product" theory which is both logical and in keeping with common law tracing's status as an identification process closely tied to legal property rights, without recourse to other areas of law. The lack of traditional authority seems likely to ensure that *Lipkin Gorman* is in future seen as the repository of the subject's guiding principles.[147] However, the eagerness with which the House of Lords was willing to "side-step" the problem potentially created by Cass's legal rights to the money in that case, suggests that future developments may be difficult. An example of such problems can already be discerned in the Court of Appeal decision in *Jones*

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[144] "In *Agip (Africa) Ltd.* v. *Jackson*...I said that the ability of the common law to trace a asset into a changed form in the same hands was established in *Taylor* v. *Plumer*...In this it appears that I fell into a common error, for it has since been convincingly demonstrated that, although *Taylor* v. *Plumer* was decided by a common law court, the court was in fact applying the law of equity..." *The Trustee of Property of F.C. Jones & Sons (a firm)* v. *Jones*, [1996] 4 All E.R. 721, 729, *per* Millett L.J.

[145] "But this is no reason for concluding that the common law does not recognise claims to assets or their products. Such claims were upheld by this Court in *Banque Belge pour l'Etranger* v. *Hambrouck*...and by the House of Lords in *Lipkin Gorman (a firm)* v. *Karpnale*...It has been suggested by commentators that these cases are undermined by their misunderstanding of *Taylor* v. *Plumer*, but that is not how the English doctrine of *satre decisis* operates. It would be more consistent with that doctrine to say that, in recognising claims to substituted assets, equity must be taken to have followed the law, even though the law was not decided until later. Lord Ellenborough C.J. gave no indication that, in following assets into their exchange products, equity had adopted a rule which was peculiar to itself or went further than the common law": *The Trustee of Property of F.C. Jones & Sons (a firm)* v. *Jones*, [1996] 4 All E.R. 721, 729.

[146] *The Trustee of Property of F.C. Jones & Sons (a firm)* v. *Jones*, [1996] 4 All E.R. 721, 731.

[147] See, for example, Millett L.J. in *The Trustee of Property of F.C. Jones & Sons (a firm)* v. *Jones*, [1996] 4 All E.R. 721.

v. *Jones.* Thus, for example, Nourse L.J.'s suggestion that one can trace into the profit derived from an exchanged product seems particularly problematic. The case seems to be an action for money had and received, the operative elements of which are completed upon the receipt of the relevant asset: how, therefore, can subsequent profits be involved? If the case, as Nourse L.J. suggests is an extension of *Lipkin Gorman,* and if that case is indeed the House of Lords' fundamental acceptance of restitution/unjust enrichment, how do we explain the fact that traditional restitutionary theory does not allow a plaintiff to recover profits in the absence of a recognised wrong,[148] or that the preservation of property rights is a subject outside the sphere of restitution/unjust enrichment?[149] Surely, in *Jones* v. *Jones* the Plaintiff should have been able to recover only the relevant amount, perhaps with interest?

Many of these problems, it is suggested, are a function of the fiduciary relationship requirement in equitable tracing. Common law tracing is being used as a means to prevent injustice being caused by that requirement, but it can only accomplish this task by being forced to compromise its identificatory and property-based nature in order to ape equity. This is an understandable, but unsatisfactory approach. However, it is one which will continue until we address the fundamental principles which should guide the logical development of the area and begin to adjust our rules accordingly. The conclusion to this chapter will attempt to lay down the necessary guidelines for such an approach.

3.2.4.2: The Mixing of Money in Bank Accounts.

Substitution is a relatively simple process which should, once one has decided whether tracing is underpinned by identification, causation, transfer of property rules or some other principle, present few difficulties to any reasonably competent tracing procedure. A more complex change of form arises where the asset is mutated, not by substitution, but by being mixed with other assets belonging to B, C or other parties. The problems of mixing are naturally most prominent with

[148] Birks, *Introduction, op. cit.*
[149] *Ibid.*

regard to fungible assets, most specifically money that has been mixed in a bank account.[150] The generally accepted view, based upon authority, rather than principle, is that common law tracing is normally defeated by such mixing.[151] This limitation goes back, yet again, to *Taylor* v. *Plumer.*[152] However, there is little doubt that this principle is equally adhered to today.[153]

It must be emphasised that, contrary to the pronouncements of some commentators, it is not the mixing *per se* which will defeat the common law, but mixing which makes identification of the plaintiff's property impossible.[154] Equally,

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[150] This study will concentrate on the problems associated with the mixing of money in a bank account as this is the normal scenario flowing from fraud. As Burrows notes, "Tracing land can hardly give rise to difficulties because of its immovable nature. And while interesting tracing questions do arise in respect of chattels other than money they have hardly ever arisen outside the context of a compensatory claim for a chattel tort, most obviously conversion.": Burrows, *Restitution, op. cit.* at page 59. For a full discussion of the effect of mixing other fungible and not fungible assets see Matthews, P., "Tracing..." *op. cit.* at page 21 *et seq*; Birks [1992] C.L.P. 69.

[151] As Millett points out, "The traditional learning is that money can be followed at common law into and out of a bank account, but only if it has not been mixed with other money in the account..."(Millett, *op. cit.* at page 72). Hanbury and Martin make a similar point when they state that, "What the common law remedies could not do was to provide full protection to the plaintiff in the most important type of case in which these questions arise: that is, the case where the defendant has received the plaintiff's money, mixed it with other money in a bank account, and gone bankrupt.": Hanbury and Martin, *op. cit.* at page 644.

[152] "....the right only ceases when the means of ascertainment fails, which is the case when the asset is turned into money, and mixed and confounded in a general mass of the same description.": (1815) 3 M. & S. 562, 575 *per* Lord Ellenborough.

[153] "...it [the common law] can only follow a physical asset, such as a cheque or its proceeds from one person to another. It can follow money but not a chose in action. Money can be followed at common law into and out of a bank account and into the hands of a subsequent transferee, provided that it does not cease to be identifiable by being mixed with other money in a bank account derived from some other source...": *Agip (Africa) Ltd.* v. *Jackson* [1990] Ch. 265, *per* Millett J. (it should be noted that Millett's assertion that the common law cannot follow a chose in action appears to have been ignored by the House of Lords in *Lipkin Gorman*). Although a number of interesting points flowed from this case, it is the common law's inability to cope with the mixing of funds which should be noted in the present context. Most specifically, it should be noted that the case appears to be distinguished from *Banque Belge* on the basis that in *Agip*, Lloyds Bank took a credit risk on the relevant payment: Burrows, *Restitution, op. cit* at page 65. However, as McKendrick notes, in *Banque Belge*, "...there was no enquiry as to whether Farrow's Bank had allowed Hambrouck to draw against the cheques before they collected them. The matter was treated as being irrelevant and, if it was irrelevant in *Banque Belge*, it is not at all clear why it should be a relevant factor in *Agip*.": McKendrick *op, cit.* at page 384.

[154] "The difficulty which arises in such a case is a difficulty of fact and not of law, and the dictum that money has no ear-mark must be understood in the same way, *i.e.* as predicated only of an undivided and indistinguishable mass of current money. But money in a bag or otherwise kept apart from other money, guineas, or other coins marked, if the fact were so, for the purpose of being distinguished, and so far ear-marked as to fall within the rule on this subject, which applies to every other description of property whilst it remains (as the property in question did) in the hands of the factor [the bankrupt] or his general legal representatives.": *Taylor* v. *Plumer* (1815) 3 M. & S. 562, 575, *per* Lord Ellenborough. Lord Haldane made a similar point in *Sinclair* v. *Brougham* [1941] A.C. 398, when he said, "The common law, which we are now considering, did not take cognisance of such duties. It looked simply to the question of whether the property had passed, and if it had not, for instance, where no relationship of debtor and creditor had intervened, the money could be followed, notwithstanding its normal character as currency, provided it could be earmarked or traced into assets acquired with it." Unfortunately he went on at page 419 to, somewhat confusingly, suggest that, "Lord Ellenborough laid down, as a limit to this proposition, that if the money had become incapable of being traced, as, for instance, when it has been paid into the broker's general account with his

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mixing only by the original defendant or a recipient who is under a duty not to mix [155] may have no effect on the process,[156] and it may be possible to trace money where it is substantially unmixed: *Banque Belge pour l'Etranger* v. *Hambrouck.*[157] Making the ability to trace dependent upon the degree of mixing[158] or the duty of the recipient may be reasonable. With regard to the present study (and in a modern context) this is, of course, likely to be of little help. It is unlikely that money which has been subject to a commercial fraud will be anything but entirely fungible and subject to loss of identification immediately upon being mixed. This will occur either because the defendant places it into an account which is already substantially in credit or through which other funds subsequently pass. Indeed (as we have seen in Chapter One), normal modern banking transactions often have the effect of mixing money or making it otherwise unidentifiable as a matter of course.[159]

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banker, the principle had no remedy excepting to prove as a creditor for money had and received." It is difficult to doubt that Aitkin L.J. was correct when, commenting on this passage in *Banque Belge pour l'Etrange* v. *Hambrouck* [1921] 1 K.B. 312, 335, he stated that, "The words above...do not represent and doubtless do not purport to represent Lord Ellenborough's actual words; and I venture to doubt whether the common law ever so restricted the right as to hold that the money became incapable of being traced, merely because it was paid into the broker's general account with his banker. The question always was, Had the means of ascertainment failed?"

[155] "The latter objection is easily disposed of. The cause of action for money had and received is complete when the plaintiff's money is received by the defendant. It does not depend on the continued retention of the money by the defendant. Save in strictly limited circumstances it is no defence that he has parted with it. *A fortiori* it can be no defence for him to show that he has mixed it with his own money, that he cannot still tell whether he still has it or not. Mixing by the defendant must, therefore, be distinguished from mixing by a prior recipient. The former is irrelevant, but the latter will destroy the claim, for it will prevent proof that the money received by the defendant was the money paid by the plaintiff": *Agip (Africa) Ltd.* v. *Jackson* [1990] Ch. 265, 271, *per* Millett J.

[156] There is authority for the position that, "...if a man, having undertaken to keep the property of another distinct, mixes it with his own, the whole must both at law and in equity be taken to be the property of the other, until the former puts the subject under such circumstances, that it may be distinguished as satisfactorily, as it might have been before the unauthorised mixture on his part": *Lupton* v. *White* (1808) 15 Ves. 432, 436; Pearce, *op. cit.*. Moreover, "The rule may apply not only where there is an express duty not to mix, but also where it is the defendant's fault that the mixture cannot satisfactorily be resolved. Obviously when the rule applies to any abstractions from the mixture it will be impressed with the rights of the claimant": Pearce, *op. cit.* at page 282.

[157] "In the present case less difficulty than usual is experienced in tracing the descent of the money, for substantially no other money has ever been mixed with the proceeds of the fraud.": [1921] 1 K.B. 312, 336, *per* Aitkin L.J.; "[in that case]...money in a substantially unmixed bank account was treated by the majority of the Court of Appeal as identifiable, even though the payment into a bank account is a clear illustration of a debtor-creditor relationship.": Hanbury and Martin, *op. cit.* at page 645.

[158] "If the victim's property has become indistinguishably mixed in a common stock of assets which has been substantially squandered before being used to acquire other items of property, it is at least open to debate whether it makes much sense to treat the victim any differently from the person whose property was consumed straight away. In the most extreme case, however, the fact remains that it would seem little short of capricious to make the continued availability of the victim's remedies dependent upon whether his £1000 was mixed with another £1 before an asset was acquired out of the fund.": Moriarty, S., *op. cit.* at page 1.

[159] To some extent the courts have circumvented the problems created by the inability of common law tracing to trace through mixtures and electronic transfers by concentrating on identification. For example, rather than attempting to trace cash through the clearing system, it may be possible to physically follow the relevant cheque. Such techniques are, however, at best of limited help with regard to complex transactions.

Moreover, the proceeds of such a fraud are likely to be intentionally laundered by being passed through numerous banks, countries and jurisdictions with the specific aim of making it unidentifiable from both the accounting and legal point of view.

This inability to follow such a fund severely limits the effectiveness of tracing at common law. However, this analysis is potentially open to criticism. Thus Lord Ellenborough's original methodology envisaged the mixing of coins in a bag. However, today we are concerned not with the physical mixing of notes and coins but with the technical mixing of bank accounts. The question arises as to whether the two are based on the same principles and should be subject to the same rules. The courts have certainly felt that they should be, but there is some evidence to suggest that this is incorrect. As noted above, a party with a bank account in credit actually owns no money but only a claim against the bank: a chose in action.[160] When money is added to a bank account, either there are now two chose, or the original one is replaced with a new one for the larger amount: "Whichever it is must depend upon the intention of the parties. And I am sure whatever my intention...the normal intention of the bank is to have one single account, brought up to date at the end of every day's transactions."[161] This is undoubtedly correct. Thus we can argue that no mixing takes place, one chose in action is replaced by a larger one either at the end of the day or, with regard to modern technology, potentially as soon as the money is paid into the bank. This would suggest that such transactions involve the exchange of one product for another, rather than mixing. If this is the case then "exchange product" theory would suggest that the common law should be able to trace into the product of the original sum. It is true that one now appears to have a single product owned not by one party but by two, but with regard to fungible assets, other than money, it has been argued that the common law would have little difficulty in treating the parties as co-owners of the product.[162] Thus we have a situation in which the original inability of the common law to trace into mixtures is based on the mistaken belief that *Taylor* v. *Plumer* is a common law case and is perpetuated by an overly simplistic notion of mixing in bank accounts.

[160] Matthews, P., "Tracing..." *op. cit.* at page 11; *Foley* v. *Hill* (1848) 2 HLC, 28, 36.
[161] Matthews, P., "Tracing..." *op. cit.* at page 12.
[162] *Ibid.*

Even in the presence of a relatively simplistic view of mixing within a bank account it should, logically, be possible to trace into the exchanged product within an account.[163] The rational conclusion to this argument is that:

> "...there seems no reason why money converted into an identifiable debt should not be traced. When money is paid into a bank account, it is converted into a debt; so there is no reason why it should not be possible, subject to identifiability, to trace into, (and through) a bank account."[164]

The result being that:

> "...when the money of the claimant is paid into a bank account, the claimant loses his right to follow the money itself, but he should be able to follow it into its product which is the debt owed by the banker to the depositor (if the account is in credit). Also, the money may be followed *in specie* when it does not pass into currency, as is the case where no consideration is given."[165]

Nevertheless, recent cases have unfailingly perpetuated the common law's inability to trace through a mixture.[166] Thus we continue to have a situation in which:

> "The picture so often drawn in this context is of that poor mutt, the common lawyer, able to grasp the identity of specific coins but retiring mouth agape, in baffled amazement once they are mixed with the other coins."[167]

This may not be an entirely accurate picture, but neither is it an entirely inaccurate one. We have seen that common law tracing contains a range of flaws, logicalities

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[163] "If money or negotiable securities are received in good faith and for valuable consideration the transferee takes property even if the transferor has none. Lord Mansfield in *Miller* v. *Race* saw this as the true reason why it was said that money may not be traced. But though it is true that the money itself may not be followed once it has passed in currency, it may be followed into its exchange product, which is the valuable consideration which must be given for it to pass into currency. Accordingly, when the money of the claimant is paid into a bank account, the claimant loses the right to follow the money itself, but they should be able to follow it into its exchange product which is the debt owed by the banker to the depositor.": Pearce, R.A., *op. cit.* at page, 283.

[164] Pearce, R.A., *op. cit.* at page, 282.

[165] Pearce, R.A., *op. cit.* at page, 283.

[166] *Agip (Africa) Ltd* v. *Jackson* [1990] 1 Ch. 265; *Jones* v. *Jones*, [1997] Ch 159.

[167] Scott, 7 U.W.A.L.R., 463, 510 (although it should be noted that Scott does not believe that this is the true situation and attributes this view more to "...the isolation of the Chancery bar than to the deficiencies of the common law. (*Ibid.*); The courts have also emphasised that in order to take advantage of "exchange product" theory of all the original asset must belong to one person (*Lipkin Gorman (A Firm)* v. *Karpnale Ltd* [1991] 2

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and contradictions. Perhaps the most damaging criticism which can be made against it is that results can be determined by the methodology used by the defendant, rather than the justice of the plaintiff's case. Suggestions as to how these problems can be rectified will be made in the conclusion to this chapter and the discussions which follow. However, before we can criticise the system as a whole, we must examine whether equitable tracing is a tool capable of rectifying all the problems created by the deficiencies within the common law.

A.C. 548; *Banque Belge pour l'Etranger* v. *Hambrouck* [1921] 1 K.B. 321; Matthews, P., "Tracing..." *op. cit.* at page 12): thus militating against the possibility of embracing a form of common ownership.

3.3: EQUITABLE TRACING.[168]

3.3.1: INTRODUCTION.

In some circumstances the common law tracing process is arguably simpler, more effective and places fewer obstacles in the path of a potential plaintiff than its equitable counterpart.[169] This being the case it might reasonably be asked why any plaintiff chooses to go down the equitable road. This question is of particular pertinence with regard to cases concerning commercial fraud because, as Millett has noted, the victim will often have held both the legal and equitable title.[170] The reason for equity's popularity is, however, clear and has been examined above: it is a function of the common law's deficiencies, particularly with regard to the mixture of fungibles.[171] As such it represents one of a number of equitable weapons or techniques which may be available to the plaintiff:

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[168] "The law relating to the tracing of an equitable proprietary interest is still in a state of development. In *A-G for Hong Kong* v. *Reid* A.C. 324 the board decided that money received by an agent as a bribe was held in trust for the principle who is entitled to trace and recover property representing the bribe. In *Napier and Ettrick* v. *Hunter, Lord Napier and Ettrick* v. *R.F. Kershaw Ltd* [1993] A.C. 713, 738-739 the House of Lords held that payment of damages in respect of an insured loss created an equitable charge in favour of the subrogated insurers so long only as the damages were traceable as an identifiable fund. When the scope and ambit of these decisions and the observations of the Board in *Space Investments* fall to be considered it will be necessary for the history and foundations in principle of the creation and tracing of equitable proprietary interests to be the subject of close examination.": *Re Goldcorp Exchange Ltd.* (in receivership) [1994] 2 All E.R. 806, 832, *per* Mustill L.J.

[169] See generally, Oakley, *op. cit.*.; Goode, "The Right to Trace and Its Impact in Commercial Transactions - II" 92 L.Q.R., 528; McNichol, D., *op. cit.*; Millett, *op. cit.*.

[170] "...the claimant is usually not a mere equitable owner such as a beneficiary under a settlement but a former legal and beneficial owner who has been defrauded; it is not immediately obvious why equity should have any contribution to make.": Millett, *op. cit.* at page 137.

[171] Goode notes that "tracing" is often used "as if it encapsulated all real rights in equity" whereas "the equitable right to trace is in truth but one of a number of real rights available in equity for O's protection. These are:

1. Tracing rights in the orthodox sense, namely those arising from a trust relationship (whether created by acts of parties or imposed by law) encompassing an asset in which O had a beneficial interest prior to receipt of the asset by the defendant.
2. Rights arising under a trust of an asset for O where O had no beneficial interest in the asset prior to its receipt by the defendant.
3. Equitable interests not derived from a trust relationship, because the person in whom the legal title is vested holds the asset primarily for an interest of his own, not for the benefit of the holder of the equitable interest.
4. Equitable charges, which do not technically confer on O any interest in the charged asset but are simply encumbrances, giving O the right to look to the asset for satisfaction of his claim in priority to the claims of other creditors. Equitable charges subdivide into: (i) consensual equitable charges; (ii) equitable liens, that is, charges imposed by law.
5. Mere equities, that is, rights to impeach or qualify a legal or equitable interest. Such rights savour of real rights in that they bind each recipient of the asset whose interest is not strong enough to displace them; yet they are not themselves proprietary interests, their real character reposing exclusively in their

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> "When money to which one person is legally or equitably entitled is wrongfully mingled by another with money of his own, the person wronged may have either a right to an equitable lien on it, or a share of, the whole commingled fund, or any traceable product of it."[172]

The imposition of the equitable lien should in most cases produce few difficulties. The latter two techniques will, under some interpretations, involve the imposition of a constructive trust with equitable tracing normally coming to the fore where the plaintiff attempts to identify the product of his original asset.[173] However, as we shall see, even this interpretation is open to question. Indeed, it is not unreasonable to suggest that although equitable tracing is more able than its common law equivalent, it has also created at least as many difficulties and certainly more litigation.

3.3.2: THE RULES OF EQUITABLE TRACING.

Although the equitable process may be perceived as more able than its common law equivalent, it is not without its idiosyncrasies. Specifically, it requires the plaintiff to establish three basic elements.[174] First, the technique requires the presence of an underlying equitable proprietary foundation. Second, it requires the existence of a fiduciary relationship. And finally, there must be certain "transactional links"[175] between his original property and the property now in the defendant's hands.

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inchoate effect on real rights vested in another" Goode, "The Right to Trace... II" *op. cit.* at pages 528-529.

[172] Taft, "A Defence of a Limited Use of the Swollen Assets Theory Where Money Has Wrongfully Been Mingled With Other Money" 39 Col. Law. Rev., 172.

[173] "Where the person wronged seeks a share of a traceable product of the countermingled fund, he is simply making further use of the 'constructive trust' remedy. He is again claiming his property or 'following the *res.*' Since the 'constructive trust' remedy gave him a *pro rata* ownership of the mingled fund, if the 'constructive trustee' of that fund wrongfully exchanged it for something else the person wronged may elect to have the wrongdoer treated as a 'constructive trustee' of the product of the mingled fund.": Taft, *op. cit.* at page 172; it should be borne in mind that, as noted above, tracing can also be used in the wider context of establishing personal liability. It might also be noted that the nature of the constructive trust is a debatable issue.

[174] Other commentators may classify these requirements differently or indeed identify other requirements. Thus, for example, Snell states that equitable tracing requires, (a) that the property is traceable, (b) that there is an equity to trace, and (c) that tracing should not produce an inequitable result: Snell's *Principles of Equity*, 28th ed., 286. Equally, there is some discussion, as we shall see below, as to whether an equitable proprietary basis and a fiduciary relationship are (or should be) alternative or competing requirements.

3.3.2.1: The Requirement For a Proprietary Base and Fiduciary Relationship.

At one time it appeared to be accepted by the courts that the rules of tracing required the existence of an express trust. The willingness of the courts to widen its usage to situations in which a fiduciary relationship existed can be seen as a considerable relaxation of the area's strict code.[176] It allowed plaintiffs who could not point to the breach of an express trust, but who could demonstrate that a relationship of trust had been breached, to have some possibility of gaining just recompense. Today, however, when many commentators argue for a closer relationship between the common law and equity, the fiduciary relationship and equitable proprietary base requirements are more usually viewed as restrictions on the technique's effectiveness. Some opinion suggests that these limitations may soon be removed.[177] Nevertheless, at this point in the law's development, equitable tracing requires the plaintiff to show that he has an equitable, as opposed to absolute, proprietary interest.[178] The necessity for such an equitable property basis clearly dovetails with (or is another facet of) the requirement for a fiduciary relationship.

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[175] Oesterle, D.A. (1983) 68 Cornell LR 172.

[176] "Has it ever been suggested until very recently that there is any distinction between an express trustee or an agent, or a bailee, or...anybody else in a fiduciary position?" *Re Hallet* (1880) 13 Ch.D. 696, 709, *per* Jessel M.R.

[177] "We are probably heading toward a situation where all that will be required in order to take advantage of equity's powerful tracing abilities is a simple proprietary base, whether through a legal or equitable interest...": Oliver, P., "The Extent of Equitable Tracing", (1995) T.L.I., Vol. 9, No.3, 78. Oakley notes, "The first type of equitable tracing claim to become established was the right of the *cestui que use* (the beneficiary under a use) to enforce the use against the oeffee to uses (the trustee)...the right of the beneficiary, which dates from the end of the fourteenth century, was initially available only to the trustee himself." He goes on to note that by 1466 "...the beneficiary could enforce his interest against any transferee from the trustee with notice" and by 1482 he could enforce his interest against the heir to the trustee. By 1523 he could also enforce his rights against anyone "...to whom the land had been conveyed as a gift." "These rights were subsequently rationalised in the second half of the seventeenth century by the enunciation of the equitable doctrine of notice - namely, that an equitable interest was good against the whole world other than a bona fide purchaser for value without notice, actual or constructive." Oakley, *op. cit.* at page 65.

[178] The extent to which the plaintiff must demonstrate his equitable property interest at every stage of the substitution process may, however, be limited. Thus, as we will see, in *El Ajou* v. *Dollar Land Holdings plc and another* [1993] 3 All E.R. 717, Millett J. described the interest as notional and denied that it needed to be shown against every account through which the money passed. Thus Birks says of this decision, "The assertion of a proprietary claim requires a proprietary base at the head of the chain of substitutions. The plaintiff then has to show, by tracing, where the value of the asset at the head of the chain is now located. He can then claim a property in the assets in which that value is traceably located. He does not have to show that at every point in the tracing chain he could have claimed...[such an] interest in such an asset.": Birks, "Tracing Misused" (1995) *Trust Law International*, Vol. 9, No. 3, 92.

It comes as little surprise to discover that, like many of the problems in this area, these requirements are a result of historical accident rather than considered development. Specifically, they are a legacy of the split between law and equity which held that equitable remedies were available only when the action was brought in equity.[179] Hanbury and Martin have argued that this position is illogical[180] and it is almost impossible to disagree with this view. Indeed, they (and a number of other commentators) suggest that until recently its logic had, perhaps tentatively, been accepted by the courts. They hold that the combined effect of *Sinclair* v. *Brougham*[181] and *Banque Belge pour l'Etranger* v. *Hambrouck*[182] was to bring the common law and equity within touching distance. If this is the case, it clearly has implications which go beyond the narrow questions of equity's requirements, and raises the possibility of combining the equitable and common law rules. Thus, for example, it has been suggested (as noted above) that in *Banque Belge* the court had begun to address the difficult issue of the common law's inability to trace into a mixture. In a passage immediately following his famous assertion that, "...equity had the courage to lift the latch [to the bank], walk in and examine the books,"[183] Lord Aitkin continued, "I can see no reason why the means of ascertainment so provided should not now be available both for common law and equity proceedings."[184] Lord Denning M.R. interpreted these developments in the following manner:

> "It may be that 150 years ago the common law halted outside the banker's door, but for the last 100 years...it has had the courage to lift the latch, walk in and examine the books: see *Banque Belge*...and *Re Diplock's Estate*..."[185]

Thus, we can argue that, at least since the fusion of law and equity, each area's remedies and techniques have been fully available, and this has been specifically

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[179] Hanbury and Martin, *op. cit.* at page 648.

[180] "This makes little sense, because an absolute owner, having legal and beneficial ownership, is just as much the owner in equity as is a beneficiary under a trust, and equity never disputed this. It merely did not have jurisdiction to adjudicate on it. There seems to be no reason at all on the merits why the equitable tracing remedy should not be available to the beneficial legal owner.": Hanbury and Martin, *op. cit.* at page 648.

[181] [1914] A.C. 398. For an up to date interpretation of this case see, *Westdeutsche Landesbank Girozentrale* v. *Islington London Borough Council* [1996] 2 W.L.R. 802.

[182] [1921] 1 K.B. 321.

[183] [1921] 1 K.B. 321, 335.

[184] *Ibid.*

[185] *Chief Constable of Kent* v. *V* [1983] Q.B. 34, 41, *per* Lord Denning M.R.

recognised with regard to tracing in more than one case. If it is true that there is no procedural reason to prevent the common law taking advantage of equitable techniques, then it seems equally clear that there is no requirement of principle which demands the imposition of a fiduciary relationship/equitable property basis. It is entirely arguable that either general rights in property[186] or unjust enrichment[187] appear to be a more appropriate foundation.

Nevertheless, the case of *Re Diplock's Estate*[188] is generally seen as interpreting *Sinclair* v. *Brougham* to the effect that a fiduciary relationship is a necessary pre-requisite to equitable tracing. In the former case the Court of Appeal evinced the opinion that:

> "...equity may operate on the conscience not merely of those that acquire legal title in breach of some trust, express or constructive, or of some other fiduciary obligation, but of volunteers provided that as a result of what has gone before some equitable proprietary interest has been created and attaches in the property in the hands of the volunteer."[189]

This is a reasonable interpretation of previous cases, and it is not immediately apparent why it is held to be authority for a fiduciary relationship requirement. Oakley has convincingly demonstrated that no such requirement existed before *Re Diplock's Estate.*[190] He argues that a strong line of authority[191] culminating in *Banque Belge* created a situation in which a holder of the legal and equitable title could trace in equity.[192] As a result he concludes that *Re Diplock* established the

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[186] "In principle no fiduciary relationship is needed to establish the right to trace in equity. The right in no way depends on personal relationships (except where questions of priority of entitlement to a mixed fund arise) but rests entirely on following property or ownership": Pearce, R.A., *op. cit.* at page 286.

[187] Hanbury & Martin, *op. cit.* at page 667; Goff and Jones, *op. cit.* at page 72.

[188] [1948] Ch. 465. In this case Caleb Diplock left the residue of his estate on trust to charities and benevolent "objects" to be chosen by his executors. The executors distributed a substantial amount of money to a large number of charities under the assumption the gift was valid. This assumption was challenged by Diplock's next of kin and was held to be incorrect. As a result the next of kin were granted the right to equitably trace the relevant money.

[189] [1948] Ch. 465, 530.

[190] Oakley, *op. cit.* 64.

[191] Notably, *Ryall* v. *Ryall* (1739) 1 Atk. 59; *Lane* v. *Dighton* (1762) Amb. 409;; *Ex parte Cooke* (1876) L.R. Ch. Div 123; *Ex parte Dale & Co.* (1879) 11 Ch.Div 772.

[192] "Clearly in this case [*Banque Belge*] the bank held both the legal and equitable proprietary interests in the money obtained by forgery. Therefore the judgment of Scrutton L.J. and the corroborating dicta of Bankes and Aitkin L.J.J. clearly support the view that the right to trace in equity is not confined to situations where

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need for an equitable property but not a fiduciary relationship.[193] Other commentators are equally adamant that the case has been wrongly interpreted[194] and that there is no basis in principle for the requirement.[195] Thus, for example, Pearce argues that the passage in which Lord Greene M.R. criticised Lord Duedin's belief[196] that unjust enrichment was enough in itself to raise a charge, has been misinterpreted.[197] It does certainly appear that Pearce is correct in suggesting that the "or" between the relevant elements of the passage is being used disjunctively and that as a result a fiduciary relationship *or* a continuing property right recognised by equity should be viewed as alternatives.[198] The failure to make this distinction in future cases can, to some extent, be blamed on the headnote to the case, which states that property can be followed not where the alternatives exist, but where there is a fiduciary relationship which gives rise to an equitable property interest.[199] Thus the case has been interpreted as suggesting that an equitable property interest can only flow from a fiduciary relationship. The misinterpretation of the headnote was compounded by the fact that the next-of-kin in *Re Diplock*, bereft of the

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legal and equitable proprietary interests in property are divided but arises also where one person holds both legal and equitable proprietary interests in the property in question. Thus, it is submitted that *Re Hallet's Estate* and *Banque Belge*...establish that an equitable tracing claim is available whenever the claimant can show an equitable proprietary interest in the property in question whether or not the claimant also holds the legal proprietary interest in the property in question." Oakley, *op. cit.* at page 74.

[193] "...*Re Diplock* is further authority that an equitable tracing claim is available whenever the claimant can show an equitable proprietary interest in the property in question...It is submitted that the authorities clearly establish that the only prerequisite of an equitable tracing claim is an equitable proprietary interest...that this principle is not limited to situations where legal and equitable proprietary interests in property are divided...A fiduciary relationship, in the sense of an obligation to exhibit an especial duty of good faith does not of itself create any right in a party to that relationship to trace property either at law or in equity - such a right only exists where the proprietary interest is found to exist in the party seeking to trace. None of the authorities is contrary to these propositions.": Oakley, *op. cit.* at page 82.

[194] "...it does not decide that a fiduciary relationship is needed. Even if it does, then as an authority it should be confined to its particular facts. It was clearly a case concerning a fiduciary, and the question of whether a fiduciary relationship was essential does not arise on the facts. The case may thus be authority that a fiduciary relationship is sufficient, but not an authority that it is necessary.": Pearce, R.A., *op. cit.* at page 287; *Re Diplock's Estate* [1948] Ch. 465.

[195] "The results of the imposition of this requirement met with almost universal condemnation, and in principle the requirement is wrong. It conflicts with the basic concept of tracing that a claimant is able to recover property which he can identify as his own.": Pearce, R.A., *op. cit.* at page 287.

[196] *Sinclair* v. *Brougham* [1914] A.C. 398.

[197] The relevant passage states that, "Such a view would dispense with the necessity of establishing as a starting point the existence of a fiduciary or quasi-fiduciary relationship or of a continuing property recognised in equity.": *Re Diplock's Estate* [1948] Ch. 465, 520.

[198] Pearce, R.A., *op. cit.* at page 277, 288. See also on this point Oliver, P., *op. cit.* at page 78 and McNichol, D., *op. cit.* at page 7.

[199] "...a fiduciary or quasi-fiduciary relationship between the claimant and the recipient of his money as to give rise to an equitable proprietary interest in the claimant.": *Re Diplock's Estate* [1948] Ch. 465, 466-467; Pearce, R.A., *op. cit.* at page 277.

equitable property, were forced to rely on the fiduciary relationship.[200] There is no doubting the closeness of a fiduciary relationship and a property in equity, indeed one can normally be identified as the flip side or begetter of the other.[201] Nevertheless, it seems clear that, in certain circumstances, one can exist without the other.[202] Thus, it is contended that the connection between the existence of a fiduciary relationship and the creation of equitable property has been asserted beyond the requirements of authority or principle. It is difficult to logically counter these arguments; however, they have recently found little favour with the courts. Most specifically, Millett L.J. (as he now is) has been particularly vociferous in defence of the fiduciary relationship requirement. Thus in *Agip (Africa) Ltd* v. *Jackson* [203] he stated that, "The only restriction on the ability of equity to follow assets is the requirement that there must be some fiduciary relationship which permits the assistance of equity to be involved."[204] It is clear from his Lordship's recent pronouncements that this ridged split between the common law and equity is not one which he believes to be based on principle or efficiency or one which, in a strict sense, he wishes to see preserved.[205] Despite this, certainly with regard to the fiduciary relationship requirement, the decision of Millett J. (as he then was) in *Agip*

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[200] "What is needed to trace is some continuing equitable right of property. This is the principle which was applied in *Re Diplock* but because of the position of the claimants in that case, next-of-kin claiming on the invalidity of a will, a fiduciary relationship between them and the executors had to be shown to establish the claimants' equitable interest in the property - property to which they were entitled only by reason of the personal representative's duties towards them.": Pearce, R.A.,*op. cit.* at page 290.

[201] The common interdependence of these elements can be seen by comparing Oliver's suggestion (Oliver, P., *op. cit.* at page 78) that, "The essence of this fiduciary relationship in most cases is...the existence of an *equitable* proprietary base..." with the passage in *Re Diplock* to the effect that, "Lord Parker and Viscount Haldane both predicate the existence of a right of property recognised by equity which depends on there having existed at some stage a fiduciary relationship of some kind...sufficient to give rise to the equitable right of property.": [1948] 465, 540.

[202] "A legal and beneficial owner of land is owner in the eyes of equity, even though there is no fiduciary relationship because he also holds the legal title.": Pearce, R.A., *op. cit.* at page 287; this is of course similar to the point made by Hanbury and Martin above.

[203] [1990] 1 Ch.D. 265.

[204] [1990] 1 Ch.D. 265, 290. Equally, in *El Ajou* v. *Dollar Land Holdings plc and another* [1993] 3 All E.R. 717, 739 he held that, "...it is a prerequisite of the right to trace in equity that there must be a fiduciary relationship which calls the equitable jurisdiction into being, this makes it necessary to consider separately the common law and equitable tracing rules."

[205] "The fact that there are different tracing rules at law and in equity is unfortunate though probably inevitable, but unnecessary differences should not be created where they are not required by the different nature of legal and equitable doctrines and remedies. There is, in my view, even less merit in the present rule which precludes the invocation of the equitable tracing rules to support a common law claim; until that rule is swept away unnecessary obstacles to the development of a rational and coherent law of restitution will remain.": *The Trustee of Property of F.C. Jones & Sons (a firm)* v. *Jones*, [1996] 4 All E.R. 721, 729. Indeed he specifically noted in *Agip* that, "The [fiduciary] requirement has been widely condemned and depends on authority rather than principle, but the law was settled *In re Diplock's*...It may need to be reconsidered...": [1990] 1 Ch.D. 265, 290, *per* Millett J.

(Africa) Ltd v. *Jackson* was accepted by the Court of Appeal[206] and seems to represent the law as it now stands.

One might argue that as a result of the perceived obsolescence of the fiduciary relationship requirement, the courts have been willing to discover a fiduciary relationship in a wide, and arguably unwarranted, range of circumstances.[207] Thus they have allowed equitable tracing where the relationship existed between parties other than the plaintiff and the defendant,[208] or where no relationship existed prior to the point at which the relevant asset was received by the defendant.[209] Of specific interest to the present study, it has been held that the perpetration of fraud will normally result in the creation of a fiduciary relationship.[210] This is undoubtedly the case with the majority of corporate/commercial fraud, but is it true with regard to all forms of fraud? Suppose, for example, that an advertiser on the Internet based in Australia offers goods for sale, and a buyer in the United Kingdom electronically transfers the purchase money. The transaction is a fraud and no goods were transferred or even existed. Can we really find that a fiduciary relationship exists between the two parties? The historical principles upon which the fiduciary relationship was based might indicate the answer to be no, but modern authority suggests that this question would be answered in the affirmative.[211] An equally interesting question is whether a fiduciary relationship exists not only between a fraudster and his victim, but also a thief and his prey. The former case rests on the dishonest manipulation of trust and, as a result, lends itself to the finding of a fiduciary relationship. But there is little in the thief/victim relationship to suggest

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[206] *Agip (Africa)* v. *Jackson and Others* [1991] Ch. 547; see also *Boscawen* v. *Bajwa, Abbey National plc* v. *Boscawen* [1995] 4 All E.R. 769.

[207] As Millett has noted extra-judicially, "Much judicial and academic learning has been devoted to attempts to define the term 'fiduciary', particularly in Australia and Canada. In England, as usual, we try to muddle through without attempting a definition, believing that we will recognise a fiduciary when we see one. Recent experience shows this to be optimistic.": Millett., P., "Equity's Place in the Law of Commerce", Lecture to the Chancery Bar Association., June 1997, 5.

[208] *Re Diplock* [1948] Ch. 465; where the relationship between Celeb's personal representatives and the next of kin was considered to be sufficient even in the absence of a fiduciary relationship between the next of kin and the recipient charities.

[209] *Chase Manhattan Bank NA* v. *Israel-British Bank (London) Ltd* [1981] Ch. 105.

[210] "...the requirement is...readily satisfied in most cases of commercial fraud, since the embezzlement of a company's funds almost inevitably involves a breach of a fiduciary duty on the part of one of the company's employees or agents." *Agip (Africa)* v. *Jackson and Others* [1990] 1 Ch.D. 265, 276.

[211] Thus Birks suggest (Birks, P., "On taking seriously the difference between tracing and claiming", 1997, T.L.I., Vol.1, No.1, 2) that Lord Brown-Wilkinson's judgment in *Westdeustche Landesbank Girozentrale* v. *Islington London Borough Council* [1996] 2 W.L.R. 802, 838 can be interpreted in this way.

that the finding of a such a fiduciary connection could be anything other than a function of policy.[212] Nevertheless, for most of the 20th century Australian law has accepted that a thief can be viewed as a trustee of his ill-gotten gains.[213] However, even recently, this has been described as a heresy by English commentators. Certainly there appears to be a paradox in suggesting that a relationship of trust exists in such situations. Nevertheless, at least one of the judges in *Lipkin Gorman* v. *Karpnale Ltd*[214] appears to have accepted the Australian position. If this is the case then it might well be argued that at the present stage of the law's development there are few situations involving dishonesty in which the courts would not discover a fiduciary relationship where failure to do so would leave the plaintiff bereft of a reasonable remedy. Moreover, it appears that even in the absence of dishonesty, there are few circumstances in which the courts are unable to discover a fiduciary relationship where they wish to do so.[215]

Thus, there is little doubt that many situations from which fraud can arise, even within a narrow definition, must logically give rise to a fiduciary relationship. The next natural question was considered in *RE Goldcorp Exchange Ltd (in Receivership)*:[216] i.e. to what extent will circumstances which give rise to mistake also result in the creation of a fiduciary relationship? In this case the Plaintiffs attempted to trace their money into the surviving assets of the company. The court was reluctant to allow the Plaintiffs to trace as a result of an apparently valid contract.[217] Thus where dishonesty is clearly involved tracing will, it appears,

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[212] It is of course arguable that the fiduciary relationship in any context is a function of policy.
[213] *Black* v. *Freeman* (1910) 12 C.L.R. 105.
[214] [1991] 2 A.C. 548, 563, *per* Lord Templeman.
[215] "We have shown an overwhelming reluctance to define or in any way 'pin down' the fiduciary relationship...part of the reason for this is that the concept is unusually difficult, being intrinsically non-rational...the academics and the judiciary alike have striven hard...to evade definition...some have come right out and stated that attempts at definition are unwise or inappropriate.": Shepherd, J.C., *The Law of the Fiduciary*, 3.
[216] [1995] 1 A.C. 74. In this case, Goldcorp, a company dealing in precious metals based in New Zealand, became insolvent. A floating charge over all the company's assets ensured that there was nothing left to satisfy the company's general creditors. A number of private parties had relied on the company's advice which suggested that they should leave their gold on seven days call with the company. In other words the gold had been paid for, but not delivered. Unfortunately for the investors, the company had not allocated any particular gold to any particular customer and failed to keep their promise to the effect that enough gold would be kept in stock to meet all claims.
[217] "The company's stock of bullion had no connection with the claimant's purchases, and to enable the claimants to reach out and not only abstract it from the assets available to the body of the creditors as a whole, but also to afford a priority over a secured creditor, would give them an adventurous benefit devoid of
Footnote Continues on Next Page:

normally be possible. Where, however, an otherwise valid contract is affected by mistake, or perhaps even misrepresentation, it will not. However, it is submitted that Oliver is correct when he says, "...a court might well choose to distinguish the *Goldcorp* contract, which was proper and legitimate at the outset and had not been avoided, from the *El Ajou* type of business which was a scam from the start."[218] As a result, it seems likely that any victim of fraud, commercial or otherwise, will be able to establish the necessary relationship to indulge in equitable tracing. The question is, however, less clear where mistake in the absence of dishonesty is concerned. Finally, with regard to the question of mistake it should be noted that a payment resulting from a mistake of fact will ensure that the payer will retain an equitable interest in that property.[219] The relevant question therefore becomes again whether a plaintiff must establish an equitable interest *and* a fiduciary relationship.

It is clearly arguable that if we are to accept a traditional view of the rules of equity, then the existence of a fiduciary relationship or an equitable property is a reasonable requirement. Whether it is also a rational ingredient of a logical system concerned with reason rather than historical accident is, however, more doubtful. If one attempts to analyse the area from first principles, or what we have described as the original position, it seems unlikely that a logical individual in full possession of the relevant facts and free from self interest would arrive at the requirements of our present system or indeed the system itself. The consequences which flow from this assumption will be examined in the conclusion to this chapter. Whether or not we see the fiduciary relationship requirement as a necessary prerequisite to the involvement of equity, a result of judicial mistake or an historical accident, it seems at least arguable that the welter of criticism recently aimed at it, combined with its doubtful parentage, may soon lead to its demise.[220] Indeed, Birks claims that recent

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the foundation in logic and justice which underlines this important new branch of the law.": [1995] 1 A.C. 74, 99, *per* Lord Mustill.

[218] Oliver, P., *op. cit.* at page 78.

[219] *Chase Manhattan Bank NA* v. *Israel-British Bank* (London) Ltd [1981] Ch. 105; *Bankers Trust Co.* v. *Shipira* [1980] 1 W.L.R. 1274.

[220] "...there is considerable pressure to eliminate the requirement altogether so as to bring the common law and equitable tracing rules closer together, and thereby allow both legal and equitable owners to take advantage of the more powerful equitable tracing devices. It is fair to say...that the fiduciary requirement has been sufficiently battered by repeated attacks that it will probably succumb to the next sustained campaign at the level of the House of Lords.": Oliver, P., *op. cit.* at page 79.

House of Lords, dicta in Lord Browne-Wilkinson's judgment in *Westdeustche Landesbank Girozentrale* v. *Islington London Borough Council*[221] holds that "...tracing in equity does not require the trigger of a fiduciary relationship".[222] However, in the present author's view those comments are far from clear, and even Birks is forced to admit that "...it might be possible to think he was reaffirming precisely the requirement which he was bent on repudiating"[223] and respected commentators have indeed taken this position.[224]

3.3.2.2: Transactional Links: Property Which Is Traceable.

The rules which decide whether a particular piece of property is linked closely enough to the original asset to be traceable are idiosyncratic, but have been widely examined. As a result they will be considered only briefly and emphasis will be placed on their practical application. In this context it is necessary to take cognisance of four cases specifically concerning bank accounts. Chronologically, the first of these is *Clayton's Case*[225] which established that where trust money is mixed in an active bank account, in the absence of specific contra intention, the first payment into an account should be considered to be the first out.

Second is the case of *Re Hallet's Estate*.[226] Hallet mixed a marriage settlement with his own money and that of another trust (of which one of his clients was a beneficiary). He died leaving insufficient funds to pay his creditors and the two trusts. The relevant question was whether money removed by Hallet from the account was his, the trust's, or proportionately owned by each. Jessel M.R. stated that:

> "It is obvious he must have taken away that which he had a right to take away...His money was there...and why should the natural act of

[221] [1996] 2 W.L.R. 802, 838.
[222] Birks, P., "On taking seriously the difference between tracing and claiming", 1997, T.L.I., Vol.1, No.1, 2.
[223] *op. cit.* at footnote 15.
[224] (1997) 113 L.Q.R., 21, 22.
[225] *Devaynes* v. *Noble, Clayton's Case* (1816) 1 Mer. 572.
[226] (1880) 13 Ch.D. 696.

> simply drawing out the money be attributed to anything except to his ownership of the money which was at the bankers?"[227]

The case of *Roscoe* v. *Winder*[228] placed a potentially important restriction upon the plaintiff's ability to trace into the defendant's assets. The case involved circumstances in which the relevant bank account had been reduced by withdrawals before further payments in were made. It was argued that the defendant should be able to trace into the higher balance.[229] Sargent J., however, was unimpressed with this approach:

> "You must, for the purpose of tracing...put your finger on some definite fund which either remains in its original state or can be found in another shape. That is tracing and tracing, by the very facts of this case, seems to be absolutely excluded except as to the...[lowest balance]."[230]

As a result, tracing can apply only to, "such an amount of the balance ultimately standing to the credit of the trustee as did not exceed the lowest balance of the account during the intervening period."[231] In other words, where A receives £100 of B's money into his account which already contains £200 and subsequently removes £250 before adding another £250: A can only trace into the lowest balance, i.e. £50. This necessarily means that should B have removed £301 instead of £50, thus taking the balance into overdraft, tracing becomes impossible. This, it is submitted, illustrates part of the confusion within the law of tracing. If the

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[227] (1880) 13 Ch.D. 696, 572, *per* Jessel M.R.; It should be remembered, however, as Hanbury and Martin point out, "...that this principle operates in the context of a claim against a balance in the account, and does not derogate from the general principle...that the beneficiaries have a first charge on any property bought out of a mixed fund.": Hanbury and Martin, *op. cit.* at page 655. It should be noted that of equal importance to the present study was the court's decision that Mrs Cotterill (the client beneficiary) could bring a tracing action by virtue of the fiduciary relationship between herself and Hallet, notwithstanding the fact that Hallet was not a beneficiary of the relevant trust.

[228] [1915] 1 Ch 62; this case was recently examined with approval by the Privy Council in *Re Goldcorp Exchange Ltd (in Receivership)* [1995] 1 A.C. 74.

[229] "...that the debtor, by paying further moneys...into this common account, was impressing upon those further moneys so paid in the like trust or obligation, or charge of the nature of a trust, which had formerly been impressed upon the previous balance to the credit of the account.": [1915] 1 Ch 62., 68, *per* Sargent J.

[230] *Ibid.*

[231] [1915] 1 Ch 62., 69, *per* Sargent J.; it should be noted that, "It is not the case that the trustee is presumed to be honest rather than dishonest....and that he is presumed to expend his own money first. Although the end result might usually be the same, this view is inconsistent with the clear words of Jessel M.R. in R*e Hallet's Estate.* Sargent J.'s view does in any case impose an unrealistic fiction, and unless the presumption is treated as an irrebuttable presumption of law, may lead to the point where it may be rebutted by sufficiently dishonest acts by a trustee": Pearce, R.A., *op. cit.* at page 286.

equitable process is based upon questions of conscience, then the concept of the balance being impressed with the trust is entirely consistent. If it is merely an identification process, as *Roscoe* v. *Winder* suggests, then it might be hoped that the courts would refrain from calls to conscience when it is expedient to do so.

Finally, in this quartet, is *Re Oatway*[232] in which a lawyer mixed trust money in his own account. He removed a proportion of the money, which was invested in shares and dissipated the rest. When he died insolvent, the trustees attempted to trace into the shares. As we have seen, *Re Hallet's* suggests that the mixer removes his own money first and thus that the shares should belong to the estate. Unsurprisingly, the trial judge was unimpressed by this argument and found for the plaintiffs.[233]

The confusion mentioned above with regard to conscience and identification (and indeed causation) can be seen if we compare *Roscoe* v. *Winder* and *Re Oatway.* Let us consider a case in which the defendant has mixed £10,000 of trust money with £10,000 in his personal account. Assuming he removes £15,000 and invests it in shares, *Re Oatway* tell us that the plaintiff can trace into the £15,000 worth of shares and into £5000 in the account, but no more, even if other moneys are paid into it (*Roscoe* v. *Winder*). But what if the defendant sells the shares and returns the proceeds to the account? *Roscoe* v. *Winder* now states that the defendant can still claim only the lowest balance. It might be possible for the courts, in this situation, to take a pragmatic view and allow the plaintiff to follow the money through the investment and back into the account? although this seems at best a complex route. Assuming that this could be done, then how would the courts react in a case where the money removed from the account was used to pay the defendant's living expenses, which freed up money which could then be invested in shares? We shall see below that the courts may decide that such investments are unavailable to the

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[232] [1903] 2 Ch. 356.

[233] "It is...clear that when any of the money drawn on has been invested, and the investment remains in the name, or under the control of the trustee...he cannot maintain that the investment which remains represents his money alone...he never was entitled to withdraw the [original sum]...or...he could not be entitled...to...hold...the investment made therewith freed from the charge in favour of the trust, unless or until the trust money...had first been restored, and the trust fund reinstated by due investment of the money in the joint names of the proper trustees, which was never done.": [1903] 2 Ch. 356, 360.

plaintiffs. However, it is not immediately clear why this should be the case if, as we are often told in tracing cases, equity works on the conscience of the defendant.

3.3.3: COMPLEX PROBLEMS ASSOCIATED WITH TRACING.

Many of the complex issues raised by tracing are in fact a subset of the common law's inability to trace through mixtures and potentially substitution. However, whilst these problems originally occurred with regard to simple transactions (for example, adding coins belonging to another to those in a bag), they are given added colour by the influence of modern banking techniques discussed in the previous chapters.

3.3.3.1: Swollen Assets, Backward and Leapfrog Tracing.

We have seen that where A obtains B's car and swaps it for C's boat, A can act against the boat. This is equally true where A sells the car and uses the proceeds in order to buy a boat. But what is the situation where the use of the relevant dissipated asset allows the defendant to preserve other assets?[234] Thus, for example, A sells the car and uses the proceeds in order to buy food and lodgings. He then uses the money he saves in living expenses to buy the boat.[235] If we are to look at the purely identificatory nature of tracing, it seems that the chain has been broken and no action is possible against the boat. This is logical, but appears potentially to ill serve the cause of justice. A number of commentators, notably in the United States, have suggested that where a person's estate has been "swollen" by the misuse of another's property (normally trust property) it should be possible for the

[234] As Taft puts it, "Where...the countermingled fund has been so dissipated that not enough remains to equal the money wrongfully mingled, or where the person wronged cannot sustain the burden of proof in tracing his money into any specific fund or property of the wrongdoer, the question then arises as to whether the person wronged has any claim on other assets of the wrongdoer prior to the creditors generally.": Taft, *op. cit.* at page 173.

[235] Bogert gives the following example, "...assume that T is a trustee for C of $1000 in cash, and that T has a personal bank account of $1000, a bond which he owns personally and which is worth $1000, and $5000 in personal debts, deposits the trust cash to the personal bank account and checks out the entire $2000 to pay his creditors. He then dies, leaving as his only asset the $1000 bond and leaving $3000 in unpaid claims of his personal general creditors as well as the claim of C for the trust money. It has been urged on behalf of C in such a case that the $1000 of trust funds can be traced into the $1000 bond, which T left at his death; that, while the trust money did not buy this bond, the trust money paid debts of T that would otherwise have been paid by the sale of the bond, so that the insolvent estate of T would have had no assets at all instead of assets of $1000 if the trust money had not been employed to pay T's debts. The argument is thus made that the trust funds have swollen the estate of T from nothing at all to a $1000 estate.": Bogert, *Trusts and Trustees*, (1935), 2658.

plaintiff to claim preference over other creditors,[236] even in the absence of a direct identificatory connection. This is normally described as the "augmentation" or "swollen assets" theory.[237] Beyond the above usage it is also worth noting that this approach has been mooted as a potential way to temper the rule in *Roscoe* v. *Winder*.[238]

In England the theory came to the fore with Lord Templeman's advice in the Privy Council case of *Space Investments Limited* v. *Canadian Imperial Bank of Commerce Trust Co. (Bahamas) Limited*.[239] In this case the trustees of a bank had deposited trust money with the bank before it became insolvent. This action had been within the terms of the trust instrument, and as such the beneficiaries were in no better position than any other unsecured creditor. However, his Lordship went on to consider *obiter* what the situation would have been if the trustees had dissipated the trust money for their own purposes without the authority of the trust instrument. He accepted that tracing into the bank's other assets may have been possible because:

> "...the customers and other unsecured creditors voluntarily accept the risk that the trust bank might become insolvent and unable to discharge its obligations in full. On the other hand, the settlor of the trust and the beneficiaries interested under the trust never accepted any risks involved in the possible insolvency of the trustee bank..."[240]

This is, of course, the same argument given for tracing in general, and it might be suggested that it is not immediately clear why it should also provide the basis upon which the leap from identification in a narrow form to "swollen assets" theory can

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[236] Through a lien on the estate.

[237] "When relying upon the "swollen assets" theory, the person wronged is not seeking to reclaim his property or its product as when asserting the "constructive trust" remedy. He is endeavouring to have the court give him a lien on all the property of the wrongdoer with which his property was mingled. The result of the "swollen asset" theory is to give the person wronged a priority with respect to the general assets of the wrongdoer...": Taft, *op. cit.* at page 174; Smith, *op. cit.* at page 310.

[238] Which was recently examined with approval by the Privy Council in *Re Goldcorp Exchange Ltd (in Receivership)* [1995] 1 A.C. 74.

[239] *Space Investments Limited* v. *Canada Imperial Bank of Commerce Trust Co. (Bahamas) Limited* [1986] 3 All E.R. 75.

[240] [1986] 3 All E.R. 75, 76-77.

be made. He explained the particular circumstances for his consideration when he said:

> "A bank in fact uses all deposit moneys for the general purpose of the bank. Whether a bank trustee lawfully receives deposits or wrongfully treats money as on deposit from trusts, all the moneys are in fact dealt with and expended by the bank for the general purposes of the bank. In these circumstances, it is impossible for the beneficiaries interested in trust money misappropriated from their trust to trace their money to any particular asset belonging to the trustee bank. But equity allows...[them] to trace the trust money to all the assets of the bank and to recover trust money by the exercise of an equitable charge over all the assets of the bank."[241]

Generally, this step from identifiable product to causative product has received little support amongst English theorists;[242] nevertheless the arguments in its favour (made in particular by American commentators) are worthy of consideration. One such argument suggests that in certain circumstances tracing already goes beyond the strict bounds of identification;[243] and once this boundary of principle has been breached a refusal to accept at least a limited theory of "swollen assets" becomes illogical.[244] Writing of American law in 1935, Taft posited an interesting example[245] upon which he comments:

> "It would seem that in either of the two cases supposed, T being solvent...his general creditors would have no rights in his general assets, every reason of justice requires the same treatment for C. He gets it under the "swollen assets" theory but not under the "strict tracing" theory. This is because the "strict tracing" theory apparently regards form as more important than substance. This formality is inconsistent with the general principles of equity, especially where, as in the case of a solvent wrongdoer, application of the "swollen

[241] [1986] 3 All E.R. 75, 77.
[242] Oliver, P., *op. cit.* at page 81.
[243] An argument already noted and accepted by the present study.
[244] Specifically in support of the use of a "swollen assets" approach where the wrongdoer is solvent at the time of his wrongful receipt of the relevant sum.
[245] "...if T steals $100 from C and used the $100 to pay his debt to A, C is only a general creditor under the "strict tracing" theory. On the other hand, under the "swollen assets" theory, if T is solvent at the time of the theft, C gets a lien on T's general assets for his $100. Of course, if, instead of using C's money to pay A, T had deposited C's money in the bank where he had another $100 on deposit and had then drawn a check payable to A for the debt of $100, C under the "strict tracing" theory would have had a lien on the bank account for $100. In the first case suppose, however, if the "strict tracing" theory had been followed, C would have had no lien, even though at all times up to his insolvency T had $100 in his bank account.": Taft, *op. cit.* at page 189.

> assets" theory would not interfere with the rights of others. Perhaps the formalisation of the "strict tracing" theory may be justified to protect general creditors, when they have a right to protection in equity, but certainly that formalism should not be applied so as to negate use of the "swollen assets" theory where substantial justice requires it and the rights of others do not interfere with its use."[246]

In summary, therefore, we can see that tracing has gone beyond the merely identificatiory. If this is the case, why should we not embrace causation and allow a plaintiff to trace into swollen assets? The clear answer is that to do so would be unfair to other unsecured creditors who have not taken the risk of insolvency. However, why does this proposition rule out tracing into swollen assets, where to do so would not interfere with the rights of others?

Despite the logic of this argument, as a matter of authority, it seems that the door has been fully closed on its possible acceptance in this country. Indeed, it is arguable that the concept had already been rejected by the English courts in *Re Hallet.*[247] Thus, although the principles raised by *Space Investments Limited* were initially approved in New Zealand,[248] upon referral to the Privy Council[249] the approach was strongly questioned[250] and following *Re Goldcorp* it seems unlikely that, at least in the foreseeable future, the "swollen assets" theory will again find favour with English courts.

Chapter One contains a consideration of some of the processes involved in the modern bank clearing system. In the context of the above discussion it can be seen that many of these techniques can compromise the effectiveness of tracing: most specifically, because they often involve electronic transfers, the breaking of physical connections, mixing, and the taking of "delivery" or "credit risks." Equally, similar problems of establishing a relevant causal connection between a disputed payment and a relevant asset can be created when a party makes use of bank overdraft or credit facilities. In an attempt to circumvent these (and other) problems the courts

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[246] Taft, *op. cit.* at page 189.
[247] [1894] 2 Q.B. 237.
[248] *Liggett* v. *Kensington* [1993] 1 N.Z.L.R. 257.
[249] *Liggett* v. *Kensington* [1994] 3 W.L.R. 199.
[250] See also *Bishopgate Investments Management Limited* v. *Homan* [1994] 3 W.L.R. 1270.

have, in recent years, attempted to develop techniques which, as Matthews notes, occupy the mid-ground between tracing as pure identification and "swollen assets" theory.[251] In other words, they are of use where the claimed asset is clearly connected to the original asset, but that connection is in some way indirect or flawed. As a result, they can also be seen as a way around the less desirable rules of equitable tracing[252] without recourse to the more drastic "swollen assets" theory.[253]

The first situation in which such a technique might be used was demonstrated in *Bishopgate Investment* v. *Holman* [1994].[254] The pertinent question in this case was whether the Plaintiff could bring an action with regard to an asset purchased with the use of an overdraft which was to be repaid using misappropriated money. One member of the Court of Appeal suggested that "backward" tracing (as this technique has become known) might be possible[255] while a second disagreed[256] and a third made no useful comment on the subject. Ulph is of the opinion that the view of Dillon L.J. is preferable[257] while Matthews is more circumspect.[258] As with "swollen assets" theory, there may be an argument of principle in favour of "backward" tracing in such circumstances. But as always, such arguments must be viewed with regard to the relevant connection between the loss and the claimed asset, in the context of the possibly competing claims of unsecured creditors. In the light of this and with regard to these competing needs, the traditional approach to tracing (and "swollen assets" theory), and the potential lack of a clear causal connection[259] in such cases, it seems doubtful that, in the absence of special circumstances, the courts have fully embraced "backward" tracing.

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[251] Matthews, P., "Tracing..." *op. cit.* at page 31.
[252] For example, the rule in *Roscoe* v. *Winder* [1915] 1 Ch 62.
[253] Oliver, P., *op. cit.* at page 81.
[254] *Bishopgate Investment* v. *Holman* [1994] 3 W.L.R. 1270.
[255] "[it is] at least arguable, depending on the facts, that there ought to be an equitable charge in favour of [the trusts] on the asset in question.": *Bishopgate Investment* v. *Holman* [1994] 3 W.L.R. 1270, 1274, *per* Dillon L.J.
[256] "I do not accept that it is possible to trace through an overdrawn bank account, or to trace misappropriated money into an asset brought before the money was received by the purchaser.": [1994] 3 W.L.R. 1270, 1279, *per Legget* L.J.
[257] Ulph, J., "City Fraud and the Pursuit of Misappropriated Property" [1995] *The Litigator*, 173, 177.
[258] Matthews, "Tracing..." *op. cit.* at page 28.
[259] Thus, for example, as Matthews notes he may borrow in the expectation of money which he never in fact receives: Matthews, "Tracing..." *op. cit.* at page 30.

The second technique is known by some commentators as "leapfrog" tracing. This suggests that where the disputed sum is used to reduce a debt or overdraft,[260] thus allowing the lender to forward more cash, the plaintiff should be able to trace into an asset acquired with the extended credit. In such a case there may arguably be a closer connection between the payment of the disputed asset, the extending of credit, and the relevant asset then found in "backward" tracing. As a result it is likely to be more readily accepted within the existing framework.[261]

To some extent it is possible to argue that these techniques are an exemplification of the way in which tracing has developed in the last fifty years. Specifically, the system is a rigid framework of rules which were often developed during the eighteenth and nineteenth centuries. When presented with the complexities of modern commercial transactions the courts are faced with the choice of failing to do justice, developing new techniques within a principled structure, or attempting to side-step the existing rules on a case-by-case basis. In general it might be suggested that they have often taken the latter option, and "backward" and "leapfrog" tracing can be seen as this policy made substance. In other words, the courts often appear to be engaged in the art of the possible, rather than a programme of principled development. While such an approach may be effective in a particular case, it is axiomatic of the methodology which originally resulted in many of the defects which our system contains.

There is little doubt that one of the contributing factors to this preference for narrow rather than broad development is the uncertainty which exists regarding the nature of tracing, which the present section has aimed to highlight. A principled development of the technique is naturally problematic if doubt exists as to whether it is concerned with the rules of property or restitution, whether it is an

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[260] For a discussion of tracing into a debt see, Smith, L., "Tracing Into...a Debt" *op. cit.* at page 290; McLauchlan, D.W., "Priorities-Equitable Tracing Rights and Assignments of Books" 96 L.Q.R., 90.

[261] However, it should be noted that Matthews suggests that the ability to trace may depend on whether an agreed overdraft is available, in which case the "In-payment of trust money will effectively 'buy' an equivalent amount of credit.": Matthews, "Tracing..." *op. cit.* at page 30. We might, however, argue that it is not entirely self-evident that where no right to an overdraft exists tracing should not be possible: thus, for example, the question of whether the defendant had a right to an overdraft, or was given an overdraft as a matter of course, does not seem to go to the foundation of the causal connection between the original payment, the provision of further credit and the purchase of a new asset.

identification process or something more. This lack of an overriding structure by which the system can develop has, arguably, resulted in the failure of the tracing process in circumstances where logic and justice would suggest it should succeed. As the rates of development and change in technology, economics and commerce increase, this situation can only worsen: i.e. the time lag between factual change and legal response will widen in the absence of a clear understanding of what tracing is and how it should develop. The conclusion to this chapter[262] will, in the light of the discussion above, attempt to identify the fundamental nature and purpose of tracing and to suggest a framework by which it can develop in a just and logical manner.

[262] And Chapter Four.

3.4: CONSTRUCTIVE TRUSTS, KNOWING RECEIPT AND KNOWING ASSISTANCE.[263]

"... a concept in search of a principle."[264]

Traditionally, constructive trusts arise due to the operation of law as opposed to the intentions of the parties[265] and have provided "a ready means of developing our property law in modern times."[266] Arguably, they have proved to be of equal importance in the law of restitution, not least because the constructive trust is a mechanism which is closely related to, or perhaps a trigger for, equitable tracing.[267]

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[263] See generally, Hayton and Marshalll, *Cases and Commentary on the Law of Trusts*, 9th Edition, London (1991) Chapter 7; Scott, A.W. "Constructive Trusts" (1955) 71 L.Q.R. 39; Ford & Chapman, Chap.22; Waters *Constructive Trusts* (1965); Goff and Jones' *Law of Restitution,* Chapter 2; Harpum, "The Stranger as Constructive Trustee", (1986) 102 L.Q.R., 114; Oakley's *Constructive Trusts*, London; Paciocco, "The Remedial Trust - A Principled Basis for Priorities over Creditors" (1989) 68 Can. Bar Rev. 315; Halliwell, M., "Strangers to a trust: in search of equity's conscience", T.L.I, August 1991, 115; Bryan, M, "Constructive trusts and unconscionability in Australia: on the endless road to unattainable perfection", *Trust Law International*, 1994, Vol. 8 No. 3, 74; Hanbury and Martin, *Modern Equity*, 14th Edition, London, (1993); McCormack, G., "Assisting in a breach of trust: principles of accessory liability", *Trust Law International*, Vol.9 No.4, 1995, 102; Allen, T., "Fraud, Unconscionablity and Knowing Assistance", *The Canadian Bar Review,* Vol. 74, 49; Gardener, S., "Knowing Assistance and Knowing Receipt: Taking Stock", (1996) 112 L.Q.R., 56.

[264] Sir Anthony Manson, foreword, Finn, *Essays in Equity*, (1985).

[265] "It is only because Equity compels the defendant to hold property wholly or partly for the plaintiff that the defendant is a constructive trustee thereof: it is not because the defendant is a constructive trustee that he is automatically forced to hold the property for the plaintiff.": Hayton and Marshall, *Cases and Commentary on the Law of Trusts*, 9th Edition, London (1991), 440. Taft explains the constructive trusts in the context of mixed funds in the following terms, "Where a person wronged seeks a share of the whole countermingled fund, he is then said to be asserting the 'constructive trust' remedy. He does not claim to be a creditor of the wrongdoer; instead he claims his property. He is sometimes said to be 'following the *res*', the '*res*' being his money, which he has traced into the countermingled fund. He argues that his money represents a *pro rata* part of the countermingled funds and that he has, therefore, a *pro rata* interest in it, even though the legal title to the mingled fund is in the wrongdoer. Since the countermingled fund is acquired partly by the wrongdoer, the wrongdoer is held to be a 'constructive trustee' of the whole, for the benefit of himself and the person wronged. Each has an interest in the fund so held in constructive trust in proportion to their respective contributions.": Taft *op. cit.* at page 72.

[266] *Sen v. Headley* [1991] Ch. 425, 440, *per* Nourse L.J.

[267] It should be noted that in many cases the defendant will no longer be in possession of the assets. Thus the remedy sought will necessarily be personal. Whether or not this relates to tracing in the strict sense is a question which has been discussed above; however, it is certain that many of the litigatory techniques and problems will be the same whatever the technical differences. However, in this context Maggary V.C.'s comments in *Re Montagu's Settlement* [1987] 1 Ch. 264, are of interest. Specifically, "The equitable doctrine of tracing and the imposition of a constructive trust by reason of the knowing receipt of trust property are governed by different rules and must be kept distinct. Tracing is primarily a means of determining property right, whereas the imposition of a constructive trust creates personal obligations that go beyond mere property rights...". There are two possibilities at work here (which can potentially, be seen as relating to remedial and institutional constructive trusts). First, one can suggest that a party who loses property to a knowing recipient can trace that property in his hands because that property is subject to a constructive trust and is therefore recoverable (this appears to be Taft's view: Taft *op. cit.*). The second possibility (apparently favoured by Megarry V.C.) is that equitable tracing allows the plaintiff to recover the property in the hands of the recipient independently of the constructive trust and the constructive trust only comes into play to impose personal liability when there is no trust property left in the hands of the recipient. The validity of these positions will be discussed below but for now we can make two points: (a) These possibilities are rarely identified and as a result traditional interpretations of personal and proprietary remedies can often

Footnote Continues on Next Page:

Unfortunately its nature potentially creates an immediate problem when attempting to follow assets into foreign jurisdictions which do not recognise such trusts or the principles upon which they rest. Moreover, the status of the constructive trust is uncertain even in countries which accept its legitimacy.[268] Equally, the intentionally vague judicial definitions we have seen in fraud are also present in this area: "English law provides no clear and all-embracing definition of a constructive trust. Its boundaries have been left perhaps deliberately vague, so as not to restrict the court in deciding what the justice of a particular case may demand."[269] In a similar vein the distinctions between knowing receipt, knowing assistance, tracing, resulting and constructive trusts have become both intentionally and unintentionally blurred.

Traditionally a stranger to a trust could be fixed with constructive trusteeship or personal responsibility analogous to constructive trusteeship in three ways; (a) by intermeddling in the administration of the trust without authority;[270] (b) by knowingly receiving trust property;[271] (c) by knowingly assisting in the fraudulent actions of a trustee. Categories (b) and (c)[272] were identified by Lord Selborne L.C. as long ago as 1874.[273]

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become confused; and (b) whatever the arguments surrounding the various triggers for constructive trusts and tracing, the two can, in certain circumstances lead to differing results. Thus it has been suggested that equitable tracing requires trust property in the hands of the defendant to be returned as long as he is not a bona fide purchaser for value. However, with regard to the constructive trust even a volunteer who has parted with trust property cannot be made subject to personal liability as a constructive trustee unless he has knowledge of the trust: *Agip (Africa) v. Jackson* Ch. 265.

[268] "Thus in general terms the English courts favour the view that the constructive trust is a substantive institution while the courts of Australia and New Zealand view it as remedial (*Muschinski v. Dodds* (1984-1985) 160 C.L.R. 583 at 615; *Powell v. Thomson* [1991] 1 N.Z.L.R.. 597, at 614-615.) and the position in Canada is uncertain.": Paciocco, "The Remedial Trust- A Principled Basis for Priorities over Creditors" (1989) 68 Can. Bar Rev. 315.

[269] *Carl Zeiss Stifung v. Herbert Smith & Co.* [1962] 2 Ch. 276. 300, *per* Edmund Davies L.J.

[270] The *trustee de son tort*: *Mara v. Browne.* [1896] 1 Ch. 199.

[271] *Belmont Finance Corp. v. Williams Furniture Ltd (No.2)* [1980] 1 All E.R. 393.

[272] Those of primary importance to the present study.

[273] "That responsibility [of a trustee] may no doubt be extended in equity to others who are not properly trustees, if they are found actually participating in any fraudulent conduct of the trustee to the injury of the *cestuis que trust*. But...strangers are not to be made constructive trustees merely because they act as agents of trustees in actions within their legal powers, transactions of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustee.": *Barnes v. Addy* (1874) LR 9 Ch App 244, 251-252.

3.4.1: LIABILITY FOR KNOWING ASSISTANCE.[274]

First, it should be noted that a party who knowingly assists in the fraudulent act of a trustee receives no trust property and therefore, technically, cannot be a trustee. Indeed acting against an assistor is usually an exercise in finding "deep pockets" which can be held responsible[275] where the original receiver has dissipated the relevant assets or cannot be found. Therefore, the assistor can be subjected to no more than a personal requirement to account, and should he become insolvent the plaintiff will be no more than an unsecured creditor.[276] Indeed, it has been suggested that even an action against a knowing receiver is personal in nature.[277] Thus, the use of the term "constructive trust" is seen by some as a useful fiction which cannot be taken literally. The validity of this situation will be discussed below, but this terminology undoubtedly goes to highlight the fact that similar principles are often thought to govern the areas regardless of whether the final result is proprietary or personal. Equally, it should be noted that "knowing assistance" is closely related to tracing. Thus, even if one were to argue that tracing in the narrow legal sense identifies property and not those associated with its movement,[278] tracing in the wider sense will certainly be used to determine liability in "knowing assistance" cases.

In *Baden Delvaux v. Société Générale* [1983][279] Gibson J. identified four elements which must be present in an action for "knowing assistance." Specifically, (a) the existence of a trust or fiduciary relationship; (b) a fraudulent and dishonest action

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[274] "...a person not nominated a trustee may be bound to liability as if he were a nominated trustee, namely, where he has knowingly assisted a nominated trustee in a fraudulent and dishonest disposition of the trust property", *Soar v. Ashwell* [1893] 2 Q.B. 390 at page 394-395, *per*, Lord Easher M.R.; see generally Loughlan, P.L. (1989) 9 O.J.L.S. 260; Haliwell, M. [1989] Conv. 328.

[275] As Lord Nicholls L.J. has recently pointed out, "The proper role of equity in commercial transactions is a topical question. Increasingly, plaintiffs have recourse to equity for an effective remedy where the person in default, typically a company, is insolvent. Plaintiffs seek to obtain relief from others who were involved in the transaction, such as directors of the company or its bankers...": *Royal Brunei Airlines Sdn Bdh v. Tan* [1995] 2 All E.R. 97, 99, *per*, Lord Nicholls.

[276] Although it should be noted that academics and the judiciary often fail to make a distinction between constructive trusteeship, a duty to account and the ability to trace. Indeed one often comes across the anomalous phrase "...personal liability as a constructive trustee.."; Hanbury and Martin *op. cit.* at page 391; *Agip (Africa) v. Jackson* Ch 265.

[277] *Re Montegues Settlement Trusts* [1987] Ch 264.

[278] Birks would suggest that tracing encompasses this wider definition.

on the part of the trustee; (c) assistance by the stranger in the dishonest design; and (d) the requisite knowledge on the part of the stranger. From these criteria and Lord Selborne's quotation above, it is clear that the most problematic question will be: what amounts to knowledge? In *Baden Delvaux*, counsel for the defendant and the plaintiff agreed five categories of knowledge, which Gibson J. seems to have accepted without question. Specifically, (a) actual knowledge; (b) wilfully shutting one's eyes to the obvious; (c) wilfully and recklessly failing to make such enquiries as an honest and reasonable man would make; (d) knowledge of circumstances which would indicate the facts to an honest and reasonable man; and (e) knowledge of circumstances which would put an honest and reasonable man on enquiry.[280] Gibson J. was of the opinion that any of the five categories would suffice in order to fix liability, and that there was no difference in this context between "knowing assistance" and "knowing receipt."[281] This is, however, a position which has been reassessed in recent years, most specifically, with regard to the necessity or otherwise of actual, as opposed to constructive, knowledge and the role of dishonesty.[282]

The question of constructive notice was considered in both *Selangor United Rubber Ltd. v. Cradock (No. 3)* [1968][283] and *Karak Rubber Co. v. Burden (No.2)* [1972].[284] In the former it was shown that the relevant bank officials had all the information necessary to appreciate the fraudulent breach of trust, but had failed to

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[279] *Baden Delvaux v. Société Générale* [1983] B.C.L.C. 325; [1995] 4 All E.R. 161; based upon *Barnes v. Addy* (1874) LR 9 Ch App 244.

[280] Generally speaking categories (a) - (c) can be viewed as actual knowledge (*Belmont Finance Corporation v. Williams Furniture Ltd.) (No.1)* [1979] Ch 250, 267) while (d) and (e) are constructive knowledge (*Re Montegues Settlement Trusts* [1987] Ch 264, 277).

[281] [1989] 3 W.L.R. 1367, 1389.

[282] It should be noted that actual and constructive notice should be distinguished from notice in the context of land or purchase without notice, "In determining whether a constructive trust has been created, the fundamental question is whether the conscience of the recipient is bound in such a way as to justify equity imposing a constructive trust upon him. The rules concerning a purchaser without notice seem to me to provide little guidance on this and to be liable to be misleading": *Re Montague's Settlement Trusts* [1978] Ch 264, *per* Megarry J. Nevertheless, Millett J.'s comments in this context are informative, "I agree...that there is no room for the doctrine of constructive notice in the strict conveyancing sense in a factual situation where it is not the custom and practice to make inquiry. But it does not follow that there is no room for an analogous doctrine in a situation in which any honest and reasonable man would have made inquiry.": *El Ajou v. Dollar Holdings Plc.* 3 All E.R. 717, 739.

[283] [1968] 1 W.L.R. 1555; [1968] 2 All E.R. 1073.

[284] [1972] 1 W.L.R. 602.

do so.[285] Ungoed-Thomas J. held that the relevant mental state was knowledge of the, "...circumstances which would indicate to an honest and reasonable man that such a design was being committed or would put him on inquiry, which the stranger failed to make, whether it was being committed."[286] It is noticeable that in coming to this conclusion he relied on "knowing receipt" cases. *Karak Rubber* arose out of predominantly the same circumstances as *Selangor,* and once again the "fault" of the bank officials was primarily the result of inexperience. The judge in that case accepted the distinction between "knowing receipt" and "knowing assistance", but again opined that if an objective view of knowledge was appropriate for the former category it should also be applied to the latter. Thus, it appears that a combination of knowledge and a potential lack of probity in categories (d) and (e) allowed the judges in *Selangor* and *Karak* to come to the conclusion that those categories could be a sufficient basis for the imposition of "knowing assistance" liability even where something less than dishonesty was involved.[287] Nevertheless, the position remained at best confused and, to varying degrees, a number of cases took divergent routes.[288]

In *Belmont Finance Corporation v. Williams Furniture Ltd (No.1)* [1979][289] the court took a significantly different approach.[290] Buckly, J. made a clear distinction between "knowing assistance" and "knowing receipt" and suggested that in the latter the defendant must have knowingly participated in the dishonest design of the trustees which required him to be party to the trustee's dishonesty. Some commentators have suggested that this is an acceptance of commercial reality.

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[285] This may have been caused more by a lack of experience on their part rather than any other failure.
[286] [1968] 1 W.L.R. 1555, 1590.
[287] An example of the problems associated with dishonesty can be seen in the situation where a true statement becomes untrue. See, for example, Gatehouse J.'s statement to the effect that, "Although there is no distinction in law between what Mr Grabiner describes as "fraud by forethought" and "fraud by after thought", I think there may be a difference in fact, bearing on the question of dishonesty. It is one thing for a man to make a material representation intended to be acted upon and known at the time to be untrue. It may be far less heinous when a representation, true at the time it was made, but falsified by subsequent events, remains uncorrected...If this is not deliberate but arises from a failure to realise a duty to correct it, this is not fraud. Only if the representor is aware that his previous representation '...can no longer be persevered in' does this failure to correct amount to fraud." *British & Commonwealth Holdings Plc* v. *Quadrex & Ors* 8th May 1991 (unreported), *per* Gatehouse J., quoted by Hunter, R.. *op. cit.* at paragraph 5.3.
[288] See for example, *Carl Zeiss Stifung v. Herbert Smith & Co. (No.2)* [1969] 2Ch 276; *Belmont Finance Corporation v. Williams Furniture Ltd (No.1)* [1979] Ch 250.
[289] [1979] Ch 250.
[290] Followed by Vinelot J. in *Eagle Trust Plc* v. *SBC Securities Ltd* [1992] 4 All E.R. 488.

Thus, for example, as far back as 1893 Bowen L.J. had stated, "The practise of merchants, it is never superfluous to remark, is not based upon the supposition of possible frauds. The object of mercantile usage is to prevent the risk of insolvency, not fraud..."[291]

Perhaps the most influential case to date in this area is one with which we have already become familiar: *Agip (Africa) Ltd* v. *Jackson* [1992]. The question of relevance in this case was whether partners and an employee of the firm of accountants used to launder the fraudulently obtained money could be held to account in equity. Millett J. emphasised the distinction between the two forms of liability: "The basis of liability in the two types of case is quite different. There is no reason why the degree of knowledge should be the same, and a good reason why it should not."[292] He went on to suggest, relying on *Lipkin Gorman* v. *Karpnale*,[293] that the five categories of knowledge should only be used as guidelines not immutable rules. The requirement was that the breach of trust was fraudulent and constructive knowledge of this was not sufficient:

> "...there is no sense in requiring dishonesty on the part of the principle, while accepting negligence for his assistant...dishonest furtherance of the dishonest scheme of another is an understandable basis for liability; negligent but honest failure to appreciate that someone else's scheme was dishonest is not."[294]

Of course this analysis assumes that the basis of liability in knowing receipt is itself reasonable, which may be open to doubt.[295] However, if we are willing to make that assumption then it is difficult to argue with Millett J.'s position. It is perhaps less obvious to hold, as he did, that even knowledge of a different dishonest scheme would suffice. Specifically, in this case knowledge of exchange control avoidance rather than the actual scheme. Nevertheless, although this introduces a potential

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[291] *Sanders Bros.* v. *McLean & Co.* (1883) 11 Q.B.D., 327, 343.; approved by Steyn in *Barclays Bank* v. *Quincecare Ltd* [1992] 4 All E.R. 363 see also *Scandinavian Trading v. Flota Ecuatorium* [1983] 529; *Manchester Trust v. Furness* [1895] 593.
[292] Ch 265, 292.
[293] [1989] 1 W.L.R. 1340.
[294] [1987] Ch 265, 294.
[295] This question will be examined in the next section.

element of uncertainty, it is not in itself unreasonable if one is considering what should have acted upon the assistor's conscience. Taking these factors into consideration, Millett J. came to the conclusion that knowledge was:

> "...essentially a jury question. If a man does not draw the obvious inferences or make the obvious inquiries, the question is, why not? If it is because, however foolishly, he did not suspect wrongdoing, or having suspected it, had his fears allayed, however unreasonably, that is one thing. But if he did suspect wrongdoing yet failed to make enquiries because "he did not want to know" (category (ii)) or because he regarded it as "none of his business" (category (iii)), that is quite another. Such conduct is dishonest, and those who are guilty of it cannot complain if, for the purpose of civil liability, they are treated as if they had actual knowledge."[296]

Unfortunately this clarity of thought proved to be absent when the case reached the Court of Appeal[297] whose analysis has been criticised for considering the issues in "...a somewhat casual way..."[298] and as leaving "...a confusion worse confounded in a difficult area of law."[299]

Despite this, three cases following *Agip* have provided some insights. Thus, in *Eagle Trust v. S.B.C. Securities* [1992][300] Vinelott J. took the view that want of probity was a requirement and this could only come from actual knowledge. Equally, the Court of Appeal in *Polly Peck International v. Nadir (No.2)* [1992][301] and the Privy Council in *Royal Brunei Airlines v. Tan* [1995][302] appear to have accepted that dishonesty or lack of probity was a requirement. Thus we have a situation in which dishonesty is a pre-requisite even though we may not be able to point to a certain degree of knowledge which will necessarily demonstrate its presence.

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[296] *Agip (Africa) v. Jackson* [1987] Ch 265 at page 292, 293.
[297] Goulding, S., Conv. 367; Norman, H. (1992) 12 L.S. 332; Harpum, C., (1990) 50 C.L.J. 409.
[298] *Equiticorp Industries Group Ltd. v. Hawkins* [1991] 3 N.Z.L.R. 700 at page 723, *per* Willes J.
[299] Harpum, C., (1990) 50 C.L.J. 409, 411.
[300] [1992] All E.R. 448.
[301] [1992] 4 All E.R. 769. Thus Scott L.J. suggested that there was a "...general consensus of opinion that, if liability as a constructive trustee is sought to be imposed...on the basis that the defendant has assisted in the misapplication of trust property (knowing assistance), something amounting to dishonesty or want of probity on the party of the defendant must be shown": at page 777.

However, returning to the original formulation of *Barnes v. Addy* (1874) it is clear that a second question concerning dishonesty arises. Specifically, whether lack of probity must also be present with regard to the relevant trustee, and traditionally it had been held that a fraudulent and dishonest design was required.[303] However, following *Royal Brunei Airlines* v. *Tan* [1995][304] it would appear that this situation has undergone a sea change. In that case the Plaintiffs appointed the Brunei company, Borneo Leisure Travel, to act as a travel agent intended to sell passenger and cargo transport. The relevant contract stated that all moneys received by the company on behalf of the airline belonged to the airline and had to be paid to it within 30 days. These moneys were paid into the company's general business accounts out of which normal expenses were paid. A number of payments were also transferred from this account into deposit accounts. These were opened in the names of the company, its managing director or principal shareholder, Tan. When the contract was terminated it became apparent that the company was both insolvent and in arrears to the airline, which brought an action to recover the amount due from the Respondent. Among other issues, it was claimed that Tan had knowingly assisted in the fraudulent and dishonest design of the airline's trustees, *viz.*, the company.

However, in the instant case, "...evidence revealed a sorry tale of mismanagement and broken promises, but it was not established that B.L.T. was guilty of fraud or dishonesty in relation to the amounts it held in trust for the airline."[305] As a result in the Brunei court, Fuad P. had come to the conclusion that:

> "As long-standing and high authority shows, conduct which may amount to a breach of trust, however morally reprehensible, will not render a person who has knowingly assisted in the breach of trust liable as a constructive trustee, if that conduct falls short of dishonesty."[306]

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[302] [1995] 3 All E.R. 97.
[303] *Barnes v. Addy* (1874) L.R. 9 Ch. App. 244.
[304] *Royal Brunei Airlines v. Tan* [1995] 3 All E.R. 97, 101.

This problem formed the basis of the Privy Council's advice delivered by Lord Nicholls: specifically, must the breach of trust which is the pre-requisite of a "knowing assistance" action itself be dishonest and fraudulent? His Lordship postulated that in a number of situations this could lead to injustice:

> "Take a case where a dishonest solicitor persuades a trustee to apply trust property in a way the trustee honestly believes is permissible but which the solicitor knows full well is a clear breach of trust. The solicitor deliberately conceals this from the trustee. In consequence, the beneficiaries suffer a substantial loss. It cannot be right that in such a case the accessory liability principle would be inapplicable because of the innocence of the trustee. In ordinary parlance, the beneficiaries have been defrauded by the solicitor. If there is to be an accessory principle at all, whereby in appropriate circumstances beneficiaries may have direct recourse against a third party, the principle must surely be applicable in such a case, just as much as in a case where both the trustee and the third party have been dishonest. Indeed, if anything, the case for liability of the dishonest third party seems stronger where the trustee is innocent because in such a case the third party alone was dishonest and that was the cause of the subsequent misapplication of the trust property."[307]

His Lordship considered a number of cases which pre-dated Lord Selborne's formulation[308] and concluded that "*Barnes v. Addy* had been interpreted in an excessively narrow manner, "...as though it were a statute."[309] The result is that:

> "...the courts have found themselves wrestling with the interpretation of the individual ingredients, especially "knowingly" but also "dishonest and fraudulent design on the part of the trustees", without examining the underlying reason why a third party who has received no trust property is being made liable at all."[310]

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[305] [1995] 3 All E.R. 97, 101.
[306] *Royal Brunei Airlines v. Tan* [1995] 3 All E.R. 97, 101.
[307] *Ibid.* His Lordship went on to suggest that there was no difference in principle between the third party who procures the breach and the third party who assisted in the breach. He gave the following example, "A trustee is proposing to make a payment out of the trust fund to a particular person. He honestly believes he is authorised to do so by the terms of the trust deed. He asks a solicitor to carry through the transaction. The solicitor well knows that the proposed payment would be a plain breach of trust. He also well knows that the trustee mistakenly believes otherwise. Dishonestly he leaves the trustee under his misapprehension and prepares the necessary documentation. Again, if the accessory principle is not to be artificially constricted, it ought to be applicable in such a case."
[308] *Fyler v. Fyler* (1841) 3 Beav 550; *A-G v. Leicester Corp.* (1844) 7 Beav 176; *Eaves v. Hickson* (1861) 30 Beav 136.
[309] [1995] 3 All E.R. 97, 103.
[310] *Ibid.*

Having concluded that the relevant requirement was dishonesty on the part of the participant, the next question was clearly what form of behaviour fulfilled that criterion. Lord Nicholls' initial answer to this question was noted in Chapter One[311] and provides a logical approach to straightforward situations arising in this area. However, its application in the more complex areas of negligence or risk taking is potentially problematic. In response his Lordship suggested that:

> "Acting in reckless disregard of others' rights or possible rights can be a tell-tale sign of dishonesty. An honest person would have regard to the circumstances known to him, including the nature and the importance of the transaction, the nature and importance of his role, the ordinary course of business, the degree of doubt, the practicality of the trustee or the third party proceeding otherwise and the seriousness of the advice and consequences to the beneficiaries. The circumstances will dictate which one or more of the possible courses should be taken by an honest person."[312]

This appears to replace the view that want of probity can be discerned from a certain type of knowledge, with the belief that dishonesty can be inferred from all the circumstances. This is no doubt true, but whether it increases certainty in the area must be open to question. Indeed, even a "reckless disregard of others' rights" is no more than a "tell-tale sign". This is a formulation which allows the courts to "do justice" in a particular case but must surely lead to increased litigation. It might be argued that this situation is apparently increased when one considers that at other points in the judgment his Lordship suggested that a party's motives should be taken into consideration,[313] a view which also, *prima facie*, moves the test away from the objective standard being sought.

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[311] "The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual. If a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour. In most situations there is little difficulty in identifying how an honest person would behave. Honest people do not intentionally deceive others to their detriment...": *Royal Brunei Airlines* v. *Tan* [1995] 3 W.L.R. 64, 73.

[312] [1995] 3 W.L.R. 64, 73.

[313] [1995] 3 W.L.R. 64, 75.

Nevertheless, it has been argued that Lord Nicholls has in fact created a test which is objective whilst taking into consideration the defendant's motives.[314] Thus, the question is whether a reasonably honest person would consider the defendant's actions to be honest in the light of his motives, with the same objective standard applied to those motives.[315] This, it is submitted; is not unreasonable however, it is difficult to imagine situations in which a defendant would fail the primary test of dishonesty and yet be saved by virtue of his honest motives. If this is the case then it can be seen as an unnecessary complication.

The case therefore attempts to move the test away from knowledge to dishonesty, and Lord Nicholls specifically disparaged the *Baden* test.[316] However, even a brief examination of the new test and the "tell-tale" signs espoused by his Lordship demonstrates that they entail an examination of whether the person "knowingly" appropriated the other's property and whether they "intentionally deceived others to their detriment" with regard to "the nature and the importance of the transaction, the nature and importance of his role, the ordinary course of business."[317] In other words, the case implicitly recognises that dishonesty cannot be fully disassociated from knowledge but does little to clarify what form of knowledge is sufficient. Nevertheless, in moving the emphasis away from sterile categories of knowledge, potentially disassociated from the principles underlying liability, to dishonesty, it is to be welcomed. Whether it will also increase certainty and therefore reduce unnecessary litigation must, however, be open to question.

[314] Gardener, S., *op. cit.* at page 56, 67.
[315] *Ibid.*
[316] [1995] 3 W.L.R. 64, 76.
[317] Gardener, S., *op. cit.* at page 56, 67.

3.4.2: LIABILITY FOR KNOWING RECEIPT.

It is well established that a party who receives trust property for his own benefit, knowing that the relevant transference was in breach of trust, holds the property as a constructive trustee. Given the above discussion, it is unsurprising that the primary question in this area is again whether knowledge should be required and, if so, what form it should take.

Birks analyses the subject in what might be seen as purely restitutionary terms. Thus he argues that a person receiving trust property for his own benefit is unjustly enriched and an action against him should therefore be maintainable regardless of mental state.[318] Gardener[319] suggests that this position has the advantage of bringing that law relating to knowing receipt in the context of trust property into line with that relating to the unjust enrichment of individuals, and notes that Millett has appeared to support this position both judicially[320] and extra-judicially.[321] Despite this, when Birks initially mooted this proposition it could be confidently stated that it did not comply with authority. Thus, for example, an innocent volunteer who dissipates trust property will not be liable.[322] However, under a defensible interpretation of *Lipkin Gorman* v. *Karpnale Ltd*[323] it might be argued that this position is now, if not existent, then obtainable.[324] The logic of this position will be examined further in the following chapter. For the moment however, we will continue on the basis that more than mere receipt is required,[325] and ask again what is the extra factor which allows recovery? Unsurprisingly, the possibilities are not dissimilar to those found in the assistance cases and largely revolve around dishonesty, risk taking, knowledge and notice.

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[318] Birks [1989] L.M.C.L.Q. 296. For a discussion of the restitutionary aspects of knowing receipt see Smith, L., "W(h)ither Knowing Receipt" 114 L.Q.R. 394; *Gold v. Rosenberg* (1997) 152 D.L.R. (4th) 385; *Citadel General Assurance Co. v. Lloyds' Bank Canada* (1997) 152 D.L.R. (4th) 411.
[319] Gardener, S., *op. cit.* at page 56, 86.
[320] El Ajou v. Dollar Holdings Plc. 3 All E.R. 717, 735, 738, 739.
[321] Millett, P. *op, cit.* at page 82.
[322] *Re Diplock* [1948] Ch. 465.
[323] [1991] 3 W.L.R. 10 (H.L.); [1991] 2 A.C. 548.
[324] See Harpum, C., "The Basis of Equitable Liability" in *The Frontiers of Liability* (Ed. Birks) (1994).
[325] Which, it is suggested, is still a majority view.

As we have seen above, Gibson J. in *Baden* was of the opinion that knowing receipt and assistance were both susceptible to the five categories of knowledge.[326] However, this position did not go unchallenged for long, specifically with regard to the sufficiency of notice.[327] In *Re Montagu's Settlement,* Megarry V.C. argued that notice relevant to the doctrine of purchaser without notice, was necessarily different from the knowledge required for the imposition of a constructive trust, not least because in the former area there existed long-established machinery for investigating defects in the transfer of land.[328] As a result he felt that suggestions in *Selangor*[329] and *Karak* to the effect that constructive notice was sufficient were irreconcilable with *Re Diplock*: the question was not one of notice but whether the "conscience of the recipient is sufficiently affected to justify the imposition of such a trust." This involved a want of probity and could only be demonstrated by the *Baden* categories (i) to (iii). A similar conclusion appears to have been reached in *Eagle Trust,*[330] although Vinelott J. seems to have taken the view that in the absence of other explanations categories (iv) and (v) might lead to the inference that the recipient knew that the asset belonged to the trust.

The question was further examined by Millett J. in *Agip* who held[331] that constructive trusteeship could be imposed (a) where a party received property for his own benefit which was transferred to him in breach of trust; (b) where a party received property for his own benefit and subsequently discovered that the transfer was in breach of trust; and (c) where a party received trust property lawfully for another's benefit and then deals with it in a manner inconsistent with the trust.[332] However, with regard to the requirements of knowledge, he satisfied himself with the wide statement that the person receiving trust property for his own benefit is

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[326] *Baden Delvaux v. Société Générale* [1983] B.C.L.C. 325.

[327] "Does it suffice if the recipient had 'notice' that the property he was receiving was trust property, or must he have not merely notice of this, but knowledge, or 'cognisance,' as it has been called.": *Re Montagu's Settlement* [1987] 1 Ch. 264, 276, *per* Megarry V.C.

[328] Relying on *Re Diplock* [1948] Ch. 465, 478.

[329] [1968] 1 W.L.R. 1555, 1582.

[330] [1992] 4 All E.R. 488.

[331] In reliance on *Baden Delvaux v. Société Générale* [1983] B.C.L.C. 325; [1995] 4 All E.R. 161.

[332] " ...the person who receives for his own benefit trust property transferred to him in breach of trust...is liable as a constructive trustee if he received it with notice, actual or constructive, that it was trust property and that it was transferred to him in breach of trust, or if he received it without such notice but subsequently

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liable if he receives it with notice (actual or constructive) that it was trust property transferred in breach of trust.[333] In this he made a distinction between the party receiving trust property for his own benefit and an agent receiving it for another's. Although constructive knowledge would be sufficient in the former case, actual knowledge would be required in the latter. Moreover, in *El Ajou v. Dollar Land Holdings plc* [1993],[334] while accepting that notice in a conveyancing sense was not applicable, he was of the opinion that an "analogous doctrine" was appropriate.

In *Cowan de Groot v. Eagle Trust plc* [1992][335] Knox J. reviewed the various authorities and came to the conclusion that:

> "I do not accept the submission made to me that in the case of knowing receipt of trust property it is not necessary to establish at least in the case of a bona fide purchaser for value of trust property that the recipient had actual knowledge in categories (i), (ii) and (iii) in the Baden case of the breach of trust...I consider that the relegation of a purchaser for value to a category more, rather than less, exposed to claims of constructive trusteeship to be misconceived."[336]

Nevertheless, although he attempted to find a strand of authority for this position he was forced to accept that those cases supporting it could be balanced by others which did not view want of probity as a requirement.[337] Arden J. came to a similar conclusion; however, as we noted above, Vinelott J. if not disagreeing appears to have identified slightly differing nuances. If differences of opinion exist within that case, there is no doubt that the cases taken as a whole fail to provide a definitive

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discovered the facts. In either case as from the time he received the property and in the second as from the time he acquired the notice...": [1990] Ch. 265,291.

[333] He has expanded on this extra judicially when he suggested, "Such considerations led Lindley L.J....to give his well known warning against the extension of the equitable doctrine of constructive notice to commercial transactions...it is inaccurate and...harmful. The purchase of land and the giving of a bank guarantee are both commercial transactions; yet the doctrine of constructive notice applies to them. Lindley L.J. was speaking of the doctrine as it was developed by the court of chancery of title in every case. This cannot be applied without modification to transactions where there is no recognised procedure for investigating title. The modification is to insist on the need to show that circumstances were such as to put the transferee on inquiry; and in an ordinary commercial context this is very difficult to establish.": Millett., P., "Equity's Place in the Law of Commerce", Lecture to the Chancery Bar Association, June 1997, 1-2.

[334] [1993] 3 All E.R. 717; [1994] 2 All E.R. 688.

[335] [1992] 4 All E.R. 700.

[336] At page 760.

answer or, arguably, a conclusive argument in favour of one approach over another. Thus we can see that broadly speaking a requirement for dishonesty, to a greater or lesser extent, equating to *Baden* categories (i) to (iii) is to be found in *Carl-Zeiss Stifung v. Herbert Smith & Co. (No.2)* [1969],[338] *Re Montagu's Settlement* [1987],[339] *Competitive Insurance Co. Ltd. V. Davies Investments Ltd* [1975],[340] *Eagle Trust v. S.B.C. Securities* [1992],[341] and *Polly Peck International v. Nadir (No.2)* [1992][342] *Eagle Trust Plc* v. *SBC Securities Ltd* [1996].[343] However, on the other hand *Belmont Finance Corporation v. Williams Furniture Ltd (No.1)* [1979],[344] *Nelson v. Larholt* [1948][345] and *Westpac Banking v. Savin* [1985][346] accept a lower standard.

Despite this diversity, the present author would suggest that the weight of judicial opinion falls on the side of the former argument.[347] As a matter of principle this is logically defensible. The requirements of knowledge of circumstances indicating facts or putting on inquiry are, generally speaking, more suitable to specific circumstances where machinery for investigation exists,[348] rather than that of general applicability. However, there is little doubt that a strict application of the categories, without consideration of the wider circumstances of the case or the requirements of "equity's conscience" or the underlying principles of liability, is necessarily counter productive. In this context, although categories (i) to (iii) are likely to demonstrate want of probity, there may be situations which fall into the final two categories from which it can be inferred. In this context it is submitted that Vinelott J. in *Eagle Trust* [1996][349] was not unreasonable in suggesting that certain circumstances would require a party to satisfy himself that a reasonable

[337] Including *Nelson v. Larholt* [1948] 1 K.B. 339; *Belmont Finance Corp. v. Williams Furniture Ltd (No.2)* [1980] 1 All E.R. 393; *Westpac Banking v. Savin* [1985] 2 N.Z.L.R. 41.
[338] [1969] 2 Ch. 276.
[339] [1987] 1 Ch. 264.
[340] [1975] 1 W.L.R. 1240.
[341] [1992] All E.R. 448.
[342] [1992] 4 All E.R. 769.
[343] [1996] 1 BCLC 121.
[344] [1979] Ch. 250.
[345] [1948] 1 K.B. 339
[346] [1985] 2 N.Z.L.R. 41.
[347] i.e. that dishonesty or want of probity is required and this is demonstrated by categories (i) to (iii).
[348] For example, the purchase of land.
[349] [1996] 1 BCLC 121.

explanation existed for apparently fraudulent circumstances. Thus the present author would accept Millett's[350] position that in certain situations constructive knowledge may be sufficient where a party is put on inquiry, but that in ordinary commercial circumstances this should be "very difficult to establish."[351] In other words, as with regard to "knowing assistance" the courts should be looking for the relevant mental requirement rather than a rigid range of categories which demonstrate its presence, and that will depend on all the circumstances.[352]

Nevertheless, it is submitted that in the real world one could not honestly predict to a recipient which of the two threads of authority discussed above would be applied; whether a specific set of circumstances would fall into a particular *Baden* category; whether inference could or would be made in the absence of knowledge falling within categories (i) to (iii) and if so whether any inquiries made would be sufficient to negate such inferences. As a result, perhaps even more noticeably than with regard to knowing assistance, this area is riddled with uncertainty which will inevitably result in expensive and perhaps unnecessary litigation.

3.4.3: CONSTRUCTIVE TRUSTS.

The primary problems in this area are: (a) when a constructive trust will come into being, which we have discussed above; and (b) how they operate in an international context, which will be examined in Chapter Five. Nevertheless, there are a number of issues which should be considered before moving on.

In this context perhaps the most prominent issue is the relationship between restitution, equity, the law of property, constructive and resulting trusts. These questions have recently come to the attention of the House of Lords in *Westdeustche Landesbank Girozentrale* v. *Islington London Borough Council*,[353] a

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[350] Millett., P., "Equity's Place in the Law of Commerce", Lecture to the Chancery Bar Association, June 1997, 1-2.
[351] *Ibid.*
[352] It might be suggested that this lessens certainty. However, it is, perhaps, doubtful whether the categories of knowledge are more effective in this context.
[353] [1996] 2 W.L.R. 802.

case which, it will be remembered, arose out of the High Court's determination that interest-rate swap agreements undertaken by local councils were *ultra vires*.

In that case, Lord Goff observed that for the last four decades restitution lawyers, in seeking to establish a coherent body of restitution law, have concentrated on constructive and resulting trusts because they appear to have the function of reversing unjust enrichment.[354] This is undoubtedly true as can be seen from a spate of articles to which his Lordship referred.[355] However, as he went on to note, these moves have caused concern among equity lawyers who believe that the principles underlying these institutions will become illegitimately distorted. Perhaps unfortunately it was Lord Goff's view that the dispute between the parties in *Westdeustche Landesbank Girozentrale* did not require him to consider these questions.

However, Lord Browne-Wilkinson was less reticent. He considered the position of coins mixed in a bag and noted that the ability to trace at common law would be lost if the coins were mixed, and that equitable tracing would only be available if there had been a breach of a fiduciary duty:

> "...i.e. if either before the theft there was an equitable proprietary interest...or such interest arises under a resulting trust at the time of the theft or the mixing of the money. Therefore, it is said that a resulting trust must arise either at the time of the theft or when the moneys are subsequently mixed. Unless this is the law, there will be no right to recover the asset representing the stolen moneys once the moneys have become mixed. I agree that the stolen moneys are traceable in equity. But the proprietary interest it is enforcing in such circumstances arises under a constructive, not a resulting trust."[356]

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[354] [1996] 2 W.L.R. 802, 810.
[355] Notably, Birks, "Restitution and Resulting Trusts", in *Equity: Contemporary Legal Developments* (Ed. Goldstein) (1992), p.335; Burrows, "Swaps and the Friction between Common Law and Equity" [1995] R.L.R. 15 and Swadling, W., "A new role for resulting trusts?" (1996) 16 Legal Studies 133.
[356] [1996] 2 W.L.R. 802, 838-839.

Nevertheless, his Lordship suggested that clear authority for the proposition that "...when property is obtained by fraud, equity imposes a constructive trust on the fraudulent recipient..."[357] was difficult to find.[358]

This part of his Lordship's judgment is very far from being a model of clarity.[359] Moreover, in the light of the facts of the case, these comments can be seen as no more than *obiter*. However, when taken together with the remarks that follow, they represent clear House of Lords consideration of the issue which comes to the conclusion that argument in favour of a restitutionary resulting trust giving a proprietary interest was:

> "...not based on sound principle and in the name of unjust enrichment is capable of producing most unjust results. The law of resulting trusts would confer on the plaintiff the right to recover property from, or at the expense of, those who have not been unjustly enriched at his expense at all.[360]

It would seem therefore that the law of restitution will, for the time being at least, be forced to develop without the help of the resulting trust. Nevertheless, Lord Brown-Wilkinson suggested the remedial constructive trust could potentially provide a fertile possibility for further development, and some commentators[361] have argued that this can be seen in *Chase Manhattan Bank NA* v. *Israel-British Bank (London) Ltd.*[362] However, his Lordship[363] took the view that the trust in that case was an institutional constructive trust arising out of the retention of property after the recipient became aware of the relevant mistake, but even this has been the subject of criticism.[364]

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[357] The property being recoverable and traceable in equity.
[358] At page 839.
[359] Birks, P., "On taking seriously the difference between tracing and claiming", *op. cit.* at footnote 15.
[360] *Ibid.*
[361] Scott, S.R., "The remedial constructive trust in commercial transactions." [1993], L.M.C.L.Q., 330; Paciocco, D.N., "The Remedial Trust - A Principal Basis for Priorities Over Creditors" (1989) 68 Can. Bar Rev. 315.
[362] [1981] Ch. 105.
[363] At pages 837-838.
[364] Thus Millett believes that the case is wrongly decided, "...not because the defendant had no notice of the plaintiff's claim when he first received the money, but because the plaintiff had no proprietary interest for him to have notice of. The plaintiff had intentionally though mistakenly parted with all beneficial interest in the money. By itself notice of the existence of a ground for restitution is obviously insufficient to found a proprietary remedy; it is merely notice of a personal right to an account and payment. It cannot constitute an
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Ultimately *Westdeutsche Landesbank* does little to clarify the question of when constructive trusts come into being or their relationship to resulting trusts, other than to suggest that the restitutionary resulting trust is to be discouraged. As Millett has noted extra-judicially that case has "horribly muddied"[365] the waters and until it is "...reconsidered by the House of Lords...this subject will remain perplexing, incoherent and self contradictory."[366]

If authority is problematic, then are there any definitive propositions we can make as a matter of principle? One in particular is, it is suggested, of importance in the context of the present study. We have seen above that the term "constructive trust" is sometimes considered to be a fiction used to denote personal liability with regard to "knowing assistance", and that it has even been suggested that a knowing recipient's liability is merely personal. With regard to the former usage, it is submitted that it is at best inappropriate and misleading and at worst potentially damaging in that it confuses a proprietary institution with a personal remedy. Thus, as Millett notes, "The accessory, charged with 'knowing assistance' in the misapplication of the plaintiff's money, is said to be liable to account as a 'constructive trustee.' What do these last three words add except confusion? The defendant is not a trustee at all, constructive or otherwise. It would help to clarify the law if we were to say simply that he was liable to account in equity."[367]

We move on to the use of the term "constructive trustee" in the context of personal rights with regard to "knowing receipt." What are we to make of the suggestion, noted above, in *Re Montagues Settlement*[368] to the effect that equitable tracing determines property rights while a constructive trust creates personal rights going beyond "...mere property rights". Once again Millett is entirely correct to suggest

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adverse proprietary interest if there is none. With all due respect to Lord Browne-Wilkinson, I believe that his analysis in the *Westdeutsche Landesbank* case is open to criticism for the same reason.": Millett., P., "Equity's Place in the Law of Commerce", *op. cit.* at page 23.

[365] Millett, P., "Equity's Place in the Law of Commerce", *op. cit.* at page 16.

[366] Millett, P., "Equity's Place in the Law of Commerce", *op. cit.* at page 25.

[367] Millett, P., "Equity's Place in the Law of Commerce", *op. cit.* at page 16.

[368] *Re Montagues Settlement* [1987] Ch. 264 (quoted above).

that this is "...a grotesque misuse of language."[369] Tracing, certainly in its wider sense, can be associated with both personal and proprietary rights.[370] On the other hand, the term "constructive trust" should be limited to situations in which a party holds property on behalf of another. Even though other rights may flow from the circumstances which give rise to a constructive trust they are not concerned with trusteeship and should always be carefully differentiated.[371]

Nevertheless, we have seen that the courts have not been able or willing to restrict themselves to these simple principles. Equally, we have noted above that "equity's conscience" has provided a confusing benchmark by which to decide when liability should be imposed. Most specifically, even if it were possible to formulate a logical test for the requisite mental state, we might ask why fault on the part of the recipient is required at all. In this context, it may be that as the influence of *Lipkin Gorman* v. *Karpnale*[372] comes to the fore, these questions can be better answered by reference to restitution/unjust enrichment. Certainly a number of commentators have welcomed this prospect. Thus Fennel notes that the case promises to harmonise the common law and equity and suggests:

> "The area...is a clear example of where this would be beneficial. There would be no reason to have a separate category of 'knowing receipt..." if it were to be accepted that liability for unjust enrichment could occur whenever the fraud of the plaintiff caused the defendant to be enriched...The defendant would be liable under a proprietary constructive trust if...[the]...property is still in his hands...but once...[he has]...parted with it liability should be strict ...a separate category of liability for knowing receipt...is to fall into the trap of making the...compensation dependent...on the technicalities of the way in which he was defrauded..."[373]

Equally, Harpum suggests of the area that, "...*Lipkin Gorman* has precipitated a legal revolution. In reality it is the *only* relevant authority."[374] The next question is, therefore, whether restitution potentially provides a more logical explanation of

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[369] Millett, P., "Equity's Place in the Law of Commerce", *op. cit.* at page 17.
[370] *Ibid.*
[371] We might note that even Millett has not been beyond using the term "...personal liability to account for it as a constructive trustee...": *Agip (Africa) v. Jackson* [1987] Ch 265.
[372] [1989] 1 W.L.R. 1340.
[373] Fennel, S. *op. cit.* at page 55.

when and why a party receiving or dealing with property should be liable. These questions represent the central themes of Chapter Five.

[374] Harpum, C., "The Basis of Equitable Liability" *op. cit.* at page 25.

3.5: SUBROGATION.

Subrogation and tracing are often closely linked both in litigation and academic comment; as a result a brief discussion of subrogation's relationship to common law and equitable tracing is appropriate.[375] Subrogation allows one party to stand in the position of another and is perhaps most commonly used with regard to insurance claims:[376] "an insurer who pays the loss is entitled to stand in the shoes of the insured in respect of any action against the party responsible for the loss."[377] Nevertheless, Birks is generally dismissive of subrogation's usefulness, arguing that it is a process which adds little to the normal techniques of restitution and simply allows the plaintiff to take over some of the rights of a previous creditor (rather than being fully substituted to them all) when an appropriate link to enrichment can be shown: notwithstanding the fact that the enrichment is in a negative form, i.e. the paying of a debt.[378] Nevertheless, it is used in practical litigation and can, according to some commentators, be applied where tracing is not possible to produce "...tracing like effects"[379] by allowing the plaintiff to be "subrogated to a *secured* claim."[380] Thus, Matthews suggests that subrogation could be used when the defendant owed a bank debt secured on a mortgage and used the plaintiff's funds to pay off that debt. The defendant will now wish to be subrogated to the bank's security over the relevant property.[381] There are several cases which commentators

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[375] Birks notes subrogation's close connection to tracing when he says, "...the first question is always whether the enrichment received can indeed be said to survive in the removal of a burden from the defendant. In other words, as always in relation to this measure, identification by the rules of tracing comes first.": Birks, *Introduction*, *op. cit.* at page 96. He continues, "Among the enrichments discoverable at the end of a chain of substitutions may be assets of any kind, even negative. The search may end in a car, or a share, or a debt discharged. It is when it ends in a debt discharged that the vocabulary changes from lien and beneficial to subrogation."; Smith, *op. cit.* at page 33. For a recent examination of this subject in the context of unjust enrichment, see, *Banque Financière De La Cité* v. *Parc (Battersea) Ltd And Others* [1998] 2 W.L.R. 475.

[376] Burrows identifies five types of subrogation, "(1) indemnity insurers' subrogation rights; (2) sureties' subrogation rights; (3) subrogation rights of business creditors dealing with trustees; (4) lenders' subrogation rights; and (5) bankers' subrogation rights.": Burrows, *Restitution*, *op. cit.* at page 77.

[377] Hanbury & Martin, *op. cit.* at page 667.

[378] "I hesitate to give subrogation a heading of its own. I shall say that within the law of restitution it really adds nothing to the number of techniques already identified. It is in the nature of a metaphor which can be done without.": Birks, *Introduction*, *op. cit.* at page 93. Goff and Jones are, perhaps, more positive about subrogation's importance and its relationship to Restitution: Goff and Jones, *op. cit.* at page 526. For a discussion of this position, see Burrows, *Restitution*, *op. cit.* at pages 77-93.

[379] Matthews, "Tracing..." *op. cit.* at page 53.

[380] *Ibid.*

[381] Matthews, *op. cit.* at page 31..

(notably Matthews) suggest point towards this possibility.[382] However, *Re Diplock* [1948][383] appears to provide a counter argument.[384] Nevertheless, the suggestion that the discharge of the debt means that there is nothing left to be subrogated to seems to be the result of a common misconception, specifically, that subrogation is entirely synonymous with substitution, rather than being convenient shorthand for acquiring "...a right with characteristics and content identical to that formally enjoyed by the bank."[385] The problem, as Birks notes (although not in the context of the instant case):

> "...is only a function of the image, for the real question is about surviving enrichment, and you are all the more certainly enriched if the bank is not merely content not to sue but absolutely barred from doing so by the discharge of its claim."[386]

Matthews and Haydon also find fault with the argument's basis in authority concerning the plaintiff's lack of association with the transaction. Haydon attempts to distinguish *Re Hallet,* while Matthews takes a different approach[387] and it is difficult to argue that, at present, the position is anything other than uncertain.[388] However, as a matter of principle, Hanbury's position is appealing:

> "Where the defendant pays off debts with money which he should never have had, it is no hardship to him to be put back in the position he was in before using the money to pay the debts."[389]

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[382] *Trevillian* v. *Exeter Corporation* (1854) 5 De G M & S 828; *Nottingham Permanent Benefits Building Society* v. *Thursten* [1903] Ch. 6.

[383] [1948] Ch. 465.

[384] "The effect of the payment to the bank was to extinguish the debt, and the charge held by the bank ceased to exist. The case...cannot be regarded as one of subrogation, and, if the [beneficiaries] were entitled to a charge, it would have to be a new charge created by the court.": [1948] Ch. 465, 549; for a criticism of this decision see: Hanbury & Martin, *op. cit.* at page 667. This was later accepted in *Euroactiveidade AG* v. *Mason Investments Limited* in which it was said, "that [the mortgagees'] debt was charged and with it the security, and so...that there are no longer any rights of [the mortgagees] left to which the plaintiff can be subrogated. The plaintiff was not a party to its funds being used to pay off the outstanding loan to [the mortgagees]. If it had been then it would have been proper for me to apply the presumption to which Lord Jenkins referred in the Ghana Bank case but as the plaintiff was not a party it must seek redress in some other way.": *Euroactiveidade AG* v. *Mason Investments Limited*, Unreported, 18 April 1994, quoted by Matthews.

[385] Birks, *Introduction op. cit.* at pages 94-95.

[386] *Ibid.*

[387] "...this refinement [Haydon's] would cause more difficulty in application than it is worth. Far more to hold *Diplock* on this point as decided *per incuriam*, in ignorance of binding authority not cited to them, i.e. *Travillian* and *Thurstan.*": Matthews, P., "Tracing..." *op. cit.* at page 33.

[388] See, however, *Bishopgate Investment Management Limited* v. *Homan* [1994] 3 W.L.R., 1270, 1279, *per* Legget L.J; see also *Napier and Ettrick (Lord)* [1993] 2 W.L.R. 42.

[389] Hanbury & Martin, *op. cit.* at page 667.

This position, moreover, seems more attractive if one accepts Birks' argument that subrogation is merely the end product of the tracing process in which one is left with a debt or negative enrichment. If this is the case then the question as to whether a proprietary right is possible must be decided in the same way as it would be in any other situation.[390]

[390] "...if the plaintiff's circumstances are such that, had the money which was received from him been spent on some corporeal asset or been put into a mixed fund, he would have been entitled to a claim *in rem* in the enrichment identified as surviving at the time of the claim, then, if the money is instead traced into a discharged mortgage, he ought to be able to revive the security. In other words a plaintiff with a sufficient proprietary base to justify a claim *in rem* should not be deprived of that advantage in a case in which the value originally received happens to be traced into the discharge of a mortgage.": Birks, *Introduction*, *op. cit.* at page 390. Of course, as Birks goes on to note, "On the other hand a plaintiff with no proprietary base should not be promoted to the rank of a secured creditor merely because the rules of identification show that the money discharged a secured debt, no more than he would be so promoted if it should be shown that the money bought an asset such as a car or a house." For a further discussion of some of the issues raised by this area see also Mitchell, "Subrogation and Part Payment of Another's Debt." [1998] L.M.C.L.Q., 15; *Banque Financiere de la Cité v. Parc (Battersea) Ltd* (29 November 1996) Unreported (C.A.).

3.6: CONCLUSION.

The above discussion demonstrates the importance of tracing as a, if not the, primary means by which the courts can hope to ensure that a party who has lost an asset as a result of dishonesty or mistake is recompensed. It also highlights the complexities under which it labours, the internal illogicalities which exist within the system and some of the ways in which it appears to fall short of the goals we might expect from a rational approach. Many of these failings are of a narrow and technical nature. Thus we have seen that a party's rights can, in certain circumstances, be dependent not upon the fundamental issues involved in a particular case, but upon the legal techniques which he uses to enforce them.[391] Equally, common law tracing, under a traditional approach, is potentially defeated not only by the mixing of funds but also by their electronic transfer and other common banking techniques. In a modern commercial context this effectively emasculates common law tracing as a response to fraud. Moreover, we have noted the difficulties which the courts and commentators have experienced not only in defining the tracing process but also in adequately explaining its nature. Equally, we have seen that some judicial reasoning is based upon past mistakes which form a chain stretching from *Taylor* v. *Plumer* to *Lipkin Gorman* v. *Karpnale* and beyond.

Such problems are exemplified by the fact that the majority of commentators persist in arguing that common law tracing is no more than an identification process concerned with property rights. It may be true that in one sense any technique that leads to the recognition of one particular element or factor over another is indeed an identification process. However, many commentators discuss common law tracing not in such all encompassing terms but as a narrow procedural/evidential technique. If this is the case, then it is submitted that we must clearly stipulate what we are identifying, and the common answer is property rights. Unfortunately, the

[391] This is true not only with regard to narrow tracing techniques in this area but also the wider actions that may be available to a particular plaintiff. Thus Fennel notes, "An examination of the principles behind tortious and contractual liability shows that they are not necessarily consistent with these recent developments [in restitution] and that as a result the outcome of a case may depend more on the mechanism used by the fraudster to misdirect the plaintiff's money than on either the injustice of the defendant's enrichment or the wrongful nature of his behaviour. This leads to inconsistency and the blurring of the key issues.": Fennel, S. *op. cit.* at page 38.

contention that common law tracing only identifies existing property rights in the traditional sense does not stand entirely comfortably with a belief in the "exchange product" theory. The theory is open to only two interpretations. Either, it gives a plaintiff ownership of the exchanged products, or it gives the plaintiff the right to treat the product *as if* it were his. In either case it ensures that tracing goes beyond the *narrow* evidential technique which many commentators suggest it to be. In other words, it is not a method by which the courts decide what belongs to someone, but a means by which they decide what *should* belong to him.[392] Once one takes this further step, it appears disingenuous to promulgate the fiction that only evidential forces are at work.[393] Of course, many of these difficulties are a function of the pretence that "exchange product" theory is a result of the narrow doctrines of the common law, when in fact it is a call to the conscience of equity.[394] This, as discussed above, is a result[395] of the mistaken interpretation of *Taylor* v. *Plumer* as a case concerned with common law and not equitable tracing. It might be hoped that the recent academic and judicial recognition of this mistake will in time lead to its rectification, but this may not be the case. In *The Trustee of Property of F.C. Jones & Sons (a firm)* v. *Jones,*[396] Millett L.J. affirmed, correctly, that subsequent cases[397] and rules of binding precedent ensure that this mistake has become part of the law of England. However, we might hope that in the light of this new understanding of common law tracing, the courts would refrain from expanding upon or extending the mistakes of their predecessors or explaining the basis of their approach. This does not appear to be the case. Thus, for example, despite being the first case to judicially recognise that *Taylor* v. *Plumer* was based on equitable tracing and thus therefore that part of *Lipkin Gorman* was intrinsically based upon this mistake, the judges in *Jones* v. *Jones* were willing to extend common law tracing without explaining how this can be justified as a matter of

[392] Or as Millett L.J. put it, "...can properly be regarded as representing his property.": *The Trustee of Property of F.C. Jones & Sons (a firm)* v. *Jones*, *The Times*, [1997] Ch 159, *per* Millett L.J.
[393] Although they might still be regarded as procedural or even remedial.
[394] Smith, *op. cit.*.
[395] Most specifically, the difficulties which face the common law with regard to mixtures and substitutions.
[396] *The Times*, March 13, 1996.
[397] Notably the House of Lords decision in *Lipkin Gorman* v. *Karpnale Ltd* [1991] 2 A.C. 548.

principle.[398] Moreover, that case also demonstrates that the courts may be willing to accept the fact that *Taylor* v. *Plumer* is misinterpreted, without necessarily embracing the consequences of such a determination. Thus, Millett L.J. accepted that common law tracing had been given a mistaken interpretation while still trying to find an intellectual foundation for that mistake. This required him to hold that:

> "If she [Mrs Jones] were a constructive trustee of the money, a court of equity, as a court of conscience, would say that it was unconscionable for her to lay claim to profit made by the use of her beneficiary's money. It would, however, be a mistake to suppose that the common law courts disregard considerations of conscience. Lord Mansfield C.J., who did much to develop the early law of restitution at common law, founded it firmly on the basis of good conscience and unjust enrichment."[399]

How this position sits with the fact that the common law is concerned with rights in property, or the suggestion which Millett L.J. has made on a number of occasions that common law tracing is no more than an evidential technique (a view he has shown no indication of changing[400]), is not clear, indeed, it could be argued that they are irreconcilable. This is not to suggest, however, that the court in that case did not achieve the most just solution, given the fact that they were constrained from using equitable tracing by the lack of a fiduciary relationship. Nor is it contended that Millett L.J. was wrong to hold that the techniques used in this area *should* not be based upon the reversal of unjust enrichment. The point is merely that as a matter of authority this position must be more fully explored than has yet been the case in the authorities.[401] It may indeed be that an understanding of the role of unjust enrichment can provide a solution to many of the problems in this

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[398] "I recognise that our decision goes further than the House of Lords in *Lipkin Gorman* v. *Karpnale*...in that it holds that the action for *money had and received* entitles the legal owner to trace his property into its product, not only in the sense of property for which it is exchanged, but also in the sense of property representing the original and the profit made by the defendant's use of it.": *The Times*, March 13, 1996, per Nourse L.J.

[399] *The Times*, March 13, 1996, *per* Millett L.J. This can be compared with Lord Sumner's statement to the effect that, "There is now no ground left for suggesting as a recognisable 'equity' the right to recover money *in personam* merely because it would be the right and fair thing that it should be refunded to the payer...": *Sinclair* v. *Brougham* [1914] A.C. 398, *per* Lord Sumner; see also *Baylis* v. *Bishop of London* [1913] 1 Ch. 127, *per* Hamilton L.J.

[400] Indeed in *Jones* v. *Jones* he reiterated that "...tracing [equitable and common law] is neither a right nor a remedy...": [1996] 4 All E.R. 721, 728, *per* Millett L.J.

[401] This question will be examined in detail in Chapter Four.

area. For the present, however, it is clear that relying on narrow, technical and potentially mistaken rules rather than principle severely limits the usefulness of common law tracing. An example of how this approach can influence the eventual resolution of a dispute is seen in the area of mixing and electronic transfer. It was noted above that Millett J. suggested in *Agip (Africa) Ltd* v. *Jackson* [402] that an electronic transfer of payment was capable of defeating common law tracing. Fox L.J has said of this proposition:

> "The enquiry which has to be made is whether the money paid...'was the product of, or substitute for, the original thing.' In answering that question I do not think that it matters that the order was not a cheque. It was a direction by the accountant to the bank."[403]

Despite such statements, it appears that the courts have accepted Millett J.'s restrictions with regard to electronic transfers (and clearing systems): *Bank Tejarat* v. *Hong Kong and Shanghai Banking Corp.*[404] It has been noted above that even if the proposition that the law of England cannot comprehend a simple banking transaction is exaggerated, the very fact that it is not completely untenable is absurd in the extreme.[405] Indeed, as Birks points out, the irrationality of this position was highlighted when Tuckey J. in *Bank Tejarat*, having denied that the payment could be traced under the common law rules, went on to say, "Thus, as Tejarat *paid* CAK

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[402] [1990] 1 Ch.D. 265.
[403] [1991] Ch. 574, 565, per Fox L.J.
[404] [1995] 1 Lloyd's Rep. 239. In this case an Iranian importer of steel (Acier) arranged with Tejarat (its Iranian Banker) to open a letter of credit in favour of CAK (a company incorporated in Jersey (the same family was in control of both companies). The relevant sum was payable against certifiable shipping documents and Acier paid approximately a third of the relevant sum in advance. Forged shipping documents were presented and the remainder of the sum due paid. The affairs of CAK were handled by two subsidiaries of the Hong Kong and Shanghai Bank (HKS Trustee and HKS Banking). With regard to the present discussion the method of payment is particularly relevant: Tejarat informed CAK that the relevant amount would be paid into an account held by the company in Munich (at Bayerische Vereinsbank (BV)). Once the forged papers were presented, Bayerische Vereinsbank (BV) instructed a Frankfurt bank to debit its account and pay the sum into the Hong Kong and Shanghai Bank in Frankfurt (this was done through a local clearing system). That Bank then transferred the relevant sum to HKS's account.
[405] A position accepted by Birks when he stated with regard to *Bank Tejarat*, "The application of the supposed rules of common law tracing...leads to alarming consequences. Nobody who is not a lawyer would deny that Tejarat had paid HKS Banking in Jersey for the account of CAK.": Birks, "Tracing Misused" *op. cit.*at page 92.

under mistake of fact...".[406] This statement is a perfect example of legal theory failing to match practical reality and such a divergence can only lead to injustice.[407]

Thus far, it has been assumed that the undermining of the common law rules is the result of mistake and mishap, combined with the lack of a logical framework for development. It may be, however, that there is a conscious or unconscious attempt in judicial circles to restrict the common law tracing rules to such an extent that they atrophy, leaving the way open to a logical development of the equitable rules.[408] Birks has said of this process:

> "It is impossible to say whether there is, as yet, anything like a policy in favour of paralysing the common law claim in order to achieve a unified law of restitution on purely equitable lines. It is to be hoped not. Such a policy could not possibly succeed in utterly eclipsing the common law claim and, in falling short of that extreme, it would merely accentuate inconsistencies and conflicts between claims at law and in equity."[409]

One of the themes of the present study is the belief that where a rule fails to satisfy the needs of justice it should be changed in an open and systematic way. The piecemeal methods which have often been used in the past have almost without fail created more internal and external illogicalities than they have solved. Birks' position is therefore to be commended. If we are to develop the rules of equity at the expense of the common law, this can only be done as part of a transparent process which encourages debate as to why change is necessary, what it is leading to, and how this is best to be achieved.

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[406][1995] 1 Lloyd's Rep. 239, 247, (italics added); Birks, "Tracing Misused" *op. cit.* at page 92.

[407] As Birks correctly notes, "If nothing is done about this, the danger is all too clear that the common law claim for money had and received...will become arbitrary in its application. It will come to depend on how a payer chooses to pay. Indeed as payments become more and more detached from physical paper, millions of transactions every day which everyone understands as payments will turn out to be vulnerable, in the event of a claim to restitution, to the absurd search for a string of clean physical substitutions.": *Ibid.*

[408] Millett, writing extra-judicially, has apparently given his approval to this process. Thus, for example, he suggests, "...A unified and comprehensive restitutionary remedy should be developed based on equitable principles, and attempts to rationalise and develop the common law action for money had and received should be abandoned...The requirement that there must be some breach of trust or other fiduciary obligation in order to start the tracing process in equity is indefensible and should be disregarded.": Millett *op. cit.* at page 85.

[409] Birks, "Tracing Misused" *op. cit.* at page 92.

If the common law process suffers from defects, we have seen above that the rules of equity are themselves not perfect. The requirement of an equitable property *and* a fiduciary relationship seems to be the result of yet another misinterpretation. Indeed, some might argue that to require the presence of either is overly burdensome and anachronistic. If our system is strictly divided between the common law and equity, then some close connection to the law of equity is clearly necessary if the rules of that system are to be part of a particular solution. However, we might have assumed that at this stage in the development of English law such a strict delineation would no longer be necessary: indeed, as we have seen above, judges of the eminence of Lord Denning have considered this to be the case.[410] Nevertheless, it seems that as a matter of authority this position is not yet within reach. Thus, for example, there have been some judicial suggestions that the techniques of equitable tracing are available to the common law and vice versa.[411] However, despite accepting the desirability of this position Millett L.J. has recently held that this state of grace has not yet been reached.[412] In this context it might be noted that Millett L.J., as we have seen above, often refers to tracing in the context of restitution/unjust enrichment. If this connection is justified, then the primary purpose of tracing must be to determine whether the defendant has been enriched at the expense of the plaintiff. If this is the case, it is far from apparent why the answer to that question should vary depending upon whether one is relying on the rules of equity or law. Nevertheless, we are currently left with a situation in which common law tracing is incapable of achieving its aims when faced with common banking and commercial transactions. Equally, in some of these situations the plaintiff will be unable to turn to the equitable rules because the necessary fiduciary relationship does not exist. In an attempt to do justice in such cases, the judiciary are forced to either circumvent the fiduciary requirement or, where they cannot, to use the common law rules in ways which belie their stated proprietary/identificatory nature.

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[410] *Chief Constable of Kent* v. *V* [1983] Q.B. 34, 41.
[411] [1983] Q.B. 34.
[412] *Jones & Sons (a firm)* v. *Jones*, [1997] Ch 159, *per* Millett L.J. emphasis on unjust enrichment throughout this case does seem to demonstrate an interesting change of position. In 1991 he wrote, "A unified and comprehensive restitutionary remedy is capable of being developed by recourse to traditional equitable principles and terminology...For those who prefer, however, the arguments canvassed here can readily be transferred into the currently more fashionable restitutionary language of unjust enrichment...Though whether this does anything to clarify the law is debatable.": Millett *op. cit.* at page 85.

The common law and equitable tracing rules should, at the very least, provide a logical and just way of allowing a plaintiff to (a) identify his legal or equitable property; (b) identify property which the courts believe *should* be taken to represent his property; (c) establish that his property has been used in ways which may give him the right to bring a personal action. If (a) and (b) are effectively achieved, the problems surrounding (c) should generally be eased. However, the influence of previous authority, which is either spurious or mistaken, has led to a framework of technical rules which prevent tracing from even the first and certainly the second of these aims in a fully rational manner. As a result of these failings it is submitted that the rules of tracing are in need of potentially radical[413] reform[414] if they are to achieve even these relatively simple aims.

If the logic of our tracing rules is difficult to discern then we have already noted that the questions associated with constructive trusts, knowing receipt and knowing assistance are also extremely difficult.[415] What standard of knowledge or fault is required remains doubtful, how and why constructive trusts come into being is equally confused and how this essentially proprietary institution is related to other personal remedies is apparently uncertain. What is clear, however, is that tracing, constructive trusts, "knowing receipt" and "knowing assistance" are very closely associated and can often be seen as complementary methods of promoting justice in similar circumstances. As a result, in searching for a logical explanation for tracing we should also be looking for a methodology which explains[416] these closely related concepts and remedies. If our proposed solution cannot achieve this aim then it is

[413] It is true that such reform could be more limited and be based upon a small-scale review of the narrow rules. However, even such a limited task must be based on a detailed understanding of the principles upon which tracing should be based.

[414] In attempting this process it must be remembered that the rights of the plaintiff cannot be considered in isolation. By its nature, tracing is likely to be attempted in situations in which the defendant is insolvent. The tracer's rights must therefore be measured against those of the defendant's creditors. The usual argument in favour of the tracer's rights taking priority over those of the creditors is that while the latter has taken the risk of the defendant's insolvency, the former has not. Despite some argument to the contrary (Burrows, *Restitution, op. cit.* at page 42) this argument is logical and has majority acceptance.

[415] "If the law imposing liability for receipt is unsatisfactory, the rules on liability for fault are even worse.": Fennel, *op. cit.* at page 46.

[416] Hopefully better than their traditional explanations.

likely that we will only solve a limited range of problems at the expense of creating new ones.

With regard to the narrow tracing rules, the first goal of tracing could, perhaps, be enhanced with relative ease. If we wish to allow a plaintiff to logically and justly identify his assets, we might begin by removing restrictions based on mistaken or outdated authority which separate legal theory from modern commercial reality. The first movement in this direction could be achieved by the removal of any rules which allow tracing to be defeated by the normal mixing of money in a bank account. Whether one accepts that money paid into a bank account which is in credit becomes mixed or whether one believes that the original chose in action is replaced by another, any rule which is based upon the mixing of coins in a bag and fails to understand that the majority of the world's money supply is represented by binary digits held on computer, is less than perfect. The mixing problem could be largely eliminated by allowing the common law to take advantage of the equitable rules a position which, arguably, should have been arrived at during the early part of the 20th century. We might, however, with regard to following cash transactions, adopt a somewhat more radical approach.

We have seen that the major problems associated with common law tracing in this area result from its authority-led desire to follow physical assets. However, at this point in the evolution of digital or electronic cash it would be possible, for example, to be paid for services with electronic currency which has never had a physical form. Even with regard to traditional cash, its electronic form is now normally of more importance than any physical representation that it may have had (or may have as part of a future transaction). Equally, we might argue that the requirement for a physical connection was never logical as it misunderstands the purpose and characteristics of money. Paper money is no more than a physical representation of value that value normally being the technical right to a corporeal asset which is held by the issuing government, although even that asset's value may be merely

notional.[417] One potentially effective method of removing the physical connection and outdated rules would be to turn to modern accounting practice rather than developing new legal rules. There is some evidence to suggest that courts have been willing to decide cases on the basis of expert "tracing" evidence from accountants as to whether a particular sum or asset represents the plaintiff's property.[418] There are conceivably some complex situations in which the courts would prefer to rely on rules developed as a result of authority rather than accounting methodology. However, banks and accountants have no difficulty in fully demonstrating that a sum paid into an account by means of electronic transfer, or through the clearing system, or through a mixture, or which involved a credit risk, is logically the same amount which left another account.[419] The adoption of such rules would eliminate almost all disputes with regard to the simpler aspects of common law tracing, and would allow some complex issues to be decided as a matter of fact on the basis of expert evidence concerning rules which are both more international and more sophisticated than those which the courts could hope to develop.

Nevertheless accounting practices may well fail, most notably when faced with international money-laundering methods which are often explicitly aimed at countering them. In a similar vein, and more importantly, they may have little of worth to say with regard to our second requirement of tracing: specifically, when *should* a particular asset be regarded as representing the plaintiff's property? So, if accounting techniques are of limited value, then we must look to an adaptation of

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[417] i.e. a government might issue more money than it can actually back. Although we might expect that the value of the physical money will become devalued in such circumstances. Our long and close association with paper money ensures that we normally consider the physical representation of value to be the value itself, but this is not the case. The physical representation's popularity is a function of convenience and functionality, not necessity. This would suggest that belief that the courts should follow physical assets rather than value in this area has long been mistaken, but not necessarily overly damaging. This is no longer the case when value is so often represented not physically, but electronically (there are arguments which we could make with regard to the passing of property in paper cash and its negotiability. These should, however, not blind us to the importance of value rather than physical representation).

[418] This is in effect what Birks argues for when he says, "The best way forward will be to assert as a matter of law, meaning as a matter of law and equity, what everyone already understands as a matter of fact, namely that a payment by A to Z made through the banking system is indeed a payment by A to Z. The artificial rules of tracing are rules of convenience...they do not need to be called into play when a series of banking movements...has been motivated by a well evidenced intent that A should be enabled to make payment to Z. Even in a simpler case where A asks B to pay Z and to await reimbursement, so that B pays as A's agent and is repaid later, it would be manifest nonsense to try to resolve the question of whether A has paid Z by looking for chains of substitutions, physical or otherwise.": Birks, "Tracing Misused" *op. cit.* at page 92.

the legal rules. The most commonly cited possibility is that the rules of equity and common law should be combined (with the removal of the fiduciary relationship requirement) to produce a technique exhibiting the strengths of both branches.[420] This is undoubtedly an attractive proposition and could remove many of the narrow technical difficulties associated with tracing. It could not, however, be unequivocally embraced until we fully understand what tracing is to achieve. Whilst this question remains unanswered, any new rules will necessarily develop in the random and piecemeal manner of their predecessors.

What then is the underlying rationale? If it is based in property rights, then these rights are not those which we traditionally understand. If I lose my bicycle to C who swaps it for a skateboard, what traditional rule gives me the right to the substitute? We must therefore be accepting some form of modification, which might be explained by a causation-based approach.[421] The law, in allowing me to bring an action with regard to the skateboard, appears to be saying that the infringement of my property rights caused the defendant to be in a position to obtain the skateboard and therefore I may bring an action with regard to it. This is a logical and morally defensible position. However, we have seen that little authority exists for this possibility[422] and, moreover, the law rejects a causation approach with regard to "swollen assets" theory. How can this be explained? The natural approach[423] is to accept that in such disputes, rights and principles are rarely absolutes, rather they are competing priorities. Thus in rejecting the causation argument with regard to the plaintiff's rights, the courts are holding that the defendant's creditors have a closer or more significant connection to the relevant assets[424] again a reasonable position. However, how do we then explain the apparent wholesale rejection of the "swollen asset" theory by the English courts?

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[419] If they could not, the world's financial systems could no longer function.
[420] Millett, *op. cit.*.
[421] This approach is recommended by Fennel: Fennel *op. cit.*
[422] Equally, the question presents itself, "if we embrace causation, how far are we willing to pursue it?" In other words, the transfer of an asset can *cause* numerous movements of value. How do we limit actions based upon causation to exclude those parties whose enrichment was caused by the transfer but not in a manner which society believes should be actionable?
[423] And one which appears to be accepted by the English courts.

Why is there no discussion of Taft's argument to the effect that "swollen assets" theory is a potentially legitimate technique in situations where the defendant was *solvent* at the time of his wrongful acquisition of the relevant asset? It appears, therefore, that the techniques of tracing go beyond mere enforcement of property rights as we traditionally understand them and that causation provides, at best, only a limited explanation. We must therefore explore whether another explanation more accurately explains tracing, and in the light of recent judicial comment it is clear that the quest must begin with the subject of restitution/unjust enrichment.[425]

As we have seen, there is no doubting the attraction of ensuring that the future development of tracing follows the path set down by a rational system aimed at achieving justice in the wide range of disputes which can arise in this area, rather than as a piecemeal response to particular questions.[426] If the judges of the past had asked whether a defendant had been unjustly enriched at the expense of a particular plaintiff, rather than whether the medium of that enrichment had been electronically transferred, or mixed, or subjected to a credit risk, or whether the recipient had the requisite knowledge, many of our present problems might have been avoided. Equally, there is little doubt that a strong body of both academic and judicial opinion favours such an approach.[427] Moreover, we may now be witnessing a crystallisation of this belief into judicial action. If this is the case, however, it is not without its own difficulties. Thus, for example, Birks argues that *Lipkin Gorman* v. *Karpnale* represents the English court's final acceptance of unjust enrichment.[428] But if this is the case it is a limited or flawed acceptance.[429] Moreover, Fennel, for example, argues that the use of common law tracing in *Lipkin Gorman* was understandable,[430] but failed in a fundamental respect:

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[424] The same argument is of course the underlying reason why the plaintiff may be unable to bring actions against subsequent purchasers for value even though one could argue that their ownership has a causative relationship to the plaintiff's loss.

[425] This topic is the subject of Chapter Four, and detailed discussion of the relationship between unjust enrichment and our civil response to fraud must necessarily come to be considered there.

[426] Indeed, this is one of the primary goals set out above.

[427] Burrows, *Restitution, op. cit.* at page 42; Fennel, S. *op. cit.* at page 38; Birks, "Tracing Misused" *op. cit.* at page 92.

[428] Birks, P., "The English Recognition of Unjust Enrichment." [1991] 1 L.M.C.L.Q. 473.

[429] See Chapter Five.

[430] "The fact that the plaintiff has lost money and the defendant has gained money does not in itself show that the defendant was enriched at the plaintiff's expense; and since the action for money had and received is a common law action, it follows that the means of identifying the plaintiff's money in the defendant's hands

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> "The flaw in this argument is that it assumes that the defendant is only enriched at the plaintiff's expense when he receives the plaintiff's money. It should be enough for the plaintiff to show that his loss causes the defendant to be enriched in circumstances in which there is a factor making the enrichment reversible...and where there are no defences."[431]

Equally, in *Jones* v. *Jones* Millett L.J. clearly expressed the opinion that the court was concerned with tracing in the context of unjust enrichment.[432] But unjust enrichment normally gives a party the right to recover the amount received by the defendant. There is no right to profit derived from the asset unless a wrong is involved. His Lordship did not identify the wrong which gave such a right, but even if it could be found, the case appears to contain more fundamental problems. Thus Millett L.J. said of the relevant claim, "She [Mrs Jones] was not a constructive trustee. She had no legal title to money. She had no title to it at all. She was merely in possession; that is to say, in a position to deal with it even though it did not belong to her." [433] Arguably this means that the law merely passively preserved the plaintiff's rights, which in the determination of some commentators ensures that such a claim is concerned purely with the law of property and is unrelated to restitution. We will see below that this view[434] is not universal and it may be that his Lordship simply did not accept that the preservation of property rights is unconcerned with restitution. However, it might be assumed that the disagreement in this area would make the clear enunciation of the principles involved of great import. If the courts do not specifically identify the methodology involved, and the powers that allow such interpretations, then the introduction of unjust enrichment into the tracing argument will have little to recommend it.

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should be the common law rules of tracing.": Fennel, S. *op. cit.* at page 42. It has already been suggested that the second part of this paragraph is incorrect. We can argue that unjust enrichment should be seen as a more fundamental motivating factor than the split between equity and the common law. This being the case there is little sense in suggesting that because an action is brought in common law the present idiosyncratic rules of the common law should apply. The methods by which we identify an unjust enrichment should be the same assuming that we accept that unjust enrichment is indeed the area's motivating factor.

[431] Fennel, S. *op. cit.* at page 38.

[432] "If she were to retain the profit made by the use of the trustee's money, then, in the language of the modern law of restitution, she would be unjustly enriched at the expense of the trustee.": *The Times*, March 13, 1996, Millett L.J.

[433] *The Times*, March 13, 1996, Millett L.J.

[434] And indeed, is in some cases being reassessed in the light of this case.

Thus, to summarise, it is suggested that the split between equitable and common law tracing is anachronistic and illogical. The technical rules which prevent a plaintiff from making an adequate claim against his own property should be removed: a tracing technique should be unaffected by common banking and financial techniques. This process might be achieved by using narrow technical changes. Thus, for example, the problems with mixing might be solved by recognising that money paid into a bank account does not mix, but results in the replacement of one chose in action with another. Alternatively, they might be solved by a more wholesale acceptance of accounting principles or the extension of the equitable rules. However, if the extension of equitable tracing is considered to be a logical way forward then the requirement of a fiduciary relationship and equitable property arguably has little merit. Equally, we must have a logical, just and rational set of underlying principles which should allow us to know when an asset can be taken to represent the plaintiff's property, and by which our legal rules can be justly modified to meet changing factual situations and the developing financial environment. It may be, *prima facie*, that restitution/unjust enrichment presents both the best and most readily accessible method by which this process may be undertaken. However, this is not a position which can be embraced lightly: specifically, as we have seen the logic of unjust enrichment is not necessarily concurrent with the traditional understanding of tracing to be found in both the historical and most recent cases. Thus, in *Jones* v. *Jones* the court at various times held that it was: passively applying property rules; applying common law tracing; concerned with unjust enrichment; extending "exchange product" theory; not concerned with money had and received, but concerned with a common law action (which goes unidentified) which is itself based in the realms of conscience. Without more, this is unacceptable. If the courts are applying the rules of property, they must explicitly say so, and explain why such rules allow the plaintiff to recover or bring an action against a particular asset. If travelling into the realms of unjust enrichment, they must identify each restitutionary element present in the case and the specific legal mechanisms of unjust enrichment under consideration. In doing this they must acknowledge, and act upon, the fact that the rules of tracing related as they are, to those of property, equity and a wider range of other subjects should

not be viewed in isolation. Just as the judges should be entreated to develop the rules of tracing within a framework of principle (whether or not this is unjust enrichment), they must also show concern for the wider implications of their decisions in this area. Thus Matthews correctly notes:

> "...in *Lipkin Gorman* there is no trace of a debate on the merits of the exchange product rule, or of how it would affect insolvency law, banking and commercial law, and criminal law, for instance, much less whether such effects would be good or bad for society."[435]

However, the principal question upon which all others must be based is whether restitution/unjust enrichment represents a better and more logical explanation of our tracing systems and the rules surrounding it than traditional explanations. As a result, this will be the subject of the following chapter.

[435] Matthews, P., "Tracing..." *op. cit.* at page 53.

CHAPTER FOUR: THE ROLE OF RESTITUTION AND UNJUST ENRICHMENT.

4.0: INTRODUCTION.

> "...there is a knife moving here...an intellectual scalpel so swift and so sharp that you sometimes don't see it moving. You get the illusion that all the parts are just there and are being named as they exist. But they can be named quite differently and organised quite differently depending on how the knife moves."[1]

In recent years, there has been a move to reclassify a number of established legal elements as part of the law of restitution.[2] The significance of this reorganisation with regard to the present study is that, perhaps, all of the civil techniques available in cases of fraud are now considered by some commentators to be part of the law of restitution. This belief is, however, far from universal: many disagreements concerning the underlying principles of restitution, its relationships with other branches of law and its outer borders are yet to be fought and won. Indeed, some respected practitioners and academics have yet to accept not only the existence of restitution/unjust enrichment as a general principle within the English system, but even that the need for such an independent classification exists.[3] As a result, the present chapter will consider the underlying rationale of restitution as a subject, its structure, nature, its basis in authority and its relationship to the techniques discussed in Chapter Three. This process is undertaken with two primary motivations. First, to discover whether the English response to fraud should now be considered to be primarily a restitutionary response and, if so, the domestic limits, boundaries and effects of such a determination. Second, to lay the foundations for

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[1] Pirsig, R.M., *Zen and the Art of Motor Cycle Maintenance*, London, (1974).

[2] Thus, for example, constructive trusts, which might traditionally have been considered to be an element of the law of property or equity, have, we are told, a closer connection to rules which reverse the unjust enrichment of one party at the expense of another. Indeed, some commentators would suggest that the use of the term "constructive trust" should be abandoned because it tends to disguise the institution's nature as a mechanical response to unjust enrichment.

[3] Atiyah, *Rise and Fall of the Freedom of Contract* (1989); Matthews, P. "The Legal and Moral Limits..." *op. cit.*; for one possible approach from the US, see Fuller and Perdue, "The Reliance Interest in Contractual Damages" (1936) 46 Yale L.J., 52.

chapters Five and Six which will examine the principles which should apply to such disputes containing a foreign element. In other words, to consider the extent to which restitution/unjust enrichment may allow us to rectify some of the problems thus far identified by this study.

There is no doubt that law, like any system of rational thought, can be divided, subdivided, classified or organised in an almost infinite number of ways.[4] Each method of division has the effect of highlighting certain aspects of the legal reasoning process while disguising, hiding or in some cases completely ignoring others.[5] There are no set rules of nature or even logic which require the lines of demarcation to be drawn in a particular way.[6] The formulation of a nation's laws will vary according to the moral, economic, ethical and social precepts that underpin the society to which they apply.[7] As a result, at any specific point in time the boundaries of a legal subject will be no more than a hybrid of logic, pragmatism, philosophy, misconception and historical accident.[8] However, this is not to suggest that the way in which we categorise systems of thought in general, and the legal environment in particular, does not carry weight. It is a fundamental determinant in forming our perception of the world around us, and therefore the ways in which we seek to change it.[9] This is true not only with regard to the conceptual frameworks we use, but also the linguistic terms which we employ to describe these structures.[10]

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[4] Thus we can categorise criminal laws by their perceived seriousness (arrestable and non-arrestable offences), by similar type (property offences, road traffic offences), by mental requirement (intention/strict liability), or in almost any other way we choose. Or equally, as Birks notes, we normally divide private obligations into tort and contract but, "[they] could be divided differently. For example, you could, albeit inconveniently, distinguish between obligations to pay money, give goods, do work and so on": Birks, *An Introduction to the Law of Restitution*, Oxford, (1985), 28.

[5] For example, categorising prohibited acts as crimes against the person is useful when structuring a textbook, but in itself gives little indication of the perceived seriousness of the various forms of assault.

[6] Although some such methodologies will be mutually exclusive, others will be mutually dependent.

[7] "Fundamentalism and scepticism, natural law and positivism, security and freedom, matter and form, these are the embittered poles between which law and legal philosophy have always moved and will continue to move.": Ehrenzweig, A.A., *Private International Law*, (1974).

[8] See, for example, O.W. Holmes Jr. comments in 1871 (on reviewing a textbook on the new subject of tort), "We are inclined to think that tort is not a proper subject for a law book.": (1871) 5 Am. L. Rer. 304-341.

[9] "Beliefs about particular matters of fact (including beliefs whose content is an unrestricted existentially quantified proposition) are structures in the mind of the believer which represent or 'map' reality, including the believer's own mind and belief-states. The fundamental representing elements and relations of the map represent the sorts of things they represent because they spring from the capacity of the believer to act selectively towards things of that sort.": Armstrong, D., *Belief, Truth and Knowledge*, 220.

[10] "If words are more or less arbitrary labels for things and ideas and the relationship of things and ideas, our use of language is pure nonsense. No doubt the truth *an sich* is hopelessly elusive, but the attainment of provisional or human truth is the reward of courage and labour. We cannot afford to shrink from the task of

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Indeed, at a fundamental level, it is unreasonable to make a dichotomy between the processes of substantive conceptualisation and linguistic labelling.[11] It is probably more correct to see language as the primary manner by which we undertake the process of categorisation.[12] The present study is an inappropriate forum in which to develop these arguments in the detail they deserve. For the present, therefore, it is necessary only to emphasise the following proposition: the ways in which we linguistically[13] label and conceptually categorise the stimuli to which we are exposed, *both*, necessarily have an influence upon the way in which way we perceive such stimuli and consequential repercussions upon the way in which we choose to respond to them. This is as true for the law as for any other physical or conceptual factor.[14] For similar reasons it is submitted that the differences between descriptive and prescriptive categorisation are at times overstated.[15] Thus, even when we attempt the process of categorisation by virtue of a mutually shared description, the importance of language ensures that we are involved in a process which will change our understanding of the thing thus categorised.[16] Further, we must also remember that in the process of organisation, the legal theoretician does

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achieving a reasonably clear and consistent terminology, even though every definition by its nature is an affirmation that tends to shut out some portion of the absolute truth. Whenever words become too hard and exclusive, humanism is concerned with reconsidering their frontiers; but whenever, as today, they become so vague as to imperil human communication, humanism aims to achieve a clear relation of labels to thought.": Editorial Preface, *Humanism and America*, XV, (1930) (quotes by Ailes, *op. cit.* at page 406): A prosaic example of the effect of language upon thought can be seen in the belief of 66% of American voters that less money should be spent on "welfare" combined with the response of 85% of the same sample to the effect that more should be spent on "helping the poor.": *Newsnight*, The BBC, 13 October, 1996.

[11] "We have no language - no syntax and no lexicon - which is foreign to this history; we can pronounce not a single destructive proposition which has not already had to slip into the form, the logic, and the implicit postulate of that which it seeks to contest": Derrida, J., *Writing and Difference*, (translated by Bass, A.), 280.

[12] "The significance of language for the evolution of culture lies in this, that mankind set up in language a separate world beside the other world, a place it took to be so firmly set that, standing upon it, it could lift the rest of the world off its hinges and make itself master of it. To the extent that man has for long ages believed in the concepts and names of things as in *aeternae veritates* he has appropriated to himself that pride by which he raised himself above the animals..." Friedrich Nietzsche, *Human, All Too Human*,(1878) Chapter 1, 11.

[13] See generally on this subject, Dummet, M., *Frege: Philosophy of Language*, 2nd ed., London (1981); McCulloch, *The Game of the Name: Logic, Language and the Mind*, Oxford (1989); Moravcsik, J.M., *Thought and Language*, London (1990); Goodrich, *Language and Law*, London, (1993); Moore, A.W. (Ed.), *Meaning and Reference*, Oxford (1993). In a modern context it is clear that the movement in favour of "political correctness" has focused upon the link between language and substance: Sullivan, A., "Truth and Lies in the Language Class" *The Sunday Times*, 12 January 1997.

[14] "If subjects such as contract and tort now seem to have a more or less agreed structure, it is not because settled common sense is by nature anterior to authority, so that all the cases have to do is to elaborate a Platonic outline. On the contrary, it is because generations of textbooks, from different hands going through successive editions, have selected and evolved a structure which for the moment seems best fitted to the matter.": Birks, *Introduction*, *op. cit.*, Introduction.

[15] This topic will be discussed in detail in Chapter Five.

[16] Matthews, "The Legal and Moral Limits..." *op. cit.* at page 17.

not have the philosopher's absolute freedom of thought.[17] Law is not an abstract system of belief; nor does it operate in an intellectual vacuum, but within a complex and interconnected matrix, impinging directly upon social, political, ethical and economic structures.[18] Any gap, or potential gap, between legal theory and reality has, of necessity, the latent ability to cause injustice.[19] If the former fails to take account of the practical problems faced by the citizenry or if it ignores society's value and priority systems, then perceived injustice will occur: the law, by definition, will be unable to provide acceptable solutions to real problems.[20] To a large extent, this is the circumstance set which we have witnessed with regard to the development of restitution.

The recent history of legal thinking, particularly in this country, dictates that the consideration of this area is largely dominated by the growing influence of unjust enrichment theory, which to a greater or lesser extent can lay claim to many of the legal techniques used to trace assets lost to fraud. In attempting this discussion, and having suggested above that most of the theoretical black holes of jurisprudence have been removed in developed legal systems, it is now necessary to turn to the

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[17] "In labelling and categorising we may well be restricting and ossifying potentially and actually useful legal doctrines and ideas.": Bates, F. [1982] Conv. 424, 431.

[18] "Reason is man's faculty for *grasping* the world by thought, in contradiction to intelligence, which is man's ability to *manipulate* the world with the help of thought. Reason is man's instrument for arriving at the truth, intelligence is man's instrument for manipulating the world more successfully; the former is essentially human, the latter belongs to the animal part of man." Fromm, E., *The Sane Society,* (1955), Chapter 3.

[19] "A conception not reducible to the small change of daily experience is like a currency not exchangeable for articles of consumption; it is not a symbol, but a fraud.": Santayana, G., *The Life of Reason,* (1905), Chapter 8.

[20] To some extent, western legal systems (being the product of incremental growth over many centuries) will often have addressed obvious discrepancies between legal theory and practice and will have developed the necessary machinery to meet new and novel situations (For example, the Law Commission, Royal Commissions, Public Inquiries, Parliamentary Committees). However, it is argued in Chapter Two that the present increased rate of social and technological change is likely to widen the gap between the creations of injustice and the ability of such agencies to respond. Moreover, our techniques for law reform are generally tuned to meet relatively overt problems. As a result they often cope well (or at least quickly) with changes in moral precepts (see, for example, changes in society's attitude to hand guns) or obvious loopholes which come to the attention of government agencies or effective lobby groups (see, for example, the sterling results achieved by the Inland Revenue with regard to tax avoidance.) However, with the possible exception of the Law Commission, they are generally unsuitable to consider the subtle and long term changes which are required to develop the fundamental recategorisation, or creation, of major legal subjects. For such a task we must, generally, rely on the academics to lay the foundations for change which, if they are sturdy enough, will be built upon by the judiciary.

most glaring exception to such a pronouncement to be found in the English system: the relationship between the law of obligations, restitution and unjust enrichment.[21]

In common law jurisdictions, we have generally divided those rights and duties owed by citizens into public and private obligations. Within these categories we further subdivide our laws into related areas: tort (*delictum*), contract (*consensus*), property, obligations or any number of other possibilities. All have their own internal logic structure which must be satisfied before a particular liability becomes legally enforceable.[22] There are, however, situations or events which while in some ways failing to satisfy some or all of these requirements are, as a matter of policy or justice, considered to be of a type which should give rise to legal liabilities.[23] While

[21] "It is perhaps not too much to suggest that the doctrine of unjust enrichment has been the area of one of the principal conflicts of modern English jurisprudence:(O'Connell, "Unjust Enrichment" (1956) 5 Am. J. Comp. L., 2, 3.) It might be contended that since 1966 the academic interest in this subject has negated some of the more prominent difficulties in this area. It will be argued below that this is not the case. However, even if it were true, the methods of categorisation used by most, if not all, unjust enrichment theorists ensure that the subject must be re-examined if it is to provide a valid means of addressing disputes with an international element. Thus while academics (and to a lesser extent the judiciary) have been intensely interested in the general reclassification of the law of restitution, in a domestic context, they have given little import either to the wider international aspects of the subject (or indeed the wider domestic effect of the characterisation process). Thus, for example, whether equitable tracing is considered to be a remedy, an identification process or a cause of action is rarely an issue in English litigation and has therefore been largely ignored. Equally, the true status of the constructive trust, as a substantive institution, a remedial tool or a hybrid of the two, is rarely a contentious factor and has therefore suffered consequential neglect. This approach is demonstrated by Burrows' belief that characterising an element as tortious or restitutionary will make little difference: Burrows, *Restitution*, *op. cit.* at page 23. In the light of the above discussion it can clearly be argued that even domestically, and in a narrow technical sense, such and approach is of doubtful value: McBride, J. and McGrath, P., *op. cit.* at page 34. In other words, it may be true that in a particular case little will turn on such a determination, but over a period of time there can be no doubt that viewing a legal element as tortious rather than restitutionary cannot fail to have an effect upon our understanding of its nature. What is certain, is that even if one accepts Burrows' suggestion in a domestic context, in the international arena such choices can become imperative. Thus, to return to the example of the constructive trust, it has been suggested, "...that nomenclature in this context is unimportant" (Slade, Sir Christopher, "The Informal Creation of Interests in Land" The Child & Co. Oxford Lecture, (1984)) and, "It matters not whether the court regards the one enriched as personally liable to repay, or as constructively a trustee of the acquired assets." In a wholly domestic case, which is being considered from an unjust enrichment perspective, this lack of precision may be unfortunate but acceptable (although it is clearly arguable that even here the distinction *may* have an effect on the outcome of a particular case). In a case involving an international element, the decision as to whether a set of circumstances creates personal or proprietary rights or results in remedial or substantive responses, may well have a decisive effect upon the rules to be applied.

[22] Offer, acceptance, duty of care, foreseeability, etc.

[23] "A complete account of civil liability in our legal system requires the inclusion of restitution or some functional equivalent, because there are important instances of liability that contract and tort, conventionally defined, cannot adequately explain. In some cases a theory of unjust enrichment provides the only available explanation of why the defendant is liable at all.": Kull, A., "Restitution Rationalised" (1995) California L.R., Vol. 83, 1191, 1192. Although it might be accepted that a functional equivalent of restitution is a necessity, the belief that unjust enrichment provides its only explanation is open to question and will be discussed below.

it may be possible for such situations[24] to be accommodated under a traditional head of law, it is often arguable that they do not fit perfectly within their decided framework.[25] In other words, there may be a gap between legal theory and reality which, if not closed, will create injustice. Thus to take the example of mistaken payments, to obtain relief under contract (even if it were possible to identify valuable consideration) it would be necessary to find a fictitious and problematic implied promise. Equally, common-sense is compromised if we suggest that a thief (or recipient of a mistaken payment) impliedly promises to return his gains.[26] Arguably tort could only encompass such claims by an unstructured increase in the accepted heads of action: whilst this might be possible, it could be no more than an uncomfortable marriage of convenience.[27] Perhaps, equally difficult problems arise when one attempts to anchor restitutionary claims purely within the law of property.[28] As a result, it has been claimed that almost all jurisdictions, whether civilian or common law, have found it necessary to develop a general principle (or set of subsidiary rules) which allows the courts to rectify such situations.[29] In a very real sense, the history of restitution in England is simply a record of the law's attempt to find a logically defensible solution to this situation. That history can, in theory, be traced back to the very beginnings of recorded law. Unfortunately, this long period of gestation, rather than resulting in a highly refined system, has created a range of historical anachronisms, ambiguities and contradictions.[30] The present chapter, therefore, considers the validity of the recently reformed views of

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[24] Examples might include the recovery of payments made under mistake or compulsion, recompense for profits made in breach of trust or actions covering *quantum merit* (for the recovery of reasonable payment for services rendered) and *quantum valebat* (for the recovery of a reasonable price for goods supplied). Kull gives the following example, "A person who receives $200 (or $200 million) through a 'bank error in your favour' is normally obliged to repay the money. Liability cannot be in orthodox tort, since the passive recipient has breached no independent duty; nor can it be in contract, since the recipient has promised nothing (and indeed may be a total stranger to the bank). The conventional explanation is to say that the recipient has been unjustly enriched if he retained the money." Kull, A., *op. cit.* at page 1192.

[25] This of course depends upon one's original analysis of what the relevant requirements are: Fuller and Perdue, *op. cit.* at page 55.

[26] As Gutteridge and Lipstein note, "It is highly improbable that the...[person enriched]...ever intended to return that which he receives whether it be due or not, for otherwise he would not have accepted it.": Gutteridge, H.C. and Lipstein, K, *op. cit.* at page 85.

[27] Kull, A., *op. cit.* at page 1193.

[28] Not least because, as Birks points out, "most restitutionary rights are not property rights at all; they are personal rights," Birks, *Introduction*, *op. cit.* at page 15; although as we shall see it is perfectly possible to argue that many restitutionary responses are in fact property-based elements resulting in personal remedies.

[29] *Fibrosa Spolka Akyjno* v. *Fairbairn Lawson Coumbe Barbour* [1943] A.C. 32, 61, *per* Lord Wright.

[30] "...history of well-meaning sloppiness of thought," *per* Scrutton, L.J. in *Holt* v. *Markham* [1923] 1 K.B. 504, 513.

restitution, its relationship to our response to fraud, its structure and boundaries and the questions of authority which necessarily provide a framework within which it must develop. This review is undertaken with a number of goals in mind. First, it is intended to test the validity of the claims made by unjust enrichment theorists in this country as to the nature of restitution and its relationship to other areas of law. Second, it will consider the rationality and effect of placing the rules and techniques identified within Chapter Three into a structure of unjust enrichment.[31] Third, it will consider how the subject should develop in the medium to long term. Finally, it provides a framework in which restitutionary cases can be discussed in a wider international context.[32]

[31] In effect whether it is true that, "Wherever the law gives a remedy measured by the defendant's gain rather than the plaintiff's loss a duty to disgorge unjust enrichment will explain the defendant's liability more readily (and at any rate more completely) than will a duty merely to refrain from injuring others.": Kull, A., *op. cit.* at page 1193. The veracity of this analysis is largely the subject of this chapter.
[32] See chapters Five and Six.

4.1: THE DEVELOPMENT OF RESTITUTION.[33]

On being asked to contribute to the *Oxford History of Europe*, Mr Gerald Brenan replied, "You can't get to the truth by writing history; only novelists can do that." Perhaps sadly, the modern basis of restitution is so bound up in its long history that the lawyer does not have the luxury of embracing Mr Brenan's philosophy. The legal elements which would eventually combine to form the foundations of restitution can be traced to Roman jurisprudence's acceptance of obligations imposed *quasi ex contractu*. This phrase, but not necessarily its nature, would later become Anglicised into quasi-contract.[34] The common law adapted the concept of quasi-contract to cover all events which, while standing outside contract or tort,[35] were of a type which the courts believed should give rise to legal obligations.[36] These events could range from judgment debts to statutory and local penalties and miscellaneous other situations and events.[37] During this process, it is possible to identify an emphasis on procedure and results, which was to have a long-lasting influence upon the whole area. Thus by the Middle Ages, the lawyer was likely to classify actions with regard to the writs used and remedies available rather than by contract or quasi-contract - the effect being the same.[38]

However, the development of a general remedy based upon non-contractual, non-tortious obligation was at best a haphazard affair.[39] The true genesis of quasi-contract, in a form which would be recognisable to the modern lawyer, arose from a rivalry between remedies available in the Courts of King's Bench (*Indebitatus*

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[33] "...the substance of the law at any given time nearly corresponds with what is then understood to be convenient; but its forms and machinery, and the degree to which it is able to work out desired results, depends very much on its past.": Oliver Wendell Holmes, *The Common Law*, (1881).

[34] The beginning of this process has been attributed to a number of sources (these range from Gaius in the second century AD, to Justinian's commissioners some three to four hundred years later). Certainly by the time Justinian's *Institutes* were written in the sixth century the commissioners accepted obligations under the heads of contract, tort, quasi-contract and quasi-tort. Birks, *Introduction*, *op. cit.* at page 30.

[35] Quasi-tort fell into disuse relatively quickly.

[36] The parties would simply be treated as if they were in a contractual or tortious relationship. Thus the receiver of a mistaken payment would be treated as a debtor. Alternatively, one who intervened in the affairs of another without invitation was placed under an obligation to act with care (*negotiorum gestor)*.

[37] For example, where money was paid over in return for failed consideration; see also Y.B. 21 & 22 Edw. I (R.S.) 598 *per* Mettingham C.J.; Birks, *Introduction*, *op. cit.*.

[38] Baker, J.H., "New Light on *Slade's Case* - Part I The Manuscript Reports" 29 C.L.J., 51; Baker, J.H., "New Light on *Slade's Case* - Part II" 29 C.L.J., 213

Assumpsit[40]) and Common Pleas[41] (*Debt and Account*[42]). *Assumpsit* allowed recovery on the basis of implied promise. It proved to be more popular than alternative actions for a number of theoretical and practical reasons.[43] However, the Court of Common Pleas considered *Assumpsit* to be no more than an attempt to avoid wager of law based upon an untenable fiction.[44] This conflict was, to a large extent, resolved by *Slade's* Case[45] which specifically addressed the question of whether an action on *Assumpsit* could be brought to recover money due under a sale. The court held that it could, and in doing so discounted the argument that, "...maintenance of this action takes away the defendant's benefit of (a) wager of law, and so bereaves him of the benefit which the law gives him..."[46] Thereafter it became generally accepted that *Assumpsit* was a legitimate alternative to *Debt.*

The court's view of actions in this area after *Slade's* case is well illustrated by the case of *Moses v Mcferlan* (1760)[47] in which the defendant argued that no contract to refund money recovered by an adverse suit could be presumed. Lord Mansfield disagreed,[48] thus confirming that in the absence of a contract, the defendant could nevertheless be fixed with similar obligations. There are a number of points of interest which arise from Lord Mansfield's judgment. First, perhaps unfortunately, his Lordship failed to make it clear whether any events existed in this context which, while falling outside the concept of quasi-contract, would still lead to legal

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[39] G.H. Richardson, *Bracton,* pages 6-7, 53.
[40] Helmholz, R.H., "Assumpsit and *Fedei Laesio*" 91 L.Q.R., 407.
[41] Ibbetson, D, "Assumpsit and Debt in the Early Sixteenth Century: the Origins of the Indebtatus Count" 41 C.L.J 142.
[42] Statute of Marlborough 1267.
[43] Specifically; (1) cases needed to be less precisely detailed; (2) the jury did not need to look for an express promise; (3) the procedure was cheaper; (4) the King's Bench judges were more open to novel actions, and; (5) wager of law could be avoided.
[44]Goff, Lord & Jones, *op. cit.*, Introduction; "In England, analytical jurisprudence, having resolved against any excursion beyond the boundaries of precedent, had to rely on fiction to rationalise the already existing rules of quasi-contract": O'Connell, *op. cit.* at page 6.
[45] *Slade's* case (1602) 4 Co. Rep 92a, 1072; see generally, Baker, J.H., *op. cit.*; Lucke, H.K., "Slade's Case and the Origins of the Counts - Part 1" 81 L.Q.R., 422; Lucke, H.K., "Slade's Case and the Origins of the Counts - Part 3" 82 L.Q.R., 81; Simpson, A.W.B., "The Place of Slade's Case in the History of Contract" 74 L.Q.R., 36.
[46] Simpson *op. cit.* at page 1074.
[47] (1760) 2 Burr. 1005. In this case the defendant had agreed in writing that the plaintiff would not be made liable on his endorsement of four promissory notes. Moses had been successful in a lower court, and now brought an action in the Kings Bench to enforce that court's award of £6.
[48] (1760) 2 Burr. 1005, 1012. "If the defendant is under an obligation, from the ties of natural justice, to refund, the law implies a debt...as it were upon a contract (*quasi ex contractu* as the Roman law expressed it)."

obligation.[49] Second, the decision is clearly based upon natural justice. The doubt surrounding this concept, particularly when invoked in a commercial context, proved to be a central factor in preventing the law of restitution being fully embraced by English judges.[50] Finally (and related to the first point above), his Lordship addressed the question of injustice in the context of its ability to trigger the court's response: the implied promise. The importance of such a promise and the resultant relationship to the law of contract was to become of increasing importance. The formalisation of this fiction can clearly be seen in Blackstone's Commentaries.[51] Indeed Blackstone placed greater reliance on the implied promise element of *Slade 's* case than any other commentator (including Lord Mansfield). In doing so he gave the theory a new impetus and central status arguably unwarranted by policy or precedent. What is certain is that the implied promise became the accepted foundation of English restitutionary law well into the twentieth century. As Goff and Jones note, "The "implied contract" ceased to be a simple and undesirable means to a desirable end. It became the 'basis of the law of quasi-contract'."[52] Thus in *Sinclair* v. *Brougham* [1914][53] it was possible for Lord Haldane L.C. to state that a quasi-contract could only be valid if it conformed to contractual formalities.

The undesirability of basing restitution upon the fiction of an implied promise which results in a quasi-contract has already been touched upon. It is illogical to claim that a defendant who clearly (in reality) intended to keep an asset (in theory) impliedly

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[49] This is a failure which would continue well into the 20th century.

[50] Certainty is the commercial lawyer's touchstone, and while it is true that injustice may clearly shine through in some cases, in many complex commercial litigations it will not only be hidden but open to a number of differing interpretations. This problem can be seen throughout the law's history, assuaged only (as we shall see below) when lawyers began to place the concept of unjust enrichment on a practical, case based, footing.

[51] "A second class of implied contracts are such as do not arise from the determination of any court or the positive direction of any statute; but from natural reason and the just construction of law. Which class extends to all presumptive undertakings or *assumpsits*; which, though never perhaps actually made, yet constantly arise from this general implication and intendment of the courts of judicature, that every man hath engaged to perform what his duty or justice requires of him." He goes on to say, "A third species of implied *assumpsit* is when one has had and received money of another's without any valuable consideration given on the receiver's part: for the law construes this to be money had and received for the use of the owner only, and implies that the person so receiving promised and undertook to account for it to the true proprietor. And if he unjustly retains it, an action on the case lies against him for the breach of such a promise and undertaking...": Blackstone, *Commentaries on the Law of England,* 1768, Book 3, page 158 (facsimile edition, Chicago, 1979). For comment see, Birks, *Introduction*, *op. cit.* at page 37.

[52] Goff & Jones , *op. cit.*, at page 9.

agreed to return it. This is compounded when one further requires that the non-existent and fictional contract should be contractually valid in all other respects before redress is possible. As Professor Birks points out, Lord Haldane L.C, "...[brought] a fiction to life. When a defendant has been enriched at the expense of the plaintiff the question of whether he should make restitution cannot be answered by asking whether a promise to pay would be valid. Looking at a piece of chalk, one might as well ask whether it is Wensleydale or Cheddar."[54] Indeed, the underlying rationale of *Sinclair v Brougham* [1914][55] provides a paradigm of the problems which this formulation engenders.[56] It is clear from the court's judgment that heavy reliance was placed on the potential validity of any implied promise to repay. This attitude takes us directly to the root confusion in the English law of restitution. By focusing upon the implied promise, the court in *Sinclair* v. *Brougham* arguably avoided, as English law had continually avoided, the real issues: specifically, whether as a matter of policy and justice a remedy should have been available in the particular situation which presented itself.[57] Not whether a non-existent contract, brought about by a non-existent promise, complied with the rules of a contract system which had no relevance to the problem at hand.

There is little doubt that the refusal to accept the deficiencies intrinsically present within quasi-contract created a gap between theory and practice which inevitably led to injustice.[58] Further, this was a situation which was likely to become increasingly problematic. Changes in the form and use of trusts, new methods of banking, electronic cash transfers and innovative ways of conducting commercial transactions, all meant that cases which could be categorised as involving unjust enrichment (and potentially far removed from implied promises) were likely to

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[53] [1914] A.C. 339, 415.

[54] Birks, *Introduction*, *op. cit.* at page 38. This statement clearly pre-supposes the acceptance that restitution/unjust enrichment is a more logical, effective or just explanation for this area. This is not necessarily a foregone conclusion and its validity will be discussed in some detail below. However, there is little doubt that restitution/unjust enrichment is, at this time, the predominant explanation for this area in England, and the following analysis will be carried out in this context.

[55] In this case a company received deposit payments from customers of a banking business which was being operated *ultra vires.*

[56] "...the fictitious promise which lay at its [quasi-contracts] root left a legacy of confusion which has seriously hindered the development of the law of restitution.": Goff & Jones, *op. cit.* at page 8.

[57] Birks, *Introduction*, *op. cit.* at page 38.

[58] see *Cowern* v. *Nield* [1912] 2 K.B. 419; *Re Rhodes* (1890) 44 Ch.D. 94.

increase. It is therefore unsurprising that some members of the judiciary began to question the historic anomalies in the area.[59] The courts gradually accepted the inevitability of change and began to impose liability where implied promise did not provide an adequate explanation.[60] During this process we can see an interesting aspect of the legal reasoning and characterisation process in practice. While the area which is now widely described as restitution/unjust enrichment maintained a close connection to contract, the fundamental reason as to why a relevant promise might be implied went relatively unexplored. The court would, in most cases, satisfy itself with vague calls to justice or a man's duty.[61] The subject's intellectual rigour, such as it was, was poured into structure and form rather than underlying rationale. In other words, to paraphrase Fuller and Perdue, the courts forgot what they were trying to achieve.[62] It is arguable that this problem continues to plague the area today. Nevertheless, with the understanding that traditional formulations of contract or quasi-contract might not adequately describe the area, its emphasis did change and jurists slowly began to concentrate upon why, rather than how, a gain should be reversed.

As one might expect, this was a slow and cumbersome process involving a long period in which implied promise, quasi-contract and unjust enrichment (and other formulations) remained ill-defined both in the abstract and as between each other. Nevertheless unjust enrichment gradually became the dominant principle within the area, so that by 1952 Winfield could define quasi-contract in terms of "unjust benefit."[63] While the consequences of this determination may not have been fully

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[59] Thus, for example, In *Re Rhodes* (1890) 44 Ch.D. 94. Cotton L.J. noted, "It is asked, can there be an implied contract by a person who cannot himself contract in express terms? The answer is, that what the law implies on the part of such a person is an obligation, which has been improperly termed a contract, to repay money spent in supplying necessaries. I think that the expression "implied contract" is erroneous and very unfortunate." In *United Australian Ltd v Barclays Bank Ltd* [1941] A.C. 1, Lord Atkins stated that, "...the ghosts of the past stand in the path of justice clanking their medieval chains; the proper course of the judge is to pass through them undeterred."

[60] *Brook's Wharf and Bull Wharf Ltd* v. *Goodman Bross* [1937] 1 K.B. 534; *Firrosa Spolka Acyjna* v. *Fairbain Lawson Combe Barbour Ltd.* [1943] A.C. 32; *Nissan* v. *Att-Gen* [1970] A.C. 179.

[61] In *Moses* v. *Mcferlan* ((1760) 2 Burr. 1005, 1012) Lord Mansfield had stated, "...the gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."

[62] Fuller and Perdue, *op. cit.* at page 52.

[63] Suggesting that it was the law "not exclusively referable to any other head of the law" imposed on the grounds that "non-payment of it" would result in unjust enrichment.: Winfield, P.H., *The Law of Quasi Contracts*, London, (1952).

developed, it did demonstrate a change in emphasis from structure to underlying principles. This process continued apace until the landmark publication of Goff and Jones' *The Law of Restitution*, in 1966. This book can arguably be seen as the beginnings of the modern law of restitution in England,[64] marking as it does a major reassessment of the area. No longer, it was argued, were the triggers of restitution to be considered a disparate collection of miscellaneous events, but rather a rational grouping, logically joined together by the common theme of unjust enrichment. There is no doubt that this process has resulted in the general abandonment of the quasi-contract within the English law.[65] Whether it has also led to the acceptance of restitution/unjust enrichment is a more difficult question, and one that will occupy much of this chapter. Certainly, a number of eminent commentators believe that it did. They argue that lawyers are freed from the task of fitting the square peg of unjust enrichment into the round hole of contractual logic, and can concentrate on the task of developing effective solutions for real problems. This new model of restitution is defined by Goff and Jones as, "...the law relating to all claims, quasi-contractual or otherwise, which are founded upon the principle of unjust enrichment."[66] Birks emphasises his view of restitution as a response similar to, for example, compensation, rather than a cause of action when he says, "Restitution is the response which consists in causing one person to give up to another an enrichment received at his expense, or its value in money"[67] and most

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[64] Or perhaps more accurately the end of the beginning.

[65] Goff and Jones state, "It is reasonable...to expect the references to "implied promise" in cases of quasi-contract will cease, and that the fiction will no longer be allowed to affect substantive rights...it follows that attention can now be diverted from this barren topic to the substantive principle of unjust enrichment which underlies not only quasi-contractual claims but also the other related claims which, with quasi-contract, make up the law of restitution.": Goff & Jones, *op. cit.* at page 9. Professor Birks takes a similar view when he says, "Nowadays, the most important thing to say about the relationship between restitution and quasi-contract is that the term "quasi-contract" ought to be given up altogether. It has no work to do. Quasi-contractual obligations are simply those common law obligations which arise from unjust enrichment. They are restitutionary in content, and unjust enrichment is their causative event. To persist in calling them quasi-contractual is to insist on a usage which adds no further information about them but does perpetually threaten to revive their misleading history.": Birks, *Introduction*, *op. cit.* at page 39; "The term 'quasi-contract' is, of course, a lexically empty label but it has proved to be a remarkably enduring category which will accommodate any obligation that does not arise by agreement of the parties...": Bennett, T.W. "Choice of Law Rules in Claims of Unjust Enrichment" [1990] I.C.L.Q. Vol. 39, 136, 138.

[66] Goff & Jones, *op. cit.* at page 16; "A person has a right to have restored to him a benefit gained at his expense by another, if the retention of the benefit by the other would be unjust. The law protects this right by granting restitution of the benefit which otherwise would, in most cases, unjustly enrich the recipient": "Seavey and Scott, "Restitution" 54 L.Q.R. 29, 29.

[67] Birks, *Introduction*, *op. cit.* at page 13. Birks is of the opinion that the trigger for such an event is necessarily unjust enrichment and "Restitution and unjust enrichment identify exactly the same area of law. The one term simply quadrates with the other.": Birks, *Introduction*, *op. cit.* at page 17; see also Hedley, S.,

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commentators in this area would accept the American Restatement's position that, "...a person who has been unjustly enriched at the expense of another is required to make restitution to the other."[68]

The assertions were until recently based upon theory and principle rather than overt authority. However, following a number of recent cases (specifically the House of Lords, cases of *Lipkin Gorman* v. *Karpnale Ltd*[69] and *Woolwich Equitable Building Society* v. *Inland Revenue Commission*[70]), many commentators have claimed that restitution/unjust enrichment is now accepted by the English courts. Thus, for example, Birks refers to *Lipkin Gorman* as "English recognition of restitution" and compares it in importance to "*Donoghue* v. *Stevenson.*"[71] Burrows is equally strident when he states that it "cannot now seriously be denied that the subject is as important and central...as contract and tort" and "any argument to the contrary...[is] authoritatively silenced."[72] Howeversome writers believe that the unjust enrichment theorists have overstated the unambiguous nature of the support that *Woolwich Building Society* and *Lipkin Gorman* provide for restitution/unjust enrichment.[73] Others still doubt the existence of certain areas of the law[74] or the

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"Unjust Enrichment" (1995) 54(3) C.L.J, 578. Bennett captures the spirit if not the specifics of restitution when he says, "The rules of unjust enrichment, generally speaking, are designed to undo errors, misconceptions and mistakes that bedevil our activities no matter how carefully we try to avoid them.": Bennett, T.W. *op. cit.* at page 136.

[68] *Restatement of the Law of Restitution*, American Law Institute, (1937).

[69] [1991] 3 W.L.R. 10 (H.L.); [1991] 2 A.C. 548.

[70] [1993] A.C. 70.

[71] "Until recently most scholars of the English law of restitution admitted that it was impossible to predict when a restitutionary claim would be allowed: precisely because there was no unifying principle linking the claims already recognised. With the acceptance by the House of Lords in *Lipkin Gorman*...that the principle of unjust enrichment *does* have a distinct role to play, scholars need no longer be so pessimistic.": Birks, P., "The English Recognition of Unjust Enrichment" [1991] L.M.C.L.Q, 473. His confidence is such that he calls those who disagree "flat earthers" and claims that, "...restitution has...at last escaped from under the shadow of a great deal of time-wasting semantic nonsense." See also Dickson, B. "Unjust Enrichment Claims: A Comparative Overview" [1995] C.L.J., March, 100, 105.

[72] Burrows, *Restitution*, *op. cit.*, Preface.

[73] Thus, for example, Hedley says of the latter case, "The judgment of the House of Lords in Woolwich's favour, and their assertion of the principle of unjust enrichment as they did so, are highly significant; and I have no quarrel with the result of the case. Yet it also shows the distinctly limited acceptance of the principle that the courts now offer, and the obstacles in the way of a fuller acceptance. The Lord's refusal to apply a theoretical 'unjust enrichment' analysis is clear enough, as the theorists note: 'If the law of restitution is not to descend into 'well-meaning sloppiness of thought', the unjust factor must be identified with greater precision'; (McKendrick, E., "Restitution of Unlawfully Demanded Tax", [1993] L.M.C.L.Q. 88, 99) and it was considered that Lord Goff's attempt at theory was 'unhelpful' and 'circular' and 'begs the question' (Burrows, *Restitution*, *op. cit.* page 315). The theorists who insist on the significance of the case, as representing the coming-of-age of the theory, find themselves greatly at odds with the judges who decided it.": Hedley, S. "Unjust Enrichment" *op. cit.* at page 583. With regard to the former case he suggests, "*Lipkin Gorman*...again demonstrated no very obvious commitment to the theory. Lord Templeman's opinion relies Footnote Continues on Next Page:

validity of restitution as grouped by the theorists.[75] Moreover, a close examination of the published work of those commentators who accept restitution/unjust enrichment demonstrates that in the detail of the area there remains a residual mass of confusion and disagreement. Indeed there are almost as many differing nuances in the exposition of restitution as there are commentators: its boundaries and relationships to other areas of law remain doubtful; the objective meaning of "unjust enrichment" can still provoke debate; the interrelationship between unjust enrichment as a high-level principle capable of triggering restitution and the low-level mechanisms by which restitution is achieved, remains complex. Equally, there is little agreement as to whether unjust enrichment/restitution serves a subsidiary role, is a cause of action, is a "great unifying principle underlying the whole range of restitutionary remedies" [76] or is simply a pragmatic way of grouping previously disparate subjects in order to gain new theoretical insights. [77]

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heavily on 'unjust enrichment' but that does not stop him using the old terminology of 'money had and received' and 'quasi-contract' as well; and at one point (to the theorists consternation) he seems to adopt a *proprietary* theory of liability, of the type urged by Stolhar.": Hedley, S. "Unjust Enrichment" *op. cit.* at page 584. Matthews makes a similar point when he says, "...they [the relevant cases] are not altogether consistent, and in any event they run well ahead of the collective *results* of the cases in which they appear": Matthews, P., "Tracing the Proceeds of Fraud", *op. cit.* at page 54.

[74] McBride, J. and McGrath, P., *op. cit.* at page 34.

[75] Atiyah, *Rise and fall of the Freedom of Contract* (1989); Atiyah, *Essays on Contract*, 52, "it seems clear to me that the present 'division' of the law of obligations into the three familiar categories espoused by Mr Burrows is designed largely for the purposes of exposition and pedagogy. It is useful to divide up a large and potentially unmanageable subject so that we can teach it and write books on it and examine it. But the question then arises whether the material within each of these three categories has more in common than material which spills across the boundaries. It is this which I deny, and I remain entirely unpersuaded by Mr. Burrows's attempt to defend the traditional divisions." (for a counter argument see, Birks "Restitution and the Freedom of Contract" [1983] C.L.P. 141). See also Dickson, "Other attempts in the common law world to expand, or at least redraw, the boundaries of restitution law (and therefore the unjust enrichment principle) including those by Stoljar and Stevens. Stoljar prefers to portray restitution law as part of the law of property, while Stevens has an even more ambitious project - a fundamental re-think of the whole law of restitution so that the cause of action in unjust enrichment (which he refers to as 'non-consensual receipt and retention of value') can become the third organising idea - beside tort and contract - for private common law.": Dickson, B. *op. cit.* at page 110. Equally, in this context, Fuller and Perdue argue that, "...all of the cases coming under the restitution interest will be covered by the reliance interest": Fuller and Perdue, *op. cit.* at page 55. In reply to this assertion, Beatson suggests that Fuller and Perdue over emphasise the importance of reliance at the expense of benefit/enrichment. However, he also suggests that Goff and Jones and Birks are guilty of the opposite form of "reductionism" by failing to give enough weight to the importance of reliance: Beatson, J., "Benefit, Reliance and the Structure of Unjust Enrichment" [1987] C.L.P., 71, 72.

[76] Dickson, B. *op. cit.* at page 101.

[77] English commentators often look wistfully across the Atlantic to the American system where the concept of unjust enrichment was entrenched much earlier. However, this view may be overly rosy. Kull says of the US system that, "The intellectual vitality of restitution in this country, and ultimately its continued existence as a recognised body of law, requires that judges and lawyers know what it is, how to use it, and how to argue about it. Anyone who reads through current law reports looking for restitution must notice that a substantial proportion of American restitution cases, perhaps a majority, are being argued and decided by lawyers and judges who do not adequately understand what they are dealing with. Even when legal issues are properly situated within the context of restitution, the technical competence of judicial opinion in the area is, all too often, strikingly low...If the present tendencies continue, the modern law of restitution-an American Footnote Continues on Next Page:

Doubts concerning the absolute acceptance of restitution/unjust enrichment in *Lipkin Gorman* and *Woolwich Equitable Building Society* will be considered below. However, it seems clear (perhaps because of the nature of the unjust enrichment theorist's arguments) that the former case, in particular, is now widely perceived as the House of Lords' "lock stock and barrel" acceptance of the area.[78] This being the situation we can expect to see a continuing increase in academic interest in the subject. More importantly, we can also expect to see a lessening in the English (and foreign) litigator's reluctance to argue unjust enrichment before our courts. These factors will combine to ensure that a large number of the doubts and difficulties surrounding restitution will come for decision before the courts in the near future. This situation must be welcomed, but not without a certain degree of trepidation. Kull has said of restitution in America:

> "To put it bluntly...Lawyers today (judges and the law professors included) do not know what restitution is. The subject is no longer taught in law schools, and the lawyer who lacks an introduction to its basic principles is unlikely to recognise them in practice. The technical competence of published opinions in straightforward restitution cases has noticeably declined; judges and lawyers sometimes fail to grasp the rudiments of the doctrine even where they know where to find it".[79]

The position is undoubtedly less dark in this country. However, practising lawyers are perhaps equally unfamiliar with the complexities and subtleties which the subject contains.[80] As a result, we can expect the development of restitution over

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invention-will become a subject actively pursued in England and the Commonwealth but no longer comprehended by American law.": Kull, *op. cit.* at page 1240.

[78] Indeed, it might be argued that we have seen the perfect example of Ahad Ha-Ma's belief that, "Wise men weight the advantages of any new course of action against its drawbacks and move not an inch until they can see what the result of their action will be; but while they are deep in thought, the men with self-confidence 'come and see and conquer.'": Ahad Ha-Am, quoted by Simon, L., in *Ahad Ha-Am: A Biography*,(1930).

[79] Kull, A., *op. cit.* at page 1195.

[80] Birks argues that as an academic subject restitution is now fully integrated into the English system: notably because it is beginning to satisfy one of his requirements for a mature subject: i.e. development through the publication of textbooks. He also sees this entrenchment as continuing, "...Law is now a graduate profession. In the last decade many courses in Restitution have been established in the universities of the common law world...Today's postgraduates being tomorrow's teachers and practitioners, it is unlikely that Restitution will ever again be split up and hidden under the fringes of other better-known subjects": Birks, *Introduction*, *op. cit.* at page 5. Unfortunately, the true picture may be that law schools which fifteen years ago might have taught quasi-contract as an adjunct to contract, may well have removed it from that subject and now fail to teach it at all with regard to undergraduate and professional training. In other words although restitution may now be an accepted postgraduate subject, it is arguable that the general legal recognition or understanding of the subject has not kept pace.

the next few years to be at best problematic, and at worst damaging to the development of a logical response to a number of pressing practical and legal problems within other areas of law. To adequately consider how these problems can best be approached, it is necessary to examine in more detail the elements necessary to give rise to restitution. This examination will concentrate on a number of precepts central to the role of restitution. Only once these underlying principles are understood is it possible to examine the way in which restitution interacts with other areas of law, its claim to be fully accepted within our system and its relationship to the civil response to fraud discussed in Chapter Three.

4.2: THE STRUCTURE OF RESTITUTION.[81]

From the above definitions, we can identify three elements essential to a restitutionary action: an expense suffered by the plaintiff, which results in an enrichment or benefit to the defendant, in circumstances that make it unjust.

4.2.1: ENRICHMENT OR BENEFIT.[82]

The law of restitution is normally said to be fundamentally concerned not with the plaintiff's loss, but with the defendant's gain.[83] This presumption will be discussed below. For now we will consider how, under traditional learning, we identify and measure gain. This question will necessarily involve a split between money on the one hand, and goods and services on the other. With regard to money, a successful action will result in the recovery of the notes and coins received or their equivalent. It is the means by which we measure enrichment, and thus will present few difficulties with regard to valuation.[84] It is not open to the defendant to claim that he did not want it or that he will not spend it; whatever his subjective feelings on the matter, he has objectively been enriched.[85]

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[81] "Every attempt to reduce the law in a given field to a rule which can be applied automatically to really new situations by the process of deductive logic is necessarily foredoomed to failure. In the words of Mr Justice Holmes, 'But certainty generally is illusion, and repose is not the destiny of man.'": Cook, W.W. "The Present State of the 'Lack of Mutuality Rule'" 36 Yale L.J. 897, 912 (1927).

[82] Much of the following debate is based on the fact that a party may broadly be enriched in two ways. As Burrows puts it, "...a person may be benefited either negatively - that is by saving an expense - or positively - that is by making a gain..." Burrows, "Free Acceptance and the Law of Restitution" 104 L.Q.R., 576, 578.

[83] "A restitutionary claim is for the *benefit*, the *enrichment*, gained by the defendant at the plaintiff's expense; it is not one for loss suffered.": Goff & Jones, *op. cit.* at page 16.

[84] "Money has the peculiar character of a universal medium of exchange. By its receipt, the recipient is inevitably benefited; and...the loss suffered by the plaintiff is generally equal to the defendant's gain, so that no difficulty arises concerning the amount to be repaid. The same cannot be said of other benefits, such as goods or services. By their nature, services cannot be restored; nor in many cases can goods be restored, for example, where they have been consumed or transferred to another. Furthermore the identity and value of the resulting benefit to the recipient may be debatable. From the very nature of things, therefore, the problem of restitution in respect of such benefits is more complex than in cases where the benefit takes the form of a money payment.": *B.P. Exploration Co. (Libya) Ltd.* v. *Hunt* (No.2) [1979] 1 W.L.R. 783, 799, *per* Goff, J. The most apparent problem in this sphere occurs when the plaintiff claims that the defendant has made a profit by using his money. This situation is potentially difficult because as Goff & Jones note, "First, a plaintiff has no right to account. It has an equitable remedy granted at the court's discretion; for example, it may be denied if a defendant acted innocently in using another's trade secret. Second, it is a personal remedy which renders a defendant liable to pay over a sum of money, consisting of the profits which he made. Thirdly, it is said that to order an account is to set in train a "complex and protracted" inquiry (*Siddel* v. *Vickers* (1892) 9 R.P.C. 152, 162-163, *per* Lindley L.J.)": Goff & Jones, *op. cit.* at page 28.

[85] The main complication which may arise is where money is paid to a third party. The decided cases take the view that this is only of benefit to the defendant: where the money is paid in satisfaction of a debt and such payment occurs with the debtor's acceptance or subsequent ratification or under compulsion of law: Footnote Continues on Next Page:

The problems surrounding goods and services[86] are, however, potentially more complex. Someone sends me unsolicited goods; am I enriched? Someone else irons my shirts, but I don't normally bother; have I gained anything?[87] Assuming that I am enriched, then by what measure?: should I pay the market value for what I receive, a reasonable sum or what I believe it is worth? Professor Birks has attempted to answer these questions by reference to what he describes as "subjective devaluation."[88] Thus, he suggests that in certain circumstances, benefit is a personal factor: the value of a service or asset is to be measured according to what the recipient considers it to be worth.[89] As a result, in some cases[90] the market value is irrelevant;[91] the defendant can argue, "...that he has a continuing liberty to choose

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Hirachhand Punamchand v. *Temple* [1911] 2 K.B. 330; *James* v. *Isaacs* (1852) 12 C.B. 79; Goff & Jones, *op. cit.* at page 28.

[86] Beatson identifies four forms of service, "(i) those that *result* in improvements to property or in a marketable residium in the hands of the defendant; (ii) those where, although there is no marketable residium, a necessary expenditure is anticipated or avoided (as where a debt is paid or other obligation met by the plaintiff); (iii) those with no marketable residium in the hands of the recipient but an increase in his human capital (as where a teacher gives a lesson to an able pupil, and; (iv) those where there is neither marketable residium nor increase in human capital (as where an actor or musician performs his art or where the teacher's lesson falls upon deaf ears).": Beatson, J., "Benefit, Reliance..." *op. cit.* at page 72. It should be noted that Beatson does not consider pure services to be of benefit for the purposes of restitution.

[87] Equally, a party receives a car which does not run. Is this a benefit because he could sell it for scrap, or a detriment because it clogs up his drive-way and annoys the neighbours?; a surgeon begins an operation and the patient dies: was there a benefit?

[88] "...benefits in kind are less unequivocally enriching [than money] because they are susceptible to an argument which for convenience can be called 'subjective devaluation.": Birks, *Introduction*, *op. cit.* at page 109; See also, *Essays on Unjust Enrichment* (ed. Burrows), pp. 129, 136-137; Birks (1989) 9 L. S. 121, 131-132; Beatson makes an interesting point with regard to Birks' view of subjective devaluation when he says, "Although he accepts the force of the argument for "subjective devaluation," he is attracted to an objective approach to value (see pages 124-128) coupled with the view that anything which can be valued in money is an 'enrichment'; this draws vast areas of law into the 'enrichment' category. The homogeneity of the category is not achieved by the concept of enrichment but by using another ingredient in the definition such as 'at the expense of' as a control device. The very broad definition of enrichment appears to lead to a relatively narrow view of 'at the expense of' (*Introduction*, pp. 132-139 *cf.* 129); a view which is not based on the way the case law has developed; see e.g. *Mason* v. *N.S.W.* (1959) 102 C.L.R. 108, 146 (Windeyer J.); *Hydro Electric Company of Nepean* v. *Ontario Hydro* [1982] S.C.R. 347." Beatson, J., "Benefit, Reliance..." *op. cit.* at fn. 29.

[89] Kull explains this in the following terms, "Value is intransitive. An object worth $100 to me (or costing $100 to produce) may be worth $10 to you or indeed nothing at all. The ineluctable contingency of value can result in a marked disparity between the cost of conferring the benefit and its value in the hands of the recipient". Kull, A., *op. cit.* at page 1201.

[90] To allow a defendant to identify his own price in all circumstances, is clearly not without its difficulties. As a result, according to Birks, the defendant is prescribed from resorting to subjective devaluation where, (a) he has freely accepted the benefit, or (b) has received an incontrovertible benefit.

[91] "The fact that there is a market in the good which is in question, or in other words that other people habitually choose to have it and thus create a demand for it, is irrelevant to the case of any one particular individual.": Birks, *Introduction*, *op. cit.* at page 109.

how to apply his particular store of value and that...he simply had not made his choice."[92]

Birks suggests that the courts' commitment to subjective devaluation is shown by two "much quoted *dicta*": specifically from *Taylor* v. *Laird* [1856][93] and *Falke* v. *Scottish Imperial Insurance Co.* (1836).[94] It is submitted that although these cases reinforce contractual principles, they arguably go no further. Indeed, it will be suggested below that the use of the older quasi-contract cases as support for modern restitution/unjust enrichment theory must be treated with caution. There is, it is submitted, a step to be taken from saying that no contract exists where shoes are cleaned without the presence of offer and acceptance, to accepting the sophisticated formulation of subjective devaluation as advocated by Birks. Perhaps as a result of this, some commentators make little or no reference to the concept. Thus, for example, Goff & Jones contend that the price will normally be the market value,[95] often with a figure to include a potential profit[96] and possibly taking into consideration the "special position" of the parties.[97]

This lack of authority[98] and unanimity ensures that the arguments in favour of subjective devaluation must necessarily revolve around principle in general and a balance between the requirements of a receipt-based subject and the defendant's right to freedom of choice in particular. In this context, there is no doubt that subjective devaluation appears to contain a number of problems. For example,

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[92] Birks, *Introduction*, *op. cit.* at page 110. "Thus the argument holds, that the defendant whose shoes have been cleaned without his knowledge, may not feel the need for clean shoes or may have been intending to clean them himself. For this defendant, the market price of a shoe shine should not be an issue; the only relevant factor is the price at which he would have been willing pay for such a service".: *Ibid.* It should be noted that this example involves a transient benefit which will have little impact on the short-term value of the asset and no lasting benefit. However, Birks argues that subjective devaluation should apply to long term benefits including, for example, improvements to real property.

[93] "Suppose I clean your property without your knowledge, have I then a claim on your property? How can you help it? One cleans another's shoes; what can the other do but put them on? Is that evidence of a contract to pay for the cleaning? The benefit of the service could not be rejected without refusing the property itself.": *Taylor* v. *Laird* [1856] 25 L.J. Ex. 329, 332, *per* Pollock C.B.

[94] Liabilities are not forced upon people behind their backs any more than you can confer a benefit upon a man against his will.": *Falke* v. *Scottish Imperial Insurance Co.* (1836) 34 Ch.D 234, 248, *per* Bowen L.J. The relevance of these cases will be considered below.

[95] The sum which a reasonable buyer and seller would have agreed upon: Goff & Jones, *op. cit.* at page 28.

[96] *Ibid*; *Rover International Ltd.* v. *Cannon Film Sales Ltd.* [1989] 1 W.L.R. 912.

[97] *Ibid*; *Seager* v. *Copydex Ltd.* (No.2) [1969] 2 All E.R. 718.

imagine a situation in which, to secure a deal, a football agent tells Manchester United that a particular player will sign for £5,000 per week, but tells the player that he will receive £10,000. Free acceptance[99] may be difficult to find and there is no incontrovertible benefit because Manchester United have a large squad and don't actually *need* a new player under any possible definition of that word. When the situation emerges (after the player has played for the first month) the club will claim that they were only interested in a £5,000 per week player. The player will say that he would not have signed but for the £10,000. However, both sides are innocent, both have reasonable expectation, both have behaved honestly. Clearly we have rules to deal with mistakes which occur in contractual situations. However, in a restitutionary context and from a common-sense standpoint, it appears to ill serve the purposes of justice to base the remedy on what the club claim is their view of the player's value: it seems more logical for the court's starting point to be the reasonable value of the player's services to the club, and the natural place to find this must be the market price.[100] To base restitutionary remedies purely on the subjective beliefs of the defendant not only provides substantial evidential problems as to how those beliefs are to be tested,[101] but also potentially represents a powerful brake upon the commercial credibility of the entire subject. The unjust enrichment theorists might accept these problems, but would no doubt argue that it is a necessary feature of a subject where receipt, not loss, is the operative factor. However, the present author would suggest that this is merely the triumph of theory over practice, and that a range of cases in this area are in fact concerned with the *plaintiff's* loss.[102]

Perhaps in response to such problems Kull, for example, recognises that there may be certain factual situations which could change the application of subjective

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[98] Birks conveniently puts this down to "...the [court's] willingness to accept the subjective devaluation argument.": Birks, *Introduction, op. cit.* at page 111.
[99] See below under *Enrichment or Benefit.*
[100] *Vickery* v. *Richie* 88 N.E. 835 (Mass 1909).
[101] "The problem with a purely subjective approach is that one can never be sure what the defendant is thinking and, in any event, one would probably not wish to prejudice the plaintiff according to the eccentricities of the defendant.": Burrows, "Free Acceptance..." *op. cit.* at page 579.
[102] This argument will be developed below. See also on this point, Hedley, "Unjust Enrichment as the Basis of Restitution - an Overworked Concept" (1985) 5 L.S., 56.

devaluation.[103] However, he notes that this is only "...because [the] plaintiff's out-of-pocket expenditure (or customary charge) sometimes serves as the most accurate measure of the benefit conferred."[104] However, it might be suggested that this approach has proved to be one of English restitution's main failings: i.e. the attempt to define a matter of high principle, which is then shown to be incapable of dealing with difficult cases or factual situations and is thus subjected to more and wider exceptions. What is the exceptional factor in Kull's physician example? The fact that physicians are professional men who have generally well defined price structures?; the fact that there was an emergency?; the fact that the patient was unconscious?; the fact that doctors are normally paid whatever the results of their work?; or is subjective devaluation only rendered inoperative when all four elements are present?

Kull goes on, correctly (assuming one accepts his general position) to suggest that if a contract for the provision of the enrichment exists between the parties, then the enrichment should be valued by reference to the contract,[105] illustrating his point by reference to the American case of *Michigan Central Rail Co.* v. *State.*[106] He uses the reasoning in that case as proof that the decision in the well known English case of *Upton-on-Seven Rural District Council* v. *Powell* [1942][107] is flawed.[108] The position which he considers with regard to implied contract is not relevant to the present discussion. However, Kull's suggestion with regard to restitution (that any

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[103] "Thus where a physician renders service in an emergency to an unconscious patient, it is logical, not only to measure the benefit in restitution by the physician's customary charge but also to recognise the same benefit whether the patient lives or dies": Kull, A., *op. cit.* at page 1201.

[104] *Ibid.*

[105] This of course removes one of the primary objections to subjective valuation: i.e. the evidential difficulty of determining what the enrichment was worth to the defendant. Even if one was not to accept subjective devaluation, it is submitted that a price set in any pre-existing contract would take precedence over the market value in attempting to find the relevant enrichment.

[106] In this case coal was mistakenly delivered to, and used by, an Indiana state prison. The rail road at fault paid the original consignee the market value of the coal ($6.85 per ton), and brought a restitutionary action against State of Indiana for that amount. The prison normally bought coal under contract at $3.40 per ton and the court awarded restitution at that value.

[107] [1942] 1 All E.R. 220 (C.A.). In this case, mistakenly believing that a barn fire was in its area, the Plaintiff (a fire department) extinguished it. The Defendant (the barn owner) was entitled to free fire fighting services from its own authority and was unaware that a mistake had been made. The Plaintiff brought an action for the cost of the service and the Court of Appeal agreed that the barn owner was liable.

[108] "If the theory is implied contract - the grounds on which the court appears to have proceeded - the answer is that the defendant requested free services, and the plaintiff agreed to provide them. If the theory is restitution, the answer is that the plaintiff mistakenly bestowed service on someone to whom the service had little or no monetary value": Kull, A., *op. cit.* at page 1203.

benefit should have been subjectively devalued to nothing because of the possibility of alternative services) demonstrates some of the problems associated with subjective devaluation. How does the situation in *Upton-on-Severn Rural District Council* v. *Powell* differ from Kull's earlier doctor/patient example? Both are, we assume, emergencies. Both appear to involve the provision of essential services. We might also assume that in the absence of alternative free services, the fire brigade would be paid irrespective of results, as would the doctor.[109] The only difference appears to be that the landowner in *Powell* had the option of alternative and free services. So does this mean that the doctor would be unable to recover his fees if the patient, unbeknown to him, had private medical care or another doctor was waiting to step into the breach? Moreover, is it reasonable to subjugate questions of principle to factual distinctions of this type?

There is little doubt that if restitution is an exclusively receipt-based subject, then a linkage between perceived recompense and the plaintiff's recovery is necessary. However, the problems with subjective devaluation noted above lead to the conclusion that its use should, where possible, be restricted. Restitution should be a commercially based subject, and the market price is a more valid starting point for determining the commercial value of transactions than a defendant's personal and idiosyncratic mark of worth.[110] Subjective devaluation does not serve this aim and should not be accepted in its present form.

Even if, for some reason, we were forced to accept subjective devaluation for the reasons given above, the areas in which it is not available should be widely drawn, and the next two sections will investigate whether this is in fact the case. However, it should be noted that the greater the breadth which is attributed to these areas, the less appropriate it may be to describe restitution as a purely receipt-based subject.

A number of tests have been suggested to demonstrate that the defendant has been objectively enriched, thus preventing him from recourse to subjective devaluation.

[109] i.e. whether or not the building burnt down or the patient dies.

Perhaps the most commonly known are those suggested (or refined) by Birks: specifically, first, where the defendant has freely accepted the goods or services[111] and second, where he has received an incontrovertible benefit.

4.2.1.1: Free Acceptance of Goods and Services.

A defendant's receipt of goods or services does not logically imply enrichment. There is no reason why I should pay for unsolicited goods simply because they are now in my possession. The question to be asked is whether the defendant has acted in a manner that should render him liable to pay. Or, perhaps, more correctly whether he has demonstrated that he considers himself to be enriched. This involves placing him on a scale of effective intention. At one end of the spectrum will be the defendant who explicitly requested the services (in which case he will normally be contractually bound), at the other will be the defendant who receives genuinely unsolicited and unwanted goods or services to whom no liability attaches.[112] Somewhere in-between will be the defendant who, while not contractually bound to pay, must by virtue of the surrounding circumstances be considered to have freely accepted the goods and services and, it is argued, *should* therefore be held liable.[113]

Exactly where free acceptance falls along this scale will in reality be a question of policy and justice. Such questions are always complex, and this particular one will become more troublesome the further one travels along the spectrum of intention

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[110] Indeed, even Birks concedes that the courts have taken a middle line between the market value of the services and the value to the defendant: Birks, *Introduction*, *op. cit.* at pages 109-107.

[111] "A defendant who has freely accepted the benefit cannot use [the subjective devaluation] argument. The reason is that, if he has freely accepted, he has *ex hypothesi* chosen to receive it, and subjective devaluation is an argument whose premise is that where something has *not* been chosen by its recipient it cannot normally be said to have been of value to him." Birks, *Introduction*, *op. cit.* at page 266.

[112] *Taylor* v. *Laird* (1856) 25 L.J. Ex. 329 at 332, *per*, Pollock C.B.

[113] It should be noted that some commentators, including Birks, consider free acceptance to have a dual meaning or purpose: i.e. as a demonstration of enrichment and as an unjust factor. Its notable characteristic as an unjust factor is that it places emphasis on the plaintiff's behaviour and state of mind, rather than the defendant's, as is more commonly the case (Burrows, "Free Acceptance..." *op. cit.*). If one accepts Birks' position, then the interesting question is whether, while sharing the same name, they might have slightly different natures; in other words, are there circumstances in which the courts might agree that a benefit has been freely accepted while failing to find that retention would be unjust? Goff and Jones seem to suggest that free acceptance has the same meaning in both contexts. (Goff & Jones, *op. cit.* at page 19: "Moreover, in such a case, he cannot deny that he has been *unjustly* enriched"). Birks on the other hand suggests that there may, in the future, be situations in which the two would diverge (Birks, *Introduction*, *op. cit.* at page 115). It is submitted that the latter is the correct position; it is entirely arguable that the standard required to prove injustice could be stricter than that necessary to prove enrichment. Simply because the phraseology is the same does not mean that the underlying principles should necessarily be identical.

towards the far boundary of unsolicited goods or services. Goff and Jones examine the issue in the context of the duty under which a reasonable man should labour.[114] So, for example, where A allows B to clean his shoes knowing the latter mistakenly believes that he will be paid, free acceptance suggests that A must indeed pay a reasonable price. However, the question this raises is how we treat the defendant who does not request that his car is cleaned but observes the plaintiff doing so, knowing that he mistakenly expects payment.[115] Should he be required to pay for the services? Birks would answer the question in the affirmative, arguing that he freely accepted that benefit. Other commentators, however, would claim that it is reasonable to hold a defendant liable only for services expressly requested.[116] They argue that the former view places an unreasonable requirement upon the defendant, unacceptably limiting his freedom of choice. Moreover, they point out that it fails to consider the defendant who simply gives no thought to (or was indifferent to) why the plaintiff cleaned his car. Or the defendant who honestly (but not necessarily reasonably) believes the action to be a show of good neighbourliness.[117] They would suggest that in these circumstances the defendant has not freely accepted anything. Advocates of this libertarian position can point to a lack of clear judicial recognition for the principle of free acceptance.[118] However, in truth, as we see below, this provides little assistance. We are therefore returned to a question that must largely be decided as a matter of policy. In the context of these problems, however, part of that policy question is whether in itself free acceptance is a logical

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[114] "...he [the defendant] will be held to have benefited from the services rendered if he, as a reasonable man, should have known that the plaintiff who rendered the services expected to be paid for them, and yet he did not take a reasonable opportunity open to him to reject the proffered services.": Goff & Jones, *op. cit.* at page 19. In the first edition of their book Goff and Jones defined "free acceptance" in the following terms, "...the defendant will not usually be regarded as having been benefited by the receipt of services or goods unless he has accepted them (or, in the case of goods, retained them) with an opportunity of rejection and with actual or presumed knowledge that they were to be paid for.": Goff & Jones, *op. cit.* at pages 30-31; "A free acceptance occurs where a recipient knows that a benefit is being offered to him non-gratuitously and where he, having the opportunity to reject, elects to accept.": Birks, *Introduction*, *op. cit.*, Introduction.

[115] Equally, what is the situation where the cleaner was not mistaken, but cleaned the car on the "off chance" that he might be paid. Birks' specific example has been quoted to such an extent that it bears repetition here. "Suppose that I see a window-cleaner beginning to clean the windows of my house. I know that he will expect to be paid. So I hang back unseen till he has finished the job; then I emerge and maintain that I will not pay for work that I never ordered.": Birks, *Introduction*, *op. cit.* at page 265.

[116] See generally Matthews, "Freedom, Unrequited Improvements, and Lord Denning" [1981] C.L.J. 340; Burrows, "Free Acceptance..." *op. cit.*; Mead, "Free Acceptance: Some Further Conclusions" (1989) 105 L.Q.R 460

[117] Or the defendant who, while accepting that the goods/services may be beneficial to him, claims he "had more important things to spend his money on.": Burrows, *Essays on Unjust Enrichment*, 19.

component of restitution. Burrows is the most notable commentator to answer this question in the negative,[119] and in questioning this stance he is attacking free acceptance in both its guises.[120]

With regard to its role as an unjust factor, Burrows makes a distinction between the mistaken cleaner (in Birks' example) and one who takes on the work not believing that he will be paid but in the hope that he will: the "disappointed risk-taker." In the former case he accepts that free acceptance might be a relevant factor, but in the latter situation he argues it is not unjust to leave the "disappointed risk-taker" without recompense.[121] This is a strong argument: there is little value in protecting a party from the results of his own actions. If free acceptance is not an all-encompassing question of principle and only becomes a factor when the party has made a mistake, then it seems to add little to the well established concept of non-voluntary activity.[122]

With regard to free acceptance's position as a demonstrator of enrichment, Burrows suggests that its role is to provide an essential balance in the law of enrichment. Thus despite giving due recognition, as all unjust enrichment theorists do, to the receipt-based nature of restitution, he accepts that a system based purely on the subjective enrichment of the defendant is impracticable. As a result a "...line must be drawn between these two extremes [a purely objective approach or a purely subjective one]."[123] Thus, he contends that the role of incontrovertible benefit is to provide an objective standard to society's beliefs, while free acceptance embodies the subjective elements of restitution. The logic of this position is that the defendant's free acceptance demonstrates that he considers himself to be benefited. Burrows, however, argues that a defendant may well accept something which he does not consider to be a benefit or something to which he is indifferent. To Burrows, the fundamental question is "...whether the defendant would have

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[118] Garner, "The Role of Subjective Benefit in the Law of Unjust Enrichment" (1990) 10 Oxford J. of Legal Studies, 42.
[119] Burrows, "Free Acceptance..." *op. cit.*; Mead, "Free Acceptance..." *op. cit.*
[120] i.e. as a factor which makes an enrichment unjust and as a demonstration of enrichment.
[121] Burrows, "Free Acceptance..." *op. cit.* at page 578.
[122] *Ibid.*

otherwise paid for the goods and services provided by the plaintiff...",[124] and free acceptance gives no indication of this. There is little doubt that this is true, and equally little doubt that this is a damaging blow to free acceptance's claims to be a universally applicable principle.

Equally, Mead examines the details of free acceptance and finds it lacking in practical formalities. Most specifically, he questions how the defendant's liability is to be established in practice. Thus, he notes that in Birks' window cleaner example, it might be reasonable to expect the householder to explicitly inform the cleaner that he does not want the services. But how extensive is such a duty?: to what extent are we to expect the defendant to take the time (and perhaps expense) to make clear his rejection in more complex situations?[125] It might be argued that the opportunity to reject should be reasonable, but this introduces a large element of uncertainty.[126]

To counter such doubts, Birks argues that a wide range of decisions has been based (if not explicitly) upon the notion of free acceptance.[127] Despite this, a number of commentators have made an impressively complete rebuttal of the authorities which Birks has put forward.[128] It has been noted that the term "free acceptance" has

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[123] Burrows, "Free Acceptance..." *op. cit.* at page 579.
[124] Burrows, "Free Acceptance..." *op. cit.* at page 578.
[125] "...[a man] starts painting...[your gate]...But you live in a stately home where your drive is a couple of miles long. You see him through binoculars...It is a wet and windy day, and I...do not drive...Am I under an obligation to put on my outdoor clothes and walk to the end of the drive to talk to the gate painter?": Mead, "Free Acceptance..." *op. cit.* at page 465.
[126] *Ibid.*
[127] Birks in *Essays on the Law of Restitution,* (ed. Burrows), Chapter 5, points to a number of cases which include, *Alexander* v. *Vane* (1836) 1M. & W. 511; *Paynter* v. *Williams* (1833) 1 Cr. & M. 810; *Weatherby v Banham* (1832) 5 C. & P. 228; *Lamb* v. *Bunce* (1815) 4 M. & S 275. Similar principles can, it is argued, be seen in claims for *quantum merit.*
[128] Thus, for example, Mead says with regard to Birks' suggestion that the person watching another clean his windows should pay a reasonable price, "What the reader might find somewhat disturbing about this apparently clear example is that Birks provides no authority for this principle." He goes on to note in the footnote to this text, "...Birks cites the Australian case of *City Bank of Sydney* v. *McLoughlin* (1909) C.L.R. 615, in support of his argument. It is true that in this case Griffith C.J. suggested that "the circumstances may be such that a man is bound by the rules of honesty not to be quiescent, but actively to dissent, when he knows that others have for his benefit put themselves in a position of disadvantage, from which, if he speaks at once, they can extricate themselves, but from which, after a lapse of time, they cannot escape."...However, even if we accept this case as valuable authority, it would seem clear that the court had in mind only cases of assumed agency, that is, where an act is done in someone's name but without his authority. Hence, it would be misleading for Birks to suggest that this decision necessarily lays down a more general rule which might support his argument.": Mead, "Free Acceptance..." *op. cit.* at page 460. Beatson makes a further criticism of free acceptance with particular regard to pure services. He ponders how well the equating of acceptance with
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never been used in a reported English case[129] and authorities used by Goff and Jones and Birks can be explained without recourse to the concept.[130] Thus, for example, Birks and Goff and Jones rely on the courts' application of the equitable doctrine of acquiescence to demonstrate the application of free acceptance in a number of land improvement cases.[131] Birks accepts that "This classification must be tested..."[132] because there is doubt as to whether these cases are concerned with mistake or the doctrine of acquiescence, but Burrows goes further. He contends that the doctrine has two separate elements. One is concerned with mistake and unjust enrichment, the other is concerned with "...the active engendering of reasonable expectations in the plaintiff and their fulfilment arising out of a failure of consideration,[133] and belongs within the law of contract."[134] Burrows holds that the cases quoted by Birks are concerned with the latter of these two elements.

It is submitted that a close reading of these cases demonstrates that they are logically susceptible to both interpretations. This is not, however, a surprising conclusion. Unjust enrichment theorists have largely wedded themselves to a philosophy which suggests *not* that restitution is a logical development arising out of quasi-contract, but that when the courts talked of quasi-contract, whatever their

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enrichment achieves the Birksian criteria of grouping together most "like cases" and separating most "unlike cases." This is a strong point, but his conclusion that the provision of pure services do not amount to an enrichment must be open to question: "The inclusion of all requested, accepted, consented-to and acquiesced-in services destroys the homogeneity of the category because it includes not only (i) capital items, and (ii) income sources but also, (iii) all acquiesced-in interventions whether or not they result in something with exchange value and indeed whether or not they result in anything of any use to the defendant. Given his equation of 'enrichment' with 'wealth' and the meaning of 'wealth' in other contexts, the inclusion of that which, in the hands of the defendant, has neither exchange-value...nor even utility seems some what artificial": Beatson, J., "Benefit, Reliance..." *op. cit.* at page 79.

[129] This situation has now changed (*Marston Construction v Kigass* (1989) 15 Construction L.R.) although the significance of this development appears at best marginal: see below.

[130] Burrows, "Free Acceptance..." *op. cit.* at page 581; it should be noted that Burrows' explanation is in part reliant upon his conception of when a realisable benefit is incontrovertible. The validity of his position on this question is discussed below.

[131] *Willmott* v. *Barber* (1880) 15 Ch.D. 96; *Ramsden* v. *Dyson* (1886) L.R. 1 H.L. 83; *Plimmer* v. *Mayor, & c. of Wellington* (1884) 9 A.C. 699; *Inwards* v. *Baker* [1965] 2 Q.B. 29. "In equity the phenomenon of free acceptance is encountered most commonly in the context of improvements to land...The cases refer to the 'doctrine in *Ramsden v Dyson*' or to acquiescence. The idea is the same. The question is whether the owner of the land stood back and let the improvement happen in such a way as to make himself answerable for it, disabling himself from the rebuff which he wants to give the improver: 'You should not have taken the risk of working on my land.": Birks, *Introduction*, *op. cit.* at page 277.

[132] *Ibid.*

[133] "...that is, the plaintiff has not received the defendant's contractually promised performance which was the plaintiff's basis for rendering the benefit to the defendant.": Burrows, "Free Acceptance..." *op. cit.* at page 586.

[134] Burrows, "Free Acceptance..." *op. cit.* 584.

language, they were in reality discussing restitution/unjust enrichment.[135] Thus Birks suggests that although the courts used the term the "doctrine of acquiescence", they were dealing with an underlying principle which was the same as the one which we would now term "free acceptance." On the other hand, Burrows says, that they were dealing not with unjust enrichment, but with contract. In reality this is true; they were concerned with contract because they were in all probability *only* aware of the contractual/quasi-contractual elements of the case. Today's commentators might insist that whatever their language, they were concerned with unjust enrichment but this is not the situation: unjust enrichment as Birks and Burrows understand it is a modern development based to a lesser or greater extent upon the older cases (but not necessarily commensurate with them). Therefore, it is unsurprising that the decisions which Burrows and Birks point to appear to have a bias towards a contractual interpretation. However, even bearing in mind this caveat, it is submitted that Burrows' analysis is the more accurate. Although the question is at best marginal, the cases do point more closely to a reliance on reasonable expectation than what might be regarded as even an early development of free acceptance.

Whilst Burrows in the main confines himself to the suggestion that no authority exists for free acceptance, Mead contends that the concept goes against a number of established rules. Thus, he notes that contract law has, in general, refused to acknowledge that acquiescence can represent adequate acceptance of an offer.[136] Equally, he suggests that tort law shows little sympathy to the plaintiff who deliberately places himself at risk.[137] This, he suggests, argues against the imposition of liability where, for instance in the window-cleaner example, the cleaner is not even under a duty to inquire as to whether his services are required.[138] With respect, these arguments are unconvincing. Although the unjust enrichment theorists might disagree, restitution/unjust enrichment is a relatively new development in the law of England and is still in a state of development. It is disingenuous to expect it to be

[135] This argument will be developed below.
[136] Mead, "Free Acceptance..." *op. cit.* at pages 461- 462; *Felthouse* v. *Bindley* (1862) 11 C.B. (N.S.) 869.
[137] Mead, "Free Acceptance..." *op. cit.* at page 463; *ICI* v. *Shatwell* [1965] A.C. 565.
[138] *Ibid.*

fully integrated with more established subjects. The conflicts which Mead identifies are not of a nature which are so fundamental as to suggest that free acceptance is necessarily unsound.[139]

Nevertheless, a combination of these questions of principle and authority does cast serious doubts upon the concept of free acceptance. The next inevitable question is whether other possibilities are available, or whether a party only demonstrably receives an enrichment when he is incontrovertibly benefited. This has potentially important consequences for restitution's claim to be concerned not with the plaintiff's loss but with the defendant's gain. Thus, it might be argued that the absence of free acceptance and the limited availability of subjective devaluation would make the subject in practice, if not in theory, predominantly concerned with loss. This, in turn, has potentially serious consequences for how we should approach the subject, both domestically and in a conflict of law context.

Burrows has suggested two possible alternatives to free acceptance:[140] the "bargained-for" test and the "reprehensible seeking out" test. The first of these suggests that a "defendant is negatively benefited where the plaintiff performs what the defendant bargained for."[141] It holds that where a plaintiff agrees to pay for a particular thing, he has demonstrated that he believes that its provision would enrich him. This would "apply not only to discharged contracts but also to void, unenforceable, incomplete or anticipated contracts."[142] This is an area in which the normal weapon used by one commentator against another is a lack of authority.[143] Nevertheless Burrows seems unconcerned that no "explicit" authority exists for the "bargained-for" test, satisfying himself with the fact that it is an explanation for a number of cases.[144] There is nevertheless a logic in the "bargained-for" test[145] that appears to be lacking in free acceptance. The "reprehensible seeking out" test takes

[139] But we might note that they take on more import if Birks and Burrows are correct in their suggestion that restitution/unjust enrichment has always been with us, but was, as yet, unrecognised.
[140] Burrows, *Restitution*, *op. cit.*, at pages 12-6.
[141] Burrows, *Restitution*, *op. cit.*, at pages 14.
[142] *Ibid.*
[143] An argument used by Burrows against Birks on numerous occasions.
[144] *Ibid.*

this a step further by saying that where a person seeks something out, its receipt is a benefit even where the party neither wants to, or agrees to, pay for it. Thus, it would apply to a thief or a person who forced another to provide a service on penalty of violence. This test, it is submitted, raises serious problems - not the least of which is that its radicalism makes the lack of authority of particular concern. Moreover, we might ask what is meant by "reprehensible" and whether the introduction of what appears to be a moral test is not a retrograde step in a subject which has throughout its existence fought accusations of uncertainty. Burrows argues that the test is valid because, "He [the reprehensible seeker] cannot rationally say that he was indifferent to receiving the thing: and he cannot be allowed to raise the argument 'I was not willing to pay' because his reprehensible conduct shows a disregard for the bargaining process (i.e. the market system.)"[146] In reality, this test replaces the problem of indifference (which Burrows argues is inherent in free acceptance) with one of moral judgment. What of the mugger who demands the contents of a victim's handbag? He may well be indifferent to receiving her lipstick or eyeliner as his interest is in valuables. Thus if he is to be liable, the reprehensible element of Burrows' test must go not only to his willingness to pay, but also to his desire to receive the relevant asset, and we must logically be able to identify levels of reprehensibility which will lead to liability. As a result this test's advantages over free acceptance are not readily apparent.

With respect, the impression given is that many of the unjust enrichment theorists have been involved in what was described in Chapter Three as reverse engineering. In other words, they have examined the cases and attempted to formulate tests which best explain them. This is not unreasonable. The problem arises when commentators argue, as they inevitably do, that the process was in fact the other way round: that the theory explicitly came from the cases and is empowered by their authority. Moreover, it should be noted that such problems are common in this area. Commentators are wont to propagate theories which are of practical

[145] It is not unreasonable to assume that if one has agreed to pay for something then its provision can be regarded as a benefit.

[146] Burrows, *Restitution*, *op. cit.*, at pages 16; his preference for this test over free acceptance is that it overcomes any problems with regard to indifference: the defendant must have actively sought the benefit.

assistance in some limited circumstances, as if they are universal principles. This habit is a function of restitution's, as yet, undeveloped nature, combined with the determination of (some) commentators to deny this historical fact by overstating the subject's theoretical completeness. There is little or no conclusive authority in favour of any of the above tests. However, there is equally no doubt that the support of Professor Birks *et al* will ensure that free acceptance is given serious consideration when this debate comes before the courts. It is subject to the defect that it cannot, as yet, adequately explain the position of the indifferent recipient or the lengths to which an unwilling recipient must go to make his opinion known. However, it is doubtful whether these are more serious than defects found in other tests. Until the courts make a comprehensive determination on these tests we cannot know which, if any, will be favoured: all have potential defects.

The arguments in this area have been given detailed examination because they are illustrative of many of the problems of principle and authority which are common throughout the law of restitution and which suggest that it is, perhaps, an area which is not yet fully mature. This may be why its proponents strive to adopt judicial authority which is at best inconclusive. Equally, they often attempt to lay down strict tests of universal (almost scientific) application rather than usable guidelines even when the justification for such tests (both in authority and principle) is doubtful. It is the form and structure claimed for free acceptance, rather than its rationale, which undermines it. The present author has continually argued throughout this work against uncertainty. However, when creating a test to define when a party considers himself, or has demonstrated that he considers himself, to be benefited, some flexibility is inevitable. The arguments created by the unjust enrichment theorists' desire to avoid claims of woolly thinking by overstating the analytical maturity of their subject will be developed and refined in the second half of this chapter.

4.2.1.2: Incontrovertible Benefit.[147]

[147] See generally; *Greenwood* v. *Bennet* [1973] 1 Q.B. 195; *The Manila* [1988] 3 All E.R. 843.

The second test of enrichment simply asks whether the defendant has received an incontrovertible benefit.[148] Such benefit will be received in two circumstances. The first rests upon the "no reasonable man test" originally developed outside the English system.[149] This requires the court to determine whether any reasonable man would fail to find that the defendant had been saved a necessary expense. The second alternative is to ask whether the defendant has made a realisable gain.[150]

It is notable that the test for the saving of necessary expenditure is phrased in the negative: "no reasonable man." Thus if A cleans B's shoes the test would find no benefit, because some reasonable men never bother cleaning their shoes. Its workings are well illustrated by the case of *Craven-Ellis* v. *Canons Ltd* [1936].[151] However, this case also brings us immediately to the problem raised above, concerning the nature of necessity. Managing Directors are not legally, factually or morally of absolute necessity for companies. The court therefore accepted that necessity need not be absolute. This raises two specific issues. First, should the courts have the right to hold that a party has been objectively benefited, even where

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[148] In Birks' formulation such a defendant is prevented from recourse to subjective devaluation. However, it is notable that Burrows (Burrows and McKendrick, *Cases and Materials on the Law of Restitution*, Oxford, 1997, 569) is of the opinion that *Ministry of Defence v. Ashman* (1193) 66 P & CR 195 is a case in which subjective devaluation was possible even though the defendant was incontrovertibly benefited.

[149] See, for example, in Canada, *Weldon* v. *Canadian Surety Co.*, 64 D.L.R. (2d) 735 (1966); *County of Carleton* v. *City of Ottowa* (1963) 39 D.L.R. (2d) 11; *The Indian Contract Act* s. 70.

[150] It should be noted that the principle of incontrovertible benefit is not entirely uncontroversial, accepting as it does the idea that a defendant may have to pay for goods and services which he has not requested, or even freely accepted (*Flacke* v. *Scottish Imperial Insurance Co.* (1860) 34 Ch.D. 234, *per*, Bowen L.J.) Again we are in the arena of policy and competing rights. In this context the principle of realisable gain is easily acceptable, being analogous to the receipt of money; however, the question of the saving of a necessary expenditure is more difficult. The courts might believe that I need something. I might vehemently disagree; who is to say that I should not be the final arbiter of my needs (even if I am being patently unreasonable)? The problem therefore revolves around the meaning of *necessary* expense, and this will be discussed in more detail below. What is certain is that the courts have taken a pragmatic view of this area, and there appears to be some authority for the principle of incontrovertible benefit in both its guises: *Craven-Ellis* v. *Canons Ltd* [1936] 2 K.B. 403; *BP Exploration Co. (Libya) v Hunt (no.2)* [1979] 1 W.L.R. 783; *Proctor & Gamble Philippine Manufacturing Corpn* v. *Peter Cremer GmbH* [1988] 3 All E.R. 843. However, Hedley's comments on the apparent acceptance of incontrovertible benefit in second and third cases should be noted, "...in both cases the judge seemed to share the academic's perplexity over how to use the notion": Hedley, S. "Unjust Enrichment" *op. cit.* at page 580.

[151] [1936] 2 K.B. 403. The plaintiff worked for the defendant as a Managing Director in the mistaken belief that he had a valid contract of employment. His action for *quantum merit* was upheld by the Court of Appeal, notwithstanding the fact that there was, "...nobody for want of authority, at any material time, who could act for the company...who could make requests for the company, or who could enter into any contract, express or implied.": [1936] 2 All E.R. 1066 at 1069 *per* Croom-Johnson K.C. (this passage does not appear in the law reports but is quoted by Goff & Jones at page 24). The court concluded that the company had been enriched as it had received services which it necessarily needed (they, "would have had to get some other agent to carry them out." *per* Greer L.J. at 412). Thus, the defendant company had received an incontrovertible benefit

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they would disagree? Second, if we do accept the idea of an objective benefit, how certain must the anticipated expense be before such a benefit is actionable?

The first question is potentially very difficult. There clearly are situations when society would as a whole accept that a necessary cost has arisen.[152] However, litigation in this area will necessarily involve situations in which the defendant denies that he has benefited. By accepting the ability to pronounce upon necessity as a general principle (outside the area of legal necessity) the courts have moved into potentially complex grey areas.[153] There are, it is submitted, clear problems involved in claiming that an individual has legally benefited from something which they did not freely accept and which they do not believe they need. Nor does the negative formulation of the test necessarily avoid these difficulties.

It is suggested that the practical solution to these problems is for the courts to limit the test to areas of legal necessity. A failure to do so leads to the potential anomalies which have dogged the law of restitution for centuries. This is illustrated by the case of *Craven-Ellis* v. *Canons Ltd* [1936]. As we have seen, that case was not decided on the free acceptance of service, but on necessary expenditure. We have also noted that a Managing Director is not a legal requirement. Is it therefore possible to argue, using this case, that a party who appointed himself Managing Director of a company might claim recompense, even though the company was convinced that no Managing Director was required? This cannot be a sensible proposition, and clearly in the absence of some acquiescence by the company we are unlikely to see such an approach. But it is an example of the difficulties that

because it had been prevented from incurring an inevitable (factual, legal or moral) expense (further examples can be seen in *Exall* v. *Partridge* (1799) 8 T.R. 308; *Re Rhodes* (1890) 44 Ch.D. 94).

[152] Normally in situations of legal necessity.

[153] For example: B pays for a taxi to take the unconscious and dying A to hospital. But A wishes to commit suicide because his girlfriend has left him. Is he benefited because the ride saves his life; must he make recompense for the taxi fare? Is the answer different if A is committing suicide because he is suffering from terminal cancer? Or if, rather than committing suicide, he is simply avoiding hospital treatment in order to hasten a natural death and prevent the extreme pain that the futile treatment may cause? It is not suggested that these cases are insoluble. They are merely included to suggest some of the problems we can imagine arising.

may arise when one accepts a standard of necessity which is not absolute[154] and yet which makes little or no reference to the defendant's subjective requirements.

However, while the author might argue that the only way to avoid such problems is to limit the concept of necessary expense to legal or absolute necessity,[155] this has clearly not occurred. The second question which therefore arises is, where along the line of human requirements are we to fix its position?; in other words, how certain must the occurrence of the inevitable expense be? The cases give little guidance when searching for a specific formulation. Professor Birks is happy to accept a liberal approach to what is necessary, arguing that the courts should develop case law along the principles applied to necessities for infants.[156] Thus, under this formulation the courts would ask what is reasonable to support the defendant's station in life.[157] Indeed, Birks suggests that the courts should discount only "unrealistic or fanciful possibilities."[158] Following the above discussion it is unsurprising that the present author would suggest that the necessary expense doctrine, as formulated, is a recipe for uncertainty. Nevertheless, paradoxically, it must be noted that a wide interpretation of necessity does at least have the benefit of limiting the application of subjective devaluation.

By way of contrast, realisation in money is a relatively uncontroversial area which is no more than a logical extension of the principle that the receipt of money necessarily equals enrichment. Thus, it states that where a defendant receives a benefit which he then converts into money, he is incontrovertibly benefited by the value received. The question of whether this also applies to a benefit which is only *realisable* remains moot. Burrows takes the view that an incontrovertible benefit will have accrued where it is "reasonably certain that he [the defendant] will realise

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[154] The dictionary defines "necessary" as, "Indispensable, requisite, needful; that cannot be done without": *The Shorter Oxford Dictionary*, Oxford, 3rd. ed. (1983).

[155] This, it is submitted, is not unreasonable when one is attempting to fix a defendant with a liability which they have not freely accepted, which they claim not to need, and on which they have made no realisable gain.

[156] *Sale of Goods Act 1979*, s.3 (2).

[157] It must be remembered that Birks is using the test not as a test of enrichment *per se* but as a test of whether the defendant has recourse to subjective devaluation.

[158] The discounting of unrealistic or fanciful propositions has been adopted by the Supreme Court of New South Wales in *Monks* v. *Poynice Ltd* (1987) 11 A.C.L.R. 637; Birks, *Introduction*, *op. cit.* at pages 109-117.

the positive benefit."[159] Birks argues that it is conferred only when it is actually converted into money,[160] and Goff and Jones take the view that a readily convertible benefit is sufficient.[161] All three approaches have their weakness, and the courts have provided little authority as to which is correct. Burrows criticises Birks' solution as placing an unacceptable emphasis on the date of trial.[162] Unfortunately, his own proposition could potentially suffer from the same problem while introducing a large element of doubt regarding the meaning of "reasonably certain." Burrows counters this by saying that the courts are often required to predict future behaviour. However, even using his own example of a mistakenly improved car,[163] it is difficult to understand how the courts will predict that the defendant will sell the car in the very near future when he claims he will not. Equally, Burrows criticises Goff & Jones' solution for placing an unnecessary burden on the defendant who does not wish to immediately realise the benefit.[164] Accepting that all three possibilities have their disadvantages, it is suggested that Goff & Jones have arrived at the lesser of three evils, and one which best fits the commercial realities of the modern world.

4.2.2: "AT THE EXPENSE OF THE PLAINTIFF."

If someone picks up £5 which fell from my wallet, there is little doubt that his enrichment is at my expense. But what if my mistreated wife gives a local vandal £100 to paint my Rolls Royce bright pink? The value of my car has gone down, but is there an actionable restitutionary connection between the third party's gain and my loss? Alternatively, does a party who makes money by infringing my intellectual property rights do so at my expense?

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[159] Burrows, *Restitution, op. cit.* at page 10.
[160] Birks, *Introduction, op. cit.* at page 121.
[161] Goff & Jones, *op. cit.* at page 44.
[162] Burrows, *Restitution, op. cit.* at page 10.
[163] *Ibid.*
[164] *Ibid.*

Birks has argued that the law of restitution recognises two ways by which a party can be shown to have suffered an expense,[165] and these define a fundamental split in the structure of the subject between "autonomous restitution" and "restitution for wrongs". Autonomous restitution will occur when the defendant subtracts from the plaintiff's "store of value" (as in the wallet example) and accounts for the vast majority of all restitutionary cases. "Restitution for wrongs" does not require a specific causal connection between a loss to the plaintiff and the defendant's enrichment, and according to Birks normally occurs in circumstances that other areas of law have accepted as wrong: for example, breach of fiduciary duty, interference with property, breach of confidence and breach of intellectual property rights. The primary importance of this distinction is that the victim of a relevant wrong may have a claim to profits resulting from the defendant's gain.

4.2.2.1: Autonomous Restitution.

The example given above of someone finding my £5 is the paradigm of a benefit "at the expense of the plaintiff" which gives rise to autonomous restitution. Generally speaking, few two-party relationships will create problems; if the defendant has handed over money or goods, or provided services to the defendant, then the causal connection of expense and benefit is normally self evident.[166] However, complexities can still arise[167] and real problems occur when a third party is added to the equation.[168]

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[165] Burrows describes this split as, "...*the* major theme of Birks' work...": Burrows, *Restitution*, *op. cit.*, at pages 16.

[166] This of course says nothing as to whether the enrichment was unjust.

[167] For example, Goff and Jones give the example of a plaintiff who makes a payment which is later held to be *ultra vires*: Goff & Jones, *op. cit.* at page 35. In an action for recovery of the sum, the defendant claims that although he has been enriched it was not at the plaintiff's expense because the former has passed on the costs to his customers. One solution (as Goff and Jones suggest) is to treat the matter as an evidential issue, with the burden being on the defence to show that there was no expense (The burden potentially shifting when it can be shown that the defendant has behaved in a wrongful manner: *Mason* v. *The State of New South Wales* (1958) 102 C.L.R. 108.) However, if we take the Birksian formulation of enrichment equating with subtraction, the relevant question therefore becomes, "was there, at the relevant time, a subtraction from the plaintiff's store of assets which resulted in an enrichment of the plaintiff?" If this question is applied to the above example the defendant's benefit was, it would seem, at the plaintiff's expense because *at the time* it was made a subtraction occurred from his assets (although there may be a need to consider special circumstances: see generally Birks, *Introduction*, *op. cit.*; Goff & Jones, *op. cit.*). The temporal aspects of autonomous enrichment prevents the plaintiff from pursuing profits made with his assets after the defendant's receipt. It is not unreasonable therefore to suggest that the defendant should himself be prevented from recourse to the limitation of his liability by factors which occur after his enrichment. However, it should be noted that Goff and Jones point out in *The San Giorgio case* [1983] E.C.R. 3595 (cited in *Woolwich Equitable Building Society* v. *Commissioners* of *Inland Revenue* [1993] A.C. 17) the E.C.J.
Footnote Continues on Next Page:

In the context of the present study, autonomous enrichment is of clear importance with regard to mistaken payments.[169] Beatson and Bishop are of the opinion that "...a developed doctrine of unjust enrichment tends to grant restitution whenever mistake causes the payment..."[170] and that such a wide formulation is acceptable because the change of position defence[171] prevents injustice.

It is clear that the importance of this area can go beyond innocent mistake because, some mistakes are "...induced by misrepresentations made by the defendant."[172] However, Birks' goes further and argues that any structure[173] which accepts mistake

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accepted that a member state could deny restitution in such a case: indeed it is suggested that the plaintiff would himself have been unjustly enriched at the expense of the customers.

[168] This may happen in a number of situations. For example, where B sells A's property to C without A's knowledge or permission. Is it possible, in the law of restitution, for A to recover the cash proceeds now in the hands of B? The cases suggest that where B has, in effect, intercepted cash which was actually on its way to A then he can bring himself within the subtractive sense of enrichment. Thus in this situation he would need to have an original right of action against C. This is illustrated by cases in which restitution has been allowed where B has made profit by usurping A's office (Goff & Jones, *op. cit.* at page 35; *Arris* v. *Stukely* (1677) 2 Mod. 260; *Howard* v. *Wood* (1679) 2 Show. K.B. 21. It is worth noting that Goff and Jones consider these cases to be specifically concerned with "waiver of tort.") or where B receives rent which should belong to A (*Asher* v. *Wallis* (1707) 11 Mod. 146). The theoretical basis of these cases is less than clear. Smith has suggested that where B acted or purportedly acted on C's behalf, he is necessarily bound to accept that the money was received for A's use (Smith, "A Critique of Birks' Theory of Interceptive Subtraction" (1991) 11 Oxford J. of L.S., 481). This is logically sound: A had a right of claim against C and was made poorer by the actions of B. But what is the situation where A has no right of action against the third party? In the simplest example of such a situation, C gives money to B intending that he should pass it on to A, but without a legal requirement that should do so (this situation presents a number of problems; A cannot claim a passing of property as the item in question is an unspecified quantity of money, nor can he bring an action in contract as he has provided no consideration; Goff & Jones, *op. cit.*). Common law cases hold that a right of action will arise only when B makes attournment to A; i.e. he confirms C's intention by making A aware that the money is held on his behalf (*Liversidge* v. *Broadbent* (1859) 4 H. & N. 603; *Griffin* v. *Weatherby* L.R. 2 Q.B. 753; *Shamia* v. *Joory* [1958] 1. Q.B. 448; Goff & Jones, *op. cit.*). In requiring attournment rather than proof of C's intent and B's knowledge of such intent, this test is unnecessarily pedantic and greatly limits the practical use of the remedy. Partly for this reason equity takes the more pragmatic approach of asking whether C has expressly or impliedly evinced an intention to create a trust in favour of A. If he has, A will clearly have no difficulty in enforcing his claim. He may, however, have evidential problems in convincing the courts that an intention to create a trust can be found. There is some debate as to whether it is possible to place cases of third party intervention within a unifying framework. It is clearly arguable (as is suggested above) that the enrichment will be at the expense of the plaintiff where the benefit would, without the defendant's intervention, certainly have come to him (Smith, L., "A Critique of Birks' Theory of Interceptive Subtraction" 11 Oxford J. of L.S., 481). This is, however, not universally accepted. Goff and Jones are, it seems, happier to note a range of special cases rather than search for a universal principle. It is probably true that the former view does not offend against the decided case law and is more satisfactory if one is searching to lay down a workable set of principles governing restitution. Further, this solution becomes more attractive if one accepts, as Birks does, that all third party situations which are not within the interceptive mode will be covered by "restitution for wrongs". The validity of this assumption is discussed in the following section.

[169] For a general discussion of the effect of mistake, see Appendix One.

[170] Beatson and Bishop, "Mistaken Payments in the Law of Restitution" (1986) Vol. 36, Uni. Toronto L.J., 149.

[171] *Lipkin Gorman* v. *Karpnale Ltd* [1991] 3 W.L.R. 10 (H.L.); [1991] 2 A.C. 548.

[172] Birks, *Introduction*, *op. cit.* at page 146.

[173] Which he categorises as "Non-voluntary transfer."

as grounds for restitution must necessarily accept total ignorance.[174] In other words if we conclude that an unjust enrichment occurs when a plaintiff mistakenly pays money to the defendant, it must also be present where money is taken (for example, by theft, fraud or forgery) without his knowledge. The result is that autonomous restitution will be available in most forms of fraud without the plaintiff needing to demonstrate behaviour sufficient to give rise to "restitution for wrongs."[175]

4.2.2.2: Restitution for Wrongs.

Autonomous restitution requires the plaintiff to show that the defendant has been enriched at his expense along with some factor which would make the transaction unjust. However, where the claim is based upon wrongdoing "at the plaintiff's expense".[176] the requirement is, according to some commentators, negated.[177] The primary importance of this determination[178] is that it potentially allows the plaintiff to make a claim not only against the asset coming into the hands of the defendant, but also profits derived from it. Birks explains that "wrong" is a wide-ranging concept.[179] Unfortunately, the Professor is forced to conclude that what these

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[174] "Generally it [ignorance] will..[involve]...theft or one of its specialised off-shoots. Suppose I am your employer and I put my hand in your till, or I forge a cheque so as to siphon your money into my bank account. In such cases your right to restitution can be made without your having to characterise my conduct as a crime or civil wrong. I am enriched by subtraction from you, and you, in the strongest possible way, did not mean me to be. You did not know I was taking the money. Restitution for mistake does not involve the proof of any wrong; total ignorance is *a fortiori* the most fundamental mistake. Hence any system which believes in restitution for mistake cannot but believe in restitution for ignorance, quite independently of any wrong incidentally committed." Birks, *Introduction*, *op. cit.* at page 141.

[175] Birks cites *Neate* v. *Harding* (1851) 6 Exch. 349 and *Moffat* v. *Kazana* [1968] 3 All E.R. 271 as examples of such cases.

[176] In the subtractive or causal connection sense. Bringing an action under this head potentially allows the plaintiff to claim restitutionary or compensatory damages: Birks, *Introduction*, *op. cit.* at page 313.

[177] Burrows justifies the split between autonomous restitution and "restitution for wrongs" in the following manner "...this distinction, at a deeper level, reflects two distinct moral principles underpinning the law of restitution. First, 'no man shall profit from his own wrong' where the plaintiff's loss is irrelevant. And secondly, restoration of the status quo for both the plaintiff and the defendant to the extent that the plaintiff's loss has unjustifiably become the defendant's gain.": Burrows, *Restitution*, *op. cit.*, at page 18.

[178] It has been argued that the other notable characteristic is that a party who has suffered no loss can gain recompense. Birks holds that "restitution for wrongs" will be prevented by bars to the underlying wrong: Birks, *Introduction*, *op. cit.* at pages 346-355. Burrows, however, disputes this opinion, "...applying a purposive construction, it is not necessarily the case that the rules (even though expressed as applying to wrongs) are applicable to *all* remedies, including restitution for the particular wrongs. For example, while it is indisputable that all rules expressed as applying to tort actions are meant to apply to actions for compensatory damages for a tort, it is far from clear - and must be a question for the policy of the rule - whether the language of tort actions is meant to include restitution for a tort.": Burrows, *Restitution*, *op. cit.*, at pages 17-18.

[179] "The word 'wrong'...is used in order to avoid restricting the scope of the discussion to torts actionable at common law. The word cannot be defined in terms of moral blame, since even some torts can be commissioned without fault. It is used to cover all conduct, acts or omissions, whose effect in creating legal consequences is attributable to being characterised as a breach of duty. The term thus includes not only all Footnote Continues on Next Page:

wrongs might be, "...is a question which cannot at present be given a firm and clear answer."[180] However, it is certain that most commentators would argue that "restitution for wrongs" can, potentially, come into play in a large range of cases,[181] possibly including those involving some form of interference with contract,[182] the proceeds of crime,[183] profits made in breach of trust, profits arising out of a conflict of interests,[184] profits arising out of breach of confidence[185] undue influence, and with regard to certain other tortious questions.[186] It should be noted that in these situations it would often also be possible to bring actions not only on the basis of "restitution for wrongs", but also autonomous restitution. Thus, for example, one might suggest that a briber has committed the tort of deceit against the principal,[187] equally there might be a breach of a fiduciary duty (which might be categorised as "restitution for wrongs"), alternatively one could view it as an interference with the contract between the principal and agent (and thus again subject to "restitution for wrongs"). Finally, where the briber himself receives a benefit, an action with regard to autonomous restitution may be possible against him.

These multiple possibilities have the inevitable effect of further complicating the characterisation problems that are discussed below. This is a difficulty which is exemplified by the potential for the common law element of the area, specifically, waiver of tort, to be split into three further categories. In Birks' terminology, these are alternative analysis in unjust enrichment, extinctive ratification and restitution for the wrong. By the use of the "alternative analysis in unjust enrichment", he is acknowledging the ability of the plaintiff in some cases to bring an action either

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torts but also breaches of equitable and statutory duties and breaches of contract.": Birks, *Introduction*, *op. cit.* at page 313.

[180] *Ibid.*

[181] All of these have their own requirements and limitations, some of which have been considered above (others will be considered in more detail below).

[182] *Federal Sugar Refining Company v US Sugar Equalization Board* (1946) 26 Wash. (2d) 282; it is possible to view bribery cases in this context.

[183] "...no system of jurisprudence can without reason fail to include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person.": *Cleaver* v. *Mutual Reserve Fund Life Association* [1892] 1 Q.B. 147; see also *St. John Shipping Corp.* v. *Joseph Rank Ltd* [1975] 1 Q.B. 267; *Haseldine* v. *Hosken* 1 K.B. 822; also for comment see Youdan, 89 L.Q.R. 235; Earnshaw and Pace, 37 M.L.R. 481.

[184] *Reading* v. *A-G* [1951] A.C. 507; *Regal (Hastings) Ltd.* v. *Gulliver* [1942] 1 All E.R. 378.

[185] *Peter Pan Manufacturing Corporation* v. *Corsets Silhouette Ltd.* [1964] 1 W.L.R. 96.

[186] *Howard* v. *Wolf* (1679) 2 Lev. 245; *Oughton* v. *Sepping* (1837) 1 B. & Ad. 241.

[187] *Salford Corporation* v. *Lever* [1891] 1 Q.B. 168.

with regard to autonomous restitution or "restitution for wrongs." Extinctive ratification refers to the situation in which the potential plaintiff accepts the wrongful act after the fact, thus turning the defendant into his agent, and subsequently bringing an action in money had and received. The first two categories therefore require the defendant to either ignore the wrong or accept, and thus, negate it. The final category (restitution for the wrong) allows him to show that it is a wrong which gives rise to restitutionary damages. At first sight, this category appears to be based (like much of the area) less on theory than an attempt to provide a foundation of unjust enrichment to cases which are equally explainable with regard to different or confused principles.[188] However, its wide acceptance makes the area intrinsically important and it has arguably been used with regard to cases arising out of fraud.[189] Nevertheless, the problems associated with these categorisations are widely acknowledged,[190] and there is little doubt that the availability of alternative solutions has limited the development of a comprehensive understanding of "restitution for wrongs."

However, a more fundamental problem exists in this area. Specifically, McBride and McGrath have recently denied the existence of "restitution for wrongs" within the English system.[191] This is a proposition that must be examined in some detail as it has potentially important ramifications with regard to choice of law questions.

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[188] For a discussion of such practices see Hedley, S. "Unjust Enrichment", *op. cit.*

[189] *United Australian Ltd.* v. *Barclays Bank Ltd* [1941] A.C. 1.

[190] "Though there are many cases in which the plaintiffs have obtained restitution from wrongdoers, it is often not possible to say whether they succeeded on the basis of alternative analysis or "restitution for wrongs". In particular there are very few cases which fall unequivocally into the latter category...Normally we would expect to be told by the judges themselves whether they were giving restitution on the one basis or the other. However, since...'waiver' has elided all the theoretical possibilities, the judgments do not overtly take any distinction between alternative analysis and "restitution for wrongs"." Birks, *Introduction*, *op. cit.* at page 318. Note also at page 322, "Unless counsel and the court expressly say which route to restitution is being followed it is impossible to be sure which is primarily in mind when any reason is given why restitution should or should not be given." In an attempt to clarify this situation Birks identifies three tests which between them "appear to account satisfactorily for the incidence of restitution as a response to wrongs. Specifically, (a) deliberate exploitation of wrongdoing; (b) anti-enrichment wrongs, and; (c) prophylaxis." The problems associated with these characterisations and the manner in which they arise in an international context will be further discussed below.

[191] McBride, J. and McGrath, P., *op. cit.* at page 44; see also Beatson, "The Nature of Waiver of Tort" in *The Use and Abuse of Unjust Enrichment*, Oxford, (1991), *contra* Burrows, *Restitution*, *op. cit.*, at pages 20. Sharpe and Waddams (Sharpe, R., and Waddams, S., "Damages for Lost Opportunity of Bargain" (1982) 2 O.J.L.S, 290 have also suggested an alternative interpretation. Thus, they suggest that the plaintiff is compensated, even though he appears to have suffered no loss, because he has in fact lost the opportunity to sell the asset which was being used by the defendant.

Specifically, because some commentators have accepted "restitution for wrongs" as a categorical tool for determining choice of laws issues.[192]

In considering this question, we should remember that the effect on the law of England of refuting Birks' understanding of "restitution for wrongs" may not be enormous. According to Birks, "restitution for wrongs" operates in spheres already occupied by other areas of law. Under that interpretation, if it exists, it merely gives rise to restitutionary, as opposed to compensatory, damages in some unspecified areas,[193] and explains the damages available in cases such as *Boardman* v. *Phipps* [1967].

Nevertheless, there is little doubt that most unjust enrichment theorists believe that restitution/unjust enrichment is severely diminished in importance if it does not include a concept of "restitution for wrongs." It is therefore entirely possible that the growing influence of these commentators will result in the courts becoming more willing to explicitly recognise this view. The question to be answered is whether this is justified or merely a way of extending the ambit of the subject.

The basis of McBride and McGrath's argument against "restitution for wrongs" is that the English response to wrongs is not restitutionary, but compensatory and intended to place the plaintiff into the position he would have been in, had the wrong not been committed:[194] *per* Lord Diplock in *The Albazero*.[195] This might be contrasted with Bird's view that, "The only difference between them [tort, contract or equitable wrongs cases] is that the *remedy* is restitutionary rather than compensatory."[196] McBride and McGrath argue that what authority exists in this area denies a restitutionary response to breach of contract.[197] and that any authority in support of a restitutionary response to tort is, at best, inconclusive.[198] Birks, on

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[192] Bird, J. "Choice of Law", *op. cit.* at page 92.
[193] Moreover, some plaintiffs in this area would clearly be able to recover profits through the use of proprietary remedies.
[194] McBride, J. and McGrath, P., *op. cit.* at page 44.
[195] *Albacruz (Cargo Owners)* v. *Albazero (Owners), 'The Albazero'* [1970] A.C. 774, 841 C-D.
[196] Bird, J. "Choice of Law", *op. cit.* at page 92.
[197] *Teacher* v. *Galder* (1899) SC 5th Series 39; *Tito v Waddell (No.2)* [1977] Ch. 106.
[198] "Lord Devlin may be interpreted as endorsing the existence of a restitutionary duty arising out of a deliberately committed tort in *Rookes* v. *Barnard* [1964] A.C. 1129, 1226-7. However, his *dicta* should be
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the other hand, points to two cases which he suggests are "...unequivocal examples of "restitution for wrongs"...": [199] *Reading* v. *A-G* [1951][200] and *Boardman* v. *Phipps* [1967].[201] The importance of these cases according to Birks is that "...it is beyond argument" that the "only connection" between the plaintiff and the relevant profit was the wrong.[202] The question which we must ask is whether this is true, or whether there is a more logical explanation for these cases.

McBride and McGrath believe that the misunderstanding concerning "restitution for wrongs" has arisen because a plaintiff who claims recompense for the wrongful use of an asset is clearly alleging a wrong. However, this wrong is an incidental element of the circumstances surrounding the claim: it is not an integral part of his cause of action. Moreover, courts have never granted "restitution for wrongs" outside the area of "proprietary wrongs."[203] "Restitution for wrongs" is, therefore, the product of a misguided attempt to explain restitutionary duties in situations in which there has been no subtraction from the plaintiff.[204] This is of course a similar point to the one made above with regard to the restitution theorists' desire to shape principle to fit the facts, and provides a continuing backdrop to the study of restitution. The true basis is, according to the authors, that "the plaintiff's assets were used without the plaintiff's consent, and as a result the defendant acquired assets."[205]

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seen as endorsing the existence of a criminal punishment for a deliberate tort, inflicted through the mechanisms of private law. His language reflects this: 'In a case in which exemplary damages are appropriate the sum which [the jury has] in mind to award as compensation...[must be]...inadequate (*sic*) to punish [the defendant] for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it.": McBride, J. and McGrath, P., *op. cit.* at page 44.

[199] Birks, *Introduction*, *op. cit.* at page 320.

[200] [1951] A.C. 507. In this case a Sergeant in the British Army was paid bribes to ensure the safe passage of vehicles carrying contraband through Cairo. His attempt to recover £20,000 confiscated from him was unsuccessful.

[201] [1967] 2 A.C. 46.

[202] Birks, *Introduction*, *op. cit.* at page 320.

[203] "In no other case where a wrong has been committed do the courts allow a plaintiff to recover the gain made by a wrongdoer in committing his wrong.": *Ibid.*

[204] "Some recognised that if one acknowledges the existence of "restitution for wrongs" it is futile to differentiate between wrongs and deny the restitutionary remedy for some and admit it for others: Goff and Jones...414-417, 720-3. As this is not the position in English law, they thereby commit themselves to holding that the law is wrong; they do not pause to consider whether their premise (that there is such a thing as "restitution for wrongs") is incorrect.", *per*, McBride, J. and McGrath, P., *op. cit.* at page 49.

[205] *Ibid.*

The question which necessarily presents itself is whether McBride's and McGrath's approach can adequately explain *Reading* v. *A-G* [1951][206] and *Boardman* v. *Phipps* [1967]. In the former case there has been some suggestion that Reading could have been held liable for the misuses of property belonging to the British Army, but the question does not appear to have been considered fully. This was not, however, the case in *Boardman* v. *Phipps* [1967] where the question of whether information could amount to trust property was the subject of some discussion, and two of their Lordships concluded that it could.[207] However, despite the opposing view of the majority this case is far from conclusive. There is no doubt that at the time of the case some commentators criticised the idea that information could amount to property.[208] Nevertheless one might argue that a possible proprietary explanation could clearly throw doubt upon Birks' belief that *Boardman* v. *Phipps* [1967] is "unequivocal" proof of "restitution for wrongs" and provides some support for McBride and McGrath's position. This impression is enforced when one begins to ask what is the Birksian "wrong" which allowed "restitution for wrongs." The simplest answer to that question is a breach of Boardman's fiduciary duty. However, Lord Upjohn (dissenting) considered this position in detail.[209] and he and Viscount Dilhorne suggested that "...the defendant's conflict of interest was

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[206] *Reading* v. *A-G* [1951] A.C. 507.

[207] Lord Hodson said, "...I dissent from the view that information is of its nature something which is not properly to be described as property. We are aware that what is called "know-how" in the commercial sense is property which may be very valuable as an asset. I agree with the learned judge ([1964] 1 W.L.R. 933, 1008-1011) and the Court of Appeal ([1965] Ch. 992) that the confidential information acquired in this case, which was capable of being and was turned to account, can be properly regarded as the property of the trust.": *Boardman* v. *Phipps* [1967] 2 A.C. 46. Lord Guest reached a similar conclusion, "If Mr Boardman was acting on behalf of the trust, then all the information that he obtained in phase 2 became trust property. The weapon which he used to obtain this information was the trust holding; and I can see no reason why information and knowledge cannot be trust property..." [1967] 2 A.C. 46; Lord Cohen held that it was not property "...in the strict sense..." at page 102.

[208] Hanbury and Martin, *op. cit.* at page 593, footnote 23; Jones, G. 84 L.Q.R. 472; Oakley, *Constructive Trusts*, 2nd. ed., 78

[209] "I think...that some of the trouble that has arisen in this case, it being assumed rightly throughout that he was in such a [fiduciary relationship] capacity, is that it has been assumed that it has necessarily followed that any profit made by him renders him accountable to the trustees. That is not so...It is perfectly clear that a solicitor can if he so desires act against his clients in any matter in which he has not been retained by them provided, of course, that in acting for them generally he has not learnt information or placed himself in a position which would make it improper for him to act against them. This is an obvious application of the rule that he must not place himself in a position in which his duty and interest conflict. So, in general, a solicitor can deal in shares in a company in which the client is a shareholder, subject always to a general rule that the solicitor must never place himself in a position where his interest and duty conflict; and in this connection it might be pointed out that the interest and duty may refer (and frequently do) to a conflict of interest and duty on behalf of different clients and have nothing to do with any conflict between the personal interest and duty of the solicitor, beyond his interest in earning fees.": [1967] 2 A.C. 46, 126.

theoretical rather than real."[210] It is submitted that Hanbury and Martin are correct when they suggest that this is an argument which is "difficult to answer."[211] Equally Goff and Jones state, "We have sympathy with the vigorous dissent that...equity's rule was harshly and indiscriminately applied."[212]

Although the argument has a somewhat tenuous nature[213] it could, therefore, be claimed that *Boardman* v. *Phipps* [1967] is a case which potentially has a proprietary based explanation but no relevant "wrong." Moreover, it may be arguable that the passing of thirty years could have weakened the belief that information does not demonstrate the necessary characteristics of property. Thus, Millett has suggested extra-judicially that, "Confidential information is not trust property, but it shares this characteristic with trust property, that the person who is entrusted with it is bound to use it, if he uses it at all, only for the purpose for which he received it."[214] This at least suggests that the balance between the importance of the information's characteristics and the wrong, favours the former.

It does not, however, support the suggestion that the cases are *purely* concerned with interference with proprietary rights, and the present author would take the view that McBride and McGrath's argument is too narrow. A close reading of both cases shows that whilst the courts were concerned with factors which have a similarity to property (for example, information), they were not concerned purely with property in the traditional McBride and McGrath sense.

Moreover, other cases show similar latitude. Thus, for example, in the case of *Harrods Ltd* v. *Harrodian School Ltd.*[215] the proprietors of Harrods brought an action to prevent the defendants from using the name "Harrodian School." Millett L.J. took the view that:

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[210] Goff & Jones, *op. cit.* at page 663.
[211] Hanbury and Martin, *op. cit.* at page 593.
[212] Goff & Jones, *op. cit.* at page 663.
[213] Forcing several uncertain possibilities to be built upon one another.
[214] Millett., P., "Equity's Place in the Law of Commerce", Lecture to the Chancery Bar Association, June 1997, 9.

> "the property which is protected by an action for passing off is not the plaintiff's proprietary right in the name or get up which the defendant has misappropriated but the goodwill and reputation of his business which is likely to be harmed by the defendant's misappropriation."

Equally, the exploitation of the sergeant's position in *Reading* cannot be a use of property in the narrow sense suggested by McBride and McGrath.

However, one could argue that both *Boardman* and *Reading* are explainable as a result of breach of fiduciary duty or duties imposed by state office[216] and this raises two further possibilities beyond Birks' concept of "wrongs." First, the area is the result of policy decisions, too narrow to form a coherent area of law. Second, the area is not concerned specifically with wrongs developed by other areas, or interference with property rights, but with interference with a plaintiff's wider rights amounting to a form of unjust enrichment. Stevens supports the first view and suggests, of such cases, "In [the] remaining situations where restitutionary proprietary relief is purportedly readily available, the recovery is motivated by policies that are obviously extraneous to private law. Some of these favour the expropriation of profits gained through breaches of fiduciary duties..." [217]

It is certainly true that the courts have been extremely strict in ensuring that those parties who are in a fiduciary relationship adhere to particular standards of behaviour. However, are such policy reasons sufficient to provide a total explanation of these particular rules? The wider the areas in which restitution for wrongs is applicable, the more we must question the suggestion that it is not a part of some wider unified area of law, but a disparate collection of policy responses. If restitution for wrongs, for example, includes passing off, the suggestion that the courts were merely concerned with strict rules for fiduciaries begins to look doubtful. Certainly the argument must fail, if (as it appears to do) restitution for

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[215] [1996] RPC 697.
[216] Stevens, "Restitution, Property and the Cause of Action in Unjust Enrichment: Getting by with Fewer Things - Part I. " (1989) Univ. Toronto L.J. Vol. 39, 258, 279.
[217] Stevens, "Restitution, Property..." *op. cit.* at page 259.

wrongs includes breach of confidence, appropriation of commercial obligation and potentially even breach of contract.[218]

It is therefore submitted that the range of circumstances noted above, in which restitution for wrongs operates, would suggest that the narrow policy explanation is not sufficient. Or, if it is, the areas are so extensive that we must still look for the motivating factor behind the policy.

It is therefore reasonable to suggest that restitution for wrongs has been accepted in a range of areas which cannot be properly explained by pure interference with property or narrow policy reasons. This being the case, the next question is whether the area is (as suggested by Birks) triggered by wrongs formed with other areas or whether in the wider concept of interference with rights we can discern an independent motivation for the subject. However, the nature of restitution must be examined in more detail before we can properly answer this question. As a result, it will be reconsidered in the conclusion to this chapter.

4.2.3: THE MEANING OF UNJUST ENRICHMENT.[219]

As we have noted above, the concept of unjust enrichment is said by the relevant theorists to provide the underlying basis for the law of restitution,[220] allowing a number of techniques, remedies and topics which were previously considered to be unrelated, to be brought together into a logical category. Unfortunately, its apparent reliance on the uncertain concept of justice also provides a puissant difficulty in the law's practical application and general acceptance. The phrase "unjust enrichment" appears to suggest that any settlement will, to a greater or

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[218] Although the argument in favour of restitution has not been made in English law, it is not untenable: Goff & Jones , *op. cit.*, at page 370.

[219] "This is indeed by nature fair, that nobody should be made richer through loss to another (*cum alterius detrimento*)...It is fair by the law of nature that nobody should be made richer through loss and wrong to another (*cum alterius detrimento et iniuria)*.": Pomponious, *Digest,* 12.6.14; 50.17.206; see also Dawson, *Unjust Enrichment, op. cit.* at page 5.

[220] "...we are of the opinion that English law is now sufficiently mature to follow the examples of other common law jurisdictions and to recognise that the law of unjust enrichment unites all restitution.": Goff & Jones, *op. cit.* at page 15. Indeed some interpretations would seem to equate unjust enrichment and restitution. Thus Seavey, one of the framers of the Second American restatement, said, "Restitution is the equitable principle by which one who has been enriched at the expense of another, whether by mistake or Footnote Continues on Next Page:

lesser extent, be based upon a moral judgment and rightly or wrongly English lawyers are reluctant to submit complex commercial disputes to the unpredictable strictures of moral righteousness.[221] To some extent, it can be argued that this problem is only one of terminology because the use of the word unjust need not necessarily imply a call to higher moral authority: it can be as well accommodated within a practical legal framework as any other term of art. Indeed, as Birks points out, "disapproved" or "reversible" would both have been as appropriate as "unjust", and would have gone some way to avoiding these difficulties.[222] However, it has been argued above that the ability of language to shape our views of substantial legal issues should not be underestimated. Moreover, if the problem is merely a terminological misunderstanding then it is one which has afflicted judges, lawyers and laymen alike. This legacy of uncertainty is thrown into stark relief if one begins to search for a specific definition of "unjust" which is capable of covering all the relevant cases.[223] As a result, the task of bringing the law of restitution down from the "high ground" of morality into the fixed confines of judicial precedent to some extent remains. Nevertheless, both academics and the judiciary believe they can recognise an actionable enrichment when they see it. Thus Edmund-Davis L.J. has said that unjust enrichment, "...may defy definition and yet the presence in or absence from a situation of that which [it denotes] may be beyond doubt."[224] While this does little to enhance one's belief in the developed nature of the subject, it is clearly the only way forward if a strict formula is unavailable. Beyond this, Goff and Jones are probably correct when they say, "...most rubrics of the law disclose on examination an underlying principle which is almost invariably so general as to be incapable of any precise definition."[225] If this is the case, then the obvious antidote to a lack of a precise definition is to confine the

otherwise, is under a duty to return what he has received or its value to the other. Perhaps unjust enrichment would be a better term.": Seavey, W., "Problems in Restitution", 7 Okla. L.Rev. 257, 257.

[221] "To ask what would be *ex aequo et bono* to both sides never was a very precise guide...whatever may have been the case 146 years ago, we are not now free in the twentieth century to administer that vague jurisprudence which is sometimes styled 'justice as between man and man.'" *Balis* v. *Bishop of London* [1913] 1 Ch. 127, 140, *per* Hamilton L.J.

[222] Birks, *Introduction*, *op. cit.*.

[223] As Lord Sumner in *Sinclair* v. *Brougham* stated, "it is hard to reduce to one common formula the conditions upon which the law will imply a promise to repay money received to the plaintiff's use.": *Sinclair* v. *Brougham* [1914] A.C. 398 at 454; see in agreement *Holt* v. *Markham* [1923] 1 K.B. 504, *per* Scrutton L.J. at 514.

[224] *Carl Zeiss* v. *Herbert Smith (No.2)* [1969] 2Ch. 276 at page 301.

concept within the established ties of precedent, and this is a proposition which has, to a large extent, been accepted by both academics and the courts.[226] Burrows holds the courts have accepted that an enrichment by subtraction is unjust in eleven circumstances: mistake, ignorance,[227] duress, exploitation, legal compulsion, necessity, failure of consideration, illegality, incapacity, *ultra vires* demands by public authorities and the retention of the plaintiff's property without his consent.[228] Birks uses a somewhat different classificatory method. For him the factors are, (a) benefits which have not been voluntarily conferred;[229] (b) ineffective voluntarily conferred benefits;[230] and (c) public policy.[231] As Chapter Three demonstrates, the present study is primarily concerned with benefits conferred due to wrongful acts and non-voluntary transfer. However, although the use of these classifications may be novel in that they suggest that unjust enrichment is the law's primary motivator, they are well established explanations for causes of action in other areas, enforced by a considerable body of authority. The questions which are of relevance to the present study are: (a) whether unjust enrichment offers a better explanation for the action and techniques discussed in Chapter Three than more traditional explanations; (b) the underlying domestic effect of such a determination; (c) how the area should develop; (d) how it influences, our traditional approach to these actions and techniques in the context of the present study.; and (e) what is, and should be, the effect of this choice upon our approach to cases with a foreign element? The remainder of this chapter will begin by discussing these issues before laying the foundations for their consideration in an international context in chapters Five and Six.

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[225] Goff & Jones, *op. cit.* at page 13.

[226] "It cannot be too strongly emphasised that this recognition does not, and should not, give judges carte blanche to adjudicate disputes in accordance with their own conception of justice.": Goff & Jones, *op. cit.* at page 15; Professor Dawson elegantly explained this process in the context of unconscionability when he said, "The aims of...this common enterprise are obviously to scale down the apparent unlimited mandate of the general clause, to restructure it into distinct sub-ordinate norms that become intelligible and manageable through their narrowed scope and function.": Dawson, "Unconscionable Coercion: The German Version" 89 Harvard L.R. 1041, 1042.

[227] See Bant., E., "Ignorance'" As A Ground of Restitution – Can it Survive?" [1998] L.M.C.L.Q., 18.

[228] Burrows, *Restitution*, *op. cit.*, at pages 21.

[229] This classification covers those situations in which the benefit is transferred either specifically (under compulsion) or in effect (under mistake or necessity) without true volition (See generally *Woolwich Equitable Building Society* v. *Commissioners of Inland Revenue* [1993] A.C. 17, 179, *per*, Lord Jauncey).

[230] Situations where, for example, there is a total failure of consideration under a contract.

[231] Burrows criticises these classifications and their subdivisions on a number of grounds: Burrows, *Restitution*, *op. cit.*, at pages 21-22.

4.3: THE NATURE OF RESTITUTION: THE RELATIONSHIP BETWEEN RESTITUTION AND UNJUST ENRICHMENT[232]

Thus far, the present chapter has examined the development and structure of restitution in a manner intended to cast light upon its theoretical application and internal logic structure. It will now consider the nature of restitution and the ways in which it interacts with other areas of law within the English system. This discussion is conducted in an attempt to answer the questions enumerated in the previous paragraph. In other words, to discover how the implementation of a restitutionary grouping, which (despite claims to a strong basis in authority) is largely a theory founded on principle, will impact upon real litigation and other areas of law which often owe more to the incremental creation of rules in response to practical problems, than to the influence of overriding theory.[233]

It is not unreasonable to suggest that if we fully comprehend the relationship between unjust enrichment and restitution we will have made a very significant step towards understanding both elements individually. We have noted on several occasions that the law of England is equipped with restitutionary remedies and techniques.[234] If these are joined by a single thread of principle[235] then the area can claim to be a logical grouping worthy of serious attention. If not, then it simply does not exist: it is no more than a random set of legal elements motivated by disparate principles of law and policy,[236] and arguments to the contrary, while vociferous, are mistaken.

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[232] "Before we can tell a straight story about restitution, we must decide what the subject is about. Is restitution the body of law concerned with avoiding unjust enrichment? Is it mostly or partly other things as well? Or is the identification with unjust enrichment altogether an illusion, and restitution merely a hodgepodge of devices for undoing, unwinding, throwing into reverse, and giving things back?": Kull, A., *op. cit.* at page 1241.

[233] "To assume that anything can be known in isolation from its connections with other things is to identify knowing with merely having some object before perception or in feeling and is thus to lose the key to the trails that distinguish the object as known...The more connections and interactions we ascertain the more we know the object in question.": Dewey, J.,(Boydston, J.) *The Later Works 1925-1953*, 213.

[234] For example, tracing and the constructive trust.

[235] Or if at least a sizeable proportion are.

[236] "The law of benefit based obligation currently faces major difficulties, both theoretically and practically...Is restitution - or ought it to be - the law of unjust enrichment pure and simple? Is it unjust enrichment and something else besides: *restitution* in the sense of *restoration* or giving back? (If it means Footnote Continues on Next Page:

The *American Restatement* discusses "the principle against unjust enrichment", which is said to be founded upon, "...certain basic assumptions in regard to what is required by justice in the various situations."[237] The question with which we are presently concerned is whether these "basic assumptions" are adequately and, perhaps, exclusively explained by the shorthand description, "unjust enrichment."[238] This question in turn impacts upon other important aspects of our understanding of restitution. It is therefore unsurprising that the proponents of restitution/unjust enrichment have spent considerable time and energy attempting to establish *their* understanding of the link between these two elements, and the first half of this chapter has, largely, discussed the subject from their perspective. However, this should not blind us to the availability of other explanations. Thus, there is a wide body of opinion which refuses to fully accept the link between restitution and unjust enrichment primarily for one of two reasons.[239] First, because although unjust enrichment exerts "interstitial influence" over "many areas"[240] it cannot adequately explain any of them and is therefore incapable of providing an adequate explanation or a unifying principle for a law of restitution;[241] or second, because a number of areas normally seen as restitutionary do not appear to contain any enrichment.[242] As a result, if one is to understand the nature of restitution, it is necessary to examine not only its boundaries and modern relationships to other areas of law but most specifically its connection to unjust enrichment.[243] This is, to some extent, a narrow

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both these things, then what is the relationship between the two meanings?) Is unjust enrichment a legitimate unifying principle for this body of law, or is it at best no more than 'a convenient explanation of specific results' among 'a truly superlative collection of jurisprudential loose ends' - employed to unwind, reverse or pick up the pieces after anomalous transactions of one kind or another?": Kull, A., *op. cit.* at page 1193.

[237] *Restatement of the Law of Restitution*, American Law Institute, (1937); O'Connell, *op. cit.* at page 2.

[238] And indeed our "longhand" understanding of what that phrase means.

[239] Beatson, J., "Benefit, Reliance..." *op. cit.* at page 73.

[240] *Ibid.*

[241] O'Connell, *op. cit.* at page 2.

[242] "...in the ordinary sense of the word and that the restitutionary remedies in fact may operate as loss-splitting devices, aids to the unwinding of a contract, deterrents against unfair conduct or methods of protecting certain relationships of dependence...In other words it is a supplementary or parasitic principle to be employed to ensure 'equity' where other principles do not.": Beatson, J., "Benefit, Reliance..." *op. cit.* at page 73; for a exposition of this principle, see Dawson, J.P., "Restitution Without Enrichment", 61 B.U.L. Rev. 1208.

[243] These questions are clearly intimately connected: thus, for example, in analysing the relationship between property law and restitution one is also considering whether unjust enrichment is the only factor which can give rise to restitution or whether others (e.g. property rights) are equally valid.

and technical discussion, but not one devoid of practical importance,[244] particularly in an international context.[245]

As we have seen, unjust enrichment can be given a number of meanings. At its least important it has "...increasingly [been used]...as a loose, pejorative characterisation of a fact-situation *without* reference to any particular doctrine."[246] Equally, it can be seen as an underlying motivational factor that pervades many areas of law but is a defining characteristic of none. At its most important, it is a moral imperative that defines an area of law as significant and individual as the desire to enforce binding promises defines contract.

In the following discussion, it is important to bear in mind two points. First, the potential shades along this spectrum of thought are infinite, and even among unjust enrichment theorists the willingness to make an unequivocal statement of position is rare.[247] Second, even the traditional categorisations which form the basis of our present understanding of the law (e.g. contract and tort) should not be considered beyond question.[248]

According to Professor Birks restitution is not a substantive subject in its own right, but a response to a particular set of circumstances or triggers.[249] Under this understanding of the subject the nature of restitution is dependent upon the answer

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[244] Kull, A., *op. cit.* at page 1190; Laycock, D., "The Scope and Significance of Restitution"(1989) 67 Tex. L.R. 127; Stevens, "Restitution, Property..." *op. cit.* at page 258.
[245] *Macmillan Inc.* v. *Bishopgate Investment Trust plc (No.3)* [1996] 1 All E.R. 585.
[246] Hedley, "Contract, Tort and Restitution; or, On Cutting the Legal System Down to Size" (1988) L.S., Vol. 8, No. 2, 137, 139.
[247] For example, Goff and Jones make little attempt to explain how their formulation of restitution is related to a theoretical conception of unjust enrichment.
[248] Atiyah, "The Rise and Fall of the Freedom of Contract" 94 L.Q.R., 193; Atiyah, *The Rise and Fall of the Freedom of Contract*, Oxford, (1979); Williams and Hepple, *Foundations of the Law of Tort*, 2nd ed. (1984), 13.
[249] Birks, *Introduction*, *op. cit.*, Introduction.
[250] The question of whether restitution is solely related to unjust enrichment is, of course, closely connected to whether it is of a general or supplemental nature and its relationship to other areas of law. The restitutionary rules have often been seen as either supplemental to other rules or predominantly as remedies available when the rules of the other branches of the law have been breached. Even among those who are firmly wedded to the acceptance of restitution as a separate substantive body of law disagreement exists. Moreover, it is entirely possible to see restitution/unjust enrichment as both a substantive subject and a remedial tool, "...the first...equates the two and states that the law of Restitution is the law relating to unjust enrichment. Its adherents recognise that the principle of unjust enrichment may also operate within other categories, for instance, contract and tort, but this is a corrective or supplemental role.": Beatson, J., "Benefit, Reliance..." *op. cit.* at page 73.

to two questions. First, is restitution triggered by: (a) unjust enrichment and nothing else: (b) something other than unjust enrichment; or (c) unjust enrichment and other alternatives?[251] Second, what is unjust enrichment?

Answer (a) would justify much of the work carried out by the unjust enrichment theorists with regard to the structure, if not the detail and nature, of their area. Answer (b) would, in the absence of some alternative unifying theory, relegate the study of restitution to a subset of other areas. The effect of answer (c) is the most complex and would largely depend upon the balance between unjust enrichment and other triggers.[252]

The foremost proponent of position (a) is Professor Birks, who argues that restitution and unjust enrichment perfectly quadrate: the only factor which gives rise to restitution is unjust enrichment.[253] He views this method of characterisation as correct, primarily because it "better orders" the instances of restitution accepted by English Law and better brings together like cases.[254] In other words, he is involved

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[251] *Ibid.*

[252] The recent rise in judicial comment concerning unjust enrichment in this country would suggest that (b) is, at this point, the least likely possibility, while as a matter of authority it is difficult, as yet, to make a determination between (a) and (c). This lack of authority for (b) does not mean, however, that it can be ignored: because the judiciary, as a function of history, appear to have wedded themselves to unjust enrichment cannot (without further investigation) be taken to mean that as a matter of principle some other trigger should not be preferred. It should be noted that the fact that these difficulties exist at all is clearly a function of restitution's late development in this country which ensured that it grew within the influence of more established areas ("Where the rules of enrichment have not been allowed a separate category, they have an ambiguous and precarious position in the legal system concerned.": Bennett, T.W. *op. cit.* at page 137). In continental and other jurisdictions this problem did not arise as the law surrounding restitution developed, as a rule, separate from (although potentially supplemental to) other areas of law ("Quasi-contractual obligations in Continental law are based on a universally recognised principle of natural justice, and if they are often classified as being quasi-contractual, this expression is used to distinguish them from obligations arising in contract or tort rather than for the purpose of assimilating them into contract. In particular the action for unjust enrichment is an action *ex lege* which is frequently resorted to in order to smooth out hardships created by the rigidity of the law, and though it is often applied in connection with contracts it does not presuppose a contract.": Gutteridge, H.C. and Lipstein, K., *op. cit.* at page 85). This has clearly not been the case in common law jurisdictions in general and, perhaps, England in particular. As we have noted, above restitution developed first as part of the law of contract and then as a useful, although perhaps not essential, way of avoiding injustice caused by failings in other areas. In this context it is entirely possible to view restitution as little more than a collection of remedial tools and techniques. It is only recently that the wider view of unjust enrichment as a guiding rationale capable of embracing many legal rules and techniques better than their traditional groupings has come to the fore in this country.

[253] Birks, *Introduction*, *op. cit.* at page 18. This is, he accepts, an artificial, or "textbook", formulation because his definition of the subject necessarily excludes any triggers which are not unjust enrichment. However, he argues that this exclusion is clearly valid because, although it would have been possible for other triggers to give rise to restitution, as a matter of authority, none actually exist (Birks, *Introduction*, *op. cit.* at page 19). In effect he appears to have formulated a proposition which best explains the area and then states that cases which fall outside this formulation are excluded from it. The efficacy of this approach in the real world will be questioned below.

[254] Birks, *Introduction*, *op. cit.* at page 27.

merely with descriptive characterisation. The validity of this position is discussed elsewhere in this study: however, it does raise a number of points which should be highlighted. Firstly, Birks' position presupposes that the law of obligations is in need of some form of redefinition.[255] The validity of this position will be addressed below; however, we can at the moment suggest that in light of the discussion conducted in chapters Two and Three, the reorganisation of a legal category should occur because (a) the new system more logically groups together like subjects, rules, techniques and cases; (b) because it leads to more desirable results;[256] (c) because the new grouping possesses a greater level of internal logic than its rivals; (d) because the new category best explains the authority which exists; (e) because the present grouping is too extensive to be adequately discussed and implemented; or (f) a combination of some or all of the above. The comparative importance of these elements will depend upon the subject under consideration, but what must be emphasised is that any acceptable system will incorporate (a) – (d). If one of these is missing we can, at least *prima facie*, suggest that a better explanation is, or should be, available. We can therefore look at the connection between restitution and unjust enrichment in two ways: what *is* the relationship (as a matter of authority[257]) and what *should* be the relationship as a matter of principle?[258] Thus, we wish to test (a) whether unjust enrichment is as a matter of principle and authority, a logical explanation of restitution, and (b) if so, is it the only and best explanation?

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[255] It is common to describe this area as the law of obligations. However, Birks demurs, "The law of obligations is, looking at the matter from the other correlative, the law of rights *in personam*. The law of property is the law of rights *in rem*. Unless one is prepared to argue that there is no such thing as a restitutionary right *in rem* - that is, there is no proprietary restitution - one is compelled to accept that we are dealing with categories of rights, and not merely with a sub-category of rights *in personam*. Restitution differs from quasi-contract in breaking out of the conceptual category of obligations/personal claims; also breaking out of the common law, to reach parallel rights in equity; also in being *unequivocally* based on unjust enrichment...": Birks, "Unjust Enrichment - a Reply to Mr Hedley" (1985) 5 L.S., 67, 69. Like much of Birks' methodology the validity of this statement requires the reader to accept other Birksian propositions: not the least of which, in this case, is the artificial split between restitution and property.

[256] By this we would normally mean that it more successfully upholds society's moral, economic or social precepts than its rivals in general and the goals identified in Chapter Two in particular.

[257] Or, as Birks has put it, empirically.

[258] Or logic, as Birks would have it. Until very recently (Birks: "Restitution or Property", Lecture to the Institute of Advanced Legal Studies, 1997) Birks has argued that both methods create the same result (i.e. as a matter of principle and authority restitution and unjust enrichment perfectly quadrate). This might, as we will see below, be challenged as a matter of authority. But if this is so, Birks argues that those cases outside his formulation can be ignored because his definition necessarily excludes them. Some might suggest that this is akin to arguing that as a matter of fact, the planet Earth is the only place to contain intelligent life, but Footnote Continues on Next Page:

We might begin the discussion of principle by asking whether other explanations for restitution bring about elements (a) –(c) above better than unjust enrichment. There is little doubt that since the reassessment of restitution prompted by Goff and Jones in 1966, unjust enrichment has been the predominant tool for those who wish to see a redrawing of this area. However, the history of restitution demonstrates that this is not a necessary conclusion and that other explanations are possible.[259] Perhaps the most influential modern possibility was put forward by Fuller and Perdue.[260] They argue that the courts can give contract damages in three situations: where the plaintiff has changed his position in reliance of a promise made by the defendant (*reliance interest*); where the plaintiff has been given an expectation of enrichment (*expectation interest*); where in reliance of a promise by the defendant the plaintiff has conferred a valuable benefit (*restitution interest*).[261] In these terms the *restitution interest* is close to the quasi-contractual doctrine considered in Section Two of this chapter. However, the differences which exist are potentially important. It will be remembered that the restitution/unjust enrichment theorists object to quasi-contract on two fundamental grounds. First, it is based on a fiction, and second, because it does nothing to tell us why a promise should be implied by the courts. The first of these objections is of questionable import: it is not against the tenets of English law to imply contract terms on the basis of a fiction. The second is stronger. However, if one is willing to accept the necessary reduction of the area's scope, then Fuller and Perdue's explanation for a *restitution interest* in contract seems at least as elegant a solution to the problems of this area as the concept of unjust enrichment, *per se*, and the controversial legal categories which go with it. Indeed, it involves the same moral precept[262] simply viewed from a different legal

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if intelligent life exists elsewhere it cannot be intelligent because as a matter of principle, intelligent life exists only on Earth: it is at best unhelpful.

[259] For example, that restitution is based in contract or that it is simply a remedial measure triggered by other legal principles.

[260] Fuller and Perdue, "The Reliance Interest in Contract Damages" (1936) 46 Yale L.J. 52.

[261] However, even in 1936 Fuller and Perdue were aware that their formulation was not completely in harmony with judicial reasoning.

[262] "The object here may be termed the prevention of gain by the defaulting promisor at the expense of the promise; more briefly, the prevention of unjust enrichment.": Fuller and Perdue, *op. cit.* at page 54.

stand point,[263] and this largely addresses the unjust enrichment theorists' second objection.

However, Fuller and Perdue go further towards an alternative explanation of what we have recently considered to be restitution/unjust enrichment by noting that the *restitution interest*:

> "...unites two elements: (1) reliance by the promise, (2) a resultant gain to the promisor. It may for some purposes be necessary to separate these elements. In some cases a defaulting promisor may after his breach be left with an unjust gain which was not taken from the promisee (a third party furnished the consideration), or which was not the result of the reliance by the promisee (the promisor violated a promise not to appropriate the promisee's goods). Even in those cases where a promisor's gain results from the promisee's reliance it may happen that damages will be assessed somewhat differently, depending on whether we take the promisor's gain or the promisee's loss as the standard of measurement."[264]

They go on to suggest that where the promisor's gain corresponds to the promisee's loss[265] then the *restitution interest* becomes no more than a subset of the *reliance interest*. From this analysis it is clear that Fuller and Perdue's formula has the potential to provide a logical explanation for the area under consideration, which although making reference to unjust enrichment, at a fundamental level, does not rely on it. In couching its precepts in terms of reliance and contract, it arguably provides a stronger basis of principle than that found in unjust enrichment which can only be understood by disputable categories of decided cases. Even if one was unwilling to fully embrace the *restitution interest*, it is arguable that the more developed concept of the *reliance interest* in combination with McBride and McGrath's explanation of the "restitution for wrongs"[266] could potentially provide a

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[263] Thus we might compare Fuller and Perdue's position with that of Birks, "...the prevention of gain by the defaulting promisor at the expense of the promisee; more briefly the prevention of unjust enrichment. The interest protected may be called the *restitution interest*...it is quite immaterial how the suit in such a case be classified, whether as contractual or quasi-contractual, whether as a suit to enforce the contract or as a suit based upon the recission of the contract.": Fuller and Perdue, *op. cit.* at page 53. "....the generic conception of all the events which give rise to restitution - payments by mistake, under compulsion, on bases which fail, benefits freely accepted, obligatory expenditure compulsory anticipates, and so on...is unjust enrichment at the plaintiff's expense.": Birks, *Introduction*, *op. cit.* at page 18.

[264] Fuller and Perdue, *op. cit.* at page 54.

[265] Broadly, what we have referred to as autonomous restitution or enrichment by subtraction.

[266] As merely a result of the wrongful use of property.

working, if not fully comprehensive, explanation of the area and cases currently claimed as part of restitution/unjust enrichment.

More recently, Atiyah[267] has influentially argued for a view which regards restitutionary responses as part of the law of obligations concerned with, but not uniquely based upon, unjust enrichment. In discussing Goff and Jones' attempt to "...systematically bring together common law and equitable remedies in this area..." he argues:[268]

> "...it may be suggested that this development is as misconceived as all the earlier attempts to state the basis of the law relating to such liabilities. It is misconceived...because it fails to recognise the very substantial and close relationship between contractual and restitutionary liabilities. As I have rejected the notion that contractual liabilities are all promise-based and have insisted that where part executed contracts are enforced, the liability is primarily benefit-based or reliance-based, it is evident that I cannot support a move towards a theoretical separation of contract from restitution."[269]

Birks' counters this argument in a manner which is, initially, attractive: not least because it relies for its efficacy upon unjust enrichment's ability to better satisfy elements (a) and (c) above. He suggests that the acceptance of a "benefit-based" liability, as advocated by Atiyah, would require a distinction between benefits which give rise to liability, and those which do not. If this is the case, the benefits which give rise to liability would need to be divided between those which give rise to a claim against the gain and those which give rise to a claim for something else. It is argued that the majority of the second category would relate to promises made by the defendant: "So for practical purposes...the split would be between benefits giving full-value claims and benefits giving claims quantified by reference to a promise...in other words between restitution/unjust enrichment on the one hand and

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[267] Atiyah, "The Rise and Fall..." *op. cit.*; Atiyah, *The Rise and Fall..." op. cit.*;. For a *contra* argument see Birks, "Restitution and the Freedom Contract" *op. cit.*.
[268] Atiyah, *Rise and Fall...*, *op. cit.* at page 767.
[269] Atiyah, *op. cit.* at page 768.

contract on the other."[270] This may be true. A distinction between such claims could indeed provide a rational approach to any such area. However, it does not logically demonstrate, as Birks implies, that this is proof of the validity of restitution/unjust enrichment as a subject in its own right rather than a means of understanding the motivating factors developed by other subjects.[271] This approach[272] is apparent in the work of a number of unjust enrichment theorists (notably Birks and Burrows) when countering the arguments of Atiyah and Fuller and Perdue and is, as a result, worthy of consideration in a little more detail. The argument goes as follows. There are occasions when the law will allow a party to recover an asset even though no binding promise existed and no tort has been committed. The rules which allow this cannot be isolated anomalies: they must be bound by some rational system of principle; the best explanation of such a principle is unjust enrichment. Therefore restitution/unjust enrichment must exist,[273] and now that proof of restitution/unjust enrichment exists it can be expanded to meet new and novel situations. However, as Hedley notes, with regard to Birks' response to Atiyah's criticisms, "[it]...fails to meet the main thrust of Atiyah's arguments, that unjust enrichment, *exerts influence* over many branches of the law, while providing the *complete explanation* of none."[274]

This circular argument is of course not the only facet of the theorist's position, indeed, if it were, even the most enthusiastic believer's faith might be shaken. Most specifically, the unjust enrichment theorists tend to rely on what might be described as the "historical" and the "moral" arguments. With regard to the former, many theorists claim that a theoretical thread of unjust enrichment can be seen running through most, if not all, the restitutionary cases. This will be considered in depth below; however, for the moment we can make the point that the idea of historical

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[270] Birks "Restitution and the Freedom of Contract" *op. cit.*.
[271] Hedley, "Unjust Enrichment as the Basis of Restitution..." *op. cit.* at page 58;
[272] "...he [Birks] carefully constructs meanings for 'Restitution', 'Contract' and 'Property' with sufficient precision to enable him to maintain that the three are distinct. Again, the unjust enrichment supporter reacts as if the criticism raised was, 'Of course Restitution is a distinct category, but your theory does not unite it'. It is taken for granted that there must be a theory of Restitution; arguments to the contrary are treated, quite wrongly, as assertions that there should be a *different* theory.": Hedley, "Unjust Enrichment as the Basis of Restitution..." *op. cit.* at page 58.
[273] Hedley, "Unjust Enrichment as the Basis of Restitution..." *op. cit.* at page 56.
[274] Hedley, "Unjust Enrichment as the Basis of Restitution..." *op. cit.* at page 58.

unity can, at best, only be identified in retrospect.[275] A reading of the cases shows that the relevant remedies and techniques were historically grouped together and chained to contract as a matter of convenience.[276] Thus history, although of importance, must be treated with great caution. At most, the cases demonstrate that the courts see unjust enrichment as something to be avoided. However, they do not focus upon this element with the necessary consistency (either with regard to form or application) for us to be certain whether unjust enrichment is a unifying principle, one element of contract's application, a general philosophy running in the background of all areas, or something else again.[277]

Perhaps in partial acceptance of the defects in the historical argument, the unjust enrichment theorists place much weight on the moral imperative of their subject.[278] Thus, it is normally said that the moral basis of contract is to uphold a binding promise, the basis of tort is to prevent wrongful harm and the basis of restitution is to prevent unjust enrichment.[279] These are equal foundations of moral principle and therefore their position as legitimate areas of law is proved. This is not this case. These formulations are no more than a generalised shorthand. The fact that the established subjects of contract and tort can be explained in this way does little to demonstrate the need for restitution, or the methods by which its use can be explained. If we are to arrive at a logical position, we must take a wider view. Thus we have seen that Atiyah (and to an extent Fuller and Perdue) accept the importance of unjust enrichment throughout the law of obligations. However, they argue that they do not define a separate area of law and that other concepts represent a more attractive way of categorising this subject. Having examined the

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[275] An argument which will be developed in the conclusion to this chapter.
[276] O'Connell, *op. cit.*.
[277] Nevertheless, this should not blind us to the fact that if (as Birks argues) unjust enrichment explains the existing cases better than any other possibility, this would be a powerful argument in its favour. As a result the truth of this position will be investigated during the course of the following discussion.
[278] Where history and authority fail, it is of course not unreasonable to look to authority. However, it is questionable whether it is reasonable to go as far as O'Connell, who says when doubting of attempting to prove or disprove the existence of unjust enrichment by the weighing of contradictory authority, "Is it not more satisfactory to examine how sound is the ground on which the edifice rests? This means going beyond the self imposed bounds of analytical jurisprudence. Unjust enrichment is not to be constructed empirically by the adding together of so many judicial pronouncements and welding them into a formula...it is to be understood as the enunciation of a precept lying on the borderland of law and ethics...": O'Connell, *op. cit.* at page 4.
[279] Burrows, Contract, Tort..." 99 L.Q.R. 217; Bird, J. "Choice of Law" *op. cit.*.

general methodology by which the unjust enrichment theorists have countered these arguments and propagated their own, it is now necessary to examine their position in more detail. We have already considered much of Professor Birks' work, and Goff and Jones are relatively unconcerned with theory. As a result we will, for the moment, concentrate on the third member of the triumvirate of principal textbook authors in this country (Burrows) and the most consistent critic of unjust enrichment (Hedley).

Burrows is perhaps the primary analyst of the moral argument and suggests that restitution, contract and tort are a satisfactory "division of the law of obligations" because they separate "at least most of the law based on the three most important principles of the law of obligations."[280] These principles are, "the fulfilment of expectations engendered by binding promise", "the compensation of wrongful harms" and "the reversing of unjust enrichment."[281] In analysing the subject, Burrows attempts to take an approach similar to that adopted by Fuller and Perdue by considering the interests which the relevant remedies are designed to protect:

> "On this approach, we can say that the remedies fulfilling expectations engendered, protect the expectation interest of the plaintiff; the remedies compensating for harm, protect the status quo interest of the plaintiff; and the remedies reversing unjust enrichment, protect the restitution interest of the plaintiff."[282]

He argues that these interests, the breach of which can give rise to damages, define the fundamental way in which we can characterise our system of legal thought. To demonstrate the validity of this position he extensively examines the ways in which the protection of binding promises relate to his formulation and can be delineated from tort and restitution. There is little to object to in Burrows' interests

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[280] Burrows, "Contract, Tort..." *op. cit.* at page 217.

[281] *Ibid.* It should be noted that Burrows is happier to allow these areas to have uncertain boundaries than Birks, "It is not suggested that contract, tort and restitution are concerned only with the law based upon these cardinal principles. Rather, the argument is that since contract, tort and restitution separate at least most of the law based on each of these three cardinal principles, the division is a satisfactory division of the present law of obligations.": Burrows, "Contract, Tort..." *op. cit.* at pages 217-218.

[282] Burrows, "Contract, Tort..." *op. cit.* at page 219. He places considerable emphasis on his belief that the "status quo" interest is a more accurate description of the court's behaviour than those put forward by Fuller and Perdue: Burrows, "Contract, Tort..."*op. cit.* at pages 218-224.

formulation, or his demonstration that tort and contract can generally be seen to be separate and seem to have upheld such interests.

However, he then goes on to discuss the categorisation of restitution, beginning with an acceptance that a general doctrine of unjust enrichment is not recognised in English law[283] and contending that this is an unsatisfactory position.[284] Unfortunately, at this point he largely reverts to the "lack of alternative" argument discussed above.[285] This does little to further the discussions already considered. Nevertheless, his analysis of the ways in which the three areas of law protect the three categories is of interest. He argues that two different approaches to this question are possible. First, contract is the area of law arising out of breach of promise and protects the expectation interest. Tort prevents wrongful harm ("...but with torts actionable *per se*, harm caused by the tort including harm caused by the breach of a binding promise"[286]) and protects the status quo interests. Restitution arises from unjust enrichment ("including where enrichment is acquired by tort, and where there is enrichment by the breach of a binding promise"[287]) and relates to the restitution interest. This position is[288] generally supported by Goff and Jones,[289] Seavey and Scott[290] and Willison.[291] The second formulation accepts the binding promise/expectation element of contract while also viewing it as upholding the status quo interest with regard to harm resulting from a promise and the restitution interest with regard to enrichment flowing from a breach. Restitution excludes enrichments arising from the breach of a binding promise or arising from tort, and tort follows the above pattern except that it also protects the restitution interest

[283] Note that this article was published in 1983.
[284] Burrows, "Contract, Tort..." *op. cit.* at pages 233.
[285] i.e. traditional quasi-contractual formulations are unsatisfactory and only unjust enrichment can replace them.
[286] Burrows, "Contract, Tort..." *op. cit.* at page 254.
[287] *Ibid*; here he appears to be referring to wager of tort and breaches of promise which discharge the contract.
[288] He argues: *Ibid.*
[289] Goff & Jones, *op. cit.* at Chapter 32.
[290] Seavey and Scott, "Restitution" 54 L.Q.R. 29, 31-32.
[291] *Willison on Contracts*, (1920), s. 1455.

with regard to enrichment arising from a tort. This formulation is said to be supported by Fuller and Perdue[292] and Corbin.[293]

Burrows therefore argues that (even taking into consideration the difference between these two formulations) the division represents a majority, and therefore satisfactory, view of how the law of obligation should be split. It is unclear whether Burrows is putting forward these two formulations as part of a descriptive or prescriptive categorisation of the area.[294] What is clear, however, is that to fully establish his position he has much work to do in order to demonstrate the policy rationale for the contract/tort/restitution split in general, and his view of restitution/unjust enrichment in particular. Unfortunately he refuses to do so, concentrating his arguments on the questions surrounding the expectation interest: indeed he suggests that the restitution and status quo interests can be "dealt with fairly rapidly."[295] Using what he describes as "Aristotelian terminology", he argues that the law is more concerned with corrective rather than distributive justice: i.e. it is more concerned with the restoration of a previous state of affairs rather than the creation of a new one. This being the case, the restitution interest will often be worthy of greater support than the status quo interest, specifically, where loss matches gain (autonomous restitution), i.e. because the cause of action can be seen as two-fold.[296] Even if we ignore Hedley's suggestion that Burrows' interpretation of Aristotle is defective,[297] it seems clear that he is justified in arguing that Burrow's interpretation of modern judicial behaviour seems incorrect. Hedley takes the

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[292] Fuller and Perdue, *op. cit.* at pages 53-54, 72. For a contrary argument see Hedley, "Contract, Tort and Restitution..." *op. cit.* at pages 141-146.

[293] *Corbin on Contracts*, (1964), s.1106.

[294] Hedley argues that he is taking the former approach ("Burrows' claim cannot be a *descriptive* one, as to the technique used in assessing damages. Having stated differing approaches to damages in Contract, Tort, and Restitution, he goes on to argue that this difference reflects a fundamental difference in policy. The reason why judges enforce contracts, he is saying, is not the same as the reason why they redress torts, and both are distinct from their reasons for reversing unjust enrichment. Atiyah is right to say that all three principles can be found in the law of obligations, but wrong not to give each its own unique stomping ground. This claim, if correct, is obviously of profound importance for thought about law. But does he establish it?": Hedley, "Contract, Tort and Restitution..." *op. cit.* at page 142). The present author would suggest that Burrows' position, up to this point, is not as clear as Hedley would suggest.

[295] Burrows, "Contract, Tort..." *op. cit.* at page 256.

[296] "But it must be remembered that it will not always be the case that the enrichment of the defendant will exactly match the harm to the plaintiff. Here, therefore, one cannot simply rank the restoration of interest as presenting twice as strong a claim as the status quo interest.": Burrows, "Contract, Tort..." *op. cit.* at page 256.

[297] Hedley, "Contract, Tort and Restitution..." *op. cit.* at page 142.

example of a skilled worker and suggests that tort might compensate a party if, for example, they are injured in a way which results in an inability to sell the relevant skill, and contract would protect them against someone who refused to pay them for the skill:

> "But Burrows is wrong to distinguish the two by saying that Tort protects *something I once had*...whereas Contract protects *something I never had but had an expectation of receiving*...this is a distinction without a difference. Contract is no more 'distributive' than are Tort and Restitution; all three simply reflect the *status quo*. Burrows cannot ignore the existence of the market yet still talk of 'value', meaning the *market* value..."[298]

One could argue that this is a terminological problem which in that context should not prove fatal to Burrows' argument. However, he places such emphasis upon the corrective/distributive split that, to a large extent, he fails to enunciate other arguments of policy in his favour. In this respect, the argument weakens a central, perhaps *the* central, strand of Burrows' argument considerably. Equally, we have already examined and criticised the unjust enrichment theorists' distrust of market value which can again be seen in Burrows' position.

In taking issue with Burrows' and Birks' formulation, Hedley proposes his own framework for the law of obligations. This is worth considering in some detail as it represents one of the few logical responses to the unjust enrichment theorists made in the context of modern developments. The underlying motivation of the area is, according to Hedley, the regulation of the transfer property and the protection of assets. The protection available is primarily in the form of damages but also includes other possibilities[299] and is given in response to 'conductive' and 'receptive' cases.[300] In the former cases an interest is compromised by the behaviour of the defendant, in the latter it is affected by his receipt of the relevant asset. The salient feature is that a party may recover more than his loss under either head, if he can show he has suffered as a result of the loss of his asset. This last point is a traditional

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[298] *Ibid.*
[299] Injunctive relief, self help, etc.,: Hedley, "Contract, Tort..." *op. cit.* at page 152.
[300] *Ibid.*

interpretation which considers foreseeable loss, or enforces what Burrows describes as the status quo interest. It would allow "a factory owner" whose machinery is damaged beyond repair to recover, "...not only simply the market value of the machinery, but its *replacement* value, and possibly even profits lost while waiting for the replacement."[301] However, he then goes on to discuss the "analogous" situation in which a party steals a car and sells it for £900: the thief, "...may be ordered to pay...this sum even if the court thinks the car is worth much less."[302] In Hedley's terminology this is a "substitutional" response and can be used to explain, for example, *Boardman* v. *Phipps* and, it would appear, the areas discussed above under the headings of common law and equitable tracing.

The interests which the law protects according to this interpretation are (or should be) land, chattels[303] (other than money), money, labour, confidence (intellectual property and other trade property), shares, family rights, and rights to personal dignity and citizenship.[304] The interest being protected by the court can be determined by, "...looking to the way the court assesses the sum awarded...if the court justifies an award by saying that it represents the value of a particular chattel, then this remedy is within the chattel interest."[305] Hedley's formulation goes into some detail as to how each interest is protected in practice, although he does accept that there may be reported cases which fall outside his general system.[306] In discussing the relationship between his formulation and restitution, contract and tort he concludes, "There is no well defined area for any of them..."[307] Although he is happy to accept that tort would be closely connected to "conduct" protection while contract (formal relationships) and restitution (informal relationships) are mainly concerned with "receipt" protection.

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[301] Hedley, "Contract, Tort..." *op. cit.* at page 153; *Spartan Steel and Alloys* v. *Martin & Co., (Contractors)* [1973] Q.B. 27.
[302] *Ibid.*
[303] "The first three classes of assets would naturally be described as 'property', but I am not confining myself to strict 'property' rights: I include contractual claims to these assets as well. Thus if I contract to buy 10,000 tons of soya bean meal for delivery in three months, my assets constitute an asset within my Chattel interest just as much as if the contract were performed. This should make clear why, even though my classification embraces Contract, it has not separate interest consisting of 'asset promised'. If land is promised, the asset is within the Land interest; if shares, within the Share interest.": Hedley, "Contract, Tort..." *op. cit.* 151.
[304] *op. cit.* at page 150.
[305] *op. cit.* at page 155.
[306] *op. cit.* at page 167.

In criticising Burrows, Hedley quotes Fuller and Perdue's assertion[308] that the great fault in lawyers is to forget what they are trying to achieve. In a similar vein it is unclear what Hedley is trying to do, or perhaps, more correctly, if there is real value in what he is attempting and whether it presents an adequate response to the work of Burrows and Birks. Hedley accepts that, "I do not present an 'underlying principle' model in other words I do not jump from my assertion that obligations *can* be brought within the framework to the assertion that it *should* because it reveals principles underlying the entire law."[309] The belief that this task is necessary may or may not be reasonable, but certainly Hedley does not make his case by attacking the unjust enrichment theorists.[310] Indeed, they are attempting different tasks. What Burrows and Birks (and Fuller and Perdue) are trying to discover is *why* the courts behave as they do and the precepts to which they *should* adhere: to forge a direct link between how we classify the law in a particular way and the purpose of the law. Hedley's self-imposed task, while claiming to be of the same magnitude, is in fact far less arduous. As such it may be less open to criticism of detail, but it is also less useful in its ability to progress our understanding of the law. Indeed, if the categorisational process cannot lead to some determination as to how the law is to change and develop, then its value must be questioned.

The difficulty with Hedley's argument is shown in his suggestion that we can see which interest the courts are protecting by examining the remedies they use. This argument is at best circular.[311] In a similar vein his discussion of the damages available to a plaintiff whose car is stolen is indicative of his approach. He draws attention to the ability of the court to provide damages equivalent to an amount realised by the thief, whether or not these are above the market value of the car, the value the court would place upon it, or presumably the amount the plaintiff himself could have sold the car for. His recourse to substitution, as the discussion in

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[307] *op. cit.* at page 168.
[308] Quoted in part, above, and in full below.
[309] *op. cit.* at page 150.
[310] A point he himself makes of the unjust enrichment theorists' response to their critics.
[311] Although it is one which the unjust enrichment theorists are not above implicitly resorting to when other methodology fails.

Chapter Three demonstrates, is an incomplete explanation of this process. And nothing in his reclassification explains *why* rather than *how* the courts can do this. If the process is simply to be undertaken in order to "cut the legal system down to size"[312] it may be of some value, but fails to answer the major question which Hedley sets (or should set) for himself. Nor does it address the arguments of fundamental principle put forward by other commentators. Indeed, it might be argued that Hedley's suggestion that Burrows is confusing the levels of legal generality could be turned upon his own analysis: in others words he has recognised the requirement for reorganisation, but failed to answer the primary question of why. Perhaps, Hedley's approach is best summarised by his belief that questions in the law of obligations are akin to the battle between good and evil: "Good never wholly defeats Evil, nor Evil Good; which is just as well, for the audience is undecided which is which."[313] Of course this is true, but it does not make out the case against *attempting* to identify the protagonists and treating them accordingly.

Thus, in searching for a positive moral justification for restitution/unjust enrichment beyond its basis in authority, it is submitted that Burrows' proposition can be defended with some confidence. Specifically, as we have seen, he suggests[314] that contract, tort and restitution represent arms of the three most important moral imperatives of the law of obligations: i.e. the support of expectations created by binding promises, the compensation of wrongful harm and the prevention of unjust enrichment.[315] This formulation is not perfect. For example, it does not explain why the prevention of unjust enrichment should result in a restitutionary response. Nor can it be embraced without reservation. Thus we must accept, as does Burrows, that such categories will at best bring together the majority of like cases: some grey areas, at this stage of the subject's development,[316] will remain. Equally, it is suggested that Birks is wrong to argue that the subject will be unintelligible if it

[312] *op. cit.* at page 171.
[313] *op. cit.* at page 146.
[314] As we have seen above.
[315] Burrows, "Contract, Tort..." *op. cit.*
[316] And in all probability for the foreseeable future.

cannot be reduced to a relatively simple formulation.[317] Other areas of law do not, as a rule, conform to this belief and it has the potential to provide a powerful brake on the development of restitution. Bearing these factors in mind it is submitted that Burrows is broadly correct. Parties negotiating from behind a veil of ignorance from the original position would wish to provide a solution to the breach of binding promises, to wrongful harms and situations in which a party has come into possession of another's wealth, value or property in a manner which society believes does not give him a right to retain such a benefit.

Having considered some of the questions surrounding the acceptance of unjust enrichment as a matter of principle, it is now necessary to turn to the role of authority in more depth. This is, of course, closely connected to the question of whether restitution and unjust enrichment perfectly equate: if all cases of restitution can be exclusively explained by unjust enrichment then, under certain interpretations, this is a strong argument in favour of the court's acceptance of the concept. However, before questioning whether unjust enrichment and restitution equate as a matter of authority, the overriding importance given to this proposition by some commentators should be noted.

Few, if any, areas of law, including tort and contract, can be completely explained and defined by reference to a simple linguistic formula: "the prevention of wrongful harm" is not a comprehensive explanation of the law of tort. It might therefore seem reasonable to suggest that although the core of restitution should be unjust enrichment, its boundaries might remain uncertain or obscure. Thus, for example, Hedley argues that the exact definition of restitution is of little importance.[318] Equally, Burrows is content that unjust enrichment should bring together the majority of cases with which he is concerned.[319] Birks, however, takes a different

[317] Birks, *Introduction*, Introduction; "We have to recognise *accident*, i.e., the fact that there is no formula, no 'principle' which covers all things; that there is no totality or system of things. And this recognition at once supports a life of 'responsibility and adventure' and leads to...discovery.": Anderson, J., *Studies in Empirical Philosophy*, 86.
[318] Hedley, "Unjust Enrichment as the Basis of Restitution..." *op. cit.* at page 60.
[319] Burrows, "Contract, Tort..." *op. cit.* at page 217.

view.[320] He argues that lack of a complete definition will make the subject unintelligible and incapable of analysis. To some extent this strict approach is to be applauded: for too long, the law of restitution has been shackled by the chains of uncertain and unrigorous thinking. However, his position does leave him open to attack, and his subsequent descriptions of the area must be judged by his own strict criteria.

It was noted above that Birks based his argument on both principle and authority. With regard to the former, and in comparing the seminal works of Goff and Jones and Birks, it is clear that Birks is more concerned with the theoretical aspect of the subject.[321] Perhaps, as a result, his conceptualisation of the subject, arguably, has a tendency to take greater cognisance of theoretical elegance than practical application. Thus, for example, as we shall see below, his original delineation between restitution and property, arguably, owes more to intellectual completeness than to the realities of practical litigation. It is possible that the same can be said with regard to his conception of the relationship between restitution and unjust enrichment. It may be a cliché to suggest that if something appears to be too simple it probably is, but it is a sentiment which is initially engendered by this formulation. How is it that a subject, which touches upon so many other areas, which is possessed of such a difficult history, which was for so long misunderstood by both the judiciary and academia, should arrive at such a simple equation between trigger and response? Birks' explanation is as simple and, perhaps, unsatisfying as his original proposition: "The perfect quadration between restitution and unjust enrichment is no more than a fortunate accident. That by chance it happens that the particular nature of the response allows a generic conception of the event to be easily formulated."[322] This stretches credibility and, at an instinctive level, appears to be the result of a desire to fit facts to theory. [323] However, Birks is subtler than this.

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[320] "...the generic conception of all the events which give rise to restitution - payments by mistake, under compulsion, on bases which fail, benefits freely accepted, obligatory expenditure, compulsory anticipates, and so on...is unjust enrichment at the plaintiff's expense.": Birks, *Introduction*, *op. cit.* at page 18.

[321] Although, as noted above, because he believes he is involved in descriptive characterisation, this theoretical rigour is to some extent reduced.

[322] *Ibid.*

[323] "To fit together disjointed materials and produce a 'seamless web' of legal rules is aesthetically pleasing, but also gives the academic lawyer the feeling of having 'produced' something of permanent value. Footnote Continues on Next Page:

What he is actually saying is that restitution precisely equals unjust enrichment, because it has been artificially developed in order to create a logical whole.[324] This, however, itself raises a number of problems. First, we might question the validity of such an artificial process. There are perhaps innumerable areas of law which encompass smaller subjects which might be more adequately defined by other means. However, doing so necessarily requires us to ignore or reinterpret the wider picture: i.e. how does the smaller subject interrelate with the wider topic from which we would like to remove it? This question, as we can see from the present discussion, can be extremely complex. Moreover, the difficulties which it contains are likely to be so extensive that without a framework of authority, the task will defeat its proponents. For this very reason restitution theorists are reluctant to argue that they have discovered or improved abstract theory and let it sink or swim on the basis of its own intellectual merit. Instead, they point to the quasi-contract cases as the authority for their position: the courts have talked of quasi-contract, but they mean unjust enrichment, and therefore unjust enrichment has a basis of precedent with which to bolster its theoretical purity.[325] With respect, the argument cannot be won both ways. Either, restitution has been artificially created out of a wider whole by application of the formulation "unjust enrichment" which allows one to exclude difficult cases, or it is an organic development over several hundred years by courts who were developing contractual techniques. If the latter is true, then the claim that restitution equals unjust enrichment requires that we must again resort to a historical accident of proportions which appear unlikely in the extreme. This is not to suggest that Birks is necessarily wrong, merely that the subject requires more investigation. Indeed, it could, perhaps, be argued that if the commentators who suggest that when courts of the past talked of "quasi-contract" they exclusively meant "unjust-enrichment"[326] are correct, then Birks' formulation

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Nonetheless, this can lead to oversimplification and/or omission of difficult material.": Matthews, P., "Tracing the Proceeds of Fraud" *op. cit.* at page 34.

[324] "In fact, however, restitution does have a definition, because it is a category of law artificially selected from a larger miscellaneous class.": Birks, "Unjust Enrichment - a Reply to Mr Hedley" *op. cit.* at page 69.

[325] Burrows and McKendrick, *Cases and Materials on the Law of Restitution*, Oxford, 1997, Introduction.

[326] Burrows, *Restitution*, *op. cit.*.; Burrows and McKendrick, *Cases and Materials on the Law of Restitution*, Oxford, 1997, Introduction.

may in fact be the result of a logical judicial development. However, it will be suggested below that this is not the case.[327]

The core of the Birksian view, and the reason he believes that an artificial delineation is acceptable, is the claim that he is not attempting to create a new subject, but to suggest what he describes as a new "textbook" way of describing legal elements by way of mutually shared characteristics. Thus, he can work almost exclusively with regard to abstract logic. This reasoning is subject to a number of defects. First, it has been argued above that characterisation without change is untenable. Whatever our methodology, by reorganising a subject we necessarily influence our present understanding of it and our future perception of how it should develop. Indeed, if this were not the case then why attempt a reorganisation of restitution in the first place? Second, Birks seems to wish to "have his cake and eat it." Thus he recognises the problems of prescriptive as opposed to descriptive reclassification. He implicitly accepts that only by arguing that he is making a textual examination of the subject can he legitimately create artificial distinctions and argue that the cases which fit his formulation are restitutionary, and those which don't are not. However, not only is this argument potentially circular, but it does not equate with the tone of the rest of his thesis. Specifically, it is difficult to argue that unjust enrichment provides a merely descriptive categorisation while also holding that restitution/unjust enrichment is a subject whose underlying rationale is as fundamental (and its acceptance as important) as that underlying tort or contract. To summarise, if we examine the work of Birks and (to some extent) Burrows, we can identify several propositions: (a) as a matter of principle, restitution *should* be exclusively triggered by unjust enrichment; (b) as a matter of authority, restitution *is* always triggered by unjust enrichment; (c) any difficult cases which appear to demonstrate restitution without unjust enrichment can be ignored because the theoretical definition of the area excludes them; and (d) when the courts talked of quasi-contract they meant restitution/unjust enrichment. These propositions seem

[327] Bird makes a similar point when she says, "...it is important not to be led astray by what may merely be loose language. At the time when 'waiver of tort' cases were decided, the law of restitution was in an inchoate stage and the language of restitution was inconsistent and confused.'": Bird, J. "Choice of Law", *op. cit.* at pages 74-75.

inconsistent: can it be reasonable to exclude quasi-contract cases which appear to demonstrate restitution from the definition of restitution/unjust enrichment, if all cases of quasi-contract are referable to unjust enrichment? Bearing these problems in mind, it is now necessary to question as a matter of practice, rather than theory,[328] whether our legal systems accept restitutionary responses which are not triggered by unjust enrichment.

In discussing this question it is helpful to take cognisance of a debate which has occurred in the United States[329] in general, and with regard to the work of Dawson in particular. It has been noted above that one of the primary arguments which has been raised against unjust enrichment as a unifying principle is that it cannot adequately explain all restitutionary responses. Dawson's influential article, "Restitution Without Enrichment,"[330] takes this argument one step further by showing that restitutionary remedies do not rely on enrichment.[331] In support of this, Dawson cites a number cases which he believes demonstrate restitution without enrichment. Of these the well-known case, *Planche* v. *Colburn*,[332] is informative. Dawson argues, it would appear reasonably, that there was no measurable benefit to the publisher: i.e. there was no enrichment. Thus Dawson concludes that contract must have developed methods by which such disputes can be justly resolved without the intervention of unjust enrichment.

Birks takes a contra view and seems to suggest that the defendant in this case was benefited: he regards a service as beneficial from the point of commencement. This premise is based upon the fact that the plaintiff has gone to time and expense. However, although this may be a reason for suggesting that the plaintiff should be

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[328] And specifically, noting that any response which is not triggered by unjust enrichment *cannot be* restitutionary.

[329] It is clear that the US experience of restitution/unjust enrichment is not necessarily commensurate with that of this country. However, this is an area in which the courts and academics of both countries have fed upon each other's experience. As a result it is a valid exercise to take note of developments in the United States.

[330] Dawson, J.P., "Restitution Without Enrichment", 61 B.U.L. Rev. 563.

[331] "...to show that in most of the standard work they do, restitutionary remedies in American law do not depend in any way on showing that someone has been 'enriched' in anything like [the] sense of an increase in aggregate wealth.": *Ibid.*; Kull, A., *op. cit.* at page 1210.

[332] (1831) 8 Bing 14. In this case a publisher cancelled a project upon which an author was working. The publisher was required to pay for work done.

able to gain recompense, it cannot be a basis for suggesting that the defendant was enriched in any meaningful sense. For this reason, Burrows argues that the provision of a service designed to produce an end product is only of benefit where, subject to a *de minimus* rule, the relevant activity begins to produce its intended result.[333] From an enrichment/benefit analysis this is a more acceptable proposition, but still appears imperfect: the surgeon whose operation ends with the first incision (or half-way through) can have conferred little benefit and even a successful transplant would leave the patient with a doubtful benefit if the medical team leave before finishing the operation.[334] Of course, we might argue that by starting a job we have made its completion less onerous or expensive. But this is true only in some situations, and an acceptance of this position again suggests that disputes can only be decided on a case-by-case basis, rather than by reference to principle.

Beatson, on the other hand, takes a very different view. He splits pure services (i.e. those which leave no marketable residuum in the hands of the recipient) into two categories: those which increase the recipient's human capital, and those which do not. An example of the former is a lesson given to an "able pupil", while the latter can be seen in an actor's performance or a lesson which falls on deaf ears. The distinction between these categories is clearly problematic; equally it is not entirely clear why a lesson increases human capital while a performance does not.[335] Leaving these matters aside, Beatson approaches enrichment from an economic point of view and argues that an actionable enrichment must be one which has exchange value, capacity to produce income and transferability. From this perspective he argues that neither category of pure service can amount to an enrichment.

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[333] "So where the services comprise the cutting of hair or the removal of waste or the giving of a rock concert or the writing of a book or the building of a house the defendant can be said to be objectively enriched when...the locks of his hair are cut, items of waste are removed, the rock concert commences, the first part of the book is received and the first part of the building is erected.": Burrows, *Restitution*, *op. cit.*, at pages 8. On a prosaic level it must be noted that, perhaps, the majority of people would consider a hair cut begun, but not finished, to be a disadvantage rather than a benefit. He also agrees with Birks that the provision of a pure service is of benefit as soon as it begins: Burrows, *Restitution*, *op. cit.*, at pages 9.

[334] True this problem might be countered by recourse to subjective devaluation, but again this confuses the issue of value and enrichment and enhances the belief that subjective devaluation is being used as a pragmatic catch-all when principle fails.

[335] Beatson, J., "Benefit, Reliance..." *op. cit.* at page 71.

It is submitted that this is a near-perfect example of the transferred category fallacy which has been discussed throughout this study. The relevant question is not whether an element which we call an "enrichment" is an enrichment from an economist's point of view, but whether it *should* be from a legal perspective. Viewed in this way it is submitted that situations can occur in which a party is enriched despite the fact that no residuum of marketable value is left in his hands. The question is whether we believe restitution should be available in such circumstances, and the present author would suggest that Beatson does not give a valid reason for answering this question in the negative. Indeed, simple economic theory would suggest that a rational individual parts with, for example, £10 for a theatre ticket, rather than a CD, because he believes that the theatre ticket will provide him with greater utility than the CD: this in itself is a reasonable definition of enrichment.

Kull in direct response to Dawson's critique takes a different approach. He notes the latter's suggestion that many cases of apparent restitution are concerned with the "...unwinding of contracts, actual and supposed."[336] However, he argues that this does not prove that restitution and unjust enrichment fail to equate, but rather that the law of contract has developed its own methodology for dealing with such cases. In other words the courts "...merely gave contract damages in disguise."[337] There is some merit in this argument. It is certainly arguable that such cases find a happier home within the framework of Fuller and Perdue's "reliance interest" and anticipatory repudiation, than they do within restitution/unjust enrichment.[338] A similar contract-based explanation can, according to Kull, be seen with regard to many of the other cases used by Dawson.[339]

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[336] Dawson, J.P., "Restitution..." *op. cit.* at page 577;
[337] Kull, A., *op. cit.* at page 1205.
[338] Fuller and Perdue, *op. cit.*
[339] However, even he is forced to admit that the American case of *Vickery* v. *Richie* 88 N.E. 835 (Mass 1909) does appear to demonstrate restitution without unjust enrichment. In this case inefficient repairs were made to property in the mistaken belief that a contract for such work existed. This belief was engendered by a dishonest architect who provided the builder with a contract which stated that he would be paid $33,721 and the owner with a contract which stated that he would be required to pay only $23,200 (the architect believed that without this deception the work would not be done and he would lose his commission. The owner agreed to pay only the $23,200, and the builder sued in restitution for the remainder. It was agreed that the builder has undertaken work and provided materials to the value of $33,500 however, the increase in the property's value was only $22,000. The court, nevertheless, awarded the builder the higher sum. Footnote Continues on Next Page:

Many commentators[340] clearly believe that restitution should equal unjust enrichment. However, the argument that it has in the past always done so is not entirely convincing. Indeed, on occasion some commentators appear to accept this: "The case for a purely enrichment-based law of restitution is in one sense no more than a hunch".[341] The dilemma they face is one which all the restitution theorists have attempted, with varying degrees of success, to solve. Specifically, that restitution, without recourse to authority may not have the strength to flourish. However, the authority which exists, as a result of the historical changes discussed above, does not necessarily fit perfectly with modern restitutionary theory. The importance of this problem depends upon the commentator's approach. If they are concerned with a purely descriptive methodology, the presence of cases which fall outside this description must considerably weaken the validity of their arguments. If on the other hand they are stating that this is how things *should* be, rogue authority is arguably less problematic. The present study takes the view that it has the freedom to follow the latter course. Unfortunately, in the main, commentators do not specify which approach they are taking at any particular time.

This ambiguity with regard to the historical quasi-contractual cases has ensured that, until recently, even the most ardent unjust enrichment theorists were cautious in claiming restitution/unjust enrichment as an established part of English law. However, as we have seen, *Lipkin Gorman* v. *Karpnale Ltd*[342] and *Woolwich*

However, a close reading of this case may, as Kull suggests, indicate that it is wrongly decided ("The owner in *Vickery* was not in the position of someone who receives a valuable benefit but makes unprofitable use of it...On the contrary, the owner expressed willingness to pay for the benefit in question - the one factor that kept the builder from being simply a mistaken improver - was conditioned on the builder's apparent undertaking to erect the bathhouse for $23,200.": Kull, A., *op. cit.* at page 1212. This is entirely true, but both parties made the same mistake predicated upon the same dishonest activity. Why simply as a matter of justice should one party suffer all the detriment?). This does not, however, suggest that Dawson is entirely incorrect to argue that the result of the case is defensible. As the Manchester United example above suggests, it may not be reasonable for the builder to have recovered the full value but to base the solution to the case on the lower figure, as Kull suggests, seems equally unreasonable, if as it appears, he is basing his solution upon value received rather than market value. There is little doubt that this argument highlights some of the problems created by suggesting that contract could not provide a reasonable explanation for some of the techniques which, for example, Birks would describe as motivated by unjust enrichment: indeed according to Kull it is already doing so.

[340] See, for example, Kull and Birks.

[341] Kull, A., *op. cit.* at page1197.

[342] [1991] 3 W.L.R. 10 (H.L.).

Equitable Building Society v. *Inland Revenue* Commission[343] changed this. Many commentators have held that these cases demonstrated a final acceptance of restitution/unjust enrichment.[344] Despite this, as recently as 1995, Hedley argued that the courts seem to have made little reference to unjust enrichment.[345] He notes that a Lexis search for the words "unjust enrichment" (and related words) for the years 1985-1995 showed they were used on average only 15-20 times per year.[346] This can be compared with approximately 1200 uses of "contract", 440 for "tort" and 400 for "negligence."[347] A repeat of this exercise for the year 1997 by the present author found the comparable figures to be 30 for "unjust enrichment", 1651 for "Contract", 283 for "tort" and 645 for "negligence."

Several conclusions could be drawn from these figures. The most obvious possibility is that despite the claimed significance of unjust enrichment, it is of little practical import. In other words, the cases which call for restitutionary responses are few and far between. This is not however, a conclusion which can be reached with any confidence. A number of commentators have noted that the troubled history of restitution has resulted in practitioners failing to recognise its presence.[348] Equally, those who do identify the restitutionary element in the case before them may choose to take a more established route where, as is often the case, an alternative exists. It may therefore be that we are merely witnessing a time lag between academic and judicial acceptance and the flood of litigation that this will produce.

A second and, to some extent, related possibility is that the unjust enrichment theorists have overstepped the mark: i.e. that although the courts have adopted some of the terminology of the subject, they have not yet embraced its principles.[349]

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[343] [1993] A.C. 70.
[344] Birks, "The English Recognition of Unjust Enrichment" [1991] L.M.C.L.Q., 473.
[345] Hedley, "Unjust Enrichment" *op. cit.*.
[346] The lowest figure being 5. Although it is true to say that a marginal increase can be seen during the 1990s.
[347] Hedley, "Unjust Enrichment" *op. cit.* at page 580.
[348] See generally, Kull, *op. cit.*.
[349] This is the view taken by Hedley, who argues that in *Lipkin Gorman*, "What we do *not* see is any of the paraphernalia of "unjust enrichment" theory as expounded by its academic supporters. The phrase "unjust enrichment" is used almost entirely unadorned, as if no further explanation were required. Some judges have, indeed declared that it is simply a matter of labels, and the plaintiffs must bring themselves within some "recognised head" of restitution, meaning that they must justify their claim in the same way as if Footnote Continues on Next Page:

Thus, with regard to the language of unjust enrichment, Hedley notes that a Lexis search for "non-monetary benefits" (for the period for which he is concerned) produced no cases and "subjective devaluation" produced one.[350] "Free acceptance" produced one case[351] and "incontrovertible benefit" two.[352] A similar survey by the present author found that these phrases were not used at all during 1997 in the English cases contained on Lexis.

Hedley's proposition is that the courts have begun to use the phrase "unjust enrichment" but have not accepted it as anything more than a useful label with which to summarise a number of traditional techniques and remedies.[353] Unjust enrichment theorists chastise judges who use the language of quasi-contract and restitution together,[354] but Hedley correctly points out that this is exactly the way in which most judges behave. A clear example of this is seen in Millett L.J.'s approach in *The Trustee of Property of F.C. Jones & Sons (a firm)* v. *Jones* [355]. He justified his decision on the basis of a common law action similar, although not the same as, money had and received which has its basis in the plaintiff's ownership before adding (as an after-thought) that in the modern parlance, the defendant was unjustly

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"unjust enrichment" had never been heard of; indeed, Lord Goff himself is often cited to that effect. For many judges, then, references to "unjust enrichment" are simply a neat label for traditional remedies (By way of example, see *Westdeutsche Landesbank Girozentrale* v. *Islington LBC* [1994] 4 All E.R. 890, at page 912 paragraph j; *Hone* v. *Canadian Imperial Bank of Commerce* (unreported, 9 November 1989), "The action is one for money had and received and is based on unjust enrichment,"), but with no implication for the content of those remedies. "Unjust enrichment" no more refers to a particular theory of liability than "debt" does." : Hedley *op. cit.*.

[350] *Ministry of Defence* v. *Ashman* (1993) 66 P. & C.R. 1995, 201-202.

[351] *Marston Construction v Kigass* (1989) 15 Construction L.R.: "In *Marston Construction v Kigass* Judge Bowsher QC, stuck his toe in the waters of "free acceptance" but rapidly withdrew it...": Hedley, S. "Unjust Enrichment" *op. cit.* at page 581.

[352] *BP Exploration Co (Libya)* v. *Hunt (No.2)* [1979] 1 W.L.R; *Proctor & Gamble Philippine Manufacturing Corpn* v. *Peter Cremer GmbH* [1988] 3 All E.R. 843; "...in both cases the judge seemed to share the academics, perplexity over how to use the notion": Hedley, S. "Unjust Enrichment" *op. cit.* at page 580.

[353] *Ibid.*; Hedley also attacks the suggestion that the area has been neglected ("The self-image of 'unjust enrichment' theorists as 'frontiersmen' conceals, as so often in the past, a certain disregard for the original inhabitants.": Hedley, S. "Unjust Enrichment" *op. cit.* at page 587) that the relevant cases can only (or mainly) be explained by unjust enrichment theory and that it can be compared to contract and torts, and in this he is undoubtedly correct. The unjust theorists have made a significant virtue out of the ability of unjust enrichment to explain a large range of disparate cases, techniques and remedies. However, it is arguably true to say that before the recent rise of unjust enrichment theory in this country most of these cases were adequately, if not perfectly, described by the categories in which they were placed: equity, property etc. This can be demonstrated, Hedley correctly argues (*Ibid*), by examining the question of money had and received. It is no doubt true that money had and received can be explained by unjust enrichment but, as we have seen, it has been, and still can be, explained by reference to the protection of property or the return of loss suffered. In other words the question is one of degree: we are not attempting to pick one theory from a list of mutually exclusive alternatives, but to find the *best* theory from a range of workable possibilities.

[354] Birks, *Introduction*, *op. cit.* at page 7.

[355] *The Times*, March 13, 1996.

enriched. There is no explanation as to the mechanics of this and it, arguably, seems to be said in the old sense of a moral view rather than a legal response.[356] In other words, the courts appear to be saying that there is some form of injustice here, and thus we are providing the plaintiff with a remedy. This is clearly very different from the detailed and technical approach to unjust enrichment as an explanatory (or even unifying) principle propounded by Birks, Burrows, *et al.*[357] An example of this failure is demonstrated by the court's decision to allow the plaintiff to recover profits made by Mrs Jones. If this action really was part of restitution/unjust enrichment, then it would seem to point to "restitution for wrongs." However, Millett L.J. does not find it necessary to identify the wrong which has brought about the defendant's liability. If it is not "restitution for wrongs" then it is arguably a departure from much of the traditional thinking on autonomous restitution, and a discussion of the scope and nature of this departure might have been expected.

It might be argued that Millett L.J. is the most senior member of the judiciary (other than Lord Goff[358]) to have paid specific attention to the details of restitution/unjust enrichment. However, his willingness to treat "unjust enrichment" as little more than a form of shorthand was exemplified extra-judicially when he said:

> "A unified and comprehensive restitutionary remedy is capable of being developed by recourse to traditional equitable principles and terminology...For those who prefer, however, the arguments canvassed here can readily be translated into the currently more fashionable restitutionary language of unjust enrichment." [359]

He goes on to note that the choice would make little difference. There seems to be minimal doubt that a similar process is identifiable in *Lipkin Gorman* v. *Karpnale*

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[356] This is not intended as a criticism of Millett. It is merely used to show that even one of the judges most familiar with the technicalities of restitution/unjust enrichment can leave difficult questions unanswered when presented with practical problems.

[357] It is notable, in this context, that even some commentators who might be called unjust enrichment theorists have noted a tendency among themselves and their colleagues to overstate the case for restitution and unjust enrichment. Thus, Beatson notes, "There is a danger that we tend to over use our favourite concepts, particularly once we have left the familiar territory of contract and tort. For restitution lawyers...the temptation is artificially to enlarge the category of obligations which are based on the defendant's unjust enrichment at the expense of the plaintiff...": Beatson, J., "Benefit, Reliance..." *op. cit.* at page 71.

[358] Who has shown little taste for the theoretical aspects of the subject.

[359] Millett, *op. cit* at page 85; for comment see Hedley, S. "Unjust Enrichment" *op. cit.* at page 580.

and it is interesting to note that Millett's view seems little changed by that case.[360] Birks has urged the courts to clearly identify the individual elements (enrichment, expense, etc.) in each case. However, there is apparently little or no attempt to do this in the very case which is said to establish the acceptance of the whole area. This is true to the extent that Virgo, who generally accepts Professor Birks' formulation of the area, is prompted to argue that although *Lipkin Gorman* might accept unjust enrichment it is not concerned with that trigger.[361] Indeed Birks himself commends the case on its "...unanimous acceptance of this generalisation of the nature of the cause of action..."[362] while appearing to express disappointment at the court's failure to examine the detailed components of restitution/unjust enrichment and apparent adoption of a proprietary explanation.[363]

Thus at one extreme we have the suggestion that the courts have now accepted restitution/unjust enrichment as part of the law of England. At the other, we have what amounts to the belief that although they use the language of the subject, it signifies no more than terminological shorthand for other established areas of law. However, Hedley's arguments are unsatisfying. He claims that the courts have not expressly stated their acceptance of restitution/unjust enrichment. But he does not describe a methodology which explains *Lipkin Gorman* and *Woolwich Building Society* better than that put forward by the theorists.[364] Nor does he provide an adequate alternative to the contention that although their Lordships may not have specifically delineated the ways in which the casino was unjustly enriched at the solicitor's expense, *all* the necessary factors were present in *Lipkin Gorman*.[365] Even if the courts in that case did fail to examine the legal justification for their decision, if unjust enrichment is the only explanation for their actions, then we must (at least until the courts tell us otherwise) assume that this is the correct analysis. Equally, the courts may have understandably mistaken the language of new and old

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[360] *Ibid.* However, it should be noted that, at least with regard to linguistics, he has changed his views: Millett., P., "Equity's Place in the Law of Commerce", *op. cit.* at page 18.
[361] Virgo, *op. cit.* at page 23.
[362] Birks, P., "The English Recognition of Unjust Enrichment" *op. cit.* at page 474.
[363] *Ibid.* It might be noted that Hedley's arguments are not confined to *Lipkin Gorman*, but extend to the other great pillar of the unjust enrichment theorists' arguments: *Woolwich Equitable Building Society* v. *Inland Revenue Commission* [1993] A.C. 70.
[364] For example see, Birks, P., "The English Recognition..." *op. cit.* at page 474.
[365] Birks, P., "The English Recognition..." *op. cit.* at page 473.

remedies, but this should not mean that we should ignore their stated aim: i.e. to recognise unjust enrichment. Moreover, the judges are beginning to learn the important differences in such languages. Thus, for example, Millett L.J. criticised above for muddled use of language, has, in his more recent writing accepted the importance of separating traditional remedies from unjust enrichment.[366]

The view must be that we must take the courts at their word. They say they are recognising the principle of unjust enrichment and this must be accepted. However, within that acceptance there is a range of possible meanings of unjust enrichment, and the rest of this chapter will examine which of these possibilities is presently accepted and which would be in place in an ideal legal world.

[366] Millett., P., "Equity's Place in the Law of Commerce", Lecture to the Chancery Bar Association., June 1997, 9.

4.4: CONCLUSION: PROPOSALS FOR THE FUTURE[367]

In 1956 O'Connell, asked the question:

> "Why should the Restatement...not be readily accepted as the guide which the common law might follow? Why is it that English Law, almost alone of European systems, has proved hesitant in adopting a principle so conformable to common sense and so obviously a part of the European legal heritage? The answer is to be found partly in the accidents of the common law development, and partly in the mentality of the English lawyer."[368]

The mind-set to which O'Connell refers, is the English lawyer's preference for expanding the law by reference to precedent, rather than "ethico-judicial principles." This is little changed today, nor would the present author argue against the advantages of such an approach. Nevertheless, while closed legal minds are a factor in this problem, the previous lack of a logical explanation of restitution based in principle and authority is equally to blame. This is, however, arguably no longer the case. The work of Birks, Burrows, Goff and Jones and others has ensured that a framework, if not a complete solution, is now available. These works have not only raised the profile of the subject but also endowed it with an intellectual cohesion it previously lacked. One of the most important aspects of this process has been the demonstration that unjust enrichment can be determined with regard to analytical legal method and precedent rather than morality or "loose justice." In addition to the greater academic interest, the profile of restitution/unjust enrichment has been raised by what might be described as a more progressive judiciary, our system's greater contact with foreign jurisdictions and cases with a foreign element and, perhaps, the greater need for restitutionary remedies.[369] Moreover, the work of Atiyah, Dawson and others[370] has ensured that structured alternatives to the

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[367] "...when anyone ventures to construct a system, we all set cheerfully to work to destroy it": Beatson, J., "Benefit, Reliance..." *op. cit.* at page 71

[368] O'Connell, "Unjust Enrichment" *op. cit.* at page 3.

[369] It is, for example, unlikely that in the past, typing errors resulted in defendants being enriched to the tune of $92 million: Kull, A., *op. cit.* at page 1191.

[370] Along with renewed interest in Fuller and Perdue's approach.

restitution/unjust enrichment formulation are also available. The question to be asked, therefore, is which of these (and other[371]) possibilities should inform our choices in this area. In attempting to make this determination, Fuller and Perdue's famous warning should be constantly borne in mind:

> "...even today [there are] few legal treatise of which it may be said that the author has throughout clearly defined the purpose which his definitions and distinctions serve. We are still too willing to embrace the conceit that it is possible to manipulate legal concepts without the orientation which comes from the enquiry: toward what end is this activity directed? Nietzsche's observation, that the most common stupidity consists in forgetting what one is trying to do, retains a discomforting relevance to legal science."[372]

It is submitted that simplicity of approach is the best weapon in avoiding the Fuller and Perdue scenario of constructing an elegant system which fails to satisfy the requirements that inspired us to raise questions in the first place. This being the case, the signposts which we can use to inform the present discussion are as follows. Is there a pressing need for a reorganisation of what is normally called the law of obligations within our system?[373] If so, has the principle against unjust enrichment been accepted by the English courts?[374] Finally, if this is the case, what do we mean by the principle against unjust enrichment?[375]

The first question to be asked, therefore, is whether the law of obligations is in need of a reformation. This is a question which can, it is submitted, be answered with relative brevity. It can be asserted with a degree of certainty that the authority which does exist, along with the bulk of academic comment, accepts the need for some sort of reorganisation. This view is reinforced by the above discussion. The history of quasi-contract gives us incontrovertible evidence that if we remove an understanding of restitution/unjust enrichment[376] from the law of England there will

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[371] For example, Hedley, "Contract, Tort..." *op. cit.* at page 137.
[372] Fuller and Perdue, *op. cit.* at page 52.
[373] Part of this process is necessarily a consideration of what we mean by reorganisation or reclassification and what we hope it will achieve. It is also clearly arguable that this question is not one of reorganisation but a question of recognising an existing classification.
[374] A question which has been discussed in large measure above.
[375] i.e. will the reorganisation achieve the aims which originally prompted its consideration?
[376] Or some similar motivating factor.

be cases which the law of obligations, as presently formulated, will fail to justly resolve.

The question of authority has already been considered. The conclusion reached was that the courts have accepted the principle against unjust enrichment. However, it is, as yet, impossible to fully know what this means in terms of practical litigation. It is therefore difficult to predict which of the many understandings of the area will be adopted or the changes this will impose.

This acceptance of recent authority should not, however, lead us into accepting all that the unjust enrichment theorists have to say about the foundations of the subject. To give weight to their beliefs, theorists in this country have been keen to prove a long and established lineage for their subject. This is understandable, but should not blind us to the fact that for all intents and purposes unjust enrichment is an as yet underdeveloped subject in this country. The theorists, as we have seen, often paint themselves as pioneers pushing back the encroaching jungle of misinterpretation. As such they are in a unique position. Contract and tort lawyers rarely need to act as advocates for the very existence of their subject. Restitution lawyers on the other hand happily cast themselves into this role: "...part of this book's purpose is to continue the campaign...for a full acceptance of the English law of restitution in the hope that the remaining sceptics will be converted."[377] This quote is not included to suggest that Burrows[378] has set about this task of conversion for any reason other than his belief that unjust enrichment is a principle which should be part of English law.[379] Nevertheless, whatever the motive, the expression of evangelical intent does at least serve to remind us that nothing should be taken at face value. In this context, the use of authority by the unjust enrichment theorists must be open to question. As we have seen, they utterly repudiate the term quasi-contract and yet often rely on quasi-contractual cases as proof of the long history of restitution. Thus Burrows says of quasi-contract:

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[377] Burrows, *Restitution*, *op. cit.*, at pages 2.
[378] Or any other theorist.

> "...this approach is fictional and says nothing about why the promise should be implied. By masking the underlying basis for recovery the theory obscures the important similarities and differences between the cases reversing benefits received. Moreover, it is surely contrary to the rule of law for judges to reach decisions without properly explaining their reasoning."[380]

This is clearly correct, and yet he goes on to suggest that although the courts were using the language of quasi-contract they were, in fact, speaking exclusively of unjust enrichment: "...it is believed that, whatever language has overtly been adopted, the courts have throughout been applying the principle of unjust enrichment".[381] Birks' belief is equally simple: "...the dispersal of restitution was no more than an intellectual error, a mistake whose causes and effects can be objectively documented..."[382] In other words, everything we need to know about the subject has already been decided in the older cases, and now that this is recognised the subject has a set form and structure.

With the greatest respect, the courts cannot at one and the same time give no indication as to "why the promise should be implied" while also clearly demonstrating that they were "throughout" concerned with unjust enrichment.[383] If the courts *believed* they were dealing with a form of contract law they *were* dealing with a form of contract law, and not something which was only fully recognised many years later. In other words, the old cases may have been played out in the same arena, but the rules and equipment have necessarily changed. Commentators who pretend otherwise are sacrificing reality for fictional consistency[384] and must, like some of the older cases, necessarily be treated with caution.

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[379] And which best explains previous cases.
[380] Burrows, *Restitution*, *op. cit.*, at pages 2-3.
[381] *Ibid.*
[382] Birks, *Introduction*, *op. cit.* at page 6.
[383] Indeed it could be argued that many unjust enrichment theorists confirm Fine's view that, "Too keen an eye for pattern will find it anywhere.": Fine, *Theories of Probability.*
[384] Perhaps because they believe restitution/unjust enrichment cannot stand as a matter of principle? Indeed, in an interview conducted as part of this study, Robert Hunter argued that some theorists have gone beyond the bounds of interpretation and have deliberately misconstrued cases to give effect to their position.

In other words, although the law of England has embraced restitution/unjust enrichment, we can accept Hedley's suggestion that we still have a choice in our acceptance or rejection of its detailed formulation.[385] By accepting that the principle is a new formulation we abandon the illusory credibility given by the older cases, but we gain the freedom to develop a more effective system. We can accept that we are not, at this stage in the subject's development, bound by any unalterable channel down which this area of law must flow. Moreover, even if this were the case, the form of the present study allows the author leeway in which to speculate as to what might constitute an ideal system were we starting with a blank page. The remainder of this chapter will therefore attempt to examine what the courts have accepted and, where there is ambiguity, what they *should* accept in order to allow restitution/unjust enrichment to provide logical remedies where none presently exists. This is therefore done with the aim of providing imaginative solutions, whilst staying within the bounds of what could, as a matter of authority, be properly accepted by the English courts given the current state of precedent.

We will start this discussion, as we opened the main part of this Chapter, with the question of how we measure gain or enrichment. In this context we will ask two related questions. First, is subjective devaluation an acceptable element of unjust enrichment? Second, does this tell us anything about the exclusively receipt-based nature of the subject?

With regard to the first question, as already noted, the present author would disagree with Professor Birks that *Taylor* v. *Laird* [1856][386] and *Falke* v. *Scottish*

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[385] "At one extreme the very concept could be eschewed: we could (as lawyers once did) describe restitutionary liabilities without mentioning it, and rigorously avoid the words "unjust" and "enrichment". But no living writer defends this position. At the other extreme, we could refer *everything* to it: we could maintain that all restitutionary liabilities must be justified by some conception of "unjust enrichment" and that any case which does not fit is either wrong or part of some other branch of law. The question is where between the extremes to place ourselves": Hedley, *op. cit.* at page 585.

[386] "Suppose I clean your property without your knowledge, have I then a claim on your property? How can you help it? One cleans another's shoes; what can the other do but put them on? Is that evidence of a contract to pay for the cleaning? The benefit of the service could not be rejected without refusing the property itself.": *Taylor* v. *Laird* [1856] 25 L.J. Ex. 329, 332, *per* Pollock C.B.

Imperial Insurance Co. (1836)[387] provide authority for the concept of subjective devaluation. If this is the case, we must then ask whether subjective devaluation is necessary in order to further the requirements of justice or some other necessary factor.

The present author's answer to this question is an emphatic 'no'. Subjective devaluation has no value in bringing about just results and as a matter of practicality it is not a defensible tool. Let us assume that a defendant receives a red sports car with a market value of £20,000 as a result of an act on his part which the courts categorise as unjust. Can he argue that he is only enriched by £10 because he has a phobia about the colour red and that is what he would have paid? As a matter of practicality, how is this to be proved? As a matter of justice, how does this reasonably balance the rights and interests of the parties? Why should the plaintiff receive less recompense because of the foibles of a party who has undertaken acts which force him to disgorge his gains? In any practical context subjective devaluation is an unacceptable method of measuring value. The courts should be (and almost always are) concerned with objective measures. In this case the market value is the appropriate tool. Certainly, the parties may be allowed to bring forward evidence as to why such value is inappropriate in the circumstances, but even such evidence should be objectively based. Failure to take this approach makes this area of the law unworkable.

Clearly, however, Professor Birks must be aware of the potential absurdities created by subjective devaluation. Why then is it considered to be an acceptable part of the law? Because it is a necessary conclusion once it has been accepted that we are concerned with an *exclusively* receipt-based subject, which is itself a necessary result of the concentration on consequences (i.e. restitution) rather than causes (i.e. unjust enrichment). Certainly an analysis of the cases cited in the course of this chapter leads one to accept that there is, in English law, an emphasis on the receipt

[387] Liabilities are not forced upon people behind their backs any more than you can confer a benefit upon a man against his will.": *Falke* v. *Scottish Imperial Insurance Co.* (1836) 34 Ch.D 234, 248, *per* Bowen L.J. The relevance of these cases will be considered below.

of enrichment. However, in the practical world of litigation there is no obvious sign of exclusivity.

Thus, the language of the courts suggests that they are concerned with the balancing of rights between the parties, the unravelling of relationships, and the reversal of inequitable gains. However, there is no conclusive authority for suggesting that the area is exclusively receipt-based. Indeed, certain recent cases (for example, *Jones* v. *Jones*) cannot be explained on this basis. In that case, there is no acknowledged restitution for wrongs and the court was quite specific that it was dealing with unjust enrichment. Nevertheless, it is clear that the defendant's gain did not equal the plaintiff's loss. In other words, we cannot be dealing with an exclusively receipt-based subject. Certainly, damages may *normally* relate to the defendant's gain, but this is because one is usually concerned with an objectively valued asset or sum. This cannot be extended to suggest that the courts accept a theoretical purity to which the theorists adhere in complex cases where one must place a value on less obvious transactions. Rather, as noted above, the courts are concerned with providing logical solutions to practical problems. Those problems are not always open to theoretically pure answers. Unsurprisingly, therefore, there is good evidence to suggest that the courts do not accept a purely receipt-based notion of restitution, and good reasons for arguing that they should not do so.

With regard to those reasons, a central theme of this thesis is that the English system should develop a logical set of restitutionary principles. However, in opposition to the primary restitution/unjust enrichment theorists, the present author would not accept that the development of such principles is dependent wholly upon the courts adopting an immutable theoretical strait-jacket. There should be scope for deviation if doing so leads to better practical results. Is there such a benefit in not over-emphasising the receipt-based nature of restitution? The present author would answer the question in the affirmative. The following two chapters will show this to be the case with regard to the conflict of laws. With regard to English domestic law this lessening of the theoretical constraints will have a number of advantages that are exemplified by the removal of subjective devaluation.

It has been suggested above that the over-emphasis of the receipt-based nature of the subject is a function of the concentration on restitution, rather than unjust enrichment. In other words, perversely the theorists have identified unjust enrichment as the novel part of their subject. Nevertheless, they have taken restitution as the factor that defines the area. The logic of this and the effect of changing this perception will be discussed during the remainder of this chapter.

Having questioned the receipt-based nature of restitution it is now necessary to examine its primary non-receipt based component: restitution for wrongs. Professor Birks says of restitution for wrongs:

> "His [the claimant's] *prima facie* title to restitution rests on the statement that the defendant has enriched himself by committing a wrong against him. Having shown that that is so, he still has to establish that the wrong is one for which restitution is available, for it is incorrect to assert that the victim of every acquisitive wrong is entitled to claim the wrongdoer's gains."

The very existence of restitution for wrongs is arguably peculiar. The nature of the wider subject, according to all restitution/unjust enrichment theorists, is that there is a fundamental connection between the plaintiff's loss and the defendant's gain. It is this, more than the principle against unjust enrichment, that defines the subject. Yet, Professor Birks' proposition is that this connection is negated where the claim is based on the wrongdoing of the defendant.

In some ways this approach is simply too much. It suggests that a whole area of law can be transported into, or viewed by the precepts of, another area simply because it results in a particular kind of remedy. Indeed, it makes this assertion with regard to a restitutionary remedy which is different from the one applicable to autonomous restitution. Ultimately, as we have seen above, one could argue that with sufficient dexterity of argument, a vast range of topics could be brought within this categorisation. We do not do so because we believe that we are unchallengeably bound by previous authority or because we take the view that the present legal

categories provide the best method of understanding and developing the relevant area.

In another way, however, the Birksian approach is too little. It is set out as if to provide a unified theory, but in reality it cannot do so because it is primarily concerned with result or remedy rather than cause. In other words, the wrong is primarily identified and developed by the law of tort or equity. The only role of restitution/unjust enrichment is to provide a restitutionary remedy. It is slightly surprising that the very theorists who have recognised the unifying concept of unjust enrichment have attempted to bring in other areas simply because they result in similar, although different, remedies. The question which arises is why not simply accept that tort or equity can give rise to restitution? What is the value in developing a theory as to why a wrong allows the subject to be part of the wider law of restitution by negating the connection between loss and gain, if the principles underlying unjust enrichment are to have no say in when a claim is possible?

This approach is also too little because it fails to accommodate both the theoretical aspects of the subject and the way in which the courts actually behave. With regard to theory, it is clear that even the traditional unjust enrichment theorists accept that the rules applying to the litigatory trigger may be different depending on the nature of the action. Thus in discussing whether limitations applying to a tort should always apply where there is a restitutionary element, Goff and Jones state:

> "a restitutionary claim should not necessarily fail simply because the claim in tort would fail. The *raison d'etre* of the statutory or common law bar is critical. It may be to safeguard the defendant only from a claim for damages which may seriously impede his social, political or economic activities. It would then be an illegitimate extension of the policy of the statutory provision to reject the restitutionary claim and allow the defendant to retain his benefit."[388]

[388] Goff, Lord & Jones, *op. cit.*,727-8

In other words, although the legal system may protect the Defendant with regard to damages for loss suffered, it need not do so with regard to his unjust enrichment. This is reasonable, but is it logical? It is reasonable because, if the two forms of action are different, why should they not be subject to different rules? It is illogical for the following reasons.

Birks is quite categorical that the word restitution does not itself denote an event. As he says of restitution:

> "..it differs from "contract" and from "tort". Also from "trust" if that word is taken to denote the act of reposing trust rather than the relationship so created. 'Restitution' properly belongs in a series of words denoting responses rather than events. 'Compensation, punishment, restitution, others' is a properly aligned series. 'Contract, tort, restitution, others' is not.'[389]

If the tort and the response are completely separate, how can the existence of a restitutionary response change the rules applicable to bringing the action? The proposition only truly makes sense if one is concerned not purely with a response, but with a wider principle or the core of a cause of action. That principle is presumably unjust enrichment. If it has the suggested effect, then why should the law be content to take the meaning of wrong from another area?

We can go a considerable way towards creating a unified theory of restitution/unjust enrichment by changing our focus from response to trigger. If we accept that there are certain triggers, connected by the fact that they give rise to unjust enrichment rather than the fact that they give rise to restitution, the difficulties with the area begin to fall away. Clearly, these factors may be connected to wrongs found in tort or equity; they may even have the same genesis. This does not mean that at this point in time they are still commensurate. Indeed, an independent basis for restitution for wrongs is the only way in which we can

[389] Birks, An Introduction to the Law of Restitution, Oxford, (1985), 9-10.

logically explain why apparently similar wrongs in tort and equity give rise to differing responses.

It was argued above that McBride and McGrath were incorrect to suggest that all examples of restitution for wrongs are in reality related to an interference with property. They were, however, moving in the right direction. The defining characteristic of the area is not that there is an interference with property. Rather, the response flows from the fact that the defendant has made an unjust gain as a result of his interference with the plaintiff's interests. These interests may or may not be property rights in the strict sense. Interference with them may or may not also give rise to a right of action in tort or equity.

When viewed in this way, restitution for wrongs finds a natural home within unjust enrichment/restitution. If one takes from a person's store of value in particular circumstances, that person may recover their asset or its value: restitution by subtraction. If one interferes with a party's interests, that party may seek restitution, including profits derived from the interference: i.e. restitution for wrongs. It may be suggested that the former action is less favourable than the latter. However, it must be remembered that certain activities will give rise to both possibilities.

It is submitted that if we accept that restitution for wrongs has an independent basis, this explains not only the fact that different rules can apply to tort and restitution cases, but also a range of cases that sit uneasily within the normal categories. The only factor which can explain *Boardman* and *Reading* is that the defendant took it upon himself to use something in which the plaintiff had a relevant interest. In those cases there was no interference with property, no tort and (in the latter) only a limited deviation from the usual fiduciary duties. However, the defendants had made gains by taking upon themselves activities that could properly only be undertaken for profit by the plaintiff. The same explanation can be found at work in *Harrods Ltd* v. *Harrodian School Ltd.* Equally, it is applicable in breach of confidentiality

cases,[390] cases involving the appropriation of the plaintiff's name and/or position in order to generate a profit,[391] and cases involving the appropriation of commercial profit or other opportunities. Equally, one could apply the same approach to interference with contract cases. In such instances it cannot be said that the defendant is interfering with the plaintiff's property. Rather they are interfering with his interests, or more graphically they are doing something that only he has a right to do.

When examined in this way the connection between restitution by subtraction and restitution for wrongs becomes clearer. Ultimately they are both concerned with the interference with the plaintiff's rights. One leads to the recovery of the asset or value concerned, the other can lead to recovery of profits made from the interference. Taken together they provide a unified response to unjust enrichment in its proper sense.

This conclusion is in contrast to the arguments of Professor Birks and all other prominent unjust enrichment theorists discussed in the present work. Nevertheless, it is submitted that it can be justified. Indeed, it is the only explanation for the relevant cases. It does, however, raise further questions. Notably, it begs the question of whether unjust enrichment is a true trigger in this area; whether it is not (as Birks would suggest) a "generic conception," but rather a general principle or cause of action.

The question of whether restitution represents a general right or is of a supplemental nature has been touched upon above. The underlying problem is related to the discussion of restitution's relationship to unjust enrichment and other areas of law already considered. Differing foreign jurisdictions provide clear models for both possibilities.[392]

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[390] See, for example, *Peter Pan Mfg. Corporation* v. *Corsets Silhouette Ltd* [1964] 1 W.L.R. 96.
[391] See, for example, *English* v. *Dedham Vale* [1978] 1 W.L.R. 93.
[392] Zweigert and Muller-Gindullis "Quasi Contract", Chapter 30, Vol. III of Lipstein, K. (Ed) *International Encyclopaedia of Comparative Law* (Tubingen, 1974).

Birks has suggested that, "A 'general doctrine', if it would be intelligible at all, would be unusably vague.[393] It has been noted above that Birks' apparent view that one can categorise a legal element without changing it is unduly optimistic.[394] Thus while he may argue that he is not promoting a general doctrine, the language and methodology he proposes militates against this. The courts are involved in practical litigation and it is unlikely that in these circumstances they will be able to maintain Birks' strict belief in the separation of intellectual categorisation from practical results. If this is the case, it may well be that Birks' pronouncements will come to form the basis of a "general doctrine" despite his protestations.

Nevertheless, Birks has argued that a general right would "...try to give the principle against unjust enrichment the same status and same relation to immediate rules of liability, as in the law of negligence as held by Lord Aitkin's 'neighbour principle."[395] This, he argues, would be wrong for at least two reasons: first, unjust enrichment is on "too abstract a moral plain", and second, it has a double meaning (i.e. enrichment by subtraction and "restitution for wrongs)".[396] Before examining this, it might be noted that if a general mistake exists as to Birks' exposition of restitution/unjust enrichment, the Professor must be partly to blame. Thus, for example, while in 1985 he argued that unjust enrichment could not be equated with the neighbour principle, just a few years later he was hailing *Lipkin Gorman* as the "*Donoghue* v. *Stevenson*" of restitution.[397] Such enthusiasm, combined with the general approach evident in much of Birks' publications, along with the oft repeated

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[393] He continues, "such a 'doctrine' is no more than the 'principle', already laid aside. What is...presupposed here is a scheme for better ordering the specific instances which Lord Diplock recognised. The generic conception of the event which triggers restitution adds nothing to the existing law and effects no change except what comes from better understanding of what is already there.": Birks, *Introduction*, *op. cit.* at page 27.

[394] If one successfully argues, for example, that a remedy or technique's underlying rationale is to reverse unjust enrichment rather than protecting property rights, then it almost inevitably becomes (if not immediately then over time) something other than what it was. It may be as a result of this approach (that academic enquiry can be split from practical application) that his belief in the supplemental nature of this system seems inaccurate.

[395] Birks, "Unjust Enrichment - a Reply to Mr Hedley" *op. cit.* at page 67.

[396] *Ibid.*

[397] Birks, P., "The English Recognition..." *op. cit.*.

suggestion that restitution is of a similar importance to contract and tort, make a misunderstanding of its claimed supplemental nature inevitable.[398]

With regard to Birks' suggestion that unjust enrichment and the neighbour principle are on different moral plains, he suggests that the latter is acceptable because it "constitutes a simple intelligible command."[399] The former is not, because it requires further explanation. This appears to be a differential without substance: morality is not diminished by complexity. Equally, it is not necessarily reasonable to argue that subjects like contract and tort can be entirely encapsulated by a simple moral shorthand.

Birks' second argument against unjust enrichment as a general principle is that, unlike the neighbour principle, it "contains a hidden ambiguity."[400] By this he means that it refers not only to restitution by subtraction but also "restitution for wrongs." Thus he argues that a plaintiff who claims that a defendant has been unjustly enriched must then demonstrate which of the two methods is applicable. This is not, it is contended, of a level of complexity which should separate the principles against unjust enrichment and harm, and cannot, as Birks suggests, "...suffice to bring the general principle into grave suspicion."[401] It is after all merely a way of demonstrating enrichment.

However, there may be some validity to this argument if Birks is correct in his suggestions that restitution for wrongs is merely a restitutionary response to wrongs developed by other areas and has a fundamentally different nature in other words, if the only real connection is that both areas give rise to a form of restitutionary response and are connected by a generic conception called unjust enrichment. These difficulties, however, fall away if we accept the suggestion made above that restitution for wrongs is not confined to wrongs created by other areas, but is able

[398] See, for example, Burrows, "Contract, Tort..." *op. cit.*.; Bird, J. "Choice of Law" *op. cit.*.
[399] Birks, "Unjust Enrichment - a Reply to Mr Hedley" *op. cit.* at page 67.
[400] Birks, "Unjust Enrichment - a Reply to Mr Hedley" *op. cit.* at page 68.
[401] *Ibid.*

to develop a concept of interference with rights based on unjust enrichment. In those circumstances the two areas are different only in that certain actions will allow the recovery of profits. Their underlying motivation and guiding principles are exactly the same. In such circumstances there is no "hidden ambiguity."

As noted above, models for both approaches can be found in other jurisdictions. Thus, for example, the Australian courts accept the "unifying theory" approach.[402] On the other hand, the courts of Canada have accepted that unjust enrichment is the factor upon which liability is dependent.[403] There is little doubt that the Canadian courts have encountered significant problems in taking this view. However, following the necessary change in approach they have been able to develop logical remedies in areas which were previously deficient.[404]

It may be that in this area, as with the split between restitution and property, Birks is limiting the width of his thesis in order to protect this fledgling area from the strong criticism that a general principle, threatening other areas, might attract. Indeed, as noted, despite his denials, there are times when he discusses unjust enrichment as if it were a general principle. Moreover, it may be that the apparent rise in importance of restitution has given unjust enrichment theorists the confidence to abandon their previous caution, and concentrate on the establishment of restitution/unjust enrichment as an equal to contract and tort. Unfortunately, as yet, little express movement by academics has been made in this direction.

However, if academics in this country have been slow to move towards a general principle of unjust enrichment, practitioners have not been so reticent. Thus, for example, Michael Tugenhat QC[405] has expressed the opinion that in practice unjust enrichment was widely accepted as a cause of action long before *Lipkin Gorman*, and that that case merely represents a convenient expression of the position already

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[402] *David Securities Pty Ltd* v. *Commonwealth Bank of Australia* (1992) 175 C.L.R. 353
[403] See, for example, *Pettkus* v. *Becker* [1980] 2 S.C.R. 834.
[404] For, example, aboriginal claims again the crown (*Blueberry River Indian Band* v. *Canada* [1995] 4 S.C.R 344).
[405] Interviewed by the author as part of this study.

attained. The present author would agree that in practice the courts rarely make the fine distinctions between cases and explanations that Birks would suggest.

This approach is also taken by those who actually bring cases before the courts. If Birks is correct in his interpretation of restitution for wrongs, we would expect to see Statements of Case alleging breach of tortious duties and directly claiming restitutionary recovery of profits. Whilst recognising the defects in anecdotal evidence, the present author would hazard to suggest that Statements of Case in fact never take this approach. Rather they are couched in the form of alternative claims: i.e. practitioners assume that a claim in restitution for wrongs is independent of any underlying tortious or equitable wrong. Moreover, like the courts, pleadings involving restitution by subtraction invariably take the position that unjust enrichment is a cause of action.

This is not only the practical reality of the situation but also makes logical sense when one examines the underlying pronouncements of the theorists. In supporting their subject, the unjust enrichment theorists have traditionally used a two-pronged argument. First, they say that unjust enrichment is not a general principle but does provide an explanation for a range of disparate subjects. Second, they suggest that it "fills in the gaps" of other subjects. The first part of this argument contradicts the second. If unjust enrichment merely explains a disparate range of topics, then to a large extent those subjects remain within the sphere of influence of the areas of law that gave birth to them. However, restitution is neither part of those subjects nor properly independent. As a result, it is not a proper tool to be used by those areas, but cannot adequately react to changing circumstances by itself. The subject does not have the ability to develop in a way which will "fill in the gaps." Nevertheless, its evolving profile may prevent other areas from developing their own effective solutions.

In other words, we can accept that unjust enrichment does explain a range of disparate areas. However, if it is merely a generic conception, it does not provide new solutions. If this is the case, its importance is marginal. If, on the other hand,

we accept unjust enrichment as a general principle or cause of action, it is capable of forming an essential and dynamic third limb to the law of obligations.

It is also submitted that recent cases suggest that both practitioners and the courts do not necessarily appreciate the subtle "text book" distinctions made by Professor Birks and others. Rather they may be moving towards a position in which their language suggests that unjust enrichment is analogous to, if not yet expressly accepted as, a general principle: see, for example, *Jones v. Jones* and *Kleinwort Benson Ltd* [1999] 2 A.C. 349; *Countrywide Communications* v. *ICL Pathway Ltd* [2000] CLC 324; *Aberdyce Joinery* v. *Ali* 2000 G.W.D 1; *Agodzo* v. *Bristol City Council* [1999] 1 W.L.R. 1971.

Indeed, the view of unjust enrichment as a general principle is far more in keeping with the history of the subject than the gloss placed upon that history by the theorists. It has been suggested that when the courts believed they were dealing with a form of contract, they *were* necessarily so doing. At that time, there was no doubt that breach of an implied promise in quasi-contract was a cause of action, just as a breach of binding promise was a cause of action in contract. If this is the case, then it is for the theorists to detail how their recognition of the "generic conception" of unjust enrichment lessened its status from general principle to explanation.

If we are right that the courts are moving in this direction, then the practice of law is moving ahead of those charged with its theoretical development. Such development is essential in a newly recognised area. Having had the foresight to understand the importance of unjust enrichment/restitution, it is now incumbent upon the theorists to recognise that the subject should move (and may well be moving) to the next stage of its development.

The present thesis suggests, therefore, that (a) unjust enrichment is or should be an independent cause of action encompassing autonomous enrichment and restitution for wrongs; (b) the courts and practitioners are accepting this; (c) it is time for the academics to take a similar step in order that both they and the courts can act in tandem in order to provide a logical route for development.

Nevertheless, the above arguments leave one primary question unanswered. Specifically, what is the relationship of restitution and the law of property? Professor Birks has, until recently, been unequivocal in his belief that the laws of property and restitution are entirely separate.[406] This is a necessary corollary to his suggestion that, "If at that moment [the defendant's receipt of the enriching benefit] the law passively preserves pre-existing rights, there is no restitution."[407] The reason which Birks gives for what, even he accepts, is an artificial limitation on the scope of unjust enrichment, is that without it the laws of restitution and property would become indistinct.[408] Goff and Jones are equally concerned to draw a logical line between the two subjects.[409] Whatever the truth of these positions, it is clear that an intimate relationship exists between restitution and property:

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[406] "Both rights *in personam* and *in rem* are restitutionary if they are created when a defendant receives an enrichment at the expense of the plaintiff and have the effect of causing him to yield up that enrichment to the plaintiff...The key [to the distinction between restitution and property] is the isolation of the phenomenon of reversal as opposed to deterrence and anticipation of unjust enrichment.": Birks, "Restitution and the Freedom of Contract", [1983] C.L.P. 141; quoted by Goff & Jones, *op. cit.* at page 68.

[407] Birks, *Introduction*, *op. cit.* at page 14.

[408] "...necessity for a line to be drawn between the law of restitution and the law of property...there is both a conceptual and practical necessity for not allowing the two subjects to merge into one.": Birks, *Introduction*, *op. cit.* at page 15. This can, for example, be compared with the view of Laycock, writing from an American perspective. "'Restitution' also includes its original literal meaning, which is simply restoration of something lost or taken away. Thus restitution continues to include remedies that restore to the plaintiff the specific thing he lost...the *Restatement* refers to in-kind restoration of specific property as 'specific restitution.'...In my judgement, specific restitution is part of the core concept of restitution. It is conceptually equal to the avoidance of unjust enrichment.": Laycock., D., "The Scope and Significance of Restitution" (1989) 67 Tex. L.R. 1270, 1280; the potential width of this proposition can be seen when the same author states, "Restitution is also commonly distinguished from injunctions and specific performance, even those remedies that also grant specific relief and are premised on the inadequacy of substitutionary remedies such as damages. An injunction can order a defendant to return specific property to the plaintiff, and in this simple case, the injunction is a means to achieving specific restitution" *op. cit.* at page 1283. It should, however, be noted that this is far from being universally accepted even among American theorists: Kull, A., *op. cit.* at page 1193.

[409] They state that, "A restitutionary claim may be granted in order to revest title in the plaintiff; a plaintiff may, in an action for money had and received, rely on his legal title, having rescinded a contract. In equity he may submit that the defendant is a constructive trustee of, or that a lien be imposed over, certain assets; or he may seek to be surrogated to another's claim...Such restitutionary claims must be carefully distinguished from a pure proprietary claim where the plaintiff asserts that the property which he has identified in the defendant's hands belongs, and has always belonged, to him. The law of property forms no part of the law of restitution.": *op. cit.* at page 68; in other words the injustice may be caused by the ownership but is not dependent upon it. Thus they make a distinction between cases in which title is revested from those which are purely proprietary. This position, when viewed alongside the author's view that restitution is concerned with the reversal of unjust enrichment, appears to suffer from a logical defect: "[they]...would seemingly include cases of vindication of existing ownership...but would seemingly include all cases of *revesting*, whether they reverse unjust enrichment or not...Claims to property transferred by the plaintiff by reason of fraud or other flawed motives are to be restitutionary, and not part of property law, where property passes at law. Similar claims where property does not pass at law are not to be restitutionary. But the former category includes cases where there is no unjust enrichment; the latter include cases where there is.": Matthews, P., "Tracing the Proceeds of Fraud", *op. cit.* at page 56.

> "Restitution can be seen as an aspect of the legal protection of property, and many instances of what the law characterises as unjust enrichment might be described by saying that the defendant has received property of the plaintiff by means of a transfer that was legally ineffective to convey ownership. This is the case, for example, not only where the defendant's enrichment arises from an act of outright conversion, but also where the claim to restitution is based on a mistaken payment. In these and many other circumstances, restitution's ordinary mode of oppression is to restore to the plaintiff what was formerly his property."[410]

Kull clearly seems to see a closer relationship between the laws of property and restitution than that accepted by Birks. Equally, as we have seen, Hedley takes a different route, arguing that restitution is (or should be) concerned specifically with the protection of property rights.[411] Indeed, Matthews has compared the argument between restitution lawyers and property lawyers to the bickering of divorcing parents, each claiming that the rules will be better off with them. There is a large element of truth in this analogy. It is difficult to escape the belief that unjust enrichment theorists have interpreted both old and new cases with regard to an agenda above and beyond the mere understanding of facts and rules. As Hedley says, theorists like to portray themselves as frontiersmen and no discoverer of new lands ever succeeded by accepting the claims of the native inhabitants.[412] The truth is that we do not (and perhaps cannot) know what the effect of drawing an artificial line between restitution and property will be.[413] We might, of course, speculate as to whether a strict delineation between legal subjects is entirely possible or even desirable. The underlying principles of the law should, as a matter of logic, demonstrate a uniformity of approach. As a result legal subjects based upon these principles are likely to overlap. Although some theorists, notably Birks, make a strong effort to establish clear boundaries for the law of restitution and make vociferous claims for the importance of such a categorisational distinction, in truth

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[410] Kull, A., *op. cit.* at page 1214.
[411] Although this is to view the subject from a slightly different perspective.
[412] Hedley, "Unjust Enrichment" *op. cit.* at page 580.
[413] This is partly because, as Matthews points, out, "We have simply no evidence one way or the other. We have a little argument, we have a lot of assertion, but we have no *evidence.* There is no social testing, no research, there are no surveys of the views of lawyers (or anyone else) as to what would be better. We just Footnote Continues on Next Page:

this is overstated. The potential overlap between contract and tort does little to undermine the core validity of either. The same can be said of interrelationships between restitution and these two subjects.[414] However, the relationship between restitution and property is arguably different and more important. We have seen that problems occur if we attempt to incorporate restitutionary relationships into the law of contract because, although the borders of these two subjects touch, the reversal of unjust enrichment[415] has a potentially different nature from the desire to uphold a binding promise. The difference in principle between the law of restitution and the law of property is, at a fundamental level, less clear: we can argue that little or no difference exists between saying that a remedy is given to protect the party's property rights and that a remedy is given because the abuse of the party's property rights has caused the defendant to be unjustly enriched.

Thus, a growth in one area could theoretically threaten the independence or even the existence of the other (or at least some parts of it). It is not enough, for example, for Birks to differentiate them by saying that more restitutionary remedies are in fact personal: this is true, but their motivation is often closely connected to ownership or rights of possession. Birks intrinsically accepts this close relationship between the subjects by attempting to create the artificial divide between them in order to prevent, as he says, the law of property being subsumed by the law of restitution. It seems equally possible, given the relatively late development of the area, that the opposite result cannot be discounted.

As a matter of ease we might accept that Birks' formulation should be favoured. Whether, however, an artificial formulation of this kind can be maintained in the practical world of litigation must be open to some question. Moreover, we must ask whether it is logical. If A takes my car and swaps it for B's boat then, according to Birks, my claim against the boat is restitutionary because new rights were created. If, however, B keeps the car, then my claim is in property. But, surely at a

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have a rather sterile row about who shall have custody.": Matthews, P., "Tracing the Proceeds of Fraud" *op. cit.* at page 58.

[414] With due note paid to the problems associated with the confusion between restitution and quasi-contract.

fundamental level both are motivated by the same factor (whether we call it the protection of property or the prevention of unjust enrichment). If B's exchange of my car represents an unjust enrichment at my expense, how can it be that he is not unjustly enriched at my expense when he merely holds my car? In fact we can raise a technical argument as to why this might be: specifically, while the car is in the possession of B, I still own it as a result, B cannot have been enriched at my expense.[416]

As a result of these problems, some commentators have suggested a new approach. Thus, Virgo has argued that *Macmillan Inc.* v. *Bishopgate Investment Trust plc. (No.3)*[417] gives us a fresh insight into the structure of restitution as applied by our courts and that it effectively amounts to a reinterpretation of the House of Lords, decision in *Lipkin Gorman* v. *Karpnale Ltd.*[418] His position presupposes a factor which, although probably correct, must be considered. Specifically, he argues that the court in *Macmillan* were wrong to treat restitution as a cause of action, and should have realised that it amounted to no more than a generic classification: the cause of action is unjust enrichment.[419] However, the court, Virgo argues, whilst accepting the importance of restitution, stated that the case was unconcerned with unjust enrichment. In the light of the above discussion, it is clear that one could argue that this was an acceptance of a different understanding of restitution rather than a mistake. However, for the purposes of this discussion, it will be assumed that Virgo's interpretation of this point is correct.

Virgo argues that if the case was restitutionary, but not triggered by unjust enrichment, then there must be some other form of action which is capable of giving rise to a restitutionary response. Specifically, he suggests that in addition to autonomous restitution and "restitution for wrongs" a third area of restitution

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[415] This argument for the moment requires us to accept the validity of the reversal of unjust enrichment as an underlying principle.
[416] Although whether this conforms to common sense is another matter: is it reasonable to suggest that a thief is not enriched by his possession of my property merely because the title still rests with me?
[417] [1996] 1 All E.R. 585.
[418] [1991] 3 W.L.R. 10 (H.L.).
[419] Virgo, G. *op. cit.* at page 21.

related liability exists, which he claims is "Restitution based upon the vindication of the plaintiff's proprietary rights."[420] He states:

> "This cause of action resolves the tension between the law of restitution and the law of property by recognising that the law of property can establish the cause of action for which a restitutionary response may be awarded, without any need to resort to the principle of reversing unjust enrichment."[421]

He continues:

> "The approach advocated here liberates restitution in a proprietary context from the shackles of the principle of unjust enrichment and returns it to where it naturally belongs, namely within the law of property".[422]

It must be remembered that Virgo is not merely suggesting that restitution should take cognisance of a continuing proprietary interest, but that restitution is available in both what we normally refer to as the law of restitution and the law of property.[423]

It is arguable that Virgo's position is a relatively accurate description of the way in which the English judiciary are presently behaving. In other words, they seem to be unwilling to make the decisions necessary to define the boundaries of restitution. However, that is in reality the work of textbook writers, not the courts. For this reason, whether the courts have, as yet, consciously accepted "restitution in a

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[420] *Op. cit.* at page 22.

[421] *Ibid.* He continues, "Of course, it could be argued that in these circumstances the defendant has been unjustly enriched at the plaintiff's expense, but this type of analysis results in an artificial legal framework, especially as regards the creation of ever more artificial grounds for restitution to explain the decided case (Burrows' reliance on retention of property without the plaintiff's consent as a good ground for restitution is consequently unnecessary, restitution in such circumstances adequately being catered for within the context of the law of property)."

[422] *Ibid.*

[423] "If the plaintiff can establish a restitutionary claim simply by showing the continuance of a proprietary interest in the property received by the defendant. A further consequence is that restitution can be obtained without reliance on the principle of unjust enrichment in some cases which until now have required the elements of that principle to be satisfied...The plaintiff is left with a choice as to whether to base the claim on the proprietary interest or unjust enrichment.": *Ibid.*

proprietary context" divorced from unjust enrichment within the law of property is doubtful.

There is little doubt that a number of commentators view the Court of Appeal's decision in *Macmillan Inc.* v. *Bishopgate Investment Trust plc. (No.3)* as being mainly concerned with the traditional law of property rather than restitution. However, whether it can, as Virgo, argues be used to reinterpret *Lipkin Gorman* v. *Karpnale Ltd* is perhaps more problematic, not least because he, for one, contends that the latter case, "unanimously accepted the application of the principle of unjust enrichment."[424] Nevertheless, he is correct to suggest that both Lords Templeman and Goff placed considerable emphasis on the plaintiff's continuing proprietary interest in the lost money, and a similar interest can be identified in *Macmillan Inc.* v. *Bishopgate Investment Trust plc. (No.3)*. One argument which might be used to distinguish the two cases is that in the former, the plaintiffs were in fact seeking to secure a personal rather than proprietary remedy.[425] However, Virgo argues that this is a distinction without merit and that the personal remedy approach taken in *Lipkin Gorman* was a necessary result of the dissipation of the relevant asset and should not be taken to influence the underlying cause of action.[426] It is submitted that this may be correct and can be seen as an aspect of the proprietary action with a personal remedy which has been discussed in Chapter Three. The fact that this has already been addressed with regard to tracing is no accident. It represents what might well be regarded as a traditional assessment of the area with a restitutionary "gloss" placed on top. Thus, Virgo's approach envisages a two-stage assessment of the plaintiff's position. Where he has lost an asset but retained a proprietary interest in it he will bring an action based upon his proprietary base. He will only assert rights founded upon unjust enrichment where his proprietary base has been destroyed.[427] If we are to say that the first category of claims is to be removed from restitution, then this has clear implications for the importance of that subject. If, on

[424] Virgo *op. cit.* at page 23.
[425] *Ibid.*
[426] "Surely the distinction between proprietary and personal remedies should have no effect on the underlying cause of action, because in both cases the cause of action should be regarded as founded on the fact that at the time of receipt by the defendant the plaintiff had retained a proprietary interest.": *Ibid*
[427] *Ibid.*

the other hand (as Virgo appears to suggest), we are to recategorise restitution as simply the law which gives rise to a restitutionary response, rather than the law concerned with unjust enrichment, then the purity of thought which Birks and others have striven to achieve is severely dissipated. Moreover, as noted above, the present author (more than the unjust enrichment theorists themselves) would suggest that our focus should in fact move the other way: i.e. from the response to the trigger.

Perhaps as a result of these problems Birks himself has been critical of the language used in *Lipkin Gorman* which, suggests a proprietary explanation of the case.[428] His dislike of this terminology is prompted by a number of factors. Thus he argues that it demonstrates a:

> "...failure to identify the facts material to the cause of the action. To say that the money received by the club belonged to the solicitors is merely to assert an abstract proposition of law. Consequently it gives us nothing to align with other familiar unjust factors, all fact based, such as mistake, pressure, inequality, and failure of consideration."[429]

With respect, the belief that the protection of proprietary rights is more abstract than numerous other legal conceptions is only apparent if one is trying to equate it with other heads of unjust enrichment. If Virgo is correct, their Lordships were not attempting to do so. Birks' second criticism is that it creates a danger that a continuing property will become a requirement of restitution, thus severely limiting the plaintiff's ability to recover mistaken payments and payments "made for a consideration which subsequently fails."[430] However, depending upon how we understand the effect of mistake and failed consideration, Virgo's two-stage formulation seems to avoid this eventuality which may in any case be over-emphasised.

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[428] "Their Lordships' proprietary approach to the unjust factor would certainly have rejoiced the heart of the late Professor Samual Stoljar (S.J. Stoljar, *The Law of Quasi-Contract*, 2nd ed. (Sydney, 1989), 5-10). But it is not satisfactory.": Birks, P., "The English Recognition..." *op. cit.* at page 482.
[429] *Ibid.*

There is no doubt that many of the difficulties in this area are a result of the range of terms used by the judges in *Lipkin Gorman* to describe what we must assume is the same cause of action. Thus Lord Templeman uses the proprietary language to which Birks objects, while also discussing the area in terms of unjust enrichment and referring to money had and received[431] and even quasi-contract.[432]

Perhaps as a result, Birks has put forward a view of property and restitution which, if correct, would produce a different understanding of unjust enrichment, the relationship between restitution and property law and the not inconsiderable problems which have been associated with the case law in this area in general, and with regard to *Macmillan Inc.* v. *Bishopgate Investment Trust plc. (No.3)* and *Jones* v. *Jones* in particular.[433] This approach marks a significant departure from the Professor's fundamental view of this area, *viz.* that the passive preservation of property rights cannot be part of restitution/unjust enrichment.[434]

The question which Birks places at the centre of this reassessment is one posed by Swadling: i.e. can it be correct to state that the action in *Macmillan* v. *Bishopgate* was totally concerned with property and totally unconcerned with unjust enrichment?[435] He begins by looking at two possible situations: (a) where X loses his wallet and Y finds it and (b) where X loses his wallet and Y removes £50 and buys asset Z with it. We know that in situation (a) X may simply say "that thing is mine" and claim its recovery.[436] It appears that *Jones* v. *Jones* states that in example (b) X may claim asset Z. However, it is this process which has caused many of the difficulties which we have noted in Chapter Three. In example (a), we can argue that X is asserting his property rights, but can we say the same in example (b) where traditional rules (ignoring "exchange product" theory) would appear to deny that

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[430] *Ibid.*
[431] [1991] 2 A.C. 548, 560; Hedley, S., "Unjust Enrichment" *op. cit.* at page 584.
[432] [1991] 2 A.C. 548, 566.
[433] Birks: "Restitution or Property", Lecture to the Institute of Advanced Legal Studies, 1997; Birks, "Misnomer", *Restitution, Past Present and Future,* Oxford 1998.; Birks, "The Concept of a Civil Wrong", D. Owen (ed.), *Philosophical Foundation of the Law of Tort*, Oxford 1997.
[434] "A cleric who loses his faith abandons his calling, a philosopher who loses his redefines his subject.": Gellner, *Words and Things,* 259.
[435] Swadling, W., "A Claim in Restitution" [1996] L.M.C.L.Q., 63.
[436] *Chase Manhattan Bank N.A.* v. *Israel-British Bank (London) Ltd.* [1981] Ch. 105

the ownership of Z can reside in X? Birks argues that the rights are not the same. He suggests that rights in property do not simply move from one asset to another but change in relation to the movement. When X originally gained the rights in his wallet and the £50, he did so consensually in return for the purchase price and, for example, as payment for his labour, respectively. The right with regard to the substitute is not referable to the original act which gave X property rights but is a new, non-consensual, right and relates to a new relationship flowing from Y's change of the money into the new asset. This is a reasonable interpretation of *Jones* v. *Jones*. But it forces us to go one step further. Swadling[437] has argued that Birks' previous position with regard to *Lipkin Gorman* was unsatisfactory, because he could only find a place for unjust enrichment in that case by arguing that the use of tracing necessarily brings the case within the umbrella of unjust enrichment.[438] It is submitted that this argument is misguided. If we accept that this understanding of property rights in *Jones* v. *Jones*[439] allowed the plaintiff to trace against a substitute as a result of unjust enrichment, then we must also accept that had no substitution been made, the plaintiff could also have acted against the original asset by virtue of the defendant's unjust enrichment. In other words, when X brings an action to recover his wallet, the law of restitution/unjust enrichment does indeed have a part to play: it is the motivating factor which explains why the plaintiff has a right to bring the relevant action. Returning to *Macmillan*, Birks would therefore argue that because all transfers were consensual the claim was not primarily concerned with unjust enrichment. However, this is different from saying that the claim was purely concerned with the assertion of property rights, and a claim concerning unjust enrichment could feasibly run concurrently with those traditionally associated with property.

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[437] Swadling, W., "A Claim in Restitution" [1996] L.M.C.L.Q., 63.

[438] This somewhat circular position is explained by Birks when he says, "In what legal context is tracing through substitutions encountered? The answer is that it is never found other than in restitutionary claims - claims, that is, to recover enrichment received by the defendant at the plaintiff's expense.": Birks, "Mixing and Tracing" *op. cit.* at page 84. The problem with regard to *Jones* (as far as Birks' position is concerned) is that the tracing appears to take place with regard to a property claim which Birks believed was outside the sphere of restitution, and unlike *Lipkin Gorman* could perhaps not be logically explained in other ways.

[439] [1997] Ch 159.

We might raise several objections to this position. Primarily we have noted above that technically, although X has lost his wallet, his continuing ownership means that Y cannot, objectively (or empirically), have been enriched. Birks argues, however, that the willingness of the court to raise a potentially personal claim in *Chase Manhattan Bank* up to the level of a proprietary claim, demonstrates their willingness to look at factual rather than empirical enrichment.[440]

This is a fundamentally unsatisfactory approach. It is not acceptable to argue that the courts are, without stating so, deciding cases in the light of the practical effect of a party's acts rather than the law. With regard to the specific case in question, the better explanation is that on this point *Chase Manhattan Bank* was wrongly decided. [441] The present author would therefore suggest that, elegant as it is, there is no authority for Birks' explanation on this point. It is also suggested that artificial delineations are meaningless in the practical application of law. Birks can only argue for such categorisations because he is said to be dealing with a "textbook" analysis. However, such an approach is not honest or useful if we wish the results of that analysis to have practical effect.

The removal of such artificial categories has two effects. First, as suggested above, unjust enrichment and restitution do not equate. Moreover, there is no reason why they should, if we accept that the purpose of the subject is to develop a substantive understanding of unjust enrichment which gives rise to responses as opposed to finding the ways in which the generic conception of unjust enrichment explains the remedial subject of restitution. In other words, this thesis is concerned specifically with "unjust enrichment/restitution"; the subject in which the general principle of unjust enrichment gives rise to restitution. This is in contrast to Birks who is concerned with the subject of restitution/unjust enrichment: i.e. a response to a

[440] "A possible criticism of the...traditional view is that it draws the line between rights and remedies in the wrong place. If one looks behind the creation of so called equitable proprietary rights through resulting trusts one sees that sometimes they appear to rest on the unjust enrichment of the defendant at the plaintiff's expense so that the resulting or constructive trust is itself a proprietary remedy triggered by the right to have an unjust enrichment reversed.": Burrows, *The Law of Restitution*, London (1993), 497.
[441] See Chapter 3 above.

number of disparate factors explained by the generic conception of unjust enrichment.

Birks' understanding is only logical if unjust enrichment can explain every occurrence of restitution, because that is what it was developed to do. Unfortunately it cannot do this. If, on the other hand, we accept the general principle of unjust enrichment which in certain circumstances gives rise to restitution, we can acknowledge that other topics may also give rise to the same response. We can accept that, as Dawson and Virgo suggest, contract law and land law respectively may have given rise to their own restitutionary responses independent from unjust enrichment. Such acceptance is the next logical step in the theoretical development of the area. It also is in accord with the way practitioners are presently formulating claims and the way in which the courts have behaved in cases such as *Lipkin Gorman*, *Jones* v. *Jones* and *Macmillan.*

The second effect (and a necessary corollary of this approach) is that we should eschew artificial divisions between different areas of law in general and between the law of restitution and the law of property in particular. The primary reason for avoiding such divisions is that in the practical world of litigation they are impossible to maintain. Those involved in such litigation are rarely interested in the theoretical niceties of whether they are concerned with unjust enrichment/restitution or property. They are concerned with specific problems, cases and precedents. Where the two subjects touch, they will create arguments made by analogy and will cross-fertilise. No judge concerned with a "property case" will refuse to examine related cases because they appear in restitution textbooks.

Moreover, Birks' arguments that a joined subject would be too large to be manageable, is again more of a concern to academics than practitioners. The courts are invariably concerned with small elements of wider topics and freely roam between different legal areas.

Finally, Birks argues that if property lawyers are to deal with restitutionary issues they must develop ways of deciding which particular remedies should be available in

a manner which would reflect unjust enrichment. They would therefore recover ground already examined by restitution lawyers. So be it. If their methodologies fully reflect those principles, then the cases will primarily be seen as "unjust enrichment" cases, whether created by restitution lawyers or property lawyers. Indeed, in the real world such distinctions do not apply.

Ultimately the law must be allowed to develop in the ways necessary to do justice. It cannot be argued that such cross-fertilisation should be discouraged simply because of demarcational disputes between theorists. The likely effect will be that the laws of property and restitution will learn from each other. The fact that they may move together and produce "joined-up law" is not in the present author's opinion to be discouraged. Moreover, such a movement cannot prevent us studying or understanding the individual elements of each area, just as our understanding of contract and tort is not lessened or restricted because we can group them within the law of obligations.

4.4.1: SUMMARY OF PROPOSALS

Unjust enrichment/restitution is a relatively newly recognised subject. As a result, the earlier sections of this chapter attempted to examine the area with a sceptical eye. The present author's view is that the subject as a whole can withstand such testing because ultimately it provides the only logical solution to certain common problems. With one or two honourable exceptions both commentators and the judiciary have arrived at the same conclusion. Nevertheless, there remain fundamental areas of doubt with regard to the nature of the subject and how it should develop. It is here that the present thesis would hope to make a contribution. That contribution is primarily the recommendation that we should concentrate on the trigger of the area rather than its response. This change in focus allows us to begin to see the principle against unjust enrichment as a freestanding legal concept capable of giving rise to legal remedies. Once this is accepted, a range of factors falls into place and the path to future development becomes more clearly defined.

In this context the first question to be raised was whether the purely receipt-based nature of the subject could be justified. On one view the answer is simple: the subject is purely receipt-based if it is merely the law concerning the return of the value lost as explained by the generic concept of unjust enrichment. If, on the other hand, we can say that it is the law of unjust enrichment, a general principle giving rise to restitutionary responses (which can include the recovery of profits), then the view changes. We are now concerned with the trigger and the response, rather than merely the response as explained by the generic concept. In such circumstances, there is no doubt that the response is still receipt-based, but the whole subject is not completely defined by that categorisation. We are free to examine when the subject should be constrained by its nature and when the requirements of logic or justice should take precedence. The primary initial recommendation flowing from this conclusion is that Professor Birks' championing of subjective devaluation should be rejected. Its only justification is that it is necessary for a purely receipt-based subject. When that reasoning falls away it can be seen that subjective devaluation should be replaced with market value with adjustments for properly evidenced objective factors where appropriate.[442] Moreover, further benefits flow from this determination with regard to the conflict of laws, and these will become apparent in the next two chapters.

The next major proposal of this thesis with regard to this area is that unjust enrichment should not merely be an explanation of previously disparate restitutionary responses, but the principle that triggers those responses. This is connected to the first proposal in that when we focus on the trigger, rather than the response, we are free to develop a logical area of law, rather than an explanation for other areas.

It is submitted that there is nothing in the nature of unjust enrichment to prevent this move, and indeed many practitioners and arguably the courts are already viewing unjust enrichment as a cause of action. Professors Birks' argument to the effect that

[442] For example, where the relationship between the parties indicates a price other than the market value was likely to have applied.

unjust enrichment is on "too abstract a moral plain" simply requires us to properly analyse the topic. His second argument to the effect that it cannot properly encompass restitution for wrongs and restitution by subtraction falls away if we accept that restitution for wrongs can be independent of other areas.

Failure to take this step removes the core purpose of the topic: to provide solutions to problems not catered for by other areas. If we wish to look for a model of how this can work, we need only look to Canada and the seminal case of *Pettkus* v. *Becker*.[443] That case finally determined that a remedy would be available if, (a) the defendant had received an enrichment; (b) there was a corresponding detriment to the plaintiff; and (c) there was an absence of any legal reason for the exchange. In such cases the relevant remedy is a constructive trust.

In practical terms this is a major step forward. Nevertheless, in one way, it is only a change in the way we perceive the subject. The present theorists look at, for example, mistake or failure of consideration and say that the fact that these lead to restitution is because they can all be explained by the idea of unjust enrichment. In other words, they are connected by unjust enrichment but still have an unbroken bond to their original areas. On the other hand, if one takes the step of accepting that these areas are not just explained by the principle against unjust enrichment, but fundamentally motivated by it, this has enormous benefits with regard to ease of understanding, unified developments and the creation of real remedies to real injustices.

The cases suggest that this is the way in which practitioners and the courts are behaving. The theorists have vociferously argued that the courts should always look for a loss, a corresponding benefit, unjust enrichment and a lack of a defence. It is less than surprising that in some respects practitioners have not understood that in doing so they are looking for a "generic conception" but believe they are looking for the necessary element of a cause of action. A "generic conception" is not

[443] [1980] 2 S.C.R. 834.

normally an important part of any case, and it should come as no great revelation that many practitioners have failed to understand its complex and subtle nature.

If this is the case, then, as noted above, the courts and the practitioners are further along the road to creating a general principle than the academics. Such a principle has the double advantage of simplifying the law and making it more effective. In such circumstances it is incumbent upon the academics to retake their former position as the pathfinders in this area.

Once we have accepted the advantages intrinsic in a general rule, it is not a great step to accept that restitution for wrongs can have an independent basis, founded upon unjust enrichment. Such a step removes the illogical position of suggesting that there are restitutionary responses based within other areas of law, but not governed by the rules of those areas. It is again the logical result of changing our focus from response to trigger. In other words, the foundations of the whole area are bound by the trigger of unjust enrichment, rather than the response of restitution. In such circumstances the real distinction between restitution by subtraction and restitution for wrongs is that the latter can, in certain circumstances, give rise to the recovery of profits. However, taken together, the two parts of the whole provide logical and complementary responses.

The final suggestion of this chapter is that artificial divisions have no place in the practical application of law. It may be that academics will wish to retain such divisions in order to make subjects manageable for the purposes of research, teaching and writing. However, in dealing with cases in the real world we cannot expect the courts to maintain a false quadratic connection between restitution and unjust enrichment or a division between the laws of restitution and property for such reasons. With regard to the former division, the law of unjust enrichment/restitution is very simply concerned with the circumstances in which unjust enrichment gives rise to restitution. If other areas give rise to restitution, so be it. The topic we are concerned with need neither explain those areas nor encompass them.

Equally, there is no practical way in which we could ensure the separation of the laws of restitution and property, and no theoretical reason why we must do so. The courts will consider disputes on a case-by-case basis. Cross-fertilisation between the areas is both inevitable and to be encouraged. Indeed, the modern use of the constructive trust shows that this has been happening for many years. If the two subjects eventually grow together, we should not resist that process. They are clearly related and the present author would doubt that the courts of England would be unable to properly implement the rules of such a unified subject.

The present chapter therefore makes four primary proposals: (a) the receipt-based nature of unjust enrichment/restitution should not be over-emphasised; (b) unjust enrichment is, or should, be a general principle; (c) restitution for wrongs has a basis independent of other areas; and (d) any attempt to impose artificial divisions between the laws of restitution and the property, or to make exclusive connections between unjust enrichment and restitution, should be abandoned.

None of these proposals would be supported by Professor Birks, and few would find favour with the other leading restitution theorists in this country. However, it is submitted that this is due to an over familiarity with the theory of the subject. Specifically, the theorists have attempted to fit all restitutionary cases to a pre-defined theory. If, on the other hand, we examine the cases in their own right it is submitted that the law of England is on the road to supporting the above proposals as a matter of theory and has already begun doing so as a matter of practice. If this is not the case, then it is a position to which we should aspire. Taking further steps in that direction will increase the intellectual coherence of the area and therefore progress towards achieving what must be its ultimate aim: providing just solutions to problems not properly falling within other areas.

Nevertheless, the process of bringing theory and practice together is fraught with difficulty, and in the light of the growing internationalisation identified in the previous chapters, it is submitted that one of the factors which may determine its

success is how the courts approach unjust enrichment cases with a foreign element. Unfortunately, for various reasons[444] this area is also amongst, perhaps, the most neglected element of the subject. As a result it will form the basis of the next two chapters, for if we cannot divine a logical approach to restitutionary cases with a foreign element, it must necessarily throw doubt not only on the pronouncements of the unjust enrichment theorists, but also the arguments made in the present chapter.

[444] Which will be examined in Chapter Five.

CHAPTER FIVE: THE RATIONALE OF THE CONFLICT OF LAWS AND THE IMPORTANCE OF CHARACTERISATION IN THE CONTEXT OF RESTITUTION/UNJUST ENRICHMENT.

5.0: INTRODUCTION: THE CONFLICT OF LAWS AND FRAUD.

> "...the nature of the conflict of laws is a dismal swamp, filled with quaking quagmires and inhabited by learned but eccentric professors who theorise about mysterious matters in strange and incomprehensible jargon. The ordinary court or lawyer is quite lost when engulfed or entangled in it."[1]

The earlier chapters of this study have shown that there is no generally accepted definition of fraud in this country and no requirement that a defrauded plaintiff should bring an action in a set manner. This open structure is the product of a deliberate judicial policy; nevertheless it ensures that the facts giving rise to civil litigation concerning fraud and the legal consequences[2] flowing from them can be many and varied. The parties may have a previous personal, contractual or fiduciary relationship or they may be perfect strangers. They may be domiciled or resident in the same country or many different countries. The fraud may be dependent on a previous relationship or unconnected with it. The relevant fraudulent act may be initiated by an individual against another individual, an individual against an organisation, an organisation against an individual or any combination of these and other possibilities. The proceeds of fraud can range from cash, to the cargo of a ship, to any form of intangible property. Indeed, it can be anything on which someone, somewhere in the world, would place a value. Any one of these factors might mean that the fraud takes on a character which is not purely domestic[3] and

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[1] Prosser, (1935) 51 Mich. L. R. 959, 971.

[2] See Chapter Two.

[3] This is, of course, now potentially a factor in all litigation and is a natural function of the general internationalisation of world affairs. Thus, for example, as early as 1952 Yntema said, with regard to the US, "On the practical side, the massive evolution of the domestic economy and, during the twentieth century, the enormous extension of the foreign interests...has imposed upon the legal profession of the United States widely enlarged responsibilities...It is no longer feasible for those who are concerned with the complex problems of private as well as public law that inevitably arise not merely in connection with the foreign commerce of the United States and the effort to establish an international legal community, but also in Footnote Continues on Next Page:

might suggest to a court that it should consider applying rules other than its own.[4] This range of circumstances and consequences ensures that any choice of law rules in a case involving fraud[5] can potentially be extremely complex and/or difficult to correctly identify. Nevertheless, this is an area of growing importance both practically and theoretically. From a practical view-point, as discussed in chapters One and Two, serious fraud is increasingly common and increasingly international. Moreover, with regard to theoretical issues the recent growth in unjust enrichment theory has ensured that many aspects of restitutionary practice have been subjected to extended academic and judicial interest.

Clearly, therefore, there is an anomaly in how little legal comment has been generated by the specific area currently under discussion. Judicial neglect is no doubt largely due to the uncertain position of restitution in this country a factor identified by Gutteridge and Lipstein in 1941.[6] However, they also correctly predicted that restitution would become of increasing importance.[7] Nevertheless, the remaining uncertainties surrounding restitution in the English system ensured that litigants (and perhaps particularly foreign litigants)[8] remain reluctant to bring claims related to unjust enrichment before our courts.[9] Academia appears to have

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considering proposed legislation and legal reform in the domestic scene, to ignore or misestimate what is happening in other parts of the world.": Yntema, H.E., 1 Am. J. Comp. L. (1952).

[4] Whether a court applies its own rules in order to bring about results analogous to those which it believes would be achieved by a foreign court or whether it actually applies the rules of a foreign state will be discussed below. For the moment the phrase "applying rules other than its own" (and other similar terminology) is used to suggest that the court has taken cognisance of foreign rules in a way which may affect its final determination of the dispute before it.

[5] This is equally true of cases based on restitution and equitable obligation in general.

[6] "It is possible, no doubt, to explain this lack of interest on the grounds that the question is not one which occurs very often in practice. The various Continental rules relating to quasi-contract do not, in substance, differ widely from one another. Further, the somewhat narrow view of quasi-contractual liability hitherto taken by English law has probably discouraged foreign creditors from pressing claims of this type in our courts.": Gutteridge, H.C.. and Lipstein, K., *op. cit.* at page 80.

[7] "It would...be unwise to dismiss the question of conflict as being in this instance of no practical importance when we have regard to the growth in the interest of quasi-contract which has been a feature of the literature of English law during the last two or three years and to the possibility that the English law may undergo revision in this direction.: Gutteridge, HC and Lipstein, K., *op. cit.* at page 80.

[8] Blaikie, *op. cit.*

[9] "The person bringing an action in an Anglo-American system would be advised to base the claim on contract or tort and plead enrichment only in the alternative. In some legal systems, and French law is an example, the subsidiary nature of enrichment claims is a rule, not an option. Where enrichment remedies are supplemental in nature it is also quite likely that the possibility of pleading them is overlooked or ignored. And so, the litigant who has a choice of legal systems, might be advised to avoid bringing an enrichment claim in English law, for example, and to select West German law instead.": Bennett, T.W. "Choice of Law Rules in Claims of Unjust Enrichment" [1990] I.C.L.Q. Vol. 39, 139; A slightly different, although similar, aspect of this problem is examined by Blaikie when he says, "...often what could be regarded as quasi-
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neglected the area first, as a function of this lack of litigation[10] and second, due to the categorical accident which leaves those considering restitution separated from those involved in the traditional remedy/technique classifications who are equally isolated from the conflict scholars.[11] We are, therefore, examining an area of law, the international aspects of which have been largely ignored. This situation is only now slowly beginning to change.[12] However, the shift in the structure of fraud, deficiencies in our present system and renewed interest in unjust enrichment means that this process must be approached with fresh impetus.[13] The purpose of this and the following chapter is to provide a structured approach to the task of reassessment with specific reference to the underlying rationale of the conflict of laws and the question of characterisation in the context of tracing as a result of

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contractual claims are simply swallowed up by the contractual questions which arise out of the same relationship and are dealt with accordingly. Thus it is easier, though analytically incorrect, to refer to the question of contribution between tortfeasors, assuming a quasi-contractual classification of the issue, to the system of law governing the tort. Therefore, while the two questions should be independently solved, there may be a tendency to make the solution of one depend on the solution of the other. But, strictly speaking, the quasi-contractual obligation should be dependent on the tort for its existence, not its solution": Blaikie, *op. cit.* at page 114. Equally, Kull points out that, "...Cases involving classic restitution scenarios may be argued and decided without any apparent recognition - by the court or by counsel - that the principles of unjust enrichment might have a bearing on the issues at hand.": Kull, A., "Rationalising Restitution" (1995) California L.R., Vol. 83, 1190, 1196. This situation has also been exacerbated by the inability of English courts to raise issues concerning foreign law of their own volition: Fentiman, R., "Foreign Law in English Courts" 108 L.Q.R., 142.

[10] "The reluctance of English lawyers to recognise the existence of a separate coherent body of domestic law concerned with the reversal of unjustified enrichment has probably inhibited the development of choice of law rules for such claims.": Stevens, R., "The Choice of Law Rules of Restitutionary Obligations", *Restitution and the Conflict of Laws,* Ed. Rose, Mansfield Press, (1995), 180.

[11] Goode has noted similar problems with regard to tracing, "The property lawyer's lack of involvement with commercial law is matched by the commercial lawyer's fear (not to say ignorance) of property law and the rules of equity, with the result that in many commercial disputes where one would expect the issue to arise, the case for a right to trace goes by default.": Goode, *op. cit.* at page 360. The same effect is evident in the restitution/conflict/equitable obligation interface: Barnard, L., "Choice of Law in Equitable Wrongs: A Comparative Analysis", [1992] C.L.J. November, 474. Blaikie also identifies a number of other factors which may have led to the evident neglect of restitutionary issues among Commonwealth scholars. For example, he suggests that, "The place of private international law in Scottish legal education may...be a contributing factor." He also notes that, it has been suggested, "The perfected means of communication in present day society have reduced the importance of *negotiorum gestio*, which originally served mainly to protect the interests of those who were absent and could not be contacted. And in turn, it might be argued, this has diminished the significance which *negotiorum gestio* has for the private international lawyer." However, this is "...untenable since another facet of this 'perfected means of communication,' namely the increased availability of international travel, must surely do as much to increase the scope for *negotiorum gestio*.": Blaikie, *op. cit.* at page 112, 113.

[12] The publication of Rose (Ed.), *Restitution and the Conflict of Laws,* Mansfield Press (1995) and the judicial discussion to be found in, for example, *Macmillan Inc.* v. *Bishopgate Investment Trust plc. (No.3)* [1996] 1 All E.R. 585 may be a reflection of this process.

[13] No academic, practitioner or indeed lawmaker can afford to ignore the other intertwined aspects of the subject or their international consequences: people, money and assets now move around the world with unprecedented ease; few large commercial disputes are purely local in nature, and; both honest and dishonest litigants are acutely aware of the advantages to be gained by exploiting differing national approaches to international disputes.

fraudulent activity. Specifically, Chapter Three identified primarily domestic difficulties associated with tracing and Chapter Four suggested that some of these problems could be solved by embracing restitution/unjust enrichment. However, such a development will be of little value unless it also solves the international problems associated with tracing which we have noted throughout this study. Moreover, similar considerations apply to the wider subject of restitution/unjust enrichment. This and the following chapter will investigate the extent to which our system for dealing with restitutionary cases involving a foreign element does in fact address these problems.

It is generally accepted that neither "conflict of laws" nor "private international law" adequately describe the area under discussion in this chapter.[14] However, for want of a more appropriate alternative, this study will use the former term[15] while considering the latter to be acceptable and in most circumstances interchangeable. Both terms will, unless otherwise stated, be considered to refer to, "...that part of the law...which deals with cases having a foreign element.[16] The "foreign element" is, "...simply a contact with some system of law other than English law."[17] With regard to the present study this could be any one of a very large number and range

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[14] "This branch of law is neither international nor private in character and any conflict is notional only." Lipstein, *Principles of the Conflict of Laws National and International,* Martinus Nijhoff Publishers (1981), 1. Latin terms in the conflict of laws will be given the meaning applied to them in Dicey & Morris, 11th ed. *op. cit.* at pages 29-30. Specifically, *lex fori*: the domestic law of the forum; *lex causae*: the law which governs the question; *lex domicilii*: the law of the domicile: *lex patriae*: law of the nationality; *lex loci contractus*: law of the country where a contract is made; *lex loci solutionis*: law of the country where a contract is to be performed or where a debt is to be paid; *lex loci delicti*: law of a country where a tort is committed: *lex situs*: law of a country where a thing is situated: *lex loci actus*: law of the country where a legal act takes place; *lex monetae*: law of the country in whose currency a debt or other legal obligation is expressed.

[15] This term appears to have majority acceptance: see for example, Dicey & Morris, *op. cit.*, American Law Institute, *Restatement on the Conflict of Laws*, (1935), Beale, *The Conflict of Laws*, New York., (1935).

[16] Dicey & Morris, *op. cit.* at page 3; "Private International Law or the Conflict of Laws comprises that body of rules which determines whether local or foreign law is to be applied and, if so, which system of foreign law": Lipstein, *op. cit.* at page 1. Unless otherwise stated, the words "State", "Country" and "Foreign" will be given the definitions attributed to them by Dicey & Morris. Specifically Dicey & Morris, *The Conflict of Law,* Collins, L. (Ed.), 11th ed., London (1993), 26: Country, "the whole of a territory subject under one sovereign to one body of law."; State: "the whole of a territory subject to one sovereign power."; Foreign: "not English." Other words and phrases will, where necessary, be defined throughout this section. However, whenever discussions take place with regard to the conflict of laws it is wise to remember that words and phrases are often borrowed from domestic law without necessarily carrying the same meaning. As Cook notes, "The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them runs all through legal discussion. It has all the tenacity of original sin and must constantly be guarded against.": Cook , W.W., *Logical and Legal Bases of the Conflict of Laws*, 2nd ed., Harvard University Press, (1942), 159.

[17] Dicey & Morris, *op. cit.* at page 3.

of factors. Thus, for example, a relevant transaction or relationship could be based, or have been formed, abroad; one of the parties could be a foreign domicile, resident or national; the relevant asset might be located abroad or in the case of money, the disputed sums may have been moved through foreign bank accounts or used to buy foreign investments.

Traditionally defined, therefore, conflict of laws is concerned with the jurisdiction of a particular court,[18] the choice of law rules which that court will apply and

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[18] Jurisdiction is outside the scope of this study. However, the primary relevant agreements in this area are, (a) the Brussels Convention on Jurisdiction and Enforcement of Foreign Judgments 1968. This convention was signed on 27 September 1968 (see the agreement amended in accordance with the San Sebastian Convention OJ 1989 L285/1, which appears in The Civil Jurisdiction and Judgements Act 1982 (Amendments) Orders 1990: SI 1990 No. 2591 Sched. 1), and; (b) the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1988 which appears in the Civil Jurisdiction and Judgements Act 1991). Unfortunately, the Brussels Convention contains only one minor reference to the word restitution (Article 5.4.) and no reference to unjust enrichment. The result being that the conventions give little aid in solving many of the problems prevalent in this area (Peel. E., "Jurisdiction Under the Brussels Convention", in *Restitution and the Conflict of Laws, op. cit.*.). With regard to jurisdiction in this area the Conventions, at most, suggest that for reasons of fairness to the defendant, the most appropriate jurisdictional forum will normally be the defendant's domicile (Peel. E., *op. cit.*.; Briggs, A. "Jurisdiction Over Restitutionary Claims" (1992) L.M.C.L.Q., 283). However, this general principle is of doubtful value with regard to restitution arising from fraud, where the locational basis of the relationship, or location of the relevant asset, or an underlying contract between the parties, may be of more jurisdictional importance (To some extent this is mitigated by Articles 5.1 and 5.3 which allow for derogation from Article 2. However, there is some doubt as to whether these provisions, which fail to mention restitution or unjust enrichment, would be applicable with regard to the present debate (Peel. E., *op. cit.*; *Canada Trust Co. and others v. Stolzenberg and others* [1998] 1 All E.R. 318). As a result one is likely to be thrown back onto the traditional rules, specifically, those contained in R.S.C Ord. 11 r.1(1):
"1.- (1) Provided that the writ does not contain any clause mentioned in Order 75, r.2(1) and is not a writ to which paragraph (2) of this rule applies, service of a writ out of the jurisdiction is permissible with the leave of the Court if in the action begun by the writ-
(a) relief is sought against a person domiciled within the jurisdiction;
(b) an injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction (whether or not damages are also claimed in respect of a failure to do or the doing of that thing);
(c) the claim is brought against a person duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper person thereto;
(d) the claim is brought to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of contract, being (in either case) a contract which
(i) was made within the jurisdiction, or
(ii) was made by or through an agent trading or residing within the jurisdiction or on behalf of a principle trading or residing out of the jurisdiction, or
(iii) is by its terms, or by implication, governed by English law, or
(iv) contains a term to the effect that the High Court shall have jurisdiction to hear and determine an action in respect of the contract;
(e) the claim is brought in respect of a breach committed within the jurisdiction of a contract made within or out of the jurisdiction and irrespective of the fact, if such be the case, that the breach was preceded or accompanied by a breach committed out of the jurisdiction that rendered impossible the performance of so much of the contract as ought to have been performed within the jurisdiction;
(f) the claim is founded on a tort and the damage was sustained, or resulted from an act committed within the jurisdiction;
(g) the claim is brought for money had and received or for an account or other relief against the defendant as constructive trustee, and the defendant's alleged liability arises out of acts committed, whether by him or otherwise, within the jurisdiction.
See also Part III of the Public International Law (Miscellaneous Provisions) Act 1995.

potentially the national court's willingness to recognise court orders and judgments originating in another jurisdiction.[19] Thus the conflict of law rules with which we are presently concerned come into play when the courts of one country have jurisdiction[20] over a case, but some operative factor connects it to another jurisdiction (whose laws on the matter may differ). For example, a national of country X contracts with a national of country B to sell land in country C. A dispute arises as to whether X had the capacity to sell the land. Under the laws of country B he had the necessary capacity; under the rules of country C he did not, and under the rules of country X capacity depends upon the intended use of the proceeds of the sale. In an action brought in country X, the courts of that country must decide which rules to apply.[21] The conflict of law rules are intended to indicate how this process is to be conducted. This example is a simplistic one in which the laws of the various countries differ. However, systems may come into "conflict" in a range of more complex and subtle situations. For example, not only the laws of the relevant countries may differ but their conflict rules may also be divergent.[22] Thus the conflict rules may be specifically contradictory[23] with regard

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[19] It should be noted that the conflict of laws indicates a legal system which may resolve a dispute rather than resolving the dispute itself: Lipstein, *op. cit.* at page 3. This of course addresses only specific aspects of the subject, but it nevertheless provides a useful context in which to view the discussion below.

[20] Of course, the way in which a system approaches the question of jurisdiction may be integrally connected to the rules which determine which law one is to apply. As Burrows notes, "How one determines choice of law is a notoriously controversial question. Especially in the United States, the dispute between the formalist and realist schools of jurisprudence has surfaced very clearly in relation to whether one can develop a satisfactory 'jurisdiction-selecting' choice of law rule or whether, in contrast, a case by case 'rule selecting' approach is preferable. English law has continued to adhere to a traditional jurisdiction-selecting approach but the effect of the realist critique has been that, where possible, more flexible choice of law rules have been favoured so that a degree of purposive analysis can be undertaken." Burrows, *op. cit.* at pages 490.

[21] Falconbridge describes the purpose of the conflict of laws in the following way, "Let us suppose that a case comes before an English court for decision, and that by reason of the residence of the defendant, the domicile of the parties, the situation of a thing or other sufficient ground appropriate to the circumstances, the Court has jurisdiction to hear the case and pronounce judgment. Let us further suppose that, by reason of the existence of some foreign element or elements in the case, it is contended that in order to reach a socially desirable solution the Court ought to apply, not the ordinary rules of the forum appropriate to purely English transactions...but rules of law based or modelled on analogous rules of some foreign country. The conflict rules of the forum are designed to guide the Court in deciding whether or to what extent it should have recourse to the rules of law of some foreign country.": Falconbridge, "Characterisation in the Conflict of Laws, L.Q.R. No. CCX, [1937], 235.

[22] Castel, *Conflict of Laws, Cases, Notes & Materials,* 3rd. ed. Toronto (1974), 2-3; Dicey & Morris, *op. cit.* at pages 35.

[23] "There may be a patent conflict of laws resulting from the fact that the conflict of laws rules of two countries or legal units that are connected with the question through legally relevant foreign elements are different in terms, because as regards the same question they use different connecting factors.": Castel, *Conflict of Laws, Cases, Notes & Materials, op. cit.* at pages 2-3; Dicey & Morris give the following example "..a British citizen dies intestate domiciled in Italy, and the English conflict rule says that succession to movables is governed by the law of the domicile, but the Italian conflict rule says that succession to movables is governed by the law of the nationality.": Dicey & Morris, *op. cit.* at page 35.

to connecting factors.[24] Alternatively the conflict rules may be the same but the courts might use the essential elements or connecting factors in different ways within their conflict rules or might define them in different ways (often known as an apparent conflict).[25] Finally, there may be a latent conflict in which although the relevant countries use the same connecting factors and have identical conflict rules, they characterise the relevant question in a different way.[26] Although the second conflict potentially raises questions of characterisation,[27] the third area most clearly demonstrates the characterisational problems which will be discussed in the second half of this Chapter.[28]

Before concluding this introduction, one final point should be made. Previous chapters of this study have suggested that English law has taken an overly simplistic approach to authority. The general judicial neglect of the international aspects of

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[24] The element or elements which potentially connect the case to a jurisdiction other than the one presently adjudicating the dispute; "Typical rules of the conflict of laws state that succession to immovables is governed by the rules of the *situs*; that the formal validity of a marriage and capacity to marry is governed by the law of each party's antenuptial domicile. In these examples, succession to immovables, formal validity of marriage and capacity to marry are categories, while *situs*, place of celebration and domicile are the connecting factors.": Dicey & Morris, *op. cit.* at page 29. "Relevant connecting factors will normally be, "Nationality, domicile, residence, ordinary residence, habitual residence, place of contracting, place of performance, the place of the situation of the object, the intention of the parties, the centre of the relationship, the place where a transaction was concluded and the locality of the court seized of the dispute.": Lipstein, *op. cit.* at page 94.

[25] For example, where the countries both use domicile as the relevant connecting factor but define it differently: Dicey & Morris, *op. cit.* at page 35.

[26] Castel, *op. cit.* at pages 2-4.[27] "It is a disputed question whether this type of conflict raises a question of renvoi, or a question of characterisation, or is *sui generis*...": Dicey & Morris, *op. cit.* at page 35.

[28] It must, however, also be remembered that simply because countries have different legal systems and recognise different rights and duties does not necessarily mean that they will be unable to administer justice which recognises benefits obtained within a different system. Thus for example, "...a right of action is property. If a foreign statute gives the right, the mere fact that we do not give a like right is no reason for refusing to help the plaintiff in getting what belongs to him. We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home." Stevens, R., *op. cit.* at pages 180, 181. This principle is demonstrated in both *Loucks* v. *Standard Oil Co.*, 224 N.Y. 99, *per* Cardozo J. and *Batthyany* v. *Watford* (1887) 36 Ch.D. 269. In the former case it was necessary for an English court to decide whether it would recognise an Australian rule which placed on the life tenant of a Hungarian estate (subject to a *Fideikommis*) liability for its deterioration. The English law has no equivalent to the *Fideikommis* but the court found little difficulty in enforcing it: see Gutteridge, H.C. and Lipstein, K., *op. cit.* at page 84; Stevens (Stevens, R., *op. cit.* at pages 180, 181) uses the case of *Dies* v. *British and International Mining and Finance Corp.*[1939] 1 K.B. 724. In this case, the Plaintiff paid approximately a third of the price due under a contract for the purchase of weaponry. The plaintiff's action to recover the relevant sum could have been classified as one relating to an implied contractual promise to repay or one relating to the restitutionary duty to repay as a result of a "total failure of consideration."

the present subject means that a more fundamental approach is possible in this and the following chapter.[29]

[29] Indeed, the situation is little changed since Gutteridge and Lipstein noted, "Certainly, as far as English Law is concerned, there is an absence of authority which, however inconvenient it may be, has at least the advantage of leaving the way open for a solution which seeks to reconcile the requirements of logic and expediency.": Gutteridge, H.C. and Lipstein, K., *op. cit.* at page 83.

5.1: THE RATIONALE OF THE CONFLICT OF LAWS: DEFINING SUCCESS.

The intention of this, and the following, chapter is to examine the nature of the conflict of law rules which apply in this country and how they relate to tracing disputes arising out of fraudulent activity with regard to the influence of restitution and unjust enrichment. It will then compare the systems' practical application to the theoretical goals identified above. However, in moving from the generally national focus adopted in the earlier chapters to a broader international view, it is necessary to re-examine these principles and potentially to explore new ones. The goals of a system when dealing with purely domestic disputes are not necessarily convergent with those in an international context: because we wish to do justice as between our own nationals, does not mean that we wish to do so between, for example, a British national and a foreigner, or two foreigners who happen to be trading within our borders. In other words, does a foreign element in a case change our priorities with regard to a dispute or our concept of justice and the competing calls upon it? We might legitimately decide that narrow ideas of justice are not our primary concern in such situations, and that upholding the sovereignty of our rules or providing our citizens with a commercial advantage are equally valid priorities. We might even legitimately believe that taking such a course is necessarily, in itself, just. As a result, before considering the substantive elements of this chapter it is necessary to ponder the fundamental rationale of the conflict of laws: what do we wish the rules to achieve and how is their use justified within a national system? Thus it is necessary to consider whether it is, as Falconbridge suggests, "socially desirable" to apply the laws of another country, and if so, what these desirable effects are; whether they are outweighed by other practical and jurisprudential considerations; and if not, how they should be prioritised (and, if possible, maximised) in the area of civil fraud litigation and restitution.

To some extent the definition of the conflict of laws adopted above requires no rationale or justification. Some cases have a "foreign element" and therefore the courts must have a considered methodology for response, even if that constitutes

simply ignoring the problematic foreign aspects of the case. Indeed, the parochial approach of refusing to accept any dispute with a foreign association or only applying English law, no matter how strongly the case is connected to another jurisdiction, is a potentially viable response to such cases.[30] The question is, therefore, not why do we include conflict techniques within our system, but why should national courts take cognisance of the rules of another jurisdiction?

Throughout history there have been many, often competing and mutually exclusive, explanations for the conflict of laws. Many of these are partly or wholly discredited or have fallen into disuse. However, perhaps unfortunately, these theories cannot be ignored entirely as they are wont to make cyclical re-appearances, and even those which remain apparently dormant may well be reflected in the modern application of older cases.[31]

The problems which could be engendered by two or more legal systems coming into conflict were perhaps first recognised during the Roman Empire's decline into local and regional governance.[32] The initial solution to such problems was to hold either that by appearing before a particular court a litigant had accepted the jurisdiction of the relevant national rules, or alternatively that a party would always be governed by his personal law.[33] This methodology was, however, at best, flawed in its ability to cope efficiently with more complex conflict problems.[34] The underlying reason for the lack of conflict of law rules as we would recognise them today may, as Wolff suggests, be, "...due to the fact that private international law

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[30] An approach which essentially involves ignoring the foreign elements of a case admits a number of variants. Thus, for example, the court might refuse to hear any case with a foreign element, or rather than completely ignoring the case or its foreign aspects might accept marginal adaptation to its technical or regulatory rules: Smith, *Conflict of Laws*, London, (1993), Introduction.

[31] These theories have been widely discussed elsewhere and will thus be considered only briefly.

[32] Lipstein, K., *op. cit.* at page 3.

[33] However, "The bond of connection was either citizen or domicile. Citizenship resulted from *origo*, adoption, manumission or election, so that it was possible for one person to be a citizen of several urban communities at the same time...Clearly, then, a person could be connected with more than one urban community...The result in such a case was that he became subject to several jurisdictions...": Cheshire and North's, *Private International Law*, (North and Fawcett (Eds.)) 12th ed., (1992), 15; Lipstein, K., *op. cit.*.

[34] It might therefore be assumed that rules beyond those known to modern scholars were in existence. Thus, for example, "...all cases where a choice of law issue arose could not be determined by the simple method of applying the personal law of the defendant. If, for instance, the dispute concerned a contract of a disposition of property in which two persons belonging to different provinces were concerned, some other rule must have existed.": Cheshire and North *op. cit.* at page 16.

can only establish itself where respect is shown for foreign law, where there is an atmosphere of equality such as pervaded legal thinking in the Italian city-states from the twelfth century onward."[35]

Unsurprisingly, given this analysis, many historians identify the Italian universities of the thirteenth century as the cradles of recognisable conflict of law theory. The impetuous for this development clearly came from the conflicts that arose as between the laws of individual city-states and between states and the common Roman Law. These disputes were in turn fired, as are conflicts today, by an increase in travel, trade and commerce occurring throughout Europe. The relevant work was carried out by many scholars throughout Italy, but Bartolus De Saxoferrato (1314 - 1357) is often singled out for specific attention. Bartolus' work was carried out in the context of the developing "statute" theory. The word "statute" was used to denote local law which was specific to a particular area and was divergent to the general law of the country. The statutists acknowledged a potential split between procedural and substantive law with the latter further divided into *statuta relia* and *statuta personalia*.[36] The former were considered to be of local application within a particular jurisdiction while the latter applied to, and followed, the person.[37] In a wide sense, the relevant statutes could be identified because *statuta relia* were those laws which directly affected objects or assets, whereas *statuta personalia* were those which directly affected the person. Bartolus' initial contribution to the development of this doctrine was that he attempted to apply logical rules to groups of laws.[38] In this sense, he initiated the modern technique of grouping laws to which particular conflict rules would apply. This approach was essential in the

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[35] Wolff, *Private International Law*, Oxford, 2nd. ed., (1950), 20; Cheshire and North make a similar point when they note, "In a world which is organised on a feudal basis it is clear that there is no room for what we now know as private international law. That branch of law presupposes inter-state or international relations and the readiness of courts to apply foreign laws when necessary in the interests of justice, but feudalism recognised nothing except the local law of the land. All laws were 'real' in the sense that they were effective only within the territory of the legislator.": Cheshire and North *op. cit.* at page 17.

[36] A statute could also in certain circumstances be "mixed." A mixed statute can alternatively be defined as one which either "concerns acts" or one which "affects both persons and things." Cheshire and North, *op. cit.*, at page 19.

[37] Lipstein, *op. cit.* at page 8; "Mixed statutes apply to all acts done in the country of the enacting sovereign, even though they raise litigation in another country.": Cheshire and North, *op. cit.*, at page 19.

[38] "...he did not ask, "What legal system applies to a given set of facts?" but, "What group of relationships fall under a given rule of law?" Thus his starting-point was the grouping not of legal relationships between
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development of a logical concept of "acquired rights": i.e. the belief that rights derived under one set of rules could be maintained with regard to other jurisdictions. The doctrine of acquired rights provided the statutists with a logical reason for advocating the application of foreign rules. Unfortunately, it is open to a number of criticisms, the most prominent being circularity. Until one has decided which rules apply, how can it be known whether a party has acquired rights under it? Moreover:

> "If the doctrine of acquired rights, understood in a wider, territorial sense, were correct, every country would be obliged to pay unlimited respect to the laws of other countries, where such rights are alleged to have arisen, but such a foreign law had never been asserted even by its protagonists."[39]

Thus there is little doubt that the work of the Italian scholars provided a beginning to modern thought about the nature, function and scope of national rules and customs in an increasingly international medieval world. However, the theories which they developed contained serious logical and practical problems: not the least of which was that although the division between real and personal rules could be easily stated in theory, an acceptable means of divining into which group a rule should fall, proved problematic.[40]

Nevertheless, the statutists, approach continued to be developed, largely by the French theorists[41] of the sixteenth century and the Dutch School[42] of the seventeenth century. While accepting much of what had gone before, the Dutch academics changed the emphasis of their thinking to examine the question with which we are currently concerned: specifically, why should the courts of one

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persons, but the rules of law existing in any given country, such as those contained in the statutes of the various Italian city-states.": Wolff *op. cit.* at page 24.

[39] Lipstein, *op. cit.* at page 21.

[40] "At first sight this classification of laws appears to afford a simple and effective solution, but any attempt to discover from post-glossatators what statutes are real and what are personal meets with the utmost confusion. The truth is, of course, that the problem is insoluble. Is, for instance, a law which regulates one's capacity to transfer land to be classified as personal because it concerns persons, or as real because it affects land?" Cheshire and North, *op. cit.*, at page 19 (we will see below that this is a problem familiar to those considering restitution/unjust enrichment and the conflict of laws).

[41] Dumoulin (1500-1566) and Bertrand D'Argentre (1519-1590) are most regularly cited.

[42] Burgundud (*d.* 1649), Rodenburgh (*d.* 1668), Paul Voet (*d.* 1677), Huber (1636-94), John Voet (1647-1714).

sovereign jurisdiction take cognisance of, or apply the rules of, another? The answer they arrived at is, arguably, the earliest explanation of the conflict of laws, which still exerts widespread influence.[43] They suggested that the implementation of a foreign jurisdiction's rules is a manifestation of the relevant court's respect for that jurisdiction.[44] This is often referred to by the somewhat ill defined shorthand of "international comity"[45] a concept which finds its most clearly identifiable historical foundation in Huber's three propositions concerning the conflict of laws.[46] The propositions briefly stated are: (1) the sovereignty of a state's laws within its own territory is absolute; (2) the subjects of a state are those within its borders; (3) a state should show comity (*comiter agunt*) towards the laws of another state.[47] Thus, Huber emphasises the territorial aspects of national law in the first two principles and entreats the courts to act with comity to the rules of other jurisdiction in the third. This principle suggests that although countries have absolute control of their own affairs, they should recognise the import of rights and duties acquired under other systems unless to do so would adversely affect the local citizenry or sovereign. The principle behind this position is that:

> "...it is clear that the decision of such cases is part of the law of nations and not, properly speaking, of civil law, inasmuch as it does not depend on the individual pleasure of the higher powers of each country, but on the mutual convenience of the sovereign powers and their tacit agreement with each other."[48]

Huber holds that the state's powers within its own jurisdiction are unlimited. The state has full freedom to prescribe any rules that it wishes for its courts,

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[43] Lorenzen, *Selected Articles on the Conflict of Laws*, Chapter 6,

[44] Yntema "The Comity Doctrine" (1966) 65 Mich. L. Rev. 9; Ehrenzweig, *Private International Law,* New York (1974), 50, 54, 93; Mann, F.A., *Foreign Affairs in English Courts* (1986) Chapter 7; Collier, *Conflict of Laws*, Cambridge (1987), 351; Cheshire and North *op. cit.* at Chapter 2; Dicey & Morris, *op. cit.* at Chapter 1.

[45] There is considerable doubt as to the meaning of international comity. *The Shorter Oxford English Dictionary*, 3rd Ed Oxford, (1983) Vol. I. defines "comity of nations" as, " The courteous and friendly understanding by which each nation respects the laws and usage of every other, so far as might be without prejudice to its own rights and interests." However, it has at various times been seen as a binding duty, a representation of respect or a reciprocity.

[46] *De Conflictu Legum* (1689) translated by Davies, L.J., "Influence of Huber's *de Conflictu legum* on English Private International Law" (1937) 18 B.Y.I.L. 49.

[47] For a detailed examination of these propositions see, Mann. F.A. *Studies in International Law*, Oxford (1973); Lipstein, *op. cit.*.

[48] Huber, *Heedendaegse Rechtsgeleertheft,* for translation see Lipstein, *op. cit.* at page 15.

consideration of cases containing a foreign element. Indeed it could even instruct its courts to take no cognisance of foreign rules whatsoever. As a result, all rules of the conflict of law are national rules and subject to national political and judicial decision.[49] There are clearly, within Huber's principles, elements of the "vested rights" theory,[50] an approach which was later developed by a number of common law jurists.[51]

Unfortunately, as we have noted, the "vested rights" theory suffers from a number of logical deficiencies and in this context others can be identified. Thus it is clear that one of the primary purposes of the conflict of laws is to provide a framework of rules by which the courts may choose between competing rights assigned by differing jurisdictions. The "vested rights" theory is, by its very nature, of little assistance to the courts in determining such matters. Moreover, it is equally unhelpful in cases concerned, not with rights but with legal disabilities. The theory is also apparently at odds with the practical world of trade and commerce.[52] It is also unlikely to provide a solution where more than one legal system is in conflict. Finally, it has been argued that the element of Huber's thesis upon which this theory is based is not compatible with the first of his propositions.[53] It is perhaps unconvincing to claim, as some commentators attempting to explain this problem do, that the proposition is concerned with laws while the theory deals with rights derived from laws. However, the last of these criticisms is less important if one

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[49] Wolff, *op. cit.* at page 28.

[50] The present judicial view of "vested rights" theory was summarised by Fuld J. when he said, "...the vested rights doctrine has long since been discredited because it fails to take account of underlying policy considerations in evaluating the significance to be ascribed to the circumstances that an act had a foreign situs in determining the rights and liabilities which arise out of that act.": *Babcock* v. *Jackson* [1963] 2 Lloyd's Rep. 286, 287.

[51] Specifically, in England by Dicey, *The Conflict of Law,* 5th ed. (1932) and in the US Beale, *The Conflict of Laws,* New York (1935).

[52] Thus, for example, it fails to fully explain the common situation in which a contract formed in one country is to be, by agreement, governed by the law of another country.

[53] See Lipstein, to the effect that, "On the one hand it recognised the territoriality of laws based upon the international division of legislative competence and proclaimed an international custom to apply foreign law which has operated in a particular instance. On the other hand, it rejected the statutist doctrine which determined the application of laws in space by reference to the nature of the rules of law, but offered no substitute rules for determining when foreign law must be regarded as having operated territorially.": Lipstein, *op. cit.* at page 16.

accepts, as most modern commentators appear to, that the third principle is subservient to the first two.[54]

Nevertheless, the territorial aspect of Huber's approach has been accepted up to the present day.[55] What is less certain is the usefulness of Huber's third principle: as we shall see below, many commentators suggest that comity does not offer an adequate model of how the courts behave. Moreover, even if it did provide such a model it clearly can only do so in retrospect. Its boundaries and application are too uncertain for it to adequately demonstrate how the courts will (or in many cases even should) behave. Despite this, the influence of comity can arguably be seen in a number of cases,[56] and it still exerts some influence over academic thought particularly in the United States.[57] However, it should also be noted that Dicey & Morris dismiss the importance of comity within the English system on the basis of authority. They argue that the laws of an enemy state have been applied during war time,[58] thus showing, it is claimed, that they were applied for reasons other than respect. However, this line of argument assumes that the courts are continually reassessing the theoretical basis of the rules under which they work[59] and that the presence of other more powerful arguments necessarily precludes the secondary motivation of comity. Neither of these assumptions is unequivocally correct.[60] It is also true, as Collier points out, that there are situations and cases in which comity has clearly

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[54] Lipstein explains this in the following terms, "...there was no duty arising out of the nature of foreign private law to apply it...Instead, customary international law established a duty to give full effect to foreign law, *once a state has decided generally to apply foreign law in the particular circumstances*...comity served to underline that the foreign law need not be enforced as such and that no more than a general respect for foreign law, once chosen to apply in the particular circumstances of the case was called for.": Lipstein, *op. cit.* at page 15.

[55] *Ibid.*

[56] For example, see *Amin Rasheed Shipping Corp* v. *Kuwait Insurance Co.* [1984] A.C. 50; *Settebello Ltd* v. *Banco Totta and Acores*[1985] 1 W.L.R. 1050 (C.A.); for further examples, see Dicey & Morris, *op. cit.* at page 6.

[57] Yntema "The Comity Doctrine" (1966) 65 Mich. L. Rev. 9.

[58] Dicey & Morris, *The Conflict of* Laws, 12 ed., London, 1993, page 6; Re *Francke and Rasch* [1981] 1 Ch. 470.

[59] This argument is clearly less than suitable with regard to common law systems.

[60] Moreover, as we shall see below, Dicey & Morris generally eschew the purely theoretical explanations of the conflict of law rules in favour of the suggestion that they are the product of the court's desire to do justice to the parties. It is, not, however, arguably problematic to suggest that the courts might have applied the laws of enemy countries during times of war in order to do justice to enemy citizens, but could not have done so out of respect for the rules of the country's judicial systems? In other words, is the respect for another country's legal system necessarily immediately destroyed by war while the desire to do justice to its citizens is not? Practical reality suggests the truth of the matter might in fact be just the reverse.

been a motivating factor.[61] Moreover, it is possible that in the context of greater international litigation and economic co-operation (particularly within Europe) that comity could be of growing importance. Equally, as the above quote from Wolff suggests, whether or not comity is a defining characteristic of the conflict of laws there is little doubt that it has some importance, as no coherent system of the conflict of laws can develop in the absence of "...respect...for foreign law." Bearing these arguments in mind, it is nevertheless true that a concept as ill defined as comity is of doubtful value in determining modern international rights and duties.[62]

Nevertheless at the time, Huber's ideas were embraced, if anything, more readily in common law jurisdictions than in the Netherlands and continental Europe: although it is probably true to say that this enthusiastic conversion was in part due to the lack of any viable alternative resulting from the subject's general neglect in common law jurisdictions up until the 1800s. This is not, of course, to suggest that the common law systems were oblivious to the problems which could arise from cases connected to more than one jurisdiction. However, their solution was to make all other questions subservient to that of jurisdiction. The only issue which, therefore, faced an English court was whether it had the necessary jurisdiction to hear the case. If it did, then its own rules would be applied. In other words, the recognition of the problem had done very little to instigate development beyond that found in Roman systems. Moreover, even the subject of an English court's jurisdiction was problematic, not least because competition existed not only between English and foreign courts but also between a range of English courts. This position was modified somewhat as the courts began to recognise foreign court judgements[63] and even in some cases apply foreign rules,[64] a state of affairs which was given further impetus by the common law's marriage with the law merchant. Nevertheless despite

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[61] Collier, *op. cit.* at Chapter 21; *Foster* v. *Driscoll* [1929] 2 K.B. 470 C.A.; *Regazzoni* v. *K.C. Sethia (1944) Ltd* [1958] A.C. 301 H.L. See also, for example, "...the classification of an issue and rule of law for this purpose, the underlying principle of which is to strive for comity between competing legal systems, should not be constrained by particular competing systems of law, which may have no counterpart in the other's system": *Macmillan Inc.* v. *Bishopgate Investment Trust plc.* (No.3) [1996] 1 W.L.R. 387, 407, *per* Auld L.J.

[62] "All such schemes...must fail, I submit like all legal theories which ignore the irrefutable fact that, although we all have a sense of justice...[we]...are necessarily inconsistent with each other, not only as between national, communities, families, but in ourselves.": Ehrenzweig, *Private International Law, op. cit.* at page 58.

[63] *Collington's Case* [1678] 2 Swans 326.

this ad hoc development, for a long period the process was devoid of adequate intellectual or legal structure.

Once again the internationalisation of the European and world economies provided the impetus for change. Thus, in a case which is often considered to be the genesis of the English conflict of laws, Lord Mansfield stated:

> "Every action here must be tried by the law of England, but the law of England says that in a variety of circumstances...the law of the country where the cause of action arose shall govern."[65]

This case did not, however, herald a rapid development of the conflict of law rules in this country, a situation which contrasted strongly with that existing in the United States at that time. The federal nature of that country's legal system meant that its jurists were forced to take a more proactive approach to the problems created by conflicting jurisdictions. First, and perhaps foremost, amongst these commentators was Story[66] who stated that, (a) within its own territory every nation has exclusive jurisdiction and sovereignty, thus ensuring that the state's laws bind all persons, property rights and legal relationships within its own borders; (b) the sovereignty of nations prevents one state using its laws to affect property outside its borders or persons other than its residents; (c) as a result the effect of foreign law in a particular country is solely the choice of that country. These propositions were not radically different from those of the Dutch school: they again emphasised the territorial nature of law[67] and, *prima facie*, refuted the concept of a "universal superlaw."[68] However, Story did downgrade yet further the importance of comity, seeing it less as a duty imposed upon nations and more as an explanation for

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[64] *Blankard* v. *Galdy* (1693) 2 Salk. 411; *Scrimshire* v. *Scrimshire* [1752] 2 Hagg. Con. 395.
[65] *Holman* v. *Johnson* (1771) 1 Cowp. 314, 343. It is not suggested that the concept of the conflict of law in general, or comity in particular, was unrecognised before this time. Thus in 1678 Lord Nottingham had said, "It is against the law of nations not to give credit to the judgements and sentences of other countries. For what right hath one kingdom to reverse the judgements of another? And what confusion would follow in Christendom if they should serve us so abroad, and give no credit to our sentences?": *Cottington's Case* [1678] 2 Swans 326. Other cases of note include *Blankard v Galdy* (1693) 2 Salk 411; *Mostyn* v. *Fabrigas* (1774) 1 Cowp 161; *Dalrymple* v. *Dalrymple* (1811) 2 Hag. Con. 54.
[66] Story, *Commentaries on the Conflict of Laws,* 8th ed. by Bigelow, G.G., Boston (1883).
[67] *Lipstein, op. cit.* at page 21.
[68] Ehrenzweig, *Private International Law, op. cit.* at page 50.

national behaviour.[69] Moreover, Story's approach was different, concentrating more on European and American cases and less on the precepts of natural law and academic exposition.[70] This gave his work an intellectual credence which led to its rapid acceptance both in the United States and Europe. As such, arguably, it provided the impetus for the work of Savigny which many see as the wellspring of the modern approach to the conflict of laws.

The discussion so far gives the impression of a move away from what Ehrenzweig describes as an international "superlaw." But this is not necessarily an accurate description of academic thinking during the period. The emphasis on territorial law and the discretionary nature of comity should not be taken as proof that the concept of an overriding system of law had been abandoned as a goal or even as a practical actuality.[71]

Thus, for example, Savigny emphasised the existence of a Christian morality within the boundaries of which the inter-relationships between nations existed.[72] Within this context, he looked to the legal relationship out of which the relevant dispute arose, and the particular legal system to which it pertained. Thus, courts needed to specify the appropriate relationship and identify the relevant rules with regard to the appropriate connecting factors. This process was simplified because, as a result of the universal character of international law, all jurisdictions would be able to identify the same relationships and connecting factors. This approach is open to a number of objections. The first being its simplistic view that such methodology is of universal application: logic tells us that this is not the case and practical experience

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[69] Story, *Commentaries on the Conflict of Laws* 2d ed. (1841), 32; however, in this context see Ehrenzweig, *Private International Law, op. cit.* at page 54.
[70] Wolff, *op. cit.* at page 33.
[71] "Yet Story's work is frankly eclectic and thus lacks theoretical consistency. Like his idol, Huber, far from considering every state free to grant or withhold 'comity', he based his message on the assumption of a binding *jus gentium* and thus adhered to the same ideology as that supporting Livermore's statutist postulates. To him, international rather than interstate problems, foreign rather than American doctrine, were of the essence. To him, a private 'international' law shared by all countries, based on statutist thinking and language and unhampered by latter constitutional commands and ever less common laws, was still the goal and, in part, reality." Ehrenzweig, *Private International Law, op. cit.* at page 54.
[72] Ibid.

has ensured that such a view is no longer accepted.[73] Second, is the difficulty of identifying a relevant relationship before the appropriate legal system, from which the relationship springs, is determined. However, despite these difficulties, Savigny had ensured that, "...the modern technique of handling questions of Private International Law had emerged."[74] There is little doubt that his approach became, for many who came after him, the accepted orthodoxy. The legal systems of Italy, Greece, France and Germany,[75] to a greater or lesser extent, accepted his approach and in common law systems he became "...one of the highest authorities, second only to Story."[76]

In particular his work was taken up by Westlake and Dicey. The latter[77] incorporated into this methodology a revised view of acquired rights. As we have seen, this theory is based upon two precepts: first, that the courts apply the rules of their own territory and do not enforce foreign laws or judgements; second, that the courts of one territory can and should protect rights which have already been acquired under the laws of another territory: i.e. rights acquired under foreign jurisdictions are enforced, foreign law is not.[78] "Acquired rights" theory has been rightly criticised for circularity,[79] on its inability to provide a useful indication of the relevant law in cases concerning several jurisdictions, and on the basis that it fails to consider the fact that territorial law also includes the territory's conflict rules.[80] Nevertheless, Lipstein suggests that Dicey's view is, to some extent, defensible. He

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[73] "That the internationalist theory is simplistic and not in accord with reality is obvious, International law has not furnished the existing rules of the conflict of laws nor does it impose today in this respect upon the nations any far reaching obligations.": Lorenzen "The Theory of Qualifications and the Conflict of Laws" (1920) Colum.L. Rev 247, 268.

[74] Lipstein, *op. cit.* at page 23; The acceptance of these principles can be seen in Morris's comment that, "The conflict of law exists because there are different systems of domestic law. But systems of the conflict of laws also differ. Yet all systems have at least one thing in common. They are expressed in terms of judicial concepts or categories and localising elements of connecting factors." Morris, *The Conflict of Laws*, (1993), Chapter 29.

[75] Wolff, *op. cit.* at page 35.

[76] *Ibid.* at page 36.

[77] Whose influence on the English approach need not be over emphasised.

[78] "The cause being entertained in an English court must be adjudicated according to the principles of English law applicable to such a case. But the only principle applicable to such a case by the law of England is that the validity of Miss Gordon's marriage rights must be tried by reference to the law of the country where, if they exist at all, they had their origins.": *Dalrymple* v. *Dalrymple* (1811) 2 Hag. Con .54, 58, *per* Sir William Scott.

[79] Cook., W., *Logical...*, *op. cit.* at pages 18.

[80] Cheshire and North *op. cit.* at page 28.

believes that Dicey recognised the defects in Huber's formulation[81] and saw "acquired rights" as only a "...motive or explanation for applying foreign law...".[82] As such, Lipstein considers acquired rights to be of some practical use in explaining the conflict of law which is nevertheless "meaningless as a theory."[83]

Thus far we have considered the motivation behind the court's willingness to take cognisance of another jurisdiction's rules. However, some commentators have concentrated not on why, but on how the courts act and what they are applying. In this context Cook and the "local law" theory are of particular importance. Cook argued that whatever theories the courts may use to justify their approach to foreign rules, in reality they are applying laws from their own systems which are similar to those found in the relevant foreign jurisdiction.[84] This "local law theory" has been subjected to a number of criticisms, not the least of which is that the theory itself does not seem to adequately describe practice.[85] Moreover, it may explain what the courts are doing but gives us little insight into why they are doing it. At most, Cook argues that the motivating factor is a concern for practical or social convenience.[86] This has led Yntema to describe Cook's work as a "sterile truism."[87] However, the theory does alert the observer to the fact that merely studying and describing academic theory and the explicit statements of the judiciary (as opposed to what they actually do) can fail to give a comprehensive insight into the area.

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[81] Lipstein, *op. cit.* at page 24.
[82] *Ibid.*
[83] *Ibid.*
[84] Cook, W., *Logical...*, *op. cit..*, "The forum, when confronted by a case involving a foreign element, always applies its own laws to the case, but in doing so adopts and enforces as its own a rule of decision identical, or at least highly similar though not identical, in scope with a rule of decision found in the system of law in force in another state or country with which some or all of the foreign elements are connected, the rule so selected being in many groups of cases...the rule or decision which the given foreign state or country would apply not to the very group of facts now before the court of the forum, but to a similar but purely domestic group of facts involving for the foreign court no foreign element...": *Ibid.* at pages 20-21. Kelsen explains the "local law theory" in the following terms, "The true meaning of the rules of so-called private international law is: that the law of a State directs its organs to apply in certain cases norms which are the norms of the state's own law, but which have the same contents as corresponding norms of another state's law.": Kelsen, G., *General Theory of Law and State* 2nd ed. Harvard University Press (1961); "...no court can enforce any law but that of its own sovereign...[which] imposes an obligation of its own as nearly homologous as possible to that arising": *Guinness* v. *Miller* 291 Fed. 768 at 770 (1923), *per*, Judge Learned Hand.
[85] *Re Bonacina* [1912] 2 Ch. 394 C.A; Collier, *op. cit.* at Chapter 21.
[86] Cook , W., *Logical...*, *op. cit..*; Lipstein *op. cit.*

With regard to why, rather than how we take cognisance of foreign law, much of the work during this century has been undertaken in the United States. In particular the work of Currie, Calvers and Ehrenzweig is of interest in the present context. The first of these developed a policy-based theory that looks to an assessment of the state interest in the particular rules which have come into conflict.[88] This approach is a useful tool in rejecting conflicts which exist between apparently different rules and structures which are in fact motivated by the same questions of principle or policy. Where an examination of the underlying principles demonstrates a "real" rather than "apparent" conflict, then Currie is of the opinion that the law of the forum is to be favoured. A number of commentators have noted that the investigation of policy underlying foreign rules is a difficult, and in some cases, impossible task.[89] Indeed we have seen in Chapter Four that even with regard to a developed system like our own (and well documented areas like restitution/unjust enrichment) severe disagreements can arise as to underlying policy questions. Equally, it has also been noted that in disputes concerning more than two states, the forum may have no interest in its own law being applied.[90] The greatest problem with this approach is, however, again that it does not go to the central issue of the area: it helps to demonstrate where a real conflict exists but does not tell us why a particular rule *should* be applied.[91]

Although taking a similar initial approach to the problem of conflicts, Calvers attempted to develop a broad "rule-selecting" approach with regard to how the courts should consider "real" or "true" conflicts.[92] Thus he looks to the purpose of the relevant rules to decide whether a true conflict exists and then again examines the policy motivations in an attempt to constitute broad rules which will show which law would be most compromised by failure to apply it. Calvers then attempts

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[87] Yntema (1953) 2 A.J.C.L. 297, 317; Cheshire and North *op. cit.* at page 32.
[88] Currie, B., *Selected Essays on the Conflict of Laws*, (1963); Currie (1961) 63 Col. L.R. 1233.
[89] Cheshire and North *op. cit.* at page 36.
[90] Cheshire and North *op. cit.* at page 34; Currie (1963) 28 *Law and Contemporary Problems*, 274.
[91] One possible solution to this criticism is to use a similar approach but to attempt to determine which of the competing policy reasons would be most damaged by the use of the alternate state's rules: Cheshire and North, *op. cit.* at page 34: Baxter (1963) 16 Stan. L.R. 1. However, it should be noted that Lipstein doubts the ability of the courts of one jurisdiction to objectively determine the governmental interest of a foreign state: Lipstein, *op. cit.* at page 38.
[92] Calvers (1933) Harv. L.R. (1923), 173. See also Baxter (1963) 16 Stan. L.R. 1.

to lay down ground rules as to the relevant elements within specific areas of law.[93] Thus, for example:

> "In a conflict between the law of the State in which a relationship has its seat and the *lex loci deliciti*, the law governing the relationship applies if it has imposed on one party to the relationship a standard of conduct or of financial protection for the benefit of the other party which is higher than that imposed by the *lex loci delecti*."[94]

This example demonstrates that as an attempt to determine occasions on which justice would argue for the application of a particular country's rules, Calvers' approach has much to recommend it. Equally, it is arguable that restitution/unjust enrichment is the type of undeveloped area to which Calvers anticipated his approach would apply. Moreover, restitution has a combination of detailed complexity and a desire to prevent injustice being caused by the lack of a relevant remedy[95] which does suggest that a methodology aimed at creating justice via a group of rules developing from ongoing judicial decisions might be appropriate. However, it is self evident that this approach suffers from a number of difficulties. Thus again, it requires the courts to look into the policy reasons behind the rules of differing jurisdictions.[96] Equally, the task of developing relevant rules will "take a long time"[97] and is, to say the least, "not an easy one."[98]

The final member of this triumvirate is Ehrenzweig.[99] His approach is concerned primarily with the *lex fori*, and will be discussed in some detail below. For the moment, it is sufficient to note that any system based predominantly upon the use

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[93] "The difference between orthodox choice of law rules...and those advocated here is that the former are expressed in terms of formal categories of rules which are connected to particular countries by a series of connecting factors; the latter are in addition, expressed in terms of substantive categories of rules advantageous or disadvantageous to the plaintiff.": Lipstein *op. cit.* at page 42.
[94] Lipstein *op. cit.* at page 40.
[95] Which is a relevant factor despite the denials of some unjust enrichment theorists.
[96] Cheshire and North *op. cit.* at page 35.
[97] *Ibid.*
[98] Lipstein *op. cit.* at page 44.
[99] Ehrenzweig, A. "Restitution in the Conflict of Laws..." *op. cit.* at pages 1298; Ehrenzweig, *A Treatise on The Conflict of Laws*, West Publishing (1962); Ehrenzweig, *Private International Law, op. cit.*.

of the forum's rules must necessarily abandon some of the precepts of justice discussed in this thesis or have a differing conception of what amounts to justice.[100]

It is perhaps the contradictions and difficulties within these oft competing theories which has convinced some modern writers to place limitations upon their importance with regard to a general justification of the conflict of laws. Thus, the modern editors of Dicey & Morris largely ignore the theoretical explanations of the conflict of laws. As an alternative they highlight the importance of the court's desire to do justice as between the relevant parties, to fulfil reasonable expectations and to promote international commercial activity.[101] The brevity with which Dicey & Morris dismiss other motivations[102] suggests that they consider them to be of little import. In the context of this study the present author is less willing to reach that conclusion. This reluctance is primarily motivated by the fact that this study is concerned with an area which has been widely neglected and has generated little case law. This suggests that it might be more susceptible to theoretical influences than longer established areas. Moreover, it does appear that the judiciary seems willing to take cognisance of even those theories that have been generally abandoned by academia. Thus, for example, although Dicey & Morris dismiss the importance of comity, even they are forced to admit that the courts have considered it to be of importance in no fewer than six cases since 1951.[103]

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[100] It should always be borne in mind that much of the analysis conducted by American commentators can only be fully understood in the context of the federal system and may in some cases be only fully applicable to that system. Indeed, some of the commentators have accepted this themselves: Calvers (1933) Harv. L.R. (1923), 173, 203; Cheshire and North, *op. cit.* at page 35.

[101] Dicey & Morris, 12 ed. *op. cit.* at page 6.

[102] "What is the justification for the existence of the conflict of law? Why should we depart from the rules of our own law and apply those of another system? This is a vital matter on which it is necessary to be clear before we proceed any further. The main justification for the conflict of laws is that it implements the reasonable and legitimate expectations of the parties to a transaction or an occurrence.": Dicey & Morris, *op. cit.* at page 5; Other leading writers (for example, Cheshire and North, *op. cit.*; Wolff, *op. cit.*) devote more consideration to the history of these theories without necessarily attempting to relate them to the rules applied by modern day courts.

[103] *Igra* v. *Igra* [1951] P.404, 412; *Travers* v. *Holley* [1953] P. 246, 257 (C.A.); *Garthwaite* v. *Garthwaite* [1964] P.356, 389 (C.A.); *Israel Discount Bank* v. *Hadjipateras* [1984] 1 W.L.R. 137, 144 (C.A.); *Amin Rasheed Shipping Corp* v. *Kuwait Insurance Co.* [1984] A.C. 50, 65; *Settebello Ltd* v. *Banco Totta and Ancores* [1985] 1 W.L.R. 1050, 1057. Equally, it cannot be argued that theoretical differences are of only academic import. It is not difficult to imagine a case in which the outcome could be affected depending upon whether the court was motivated by the desire to do justice or the desire to show respect to another system of law.

Equally, it might be questioned whether the desire to do justice is in itself an adequate explanation for the conflict of laws: justice is a contradictory and paradoxical concept. It is at one and the same time the selfevident basis of all acceptable legal systems and a problematic foundation for developing rules in novel situations.[104] The most prominent of these problems lies in its uncertainty and the natural assumption that all courts will prefer their own concept of justice over those of other jurisdictions.[105] However, this is only significant where we adopt a generalised understanding of justice: i.e. if we fail to identify the concepts, principles and priorities for which "justice" is the necessary shorthand. Moreover, the suggestion, which is perhaps intrinsic in Ehrenzweig's *lex fori* formulation, is overly simplistic: the fact that domestic rules are based upon concepts of justice should not, and does not, suggest that courts do not have the necessary sophistication to realise that justice is sometimes better served by the application of rules other than their own.[106]

As a result, it is submitted that Dicey & Morris are correct to suggest that the primary motivation of the courts in a modern context is the desire to do justice as between the parties. The logical defects in the other theories, combined with the fact that they all, to a lesser or greater extent, fail to explain *why* our courts behave in the way they do, means that none of them can be fully embraced with any satisfaction. The next question is therefore what we mean by "justice." There is no doubt that a fundamental aspect of this concept is the desire for universality and predictability of results.[107] In other words, the belief that the resolution of litigation should not be unduly affected by the fact that a case is heard in one forum as

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[104] As the development of restitution demonstrates, like truth, the concept of justice is rarely universal.

[105] "...no...theory can, here or elsewhere, be a substitute for the highly individualised forum policies. 'Justice' or 'justices' are of little help.": Ehrenzweig, *Private International Law, op. cit.* at pages 59. However, all such comments by Ehrenzweig should be viewed in the context of his *lex fori* based position.

[106] This problem will be explored in greater detail below.

[107] An introductory note to the American Restatement takes a similar approach, "International commerce, to give but one example, could hardly continue if parties were frequently exposed to the hazards and unknown requirements of foreign laws. For this reason when a case involving foreign elements is presented, the courts of all civilised states now decline the easy and obvious solution of ignoring foreign law and treating the case as a purely domestic one; instead, they seek, by reference to the foreign law deemed appropriate, to protect parties against a substantial change of position because of the fortuitous circumstances that suit is brought in that particular state.": Introductory Note to Chapter 12 of the Restatement, *Conflict of Laws*, (1934).

opposed to another.[108] This, combined with the priorities defined throughout the previous chapters of this study (and in particular chapters Two and Three) should provide a framework which allows us to at least indicate a methodology which would lead to just results in the area of fraudulently obtained assets. To predictability of result, we might add other elements to which a reasonable system should aspire. Some of these can be generally seen as aspects of the desire for justice, others look more toward practicality and policy. Thus, for example, Leflar[109] identifies the maintenance of interstate and international order and the simplification of the judicial process.[110] Equally, we might add the desire to (a) enhance international commerce, (b) uphold reasonable expectations, and (c) to give vent to the express/implied intentions of the relevant parties. Leflar also emphasises the advancement of the relevant forum's governmental interests. Whether this is a legitimate factor in a system whose primary motivation is justice is debatable. However, this element is clearly analogous to, although not necessarily commensurate with,[111] public policy, which is certainly an operative factor in the English system.[112]

It might be argued that all the discussion in this chapter could be seen as a consideration of what public policy is and should be. However, in this context we are considering public policy in a narrower sense. Specifically, the circumstances in which, although a law or rule may indicate one course of action, the courts believe that some other priority suggests that the relevant rule should not be applied in the particular circumstances:[113] i.e. a factor which modifies or militates against the strict

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[108] "One of the chief ends secured by a rational system of Conflict of Laws rules is that the rights and duties of parties arising from a legal situation shall not be substantially varied because of the forum in which an action is brought to settle disputed questions arising out of the situation.": Introductory note to Chapter 12 of the *American Restatement, Conflict of Laws*, (1934).

[109] In a slightly different context.

[110] Leflar, *American Conflicts Law*, 4th ed. (1986); Cheshire and North, *op. cit.* at page 37.

[111] The difference between the advancement of governmental interests and the modification of rules because they offend against recognised principle is clearly one of substance.

[112] "English courts will not enforce or recognise a right, power, capacity disability or legal relationship arising under the law of a foreign country, if the enforcement or recognition of such right, power, capacity, disability or legal relationship would be inconsistent with the fundamental public policy of English law.": Dicey & Morris: Rule 2. It is noticeable, however, that the judiciary often appear uncertain as to the weight to give to public policy as opposed to authority, and vary in their willingness to acknowledge its influence.

[113] For example, where an apparently valid contract is deemed illegal due to immorality: "Any agreement which tends to be injurious to the public or against the public good is invalidated on grounds of public policy": *Halsbury's Laws of England*, 4th ed., vol. 9, paragraph 392.

adherence to a particular rule. These overriding priorities tend to be rationalised as an attempt to uphold either the morality or interests of the state or nation.[114]

Public policy may also take a high priority in circumstances where the law gives little or no guidance as to how the courts should proceed: i.e. where a novel situation arises. The relatively recent development of the conflict of law rules in this country means that this may occur comparatively frequently, and as a result the influence of policy is particularly strong.[115] Where a lack of authority does occur there seems little doubt that, whether explicitly or instinctively, the courts will to some extent favour principles with which they are familiar.[116] With regard to the "overriding priority" situations in which public policy comes into play, Ehrenzweig states:

> "In the equation of a formulated choice of law rule, public policy is the unknown quantity X of needed exceptions: B (the effective, "true" rules) equates A (general regime of a formulated *lex loci delicti*) minus X. To the extent that new sub-rules C are developed for guest statutes or damages, A diminishes in scope and, by approaching B, reduces X. It is the scholar's task to aid courts and legislators in formulating such sub-rules in order thus to reduce and define more closely the residue of public policy."[117]

Ehrenzweig considers that the history of public policy in this area, particularly in Europe, has shown that it is used most frequently (and in his opinion most acceptably) when the relevant rules are rigid and generalised. As a function of this idea he believes that "this crutch" is generally unnecessary in countries like

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[114] It is clearly arguable that state or national interests are occasionally confused with governmental interests.
[115] "Private International Law, like any other branch of domestic law, is determined partly by tradition and partly by policy. Since it is of recent growth, the importance of policy in its development is greater than in other branches of law which can look back on a longer history": Lipstein, *op. cit.* at page 44. This can be contrasted with the role of public policy in domestic law where, "...it has long been settled that a judge is no longer free to invent new heads of public policy. He may expound, but he may not expand this branch of the law": Cheshire and North, *op. cit.* at page 133. It should, however, be noted that domestic public policy can have an influence on the court's determination of cases with a foreign element: *Regazzoni* v. *K.C. Sethia (1944) Ltd.* [1958] A.C. 301.
[116] Thus, in a slightly different context, one US judge remarked that, "...in the conflict of laws, it must often be a matter of doubt which law should prevail, and that whenever that doubt does exist, the court which decides, will prefer the law of its own country to that of the stranger.": *Saul* v. *His Creditors,* 5 Martin (N.S.) 569, 595 (La.1827); Quoted by Ehrenzweig (Ehrenzweig, *Private International Law,* New York (1974)), and accepted by Story.
[117] Ehrenzweig, *Private International Law, op. cit.* at page 56.

England.[118] This seems to suggest that in less formalised systems the courts are informed by the same factors but are less in need of justifying their decisions by reference to public policy. This may be true of the English courts, although we may doubt whether they would categorise their behaviour in such stark terms.

It is clear that the English courts have held that foreign rules will not be applied where they are immoral, unjust, or contrary to the interests of the State.[119] It is interesting to note that while a foreign rule is clearly not contrary to public policy simply because it is different from the English rule,[120] it may be so even where England has a similar rule.[121] This is not the only problem raised by public policy in this area. Thus, for example, assuming that public policy militates against a particular system's rules, with what are they to be replaced? Despite such difficulties it is clear that public policy can have an influence upon the way in which the conflict of law rules are interpreted and applied.[122] As a result, the following discussion will consider its effect[123] along with question of principle and authority where necessary.

From the above it is submitted that although other factors may come into play, the primary motivation behind the conflict of law rules is the desire to do justice to the parties, with specific regard to predictability of result; the promotion of the parties, express/implied intentions and their reasonable expectations. Of perhaps secondary

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[118] *Ibid.*

[119] This is sometimes known as the "external Public policy rule"; Leslie, R., "The Relevance of Public Policy in Legal Issues Involving Other Countries and Their Laws", [1995] *Juridical Review*, 477; Carter, P.B., 1993 I.C.L.Q. 1.

[120] *Cheni* v. *Cheni* [1962] 3 All E.R. 873.

[121] For a discussion of this area see Leslie, R., *op. cit.*; Nussbaum 49 Yale L.J. 1047 (1939-1940): "A foreign law may run counter to the public policy of the forum, albeit the forum possesses a similar law. Thus Hooge Raad of the Netherlands, for reasons of public policy, has denied recognition to Canadian gold clauses." However, as Leslie points out, Stephenson, J. took a contrary view in *Israel Discount Bank of New York* v. *Hadjipateras* [1984] 1 W.L.R. 137. But, as Leslie himself suggests (at page 478), "...the two positions are reconcilable: Nussbaum was concerned with foreign laws contrary to the interests of the state, while Stephenson L.J. was dealing with foreign laws contrary to morality, and different considerations could well apply in differing contexts." With respect, it is suggested that making legal judgments of this kind on the basis of morality is likely to be extremely problematic.

[122] It is also clear that public policy can itself coalesce or crystallise into specific rules: *Rodriguez v Speyer Bros* [1919] A.C 59, 81.

[123] Thus, for example, although policy with regard to property has historically been centred around the penal (*Folliott* v. *Ogden* (1790) 3 Term. Rep.726 H.L.0) or confiscatory (*Frankfurt* v. *W.L. Exner Ltd.* [1947] Ch. 629; *Bank voor Handel en Scheepvart N.*V. v. *Slatford* [1951] 1 Q.B. 248) it is an area which may well have a bearing upon the present study.

importance, we may also identify questions of policy and practicality.[124] If we combine these general aspects of the search for justice with the specific issues identified in chapters One to Four, then it is submitted that we can begin to recognise a framework of goals to which the conflict of laws should aspire in its consideration of assets lost to fraud in the context of restitution/unjust enrichment. It will therefore be the intention of this study, from this point on, to consider whether the conflict of law rules concerned with restitution adequately meet these needs, and thus whether restitution is capable of satisfying the goals identified by this study in an international context.[125] As a result, the next element of this discussion requires us to examine a logical methodology by which the elements of a restitutionary action can be categorised for the purposes of the conflict of laws.

[124] "In making a choice between [conflicting] rules, the basis must be a pragmatic one - the effect of a decision one way or the other in giving a practical working rule.": Cook., W. "The Logical..." *op. cit.* at page 457.

[125] In doing so it is important to remember that although this study is primarily concerned with the consequences of fraud, the conflict of law questions must be discussed in the wider context of the law of restitution as a whole.

5.2: THE IMPORTANCE OF CHARACTERISATION[126] IN THE CONFLICT OF LAWS: INTRODUCTION[127]

> "We cannot banish categories and concepts. They are tools of thought which find their *raison d'être* in the limitations of the human mind. Their danger lies in the assumption that these man-made devices have an eternal, animate existence."[128]

The necessity for classification[129] in the international context arises because of the diversity of the various legal systems which may come into contact with one another.[130] The relevant differences[131] which may arise between these systems could

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[126] There is disagreement as to this term with some commentators preferring *qualification* or *classification.* Dicey & Morris (Dicey & Morris, *op. cit.*), Falconbridge (Falconbridge, *op. cit.*), Read (Read (1935) 13 Can Bar Rev. 764) and Lipstein, (Lipstein, *op. cit.*) all accept *characterisation.* Beckett ((1934) 15 Brit. Y.B. Int. Law 46), accepts *characterisation* while preferring *classification* and deprecating *qualification.* Bartholdy ((1965) 16 Brit. Y.B. Int. Law 20), on the other hand prefers *qualification.* It is submitted that the dispute adds little to the substantial debate and the terms should generally be considered to be interchangeable. However, it is suggested that *characterisation* most accurately describes that process under discussion.

[127] See Generally, Castel, *Private International Law,* Toronto 3rd ed. (1974), Chapter 6; Ehrenzweig, *A Treatise on The Conflict of Laws,* West Publishing (1962); pp. 327-334; Cheatham, Griswold, Reese and Rosenberg, *Cases and Materials on Conflict of Laws,* The Foundation Press (1964) Chapter 2; Section 2; Castel, *Conflict of Laws, Cases, Notes & Materials, op. cit.* at Chapter 2; Sykes and Pryles, *International and Interstate Conflict of Laws,* Butterworths (1975) Part V; Jaffey, *Introduction to the Conflict of Laws,* London (1988) Chapter 18; Castel, *Canadian Conflict of Laws* 2nd Ed, Toronto, Chapter 2; Dicey & Morris, *op. cit.* at Chapter 2; Morris, *The Conflict of Laws, op. cit.* at Chapter 29; Falconbridge, "Conflict Rule and Characterisation of Question" *op. cit.*, (1952) 30 Can. B.R. 103; Lorenzen " The Theory of Qualifications and the Conflict of Laws" (1920) Colum L Rev 247; Cook., "The Logical..." *op. cit.* at page 457; Prosser, (1935) 51 Mich. L. R. 959, 971; Falconbridge, *op. cit..*; Robertson, "A Survey of the Characterisation Problems in the Conflict of Laws" (1939) 52 Harvard L. Rev 747; Lederman, "Classification in Private International Law" Can. Bar R. Vol. XXIX [1951], 168; Bland, "Classification Re-Classified" I.C.L.Q. Vol. 6 [1957], 10; Forsyth, C., "Characterisation Revisited" 114 L.Q.R. 141.

[128] Ailes, E.H., Substance and Procedure in the Conflict of Laws" [1941] *Michigan Law Review,* Vol. 39, 392, 407.

[129] In the United States the "discovery" or identification of the problem of qualification is usually attributed to Bartin: Bartin, *Principles de Droit International Prive* (1930), Vol. I, pp. 221-239; Bartin (1930) *Recueil des Cours,* I, p.565; "It was Bartin's thesis that even if the countries of the world agreed upon uniform conflict rules, cases involving the same facts would still be decided differently in different countries, quite apart from such factors as public policy and differences in procedure, because they might characterise the question differently.": Dicey & Morris, *op. cit.* at page 37. While in Europe the German lawyer Kahn ((1891) 30 Jhering's *Jahbucher* 1 reprinted in *Abhandlungen* I (1928) 1-123) is often credited with simultaneous discovery.

[130] It has been suggested that the factors bearing upon characterisation may vary according to whether the particular courts are able to apply foreign rules at their own motion. However, it is submitted that Lipstein is correct when he states that, "Despite outward appearances, it does not seem to make any difference whether the court may, or is bound to, ascertain of its own motion...whether and, if so, which system of laws applies, and what the particular rule of foreign law is which must be taken into consideration, or whether a party must plead not only the facts but also the law, if foreign, on which he intends to rely...The only difference appears to be that the courts in common law countries cannot, go beyond the allegations of the parties. The difference is one of degree only." : Lipstein, *op. cit.* at page 95.

[131] Dicey & Morris, *op. cit.* at page 37.

be linguistic,[132] categorical[133] or flow from one system's intentional denial of the existence of legal principles accepted by others.[134] In this context three stages in the court's consideration of a case with a foreign element over which it has jurisdiction have been identified. Specifically, (a) the characterisation of the nature of the dispute; (b) selection of the proper law; and (c) the application of the proper law to the dispute before the court.[135] It should, however, be remembered that this is an academic formula for what, in the hands of practising lawyers, may well be a more structurally open process. In other words, the methodology may, "...yield unnoticeably to the expedience of judicial precision, for these stages represent no more than a progressive sequence of mental process in the judge and lawyer, and in the individual mind the sequence may be arranged."[136] The failure to fully appreciate the differences between theory and practice may well be the cause of a number of actual and perceived difficulties in this area, and this will be considered

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[132] For example, differing meanings given to the word domicile. *Ibid.*

[133] One country sees a bribe as a restitutionary issue, another as an employment law issue. *Ibid.*

[134] For example, the differences to be seen between common law and civil systems with regard to trusts. *Ibid.*

[135] "The court should, in the first place, characterise, or define the juridical nature of, the subject or question upon which its adjudication is required. The court should in the second place, select the proper law, that is, the law (whether that of England or that of some other country) indicated by its appropriate rule of conflict of laws as being the law which ought to govern the decision upon the subject or question already categorised...The Court should in the third place, apply the selected proper law to the factual situations for the purpose of deciding what, if any, legal consequences result from that situation or; if a thing is in question, what interests are created in the thing.": Falconbridge, "Characterisation in the Conflict of Laws, *op. cit.* at page 236; Sykes and Pryles (Sykes and Pryles, *op. cit.* at page 279) make a similar although slightly different point when they say, "The three classes of cases which these instances illustrate will correspond to the three stages which take place in the determination of any conflict laws question:
I. Determination of the juridical nature of the problem presented to the court, e.g. "this is a contract." When this determination has been made, then the conflicts rules appropriate to the legal category selected will be available for the solution of the problem.
II. Selection of the appropriate connecting factor, e.g. "This contract was made in France."
III. Delimitation of the proper law, e.g. 'The French law governing substance does not include limitation as a question of substance; the English law governing procedure does not include limitation as a question of procedure'"; Castel (Castel, *Conflict of Laws, Cases, Notes & Materials, op. cit.* at pages 2-1) identifies similar processes placed in a somewhat looser framework., "...the court must... determine the legal nature of the question (or questions) that require adjudication...The court will then select the appropriate conflict of laws rule and apply it to the legal question. This leads to the ascertainment of the legal system that governs the legal question. In this process the court must consider the connecting factor which is usually a fact or a placement connecting the factual situation or rather the legal question before the court with a particular legal system, Finally, the court must apply the law selected, that is the *lex causae*....": see also Bland, *op. cit.* at page 13; Ehrenzweig again identifies a somewhat different triumvirate, "According to a theory now widely taught in our schools and occasionally alluded to by our courts, the solution of a conflicts case requires the taking of at least three steps: the *characterisation* of the question at bar, the ascertainment of the *choice of law rule* 'governing' the question thus characterised, and the *localisation* (sometimes also called characterisation) of the *connecting forms* contained in the choice of law rule thus ascertained.": Ehrenzweig, A.A., *A Treatise of the Conflict of Law, op. cit.*. Falconbridge's three stage approach was generally approved by Staughton L.J, in *Macmillan Inc.* v. *Bishopgate Investment Trust plc. (No.3)* [1996] 1 All E.R. 585; [1996] 1 W.L.R. 387, 391-392.

[136] Graveson. *The Conflict of Laws* 3rd ed., 48.

below. For the moment, however, with the aforementioned caveat in mind,[137] the remainder of this chapter is generally concerned with the first of Falconbridge's three elements in the context of the civil response to fraud (with specific regard to restitution and unjust enrichment): i.e. the question of characterisation [138].

Characterisation is, in simple terms, the process of placing legal elements[139] or facts within a larger legal grouping. It is perhaps, although rarely given explicit recognition, the basic skill of all lawyers.[140] We are constantly asking whether a given set of facts creates a tortious, or contractual, or some other, relationship. If tortious, does it come under the head of negligence or defamation, deceit or passing off? These examples, of course, involve the placing of factual events and circumstances into legal categories. This chapter will, however, be primarily concerned not with the characterisation of facts, but the grouping of legal elements

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[137] It is also duly noted that some commentators prefer to see characterisation (in certain circumstances), not as a separate stage of the process, but as part of the application of the relevant conflict rule. Thus Lalive states, "It should be noted that, in all cases, except those of first impression, the so-called stage of 'selection of the conflict rule' is absent; the court only has to apply a rule of conflict to the facts of the case, thus 'selecting the proper law.' In other words, a certain legal category is already provided for with a certain conflict rule...": Lalive, *The Transfer of Chattels in the Conflict of Laws* (1995), 3; see also Bland, *op. cit.* at page 14. This may be true in a limited technical sense, but it does appear to suggest that the courts must approach the subject from an impossible starting point. Nor, even if fully accepted, does it mitigate against categorisation as a useful tool for analysing the ways in which the courts do and should behave. Moreover, even if Lalive were correct, he seems to ignore the "exceptional cases" in which the majority of commentators would accept that classification is of import: Bland, *op. cit.* at page 14. In other words the analysis of characterisation in this study is not affected by calling it a separate stage of the judicial reasoning process, or as Bland does, "...another form of 'selection of the proper law.'" Beyond this, Lalive's position does not appear to have gained any level of general acceptance and even Bland accepts that, "This is not to deny that there has been a Classification of the issue before the court..." stating only that "...this particular Classification does not take place, *because* it is a conflict of law case. The issue has been classified as all legal issues, domestic or otherwise, must be classified.": Bland, *op. cit.* at page 14.

[138] Ehrenzweig provides a simple example of how characterisation works with regard to his formulation, "...A New York resident on a flight from New York to Massachusetts has been killed in ...Connecticut...His widow desires to sue the air carriers for damages of $250,000 for breach of the New York contract. Is the New York law 'applicable' to this case? The court may 'characterise' the question as one of tort subject to the conflict rules 'governing' torts where the 'connecting factor' is the place of wrong 'localised' in Connecticut; or the court may prefer to characterise the question as one subject to the conflict rule governing contracts whose connecting factor is the place of the contract, localised in New York.": Ehrenzweig, *A Treatise on The Conflict of Laws*, *op. cit.* at page 326; Immediately following this passage Ehrenzweig goes on to discuss the difference between what he (and other commentators) call "primary" and secondary characterisation." Thus he states, "...there may be an additional state to be taken. We may have to find the primary plaintiff who under one law may be the passenger's widow, while the laws of another state may prescribe suit by the personal representatives. The '*preliminary question*' may be subject to conflict rules of its own."; Bartin gave the example of the French-Algerian case *Anton* v. *Bartholo*, Cour d'appel d'Alger, Dec 24, 1889, Clunet 18 (1891) 1171; Ehrenzweig, *Private International Law, op. cit.* at page 113.

[139] Which could be a technique, an issue, a relationship, a cause of action, or a remedy.

[140] "The problem of characterisation pervades every nook and cranny of the law. It is an integral part of all legal reasoning and is met with daily in each school, classroom and in the work of every lawyer and every judge; it is ever present so its very existence may come to be ignored.": Cheatham, Griswold, Reese and Rosenberg, *op. cit.* at page 87.

and laws. Nevertheless, the process is similar. Broadly speaking, as we have seen above, we can categorise elements in two ways. First with regard to a descriptive methodology: we place an element in a category because it shares the characteristics of other constituents of that group.[141] Second, the element can be categorised prescriptively.[142] This suggests that because an element is morally closer to, for example, restitution rather than property, it should become part of the law of restitution. This methodology requires that the element should take on the characteristics of its counterparts.[143] If viewed from a slightly different perspective, these processes can be described in the following way:

> "According to one conception humans think about reality by sorting elements into groups according to similarities, and then build the more complex structures of thought, such as argument or explanation, out of the concepts arrived at by the sorting procedures. [The alternative suggests that]...humans are primarily questioning, explanation-seeking and understanding creatures, and sorting things out according to similarities takes place only within this framework. Human cognisance gets its main impetus from finding various parts of experience problematic. This leads us to ask 'why...?' or 'what...?' questions. Pursuing some of these leads us to positing underlying natures for some elements of reality and explaining what seem to be simpler phenomena in terms of restating them to this nature."[144]

The first method might be used as an aid to examination of the whole area, and *should* involve no change to the element thus placed. This would be the equivalent of placing wounding into a category marked "offences against the person." The second methodology, on the other hand, is likely to involve a change to any legal element placed within it. Thus by moving elements previously considered to be part of the law of property into a category marked "restitution" we are likely to, and should, see a shift in emphasis from the preservation of property rights to the prevention of unjust enrichment. However, as noted in Chapter One, whichever method of classification is used will inevitably have some influence upon the content

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[141] See, Matthews, "The Legal and Moral Limits..." *op. cit.* at page 16.
[142] This process has to some extent been considered in chapters One, Two and Three.
[143] Matthews, "The Legal and Moral Limits..." *op. cit.* at page 16.
[144] Moravcsik., J.M., *Thought and Language*, London, (1990), 395.

and nature of the legal elements thus categorised,[145] and this is as true with regard to linguistic categorisation as it is with regard to what we would normally consider to be substantive characterisation: "The problems of society will also be the problems of the predominant language of that society. It is the carrier of its perceptions, its attitudes, and its goals, for through it, the speaker absorbs entrenched attitudes."[146]

In the practical setting in which cases are decided, the dividing line between the forms of categorisation can easily become blurred, and unless the process is specifically considered as a standard part of judicial methodology it can easily become confused.[147] Moreover, the characterisation problem in the conflict of laws is far from uncontroversial. Thus many commentators consider it to be perhaps not only the most fundamental,[148] but also the most complex[149] question in the conflict of laws.[150] Others, however, avoid it,[151] or even dismiss it as "judicial gymnastics

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[145] "Philosophers and others have known for a long time that purportively descriptive statements are inevitably prescriptive. I cannot absorb all the possible information available to my senses, so I am selective on the basis of the structure that I already have.": Matthews, "The Legal and Moral Limits..." *op. cit.* at page 17.

[146] Njabulo Ndebele, "The English Language and Social Change," keynote paper, 1986, the Jubilee Conference of the English Academy of Southern Africa, Johannesburg. Quoted in: Richard W. Bailey, "English at its Twilight," in *The State of the Language* (ed. by Christopher Ricks and Leonard Michaels), (1990).

[147] "The method of characterisation most widely employed by the courts is a form of low level labelling.": Cramton and Currie, *Conflict of Laws, op. cit.* at page 89.

[148] Dicey & Morris, *op. cit.* at Chapter 2. This is not, however, to suggest that all commentators recognise its importance, "Since characterisation is often of great consequence in choice of law, it is surprising that traditional theory has so little to say on the subject. The first restatement says nothing at all about it, apparently assuming that the categories of tort, contract, property and the like are self-defining. Professor Beale's elephantine treatise is also strangely silent on the question; the subject is not even listed in his index or table of contents, no general theory of characterisation is advanced, and Beale's comments on particular cases shed little light on his methods.": Cramton and Currie, *op. cit.* at page 89.

[149] "The problem of characterisation is one of the most difficult in the conflict of laws, and has generated an enormous amount of writings in many languages.": Collier, *op. cit.* 16. This is undoubtedly largely due to the nature of the problem: Bland, *op. cit.* at page 10.

[150] It should be noted that one of the primary constituents of these difficulties is characterisation's late historical development, "By the time that the importance of characterisation was appreciated, however, the various choice of law rules were relatively well established. This implied that causes of action were to be sought to match the existing choice of law rules, not vice versa. In other words, because choice of law rules had preceded the characterisation of the cause of action, the former were to play the decisive role in determining the way in which any new problem of characterisation was to be solved and not, as logic would demand, the other way round. The result was that the existing narrow range of choice of law rules had to accommodate a potentially limitless number of foreign causes of action despite the probability that the foreign causes would not precisely 'fit' these rules. This unsatisfactory situation could be rationalised of course: choice of law rules are expected to deal with heterogeneous foreign legal phenomena, past present and future and so the category and rule had to be framed in the broadest possible terms.": Bennett, T.W. *op. cit.* at page 142.

[151] Beale's Restatement; *Private International Law, op. cit.* at page 113.

involving a question begging process."[152] It has certainly on occasion been used not as a logical system of thought as applied to a set of facts and legal problems, but as a convenient method by which a court may avoid an unwelcome decision.[153]

Moreover there is often doubt as to what is being categorised: is the court concerned with the legal nature of the case, the legal nature of the rules it is to apply, the nature of the problem,[154] the nature of the connecting factors,[155] the relevant relationships, the facts of the case or surrounding circumstances?[156] Generally speaking, we can identify two factors which could be classified: the case's

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[152] Kegel quoted by Ehrenzweig, *Private International Law, op. cit.* at page 114. Ehrenzweig himself says of characterisation, "...this doctrine is about to be discarded in the countries of its origin...once hailed as a 'great discovery'...[it] is indeed an unwelcome addition to our terminology. It is unnecessary though harmless when used as a mere synonym for the policy-determined interpretation of formulated conflict rules, and it is unnecessary and harmful when used as an expression of 'legal ideas' in order to create new rules without the conscious weight of policies. The origin of the doctrine in the period of conceptualisation may hold the promise that it will disappear with the impending conclusion of this period.": Ehrenzweig, *A Treatise on The Conflict of Laws*, *op. cit.* at page 327.

[153] See, for example, *Kilberg* v. *Northeast Airlines Inc.* 9 N.Y.2d 34, 172 N.E. 2d.526 (1961). Such cases also demonstrate that Falconbridge's "three stage" approach to the conflict of law (Falconbridge, "Characterisation in the Conflict of Laws", L.Q.R. No. CCX, [1937]) is somewhat simplistic. It is naive to assume that the courts approach only one stage without an eye to both its effect on the other stages (Graveson, *The Conflict of Laws*, 3rd ed., at page 48) and general public policy goals. Of course the suggestion that the courts may use a technique, not as an instrument of principle but as a method of manipulating a case with reference to policy, is by no means new. Thus Story noted, "Whenever they [the courts] wish to express, that the operation of a law is universal, they compendiously announce, that it [the relevant authority] is a personal statute; and whenever on the other hand, they wish to express, that its operation is confined to the country of its origin, they simply declare it to be a real statute": Story, *Commentaries on the Conflict of Laws* 16 (2d ed. 1841).

[154] "The method of classifying problems rather than statutes has long come to be that of European conflicts law, especially German. Only here in the United States has the method continued to be that of classifying statutes; as it once was under the approach of the old statutists...When the new problem classifying approach was initiated [in Europe] by Savigny, traces of statutist thinking continued to linger on and bedevil conflict's thinking. But in the main a new beginning was made, and the results of the creative efforts of European thought has been made available to this contrary by Rabel. But that great scholar's work remains neglected or misunderstood. At present American conflicts law is at the stage in which European conflicts law was in the days before Watchter. It vacillates between the conceptualism of a statute - classifying approach and the 'freewheeling khadi justice' (Brainerd Currie's words) of the result selectors.": Rheinstein, How To Review a Festschrift, 11 Am.J.Comp.L. 632, 659-60 (1962).

[155] In a strict sense (and assuming that courts rigidly follow Falconbridge's "three stage" approach) it is difficult to argue that the courts can be characterising the connecting factors or legal relationship as this presupposed the existence of legal rules which can give rise to and define such a relationship (i.e. that the appropriate law has already been determined).

[156] "Widely divergent views have been expressed by writers as to what it is which is characterised. The facts, the factual situation, the legal questions raised by the factual situations, the nature of the problem presented to the court for solution, a cause of action, a claim or defence, a legal relation, a rule of law - all of these have been suggested as being the subject-matter of the characterisation process, or some phase of it.": Dicey & Morris, *op. cit.* at page 36 (nor are these elements necessarily mutually exclusive). Collier makes a similar point when he states, "...there has been very great debate and confusion right at the start of the inquiry as to what it is that is characterised. Is it a 'legal relationship', a 'legal claim', 'a legal question', 'a factual situation', the 'facts of the case', or 'the rule of English (or foreign) law'?" :Collier, *op. cit.* at page 16. For these reasons, Wolff notes that the number of legal issues brought within the subject is like, "...the mathematical process of placing a factor common to several numbers outside the bracket": Wolff, *op. cit.* at page 148.

factual elements and its legal elements. As a rule, the function of the courts in this context is to consider legal issues arising out of factual situations, not the facts themselves:[157] "...facts are themselves legally neutral."[158] It is therefore submitted that the primary purpose of characterisation is to allow the courts to formulate a consistent approach to the legal questions, be they with regard to action, remedies, rules, claims or legal relationships. In the majority of cases, therefore, the courts will be concerned with the legal nature of the case, the legal issues and the relevant rules:

> "The ultimate object of the Court's inquiry being to ascertain whether a given factual situation...gives rise to rights, imposes obligations, creates a legal relation, an institution or an interest in a thing, the court must decide what is the legal nature of the question or questions involved in the case, including sometimes the characterisation of particular rules of the law of England and other countries which may be applicable."[159]

This, of course, does not mean that the courts do not take cognisance of facts and circumstances which can have a bearing upon such issues. Moreover, some elements of the case which appear to be questions of fact may be affected by questions of law.[160] Equally, it has been suggested that what is classified may vary with the particular case at hand or even during the case.[161]

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[157] As Falconbridge states, in a slightly different context "...a purely factual situation dissociated from any particular system of law has no legal consequences, that is, it creates no legal relation, no legal rights, no legal obligations; the object of the rules of the conflict of laws is to furnish a guide as to the particular system of law which should be applied to the facts of the situation.": Falconbridge, *op. cit.* at page 104 ; "In reality no pure factual situation before the court induces a choice of law. The need to determine whether foreign, rather than domestic, law must be applied arises in practice if the plaintiff frames his claim or the defendant his reply according to some foreign law. Foreign law is not selected in the abstract but only in respect of a particular claim or defence.": Lipstein, *op. cit.* at page 23.

[158] Lederman, "Classification in Private International Law" Can. Bar R. (1951) 29 Can. B.R. 1, 17.

[159] Falconbridge, *op. cit.* at page 105; Or as Bland puts it. "...Classification in the conflict of laws will never reveal the *essence* of a rule of law. 'Classification,' says Lalive, 'cannot disclose the essence of a rule or an institution: legal classifications and categories, in domestic law as in Private International Law, have no "existence," no metaphysical reality.' As Roscoe Pound has written, (Pound, R. (1924) 37 Harv. L.R. 933,944), 'Classification is not an end. Legal precepts are classified in order to make the material of the legal system effective for the ends of law.'": Bland, *op. cit.* at page 12.

[160] For example, whether a party is a resident or not.

[161] Thus Sykes & Pryles have suggested three different forms of classification, which correspond to the various stages they believe occur in a case with a foreign element, "It now appears that what the judge does when he "qualifies" varies according to the stage at which he performs the process: at Stage I he characterises the whole factual situation, at Stage II he characterises certain particular facts, at Stage III he delimits rules of law.": Sykes & Pryles, *op. cit.*.

Bearing this in mind, we might broadly identify two circumstances in which the courts will engage in the characterisation process: first where there is doubt as to the domestic status of a legal element, and second, where competing jurisdictions treat a particular legal element differently. It is the second of these problems with which the conflict of law is normally concerned. Not least because the former problem is in normal circumstances relatively clear: through constant repetition in textbooks, cases and journals we instinctively know that the enforcement of a promise backed by consideration is part of the law of contract.[162] However, on occasion a legal element may straddle traditional boundaries and debate occurs as to which grouping it belongs.[163] As we have seen, this has, partly as a result of the recent increased profile of unjust enrichment,[164] often been the case with regard to the civil consequences of fraud.[165] Thus, for example, in a domestic context, this situation is starkly illustrated by considering the legal status of equitable tracing[166] or the so called "proprietary restitutionary remedy."

However, even where these boundary disputes exist, the consequential debate is often considered to be of little practical import in a national context: a contract is, arguably, the same animal whether we place it in a group called contract or private obligation. Thus, as we have seen when considering the characterisation of a

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[162] It is interesting to note the widespread criticism which can attach to any commentator who challenges these traditional categories: see, for example the various responses to Atiyah, *Rise and Fall of the Freedom of Contract* (1989).

[163] During this discussion it is important to remember that characterisation is often subjective and relative: a contractual problem to one lawyer is an employment issue to another. Moreover, as Birks notes with regard to the present classification of obligation creating events into contract and tort, "...even obligation-creating events could be differently divided. For a commitment to that principle of specialisation still leaves open the level on which the classification will be made, and the way in which the classifier will describe the entities which he perceives at his chosen level.": Birks, *Introduction, op. cit.* at page 29.

[164] "Characterisation problems are acute in relation to unjustified enrichment. Claims which could be characterised as restitutionary can often also be characterised as concerned with contract, tort or property.": Stevens, R., *op. cit.* at page 180.

[165] As Millett L.J. has noted extra-judicially, "No two judges, and certainly no two commentators, are agreed on the correct classification of the various situations that can arise, let alone on the requirements for recovery in each. The duality of our common law and equitable systems, with their differing language and possibly differing rules for dealing with similar situations, adds to the complication.": Millett P.J. *op. cit.* at page 71.

[166] As we have seen, Birks maintains that this technique is merely an identification process and no more (Birks, *Introduction...*, *op. cit.*.), Hanbury and Martin (Hanbury and Martin, *op. cit.*) refer to it as a remedy and Millett refers to it as a remedy, an identification process and a cause of action (Millett P.J. *op. cit.*) Equally, in England whether it is most closely related to property law or restitution has been the subject of debate, while German law denies the existence of such a technique: Stevens, R. *op. cit.* Thus as we have noted above, many of the legal consequences flowing from fraud could be classified, in domestic law, as being procedural or substantive, part of the law of property, equitable obligation, contract or tort. Moreover, Footnote Continues on Next Page:

particular cause of action, Burrows, for example, is of the opinion that nothing turns on whether we characterise the relevant wrong as part of the law of tort or restitution.[167] This proposition is open to criticism even in a domestic situation: classifying an element as public or private, tort or "restitution for wrongs", for example, necessarily affects the inferences, suppositions, analogous relationships and even authorities which are likely to be applied to it. This is particularly true where, as with restitution, one area begins to encroach upon others. Burrows' view is, nevertheless, illustrative of the general attitude with which both academics and the judiciary have approached the subject of classification in this country. The situation is, as noted above, partly explained, because in a domestic context, the classification of rules is often perceived to be of limited importance and partly because the courts are often more concerned with the categorisation of facts.[168] However, it is clear that the manner in which we categorise legal elements in a domestic context can have consequences for the way in which we approach disputes with an international context and a direct effect upon those disputes where traditional characterisation (in the second sense) is carried out with regard to the *lex fori*.

The second situation in which categorisation occurs (and its traditional usage) is where different jurisdictions categorise legal elements or factors differently.[169]

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almost all of these techniques can be classified as part of the law of restitution which can itself be sub-divided into autonomous restitution and "restitution for wrongs".

[167] "...restitution for a wrong can equally well be classified as part of the law concerning the wrong or as part of the law of restitution. To take the example of restitution for a tort, one can equally happily say that one is dealing with the law of tort or the law of restitution. Nothing of substantive importance should turn on that classification.": Burrows, A., *Restitution*, *op. cit.* at page 379 (This is, however, an interesting example because, although illustrative of the relevant point, as noted above, McBride and McGrath (McBride, J. and McGrath, P., *op. cit.*) suggest that the boundaries between tort and so called "restitution for wrongs" may be of very real practical importance. See also Hedley, S. "Unjust Enrichment", *op. cit.* at page 589: "Explanations for the recovery in these cases [money had and received] abound: we can say that the plaintiff recovers because the defendant is unjustly enriched at her expense, or that the plaintiff is recouping a loss suffered, or that the remedy is part of the protection the law affords the plaintiff in recouping a loss as part of the protection the law affords the plaintiff in respect of her property. There is very little to choose between these explanations, any of which would be quite good enough as a thumb-nail sketch of the law, what is lacking is any reason for thinking it *matters* which one we choose."

[168] "...the subject matter of domestic rules of contract or tort is *facts*, so the question is whether the particular facts fall within the rule in question. The subject matter of choice of laws is not facts but rules of domestic law...": Jaffey, *op. cit.* at page 253.

[169] As Dicey and Morris note, "...there may be a latent conflict of another kind, that is, the forum, and the foreign country may have the same conflict rule and may interpret the connecting factor in the same sense, but may yet disagree on the result because they characterise the question differently. For instance, the forum may regard the question as one of succession, while the foreign law may regard the same question as one of
Footnote Continues on Next Page:

However, it is of paramount importance during the rest of this discussion to realise that the two are necessarily interconnected.[170] Thus we potentially have a two-fold problem concerned with the question of how we categorise restitutionary elements both domestically and for the purposes of the conflict of laws. The first of these is clearly of importance to the second, although the two are not necessarily commensurate.[171] The danger in suggesting that categorisation should be the same in the domestic and conflict arenas is that in some cases it might be possible for the courts to "pass the buck"[172] with regard to questions of principle by simply adopting decisions in non-choice of law cases into international disputes. The problems associated with such reasoning have been eloquently exposed by Hancock:

> "The fallacy of the transplanted category is not just another erroneous theory of law (like the meeting of minds theory of contract) which can be controverted by a demonstration that produces undesirable results or cannot be reconciled with the cases. It is a basic bad habit of legal thinking for which we all receive preparatory training from childhood onward. Critical writing may alleviate its influence in particular instances but the novel opportunities for its application, especially in the construction of statutes, are virtually unlimited. Every new generation of lawyers and judges must encounter it afresh and struggle to overcome it." [173]

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matrimonial property. This is the problem of characterisation.": Dicey & Morris, *op. cit.* at page 35; "Since legal relationships in the *abstract* from the principle element of domestic choice of law rules, which connect these relationships with a particular system of laws with the help of connecting factors, and since the object of the dispute is a *concrete* legal relationship expressed in the form of a claim or defence, the integration of the concrete relationship into the abstract relationship formulated in the choice of rule cause a problem of interpretation which is known as characterisation."; Lipstein, *op. cit.* at page 23; Characterisation is, "...the allocation of the question raised by the factual situation before the courts to its correct legal category, and its object is to reveal the relevant rule for the choice of law.": C.G. Cheshire, *Private International Law*, 4th ed., at pages 47. It is notable that a number of commentators have suggested that classifications is, "more" than merely categorisation.

[170] As Jaffey notes, "In determining the scope of substantive rules of domestic law, to see whether the facts of the particular case fall within them, it is of course first necessary that the facts should have been correctly ascertained if the right result is to be reached. Similarly, when determining the scope of choice of law rules to see whether particular domestic rules fall within their reason or policy, it is necessary that the true nature of the effect of those domestic rules be ascertained.": Jaffey, *op. cit.* at page 253. Bennett makes a similar point when he notes, "Perhaps more than any other topic of private international law, enrichment has been influenced by the way in which it is treated in domestic law. In particular its ambiguous position within the overall legal structure has had a strong influence on the formulation of choice of law rules.": Bennett, T.W. *op. cit.* at page 138.

[171] "In private international law the position of enrichment rules within the domestic legal system is of central importance. This is so because, in orthodox thinking, access to a choice of law rule is permitted only after a claim has been characterised in terms of the available categories of legal rules. The process of characterisation contains, as it were, the key to the conflict process.": Bennett, T.W. *op. cit.* at page 140.

[172] Cramton and Currie, *op. cit.* at page 90.

[173] Hancock., "The Fallacy of the Transplant Category", 37 Can. B.Rev. 535, 574-575.

Bearing this in mind, the methods of characterisation will now be examined in more detail in an attempt to discover how we should characterise the restitutionary elements discussed in chapters Three and Four: a set of legal elements which, even now, have no certain category in English law.

5.2.1: THE PRINCIPLES OF THE CONFLICT OF LAWS AND CHARACTERISATION: PRACTICAL APPLICATION.

Academics have on occasion drawn attention to the significant gap which exists between scholarly exposition and the world of practical litigation in which the courts must operate.[174] Equally, the effect of this disparity has not escaped the attention of the courts themselves.[175] As a result, the remainder of this chapter will attempt to make logical, and perhaps more importantly practical, suggestions as to how the gap between theory and practical litigatory issues can be bridged in this area, for as Bland stated as long ago as 1957, "Any theory which sets around itself an aura of intellectual isolation and which widens the gap between academic study and practice of law is *per se* suspect."[176] As part of this process we will first briefly consider the general approach to characterisation adopted by the English courts, before examining some of the specific aspects of characterisation raised by the subject currently under discussion and taking cognisance of recent cases in which the question of restitutionary characterisation has come before the English courts.

5.2.1.1: The English Courts' General Approach to Questions of Characterisation.

It has been argued that the perfect system for justly dealing with cases involving a foreign element would be for each rule of domestic substantive law to have a corresponding conflict of laws rule.[177] This approach would of course not solve the

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[174] "Conflict of laws is like Alice's Wonderland. Its' arcane, sometimes grotesque, intellectual puzzles at times seem fanciful. In reality, they reflect the many complex problems associated with commercial transactions that span diverse legal systems. The stalemate that is sometimes reached highlights the inadequacy in some circumstances of national laws endeavouring to resolve international issues.": Spender, J.M. and Burton, G. "Aspects of Conflict of Laws in Banking Transactions" (1987) A.L.J. Vol. 61, 65.

[175] "Conflicts of law has become a veritable playpen for judicial policy makers...[The] courts are saddled with a cumbersome and unwieldy body of conflicts law that creates confusion, uncertainty and inconsistency, as well as complication of the judicial task. The approach has been like that of the misguided physician who treated a case of dandruff with nitric acid only to discover that the malady would have been remedied with medicated shampoo. Neither the doctor nor the patient need have lost his head.": *Paul* v. *National Life* 352 NE 2d 550, 533 (1986); Cheshire and North *op. cit.* at page 39. It may, of course, be true that while the judiciary may not take express cognisance of the nuisances of academic theory the two branches of legal thought come to the same conclusions by a process of intellectual "trickle down." Thus Bland opines that, "...Classification has become a matter for academic discussion in a rarefied atmosphere, too recondite for the appreciation of judges, who, although admittedly ignoring the problem, have, it is said, nevertheless adopted 'unconsciously' a practice upon which it is possible to build up some coherent theory.": Bland, *op. cit.* at page 10.

[176] *Ibid.*

[177] Lipstein, *op. cit.* at page 93.

difficulties created by conflicting approaches in different jurisdictions and the potential size and complexity of such a task ensures that this is not a practical possibility.[178] Characterisation in the international context is generally a function of the need for a single rule (or restricted group of rules) of the conflict of laws to be applicable to a large group of domestic rules. Since the "discovery" of the problems surrounding classification, a number of theories have been expounded as to the principles which should guide the courts. Unsurprisingly, given the confusion as to what is being classified, the specific theory being used has rarely been explicitly identified by the courts in this country. Indeed, whether a particular theory is intended to lay down a framework within which the courts should act, or merely attempts to describe the "instinctive" behaviour of the court, is itself debatable.

The *lex fori* theory was originally propounded by both Kahn and Bartin and as a result has, perhaps, been the predominant approach, particularly within Europe. It suggests that characterisation should be undertaken in accordance with the rules of the forum (foreign rules are to be characterised with regard to the nearest analogous rule of domestic law) and is favoured by a number of commentators.[179] It has been argued that this theory best describes the way in which the English judiciary have approached conflict of law problems.[180] However, this favouritism may well be explained by an instinctive desire to apply familiar rules and avoid technical difficulties, rather than a belief in its intrinsic superiority. This is, of course, a continuing difficulty in the study of judicial behaviour:[181] it is often problematic to determine whether any given theory is based upon logical principle or observance of judicial practice and equally difficult to determine whether judicial practice is based

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[178] *Ibid.* See to similar effect Bennett, "When the problem of characterisation could have been resolved quite simply by creating new choice of law rules. Instead of attempting to subsume new foreign rules under the existing categories or causes of action, it would have been theoretically possible merely to fashion as many choice of law rules as there were rules that seemed applicable to the case in issue. This is a variation of the process of *depecage.* Although *depecage* offers a temptingly simple solution, it is generally resisted because it would result in the fragmentation of cases into ever narrower and more specific issues, making the overall choice of law process unmanageable...Accordingly...we have to contend with the problem of characterising enrichment actions if we are to progress to the choice of law stage.": Bennett, T.W. *op. cit.* at page 136, 142-143.

[179] Lorenzen, *Selected Articles on the Conflict of Laws*, *op. cit.* at pages 80-135; Robertson, *Characterisation in the Conflict of Laws*, (1940).

[180] *Simonin* v. *Mallac* (186) 2 Sw. & Tr. 67; *Ogden* v. *Ogden* [1908] P.46 (C.A.); *Huber* v. *Steiner* (1835) 2 Bing.N.C. 202; *S.A. de Prayon* v. *Koppel* (1933) 77 S.J. 800: cited by Dicey & Morris, *op. cit.* at page 71.

[181] Bland, *op. cit.* at page 10.

upon the observance of accepted, but unnamed theory, practicality, justice or a combination of these factors. Nevertheless, at least superficially, characterisation according to the *lex fori* is a logical approach given that the court is going to apply its own conflict rules to the problem. Moreover, in a practical sense, it could be argued that any acceptance of foreign law as the characterising factor would potentially lead to the emasculation of the national law.

What is certain, however, it that the *lex fori* theory suffers from a number of potential weaknesses and difficulties, the most obvious being that the relevant foreign rule may have no near equivalent.[182] Or alternatively, apparently similar rules may have been created for entirely different purposes, in which case its application may well lead to injustice. Equally, only taking cognisance of the rules of the forum clearly risks limiting the effectiveness of our approach to the conflict of laws.[183]

One solution, suggested by a number of commentators,[184] is to attempt primary characterisation with regard to the *lex fori*, before beginning secondary characterisation with regard to the *lex causae*. This has been subjected to a number of criticisms, of which, the most concise and damning is to be found in Dicey & Morris who consider the process to be artificial, unreal and arbitrary.[185] Nevertheless, Falconbridge has also suggested a method which would take cognisance of both the *lex fori* and the *lex causae*[186] while Lipstein propounds a

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[182] *Ogden* v. *Ogden* [1908] P46, CA; *Huber* v. *Steiner* (1835) 2 Bing N.C. 202.

[183] Moreover...to argue by analogy from a rule of domestic law to a rule of foreign law is to indulge in a mechanical jurisprudence of a particularly objectionable kind, and may result in the forum seriously distorting the foreign law, applying it in cases where it would not be applicable and vice versa, so that the law applied to the case is neither the law of the forum nor the foreign law of any country whatever.": Morris, *op. cit.* at Chapter 29.

[184] Notably, Robertson, *op. cit.*; Castel, *op. cit.*.

[185] "This view is open to a number of objections, but since it has now been abandoned by its principal exponent, it is sufficient here to say that the distinction between primary and secondary characterisation is unreal and artificial and leads to arbitrary results; and that the writers who hold this view are not even approximately agreed on...where the line is to be drawn between primary and secondary characterisation...in the hands of a skilful writer, the same situation can be made to appear as a case of either primary or secondary characterisation...There is no reported case in which this theory has been adopted by an English court.": Dicey & Morris, 11 ed., *op. cit.* at page 41.

[186] Falconbridge, *Selected Essays in the Conflict of Laws*, 2nd ed., (1954), 50.

variant of this approach[187] which he suggests has been accepted by both the courts of Germany[188] and England.[189]

Nevertheless, it is submitted that characterisation purely by reference to the *lex fori* is an imperfect procedure and remains so even when the use of the *lex causae* is introduced as a balancing element.[190] As an alternative, a number of writers, most notably in Europe, have advocated characterisation by reference to the *lex causae* alone. There is no doubt that this offers a certain logic: why should one characterise a problem in isolation from the legal rules which will potentially govern it?[191] As we have discovered, the classification of a problem is part of its solution: if we suggest that a dispute is concerned with restitution we have gone some way to deciding how it is to be solved. To characterise a rule under the *lex fori* potentially dilutes the effectiveness of ultimately applying foreign rules. However, the circularity intrinsic in the *lex causae* approach is clear: how can one characterise a legal element with regard to a foreign system until one has decided what system is relevant by means of the characterisation process?[192]

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[187] "The courts analyse the nature of a claim (or defence) expressed according to some system of laws (foreign law or the *lex fori*) in the light of the function (not the technical connotation) of that rule within the particular legal system. They relate the claim or defence so analysed to that amount of their own rules of Private International Law which, upon a broad interpretation (not restricted to notions of the domestic law of the *forum*), is capable of covering the claim in question. The interpretation of disparate notions in terms of each other is the process of characterisation. The result is an indication of the law applicable which may, or may not, be that which has been pleaded by the party or parties.": Lipstein, *op. cit.* at page 96.

[188] Lipstein, *op. cit.* at pages 96 -97.

[189] *Re Cohn* [1945], Ch. 5. See also *Re Fluid* [1966] 2 W.L.R. 717, 735, 736-738.

[190] However, as we have seen, this determination does not mean that a better alternative exists.

[191] As Dicey & Morris acknowledge, this approach appears to have been accepted in this country in the case of *Re Maldonado's Estate* [1954] P.223 (C.A.). In that case the relevant party had died intestate with no kin. The deceased has been domiciled in Spain but had movable property in England. English law held that the property belonged to the Crown, Spanish law that it should go to the Spanish State. The case touched upon two conflict of law rules: (a) that intestate succession to movable property is governed by that law of the country of domicile, and; (b) the right to seize ownerless property is governed by the law of the country in which the property is situated. The question therefore depended upon how the Spanish rule was to be classified: i.e. did it concern succession or did it relate to property law? The court decided accept the Spanish approach and thus accepted that the rules were, under Spanish reasoning, concerned with succession; see also *Re Barnett's Trust* [1902] 1 Ch. 847; *Re Musurus's Estate* [1936] 2 All E.R. 1666.

[192] Dicey & Morris, *op. cit.* at page 39; Lederman makes a similar point in a slightly different context when he says, "We have to know the juridical nature of the real facts before our conflictual rules for choice of law will indicate the governing dispositive rules, and yet only dispositive rules can define the juridical nature of the real facts for purposes of this choice.": Lederman, "Classification in Private International Law" *op. cit.* at page 17; see also Lorenzen " The Theory of Qualifications and the Conflict of Laws" *op. cit.* at page 247.

Possibly as a result of these difficulties, a number of English and European writers[193] have suggested that characterisation should be carried out with regard to analytical jurisprudence: i.e. general principles universally accepted by all jurisdictions.[194] Thus, we can side step the narrow sectional problems caused by applying the local and foreign law by utilising general concepts acceptable to all nations. Moreover, this approach allows the court to apply the broad categories which are necessary in order to provide a functioning framework for cases involving a conflict of laws. Unfortunately, in a practical context it is difficult to identify the conceptions which might be used in the characterisation of such problems: as Lorenzen put it, "...the essential general principles of professedly universal application' are not remarkable for their number."[195] If nations were agreed on such matters, the conflict of law rules would be less essential than they in fact are. This being the case, even the identification of, and agreement upon, the general principles which do exist would be problematic.

5.2.1.2: The English Courts' Approach to Characterisation With Specific Reference to Cases of Restitution/Unjust Enrichment.

Although, as noted above, there has been little judicial comment on the specific question of how restitutionary issues should be characterised, some general guidelines to characterisation have been laid down and an early example of this process can be seen in *Batthyany v Watford.*[196] Bennett is, however, quite correct when he says of this case:

> "Had the court been forced to take account of modern characterisation theory, it would certainly not have given so confident an answer, either property or tort could have provided appropriate categories for the cause of action, especially in view of the lack of any choice of law rule in the case of quasi or implied contract."[197]

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[193] Beckett, W.E., (1934) 15 B.Y.I.L., 46; Rabel, E., *The Conflict of Laws, a comparative study,* 2nd ed., vol. I, Michigan, (1968).

[194] "These conceptions [which should be used to determine characterisation] are borrowed from analytical jurisprudence, that general science of law, based on the study of comparative law, which extracts from this study essential general principles of professedly universal application - not principles based on, or applicable to, the legal system of one country only.": Beckett, W.E., (1934) 15 B.Y.I.L., 46.

[195] Lorenzen, *Private International Law, op. cit.* at page 28

[196] *Batthyany v Watford* (1887) 36 Ch.D. 269.

Moreover, this and other cases[198] have led some commentators to suggest that beyond a general preference for characterisation by virtue of the *lex fori*,[199] the theoretical aspects of characterisation have had "almost no influence on the practice of courts in England."[200] Dicey and Morris go on to say of the various approaches to characterisation:

> "The way the courts should proceed is to consider the rationale of the English conflict rule and the purpose of the rule of substantive law to be characterised. On this basis, it can be decided whether the conflict rule should be regarded as covering the rule of substantive law. In some cases, the court might conclude that the rule of substantive law should not be regarded as falling within either of the two potentially applicable conflict rules. In this situation a new conflict rule should be created."[201]

The suggestion that the courts may seek "common-sense solutions" based upon "practical consideration"[202] is both an acceptable philosophy and a generally accurate description of the way in which the courts have behaved. Nevertheless it is unsurprising that English law has continually found difficulty in characterising restitutionary elements.[203] Indeed, it might be argued that the conflict of laws should not have a category based around restitution. Generally speaking, characterisation in the conflict of laws refers to broad categories associated with causes of action. Restitution is not a cause of action, but a response. Unjust enrichment, although sometimes discussed as if it were a cause of action, is more often seen as a method for explaining the underlying rationale of other causes of action. The question which we must address is whether this underlying principle is a

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[197] Bennett, T.W. *op. cit.* at page 142.
[198] See, for example, *Ogden* v. *Ogden Huber* v. *Steiner* (1835) 2 Bing N.C. 202.
[199] Forsyth, C., "Characterisation Revisited: an Essay on the Theory and Practice of the English Conflict of Laws" 114 L.Q.R.141, 150-151.
[200] Dicey and Morris, 11th ed. *op. cit.* at page 35.
[201] Dicey & Morris, *The Conflict of Laws*, 12th ed. (1993), vol. 1. Page 44; approved by Staughton L.J, in *Macmillan Inc.* v. *Bishopgate Investment Trust plc. (No.3)* [1996] 1 All E.R. 585; [1996] 1 W.L.R. 387, 392.
[202] *Ibid.*
[203] As Bennett puts it, the history of restitution ensures that, "...there were two links with contract: a category heading and a presumed agreement. Today, of course, any such facile association is deprecated, as is the term 'quasi' or 'implied' contract. The tendency instead is to refer to an underlying principle of unjust enrichment. Nevertheless, English law has particular difficulty in providing an organising category for enrichment claims, one reason being the 'multiplicity of ...procedural resources for prevention of unjust enrichment' and another the 'diversity of origins'. If the domestic system experiences difficulty in classifying enrichment actions, the same difficulty is likely to impinge on its system of private international law'": Bennett, T.W. *op. cit.* at page 136, 141.

better method of categorising legal elements for the conflict of laws than the traditional explanations. In the light of the discussion conducted in Chapter Four, it is cautiously argued that the answer to this question is "yes". This position is adopted for several reasons: specifically, (a) because it has largely been demonstrated that for some legal elements (notably quasi-contract) the traditional explanations are mistaken or inadequate; (b) because authority suggests that English courts are moving towards a position in which unjust enrichment can, from a practical point of view (if not a technical one), be considered to be analogous to a cause of action;[204] (c) despite the comments of Auld L.J.[205] in *Macmillan Inc.* v. *Bishopgate* [1996] [206] regarding "receipt-based restitution", it is arguable that characterisation with regard to restitution will lead to a greater universality of approach; (d) English courts have (although sometimes mistakenly[207]) accepted restitution as a category for the purpose of the conflict of laws; and (e) if it is correct (as this study has argued), that injustice can be caused if the English system fails to recognise that restitution/unjust enrichment provides the best explanation for some legal responses, then it can be assumed that the lack of a logical method of categorising such legal elements for the purpose of the conflict of laws which takes into consideration their domestic nature, will also lead to injustice.

The most important recent case to consider the question of characterisation in the context of the conflict of laws is *Macmillan Inc.* v. *Bishopgate Investment Trust plc. (No.3).*[208] It will be remembered[209] that this case involved a claim by the Plaintiffs to shares on the grounds of equitable ownership. The international aspect of the case rested upon the question of knowledge. Under New York law the Defendants would take the shares free of the Plaintiffs' claim unless they could show actual knowledge of it, while under English law, constructive knowledge would have sufficed. The Plaintiffs therefore claimed that the action was restitutionary and as they were an English company and the contract was made in

[204] *Lipkin Gorman* v. *Karpnale Ltd* [1991] 3 W.L.R. 10 (H.L.); [1991] 2 A.C. 548; *Macmillan Inc.* v. *Bishopgate Investment Trust plc. (No.3)* [1996] 1 All E.R. 585; [1996] 1 W.L.R. 387.
[205] Discussed immediately below.
[206] [1996] 1 All E.R. 585; [1996] 1 W.L.R. 387.
[207] See immediately below.
[208] [1996] 1 All E.R. 585.

England, the relevant rule pointed to the applicability of the English law. At first instance, Millett J. had accepted that the claim could be categorised as restitutionary, but this was not enough: it was necessary to look at the specific issue in dispute, and this was one of the main priorities with regard to the property interests in the shares.[210] With regard to the substance of the case, the Court of Appeal accepted Millett J.'s conclusion. Nevertheless, they came to a number of interesting conclusions (both explicitly and implicitly) with regard to questions of characterisation in general and the characterisation of restitutionary issues in particular.

There is no doubt that both Staughton and Auld L.L.J. were willing to accept that Macmillan's cause of action could generally be described as restitutionary.[211] We have noted above that this is at best a misuse of the term. The claim must be concerned with property, unjust enrichment or arguably some form of proprietary restitution: the response is restitutionary.[212] However, this may not be worthy of the significance which, for example, Virgo[213] places upon it. It seems to be little more than loose terminology based upon the fact that their Lordships did not consider the matter in detail because under their analysis it did not bear upon the question at hand.[214] Instead, they argued that the matter to be characterised was not the cause of action but the specific issue[215] in dispute, and that, in Staughton L.J.'s view was, "...whether the defendants have a defence on the ground that they were purchasers

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[209] See Chapter Four.
[210] [1995] 3 All E.R. 757.
[211] "I am prepared to accept that Macmillan's claim is restitutionary in nature..." : [1996] 1 W.L.R. 387, 398, *per* Staughton L.J.
[212] Virgo, G., *op. cit.* at page 21.
[213] *Ibid.*
[214] When considering the questions surrounding the restitutionary effect of Macmillan's equitable title and claim to "...an undestroyed proprietary base" Staughton L.J. said, "In my judgment the considerable learning directed at those issues does not need to be considered in the present case. This part of the appeal is not in my opinion the place to confront the law of restitution 'in a logical, consistent and coherent fashion...'": [1996] 1 W.L.R. 387, 398.
[215] "I agree that the issue provides the starting point. It is whether each bank can resist Macmillan's equitable claim to return of the shares by showing that it was a bona fide transferee for value without notice and thus acquired an interest in them superior to that of Macmillan. More specifically, the issue is whether the banks can show that they acquired the shares without notice of Macmillan's interest.": [1996] 1 W.L.R. 387, 406, *per* Auld L.J.

for value in good faith without notice...".[216] In other words, the issue was one of priority of ownership.[217]

As a result, the case has clear limitations with regard to how much it can tell us about the characterisation of restitutionary matters.[218] Nevertheless, it is informative with regard to judicial methodology in this area. Perhaps, most notably, their Lordships turned their attention to the system by which an issue should be categorised.[219] The correct approach according to Auld L.J. was to identify the relevant issue with regard to the *lex fori*. However:

> " ...the classification of an issue and rule of law for this purpose, the underlying principle of which is to strive for comity between competing legal systems, should not be constrained by particular competing systems of law, which may have no counterpart in the other's system. Nor should the issue be defined too narrowly so that it attracts a particular domestic rule under the *lex fori* which may not be applicable under the other system."[220]

This method has been described as "enlightened *lex fori*."[221] Part of the motivation for Auld L.J.'s relatively wide view of the characterisation process seems to have been a concern that some legal elements (notably "receipt-based restitutionary claims"[222]) would be problematic if "viewed through domestic eyes."[223] This is undoubtedly a potential difficulty which should be borne in mind generally. Whether it is, however, a problem which specifically affects "receipt-based restitutionary claims" may be subject to some doubt. Nevertheless, his Lordship was of the opinion that:

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[216] [1996] 1 W.L.R. 387, 398-399.
[217] "The question between the parties to this appeal is 'Who has the better right to ownership of shares in a corporation?'": [1996] 1 W.L.R. 387, 405, *per* Auld L.J.
[218] Although it might be argued that the concentration upon issues could see the importance of restitution drastically reduced (this will be discussed below).
[219] A question which, as we have noted above, has caused the courts and academics no small measure of difficulty.
[220] [1996] 1 W.L.R. 387, 407, *per* Auld L.J.
[221] See, for example, relying on earlier writers, Bird, "Choice of Law Rule for Priority Disputes in Relation to Shares" [1996] L.M.C.L.Q., 57, 58.
[222] [1996] 1 W.L.R. 387, 407, *per* Auld L.J.
[223] *Ibid.*

> "The 'receipt-based restitutionary claim' is a notion of English domestic law that may not have a counterpart in many other legal systems, and is one that may not be appropriate to translate into the English law of conflict. In my view it would be wrong to attempt to graft this equitable newcomer onto the class of cases where English courts will intervene to enforce an equity in respect of property abroad."[224]

It has generally been assumed that by "receipt-based restitution" his Lordship was referring to what the present study has described as autonomous restitution by subtraction.[225] The equation of this area purely with equity (in view of the above discussion) is troublesome, and the suggestion that "many" other legal systems do not have a counterpart to this area is also problematic.[226]

If Auld L.J.'s belief that autonomous restitution is a particularly English conception is open to question, his view that the "novel" character of restitution should preclude it from inclusion within our rules should also, it is submitted, be viewed with care. Equally, we have noted that authority in the area of conflicts in general is limited and should be treated with caution. If the purpose of the conflict of laws is, as we have concluded, to bring about justice, then to ignore a new classification which is also intended to do the same, which may be recognised by other jurisdictions[227] and which is not precluded by authority merely because it has only been recently recognised, is not an attractive position.[228] Nevertheless, it is clear that by concentrating upon very narrow and specific issues the courts could, if they wished, limit the effect of restitution to the very minimum: the recent development of the area combined with its overlapping (and sometimes supplemental) nature

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[224] *Ibid.*
[225] Bird, "Choice of Law Rule for Priority..." *op. cit.* at page 61.
[226] Thus one might ask, is this true and if so does it means that it should necessarily be ignored? Nevertheless it cannot be denied that the differences between the common law and civil conceptions of unjust enrichment do provide major difficulties for the development of a logical approach to this area. See, for example, Dickson to the effect that, "...a direct comparison of the structure of unjust enrichment claims in common law and civil law systems is bound to be misleading because the principle against unjust enrichment serves distinctly different purposes in the two sets of systems. For common lawyers unjust enrichment is a *rationale* for allowing some claims in restitution; for civil lawyers it is a residual category in the law of obligations which comes into play when other categories have been exhausted.": Dickson, B., *op. cit.* at page 126. Whether this distinction is so great as to necessarily make direct comparisons misleading is, however, open to debate. Indeed, Dickson, admits that "...in some respects there is more in common between, say, American and German unjust enrichment law than there is ...between German and French.": *Ibid.*
[227] Whether specifically or by analogy.

ensures that one can often find an alternative characterisation if one searches hard enough. This process is potentially damaging because, as discussed in chapters Three and Four, in some cases restitution/unjust enrichment may be the best explanation for the ways in which the courts behave, and to ignore such an explanation in an international context may lead to injustice.

We must also, it is submitted, treat the "enlightened *lex fori*" approach with a certain amount of caution. Specifically because it necessarily suffers from the circuitous problem associated with characterisation by the *lex causae*: i.e., it begs the question as to how we decide which system should be used to modify the *lex fori* until we have characterised the dispute and decided which system applies. Unfortunately, Auld and Staughton L.L.J. did little to clarify this question. Staughton L.J.'s discussion appears to favour the *lex fori* while Auld L.J. was of the opinion that the parties had agreed that the *lex fori* should apply. Nevertheless, in relatively straightforward cases[229] it may be a practical solution to a problem which may not be amenable to a perfect technical solution.[230]

One further point should be made concerning the Court of Appeal's acceptance of the cases as restitutionary while considering this to be irrelevant to the determination of the dispute before them. As Bird puts it, why should the Court accept the case as being of one character (i.e. restitutionary) while putting it into another category (i.e. priority of ownership/property)?[231] She argues that the court's explanation that it was categorising by virtue of issue rather than cause of action "...is not totally satisfactory."[232] This may partly be a reaction to the potential problem noted above: i.e. that a system based upon narrow questions of issue could see the dilution of the importance of restitution in the conflict of laws to the point where it has little or no significance. It is therefore informative to briefly consider Bird's alternative explanations for the Court's approach. First, she argues that the

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[228] Moreover, as we have noted in Chapter Four, "recent" must be taken as a relative term.
[229] Particularly those concerned with only two jurisdictions.
[230] "Rules which are designed to have extra-territorial effect must often be moulded in lines which offend an orderly mind because their purpose may be to meet a situation which is complicated by differences in the structure of society and differing economic methods.": Gutteridge, H.C. and Lipstein, K., *op. cit.* at page 82.
[231] Bird, "Choice of Law Rule for Priority..." *op. cit.* at page 60.

restitutionary cause of action was implicitly accepted and that only the question of the defence[233] needed to be made out. The discussion in Chapter Four, it is submitted, makes it clear that such an explanation is not acceptable. It is entirely arguable that the instant cause of action was not of a restitutionary nature[234] and it is not satisfactory to assume that the Court, without further discussion, accepted that all the necessary elements of restitution/unjust enrichment were made out, even though they may have used the subject's terminology. Her alternative is that although the case fell into the category of restitution for domestic purposes, it did not with regard to the conflict of laws. There is no doubt that there is some support for this approach in Auld L.J.'s consideration of "receipt-based restitution." However, a lack of discussion on this point by the other two members of the court, combined with Auld L.J.'s belief that "receipt-based restitution" is uniquely English, makes a detailed critique of this interpretation extremely difficult. As a result, until the court's position is clarified we must, it is submitted, accept that they were categorising by issue, rather than by cause of action. However, there is little doubt that Bird is correct to say that the position is not entirely satisfactory. Most specifically, in the present author's submission, because (a) it appears to misunderstand the role of restitution as a response rather than a trigger; (b) it appears to be a departure from the judicial approach which has gone before; and (c) because its ability to emasculate the role of restitution in the conflict of laws appears to be a mirror image of restitution's domestic history, which is now (generally) accepted to have been unhelpful.

In making this point it must be remembered that all questions of classification are a matter of degree. If the issue is to be identified with such narrow detail that its connection to other areas of restitution through the mechanism of unjust enrichment is to be ignored, then it is submitted that this will be a retrograde step. However, the categorisation of issues which form the elements of unjust enrichment rather than by the generic conception of unjust enrichment has much to recommend it to a

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[232] *Ibid.*
[233] i.e. bona fide purchaser for value.
[234] Stevens, J., "Restitution or Property? Priority and Title to Shares in the Conflict of Laws" 59 M.L.R., 74; Swadling, W., "A Claim in Restitution" [1996] L.M.C.L.Q., 63.

court attempting to discover the law applicable to the core of a dispute. In other words, in many cases it would be advantageous for the courts to concentrate on the loss, benefit, and unjust factor rather than the more general cause of action,[235] unjust enrichment.[236] Zweigert and Muller-Gindulliss disparage a similar argument,[237] nevertheless, it is submitted that if the courts clearly distinguish between the various factual and legal elements which go to make up an enrichment claim with regard to the underlying rationale of restitution/unjust enrichment, then identification and classification of the relevant limb may represent a logical way forward.

There is no doubt that *Macmillan Inc.* v. *Bishopgate Investment Trust plc. (No.3)* has provided the most explicit judicial discussion of the question of characterisation in the context of restitution/unjust enrichment. Equally, although there have been other judicial considerations of this area,[238] it is not unreasonable to suggest that these cases give a far from complete explanation of how restitutionary cases coming before the English courts will be categorised. Indeed, it may be that restitution/unjust enrichment could be such a wide-ranging concept that a generalised approach is impossible. As a result, we will now consider the characterisation of the more detailed aspects of the subject with which this study is concerned.

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[235] Or generic conception.

[236] "There are powerful reasons why the 'general obligation' of a contract should be governed by one law. For example it would be highly inconvenient and contrary to principle if questions such as discharge due to frustration or termination for breach were not governed by a single law. However, the analogy between the law of contract and that of 'quasi-contract' has long been shown to be false; and it is submitted that different considerations may apply in relation to the three aspects of a restitutionary claim.": Stevens, R. *op. cit.* at page 186.

[237] "It is precisely the character of the enrichment as unjustifiable which gives the claim for enrichment its form..." Zweigert and Muller-Gindullis, "Quasi Contract": Chapter 30, Vol. III of Lipstein, K. (Ed) *International Encyclopaedia of Comparative Law* (Tubingen, 1974), §24; Bennett, T.W. *op. cit.* at page 161. This argument is accepted in the following chapter. However, it is suggested that it should not be emphasised to an extent which prevents the courts from analysing restitution by its various elements for the purpose of characterisation.

[238] See, for example, *Arab Monetary Fund v. Hashim* [1993] 1 Ll. Rep. 543; El Ajou v. Dollar Holdings [1993] 3 All E.R. 717.

5.3: CONCLUSION: POSSIBLE APPROACHES TO THE CHARACTERISATION OF RESTITUTIONARY ISSUES BEFORE THE ENGLISH COURTS.

In the preceding chapters, a number of conclusions have been reached with regard to the relationship between restitution and this country's civil response to fraud and mistaken payments. Very briefly these can be summarised by saying that most of the techniques, actions and remedies currently available to the victims of fraud are widely, and correctly, considered to be part of the law of restitution. If we cannot yet make this statement with absolute certainty, we can tentatively predict that in the near future it will be the case. If this is correct then it is necessary, in the domestic context, to examine the relationship between restitutionary responses and other areas of law. This being the case, it is equally important that these issues are considered with regard to the conflict of laws, where, as we have seen, the manner in which an element is characterised is potentially one of the primary factors in determining the rules to be applied to a particular set of circumstances. With this in mind it is now necessary to examine, most specifically, the relationship of restitution to procedural law and property law, its supplemental nature, the role of "restitution for wrongs", the nature of tracing and the constructive trust.

5.3.1: QUESTIONS OF PROCEDURAL AND SUBSTANTIVE LAW AS APPLIED TO RESTITUTION.[239]

The determination of a legal element as procedural or substantial is of fundamental importance in the conflict of law. Procedural law can be equated with remedies and everything concerned with their enforcement.[240] Substantive, law on the other hand,

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[239] See generally, Dicey & Morris, *op. cit.* at Chapter 8; Cheshire and North, *op. cit.* at Chapter 29; Ailes, E.H., *op. cit.* at page 392; Cook., "Substance' and 'Procedure' in the Conflict of Laws", 42 Yale L.J. 333 (1933). The distinction between substance and procedure is of clear importance with regard to the present discussion because, as we have seen, a number of restitutionary elements and techniques straddle the borders between substance and procedure. Thus, for example, we have noted the generally ambiguous nature of tracing. Equally, the English courts, characterisation of the constructive trust as substantive, finds far from universal acceptance around the world (and indeed in this country).

[240] "English lawyers give the widest possible extension to the meaning of the term 'procedure'. The expression as interpreted by our judges, includes all the legal remedies, and everything connected to the enforcement of a right. It covers, therefore, the whole field of practice; it includes the whole law of evidence, as well as every rule in respect to the limitation of an action or any other legal proceeding for the Footnote Continues on Next Page:

is said to be, "rules that determine the legal relations when all the facts have been made known to the court."[241] The importance of this split is based upon one of the fundamental tenets of the subject: specifically, that matters of procedure are governed by the *lex fori.*[242] Issues of substance, as we have seen above, are determined by the law indicated by the relevant choice of law rule.[243]

Before examining these issues in more detail, it should be remembered that the dividing line between procedure and substance, like most of the categorical issues discussed in this study, is far from clear. The *American Restatement* identifies procedure in court, mode of trial, evidence, proof of facts and the rules surrounding witnesses and limitations as procedural.[244] Nevertheless, there are a number of grey

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enforcement of a right, and hence it further includes the methods, e.g. seizure of goods or arrest of person, by which judgment may be enforced.": Dicey, *The Conflict of Law*, 4th ed. 798 - 799. (1927)

[241] Comment, 33 Yale L.J. 308, 310 (1924).

[242] Dicey & Morris, *op. cit.*: "Rule 17. - All matters of procedure are governed by the domestic law of the country to which the court wherein any legal proceedings are taken belongs (*lex fori*); see also Cheshire and North, *op. cit.* at Chapter 20; Morris, Chapter 29; *Stevens* v. *Head* (1993) 176 C.L.R. 433, 445, 456-457.

[242] Dicey & Morris, *op. cit.*.

[243] Ailes does not overstate the general acceptance of this principle when he says that, "It is perhaps the most inveterate doctrine of the conflict of laws that all questions of procedure in a given instance are governed by the *lex fori*, or the law of the court invoked, regardless of the law under which the substantive rights of the parties accrue. For seven centuries, at least, courts and lawyers have broadly stated, or assumed to be axiomatic the rule that substantive rights are fixed...whilst the procedural devices by which such rights may be vindicated and enforced depend solely upon the law of the forum.": Ailes, E.H., *op. cit.* at page 392. In this context Dicey & Morris, 11th ed. *op. cit.* at page 173, highlight the following cases, *Hanson* v. *Dixon* (1906) 23 T.L.R. 56; *Huber v Steiner* (1835) 2 Bing. N.C. 202; *Socéteéte Anonyme Metallurgique de Prayon v Koppel* (1933) 77 S.J. 800.

[244] "§ 584. *Determination of Whether Question Is One of Procedure.* The court of the forum determines according to its own Conflict of Laws rule whether a question is one of substance or procedure.

§ 585. *What Laws Govern Procedure.* All matters of procedure are governed by the law of the forum.

§ 592. *Procedure in Court.* The law of the forum governs all matters of pleading and the conduct of procedure in court.

§ 594. *Mode of Trial.* The law of the forum determines whether an issue of fact shall be tried by the court or by a jury.

§ 595. *Proof of Facts.* (1) The law of the forum governs the proof in court of a fact alleged. (2) The law of the forum governs presumptions and inferences to be drawn from evidence.

§ 596. *Witnesses.* The law of the forum determines the competency and the creditability of witnesses.

§ 603. *Statutes of Limitations of Forum.* If no action is barred by the statute of limitations of the forum, no action can be maintained though action is not barred in the state where the cause of action arose.

§ 604. *Foreign Statute of Limitations.* If action is not barred by the statute of limitations of the forum, an action can be maintained, though action is barred in the state where the cause of action arose.

§ 605. *Time Limitation on Cause of Action.* If the law of the state which has created a right of action, it is made a condition of the right that it shall expire after a certain period of limitation has elapsed, no action begun after the period has elapsed can be maintained in any state.

§ 606 *Limitation of Amount Recoverable.* If a statute of the forum limits the amount which in any action of a certain class may be recovered in its courts, no greater amount can be recovered though under the law of the state which created the cause of action, a greater recovery would be justified or required.": (1) Restatement, *Conflict of Laws,* Ch. 12 (1934).

areas with potentially uncertain borders.[245,246] This difficulty is understandable. We might accept that questions of substance are concerned with rights and duties, while questions of procedure are concerned with the enforcement of these elements. However, to suggest, in anything other than abstract terms, that there is a difference between having a right and having the ability or methodology to enforce that right seems, at least at a intuitive level, problematic:[247]

> "From a logical standpoint, it is, of course, improper to speak of remedies as existing anterior to substantive rights. A substantive right is 'only the hypostasis of a prophecy - the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it."[248]

In other words, "A right is as big, precisely, as what the courts will do."[249] This belief does appear to represent a modern trend[250] and one which is clearly of

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[245] Thus Dicey, as noted above, suggested that English lawyers have given "...the widest possible extension to the meaning of the term 'procedure.'": Dicey, 4th ed. 798. (1927). However, Dicey and Morris now note that, "...in general the attitude expressed by Dicey has fallen into disfavour precisely because it tends to frustrate the purpose of the choice of law rules."

[246] An oft cited example of this problem is to be found in the well known case of *Chaplin v Boys* [1971] A.C. 356. in which the House of Lords were unable to unanimously agree whether damages for pain and suffering were concerned with remoteness (which is a question of substance) or quantification (which is a question of procedure).

[247] "With all deference, it is submitted that these definitions afford little help; they simply replace one unknown by another.": Ailes, E.H., *op. cit.* at page 401.

[248] Ailes, E.H., *op. cit.* at page 402; "The differentiation between substantive law and objective law is an illusion, although the prevalence of this illusion (as any other) has results in human behaviour, and must be taken account of.": Llewelyn, "The Bramble Bush, 82-83, (1930) 50 Harv. L. Rev. 1203 (1937), quoted by Ailes, E.H., *op. cit.* at page 394.

[249] *Ibid.* Lorenzen (although in a slightly different context) extended and expanded upon this general belief, with regard to the conflict of laws, when he said, "The terms 'substance' and 'procedure' have no inherent meaning. They may mean one thing for the purposes of constitutional law and another thing for local purposes. Whatever the label that may be attached to a given matter from these two points of view, there is no reason whatsoever why such labels should be attached to conflict of laws situations. If the legal relations between two parties are to be ascertained with reference to the law of State X, the rights created should be enforced by the courts of other states, unless the local machinery would be obstructed thereby; or, in an extreme case, if the enforcement or recognition of such rights would be shocking to the local community. Whatever rules of State X bear substantially upon the rights of the parties should be recognised and enforced...without reference to the fact whether the particular matter for purposes of constitutional or local law in the State of X or the state of the forum happens to be labelled 'substantive' or 'procedural.'": Letter written October 31, 1929 quoted by Ailes, E.H., *op. cit.* at pages 393-394; the passage is quoted in order to illustrate the dismissal of the substantial/procedural division not to suggest acceptance of the principles which underpin this argument.

[250] Thus it is an aspect of what Cook is referring to when he says, "Against the inconvenience involved in learning the foreign rule is the fact that so closely are "procedure" and "substance" connected that in many cases a refusal to accept the foreign rule as to a matter falling into the doubtful class will defeat the policy involved in following the foreign substantive law. Clearly a decision on this basis might place the line at a somewhat different point from where it might be drawn when the purpose is that involved in [cases involving other problems, such as the constitutionality of retroactive legislation].": Cook., *Logical...*, *op. cit.* at page 166.

potential importance to restitutionary claims.[251] Nevertheless, a commonality of approach is difficult to discern. Some academics see this approach as symptomatic of a general decline in the formalised consideration of the law,[252] while others would clearly take a diametrically opposing view. Whatever the truth of these arguments, a number of commentators do make a strong argument for delineation between substance and procedure. Thus, Ailes suggests first that "the distinction is referable to a fundamental habit of the human mind"[253] in the same way that we make a distinction between poetry and prose and infancy and maturity. There is no doubt that it is natural for humans to categorise and label all things, indeed much of the present study is concerned with the effect of such actions. However, the fact that we categorise is not an argument in itself for categorising in a particular way. In other words there is nothing intrinsically natural about the split between procedure and substance: indeed Ailes himself accepts that Roman law operated with relative efficiency without such a spilt.[254] Nevertheless, he is correct to suggest that the split, while not inevitable, does represent a potentially valuable tool in legal thinking.[255] Moreover, whether we accept the delineation between substance and procedure as a fundamental requirement of legal reasoning or merely, as Llewllyn puts it, an illusion which results in human behaviour which must be taken into account,[256] there is no doubt that it is an objective reality which must be considered to have both theoretical and practical effects. For example, Dicey & Morris point out,"..a court may, even today, be tempted to extend the meaning of 'procedure' in order to

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[251] Thus Bennett states, "...the insistence on a distinction between substance and procedure in this context seems dated. Modern systems of law treat right and remedy as opposite sides of the same coin, a distinction of little consequence; and this line of thought has merit because it is necessary to distinguish substance and procedure only where the remedy sought is so exotic that the procedural machinery available in the forum is incapable of executing it. There is, in this respect, nothing unusual about enrichment claims, which normally seek the restitution of cash or property.": Bennett, T.W. *op. cit.* at page 145.

[252] "The law has borne more than its share of the modern attack upon authority. The realist attitude toward the distinction between substance and procedure exposes another facet of the prevailing contempt for standards and principles...expediency, opportunism and a kind of nebulous impressionism have superseded dogmas...Some writers have gone so far as to hail the contemporary attitude as the true mark of intellectual and emotional maturity.": Ailes, E.H., "Substance and Procedure in the Conflict of Laws" [1941] *Michigan Law* Review, Vol. 39, 392, 394.

[253] Ailes, E.H., *op. cit.* at page 404. Thus he quotes Santayana, who states that, "Undoubtedly the word substance suggests permanence rather than change, because the substances best known to man (like the milk and wet sand of the young architect) evidently pass from place to place and from form to form while retaining their continuity and quantity. Such permanence is not flux, but a condition of flux.": Santayana, *The Realm of Matter,* 15 (1930).

[254] Ailes, E.H., *op. cit.* at page 403.

[255] Ailes, E.H., *op. cit.* at page 406.

[256] Llewellyn, *The Bramble Bush* 82 (1930), cited by Ailes *op. cit.* at page 393.

evade an unsatisfactory choice of law rule."[257] In other words, one might argue, as the realists do, that the split has no objective existence beyond the minds of lawyers. But this is an argument which fails to lead to a useful conclusion or illumination. One might equally argue that all manmade laws exist only in the minds of man:[258] this is true but tells us nothing of their nature or application. If we accept that the study of law is an attempt to predict the ways in which a court will behave when presented with a certain set of circumstances, then laws which exist in the minds of lawyers are of precisely equal status to objective facts and circumstances. As a result, no matter how we define it, when working within the modern English system we must accept that the split between substance and procedure is an operative factor. However, the realists are correct in suggesting (as, the present author would submit, they would be with regard to all laws) that the position in which the dividing line is drawn is a question of choice. If this is the case, then the question which naturally presents itself for practical purposes is not whether the split is necessary or logical but where should the line, which presently exists, be drawn for our present purposes. Cook goes some way to answering this question when he states:

> "If we admit that the 'substantial' shades off by imperceptible degrees into the 'procedural' and that the line between them does not 'exist' to be discovered merely by logic but rather is to be drawn so as best to carry out our purpose, we see that our problem resolves itself into this: How far can the court of the forum go in applying the rules taken from the foreign system of law without unduly hindering or inconveniencing itself."[259]

It is generally agreed that the underlying rationale of the rule that procedural questions are determined with regard to the *lex fori* is in order to prevent an undue burden or inconvenience being placed upon the court.[260] However, this does not, of

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[257] Dicey and Morris, 11th ed. *op. cit.* at page 173; "...although it is apparent that the labels 'substantive' and 'procedural' have often been affixed with an eye to the result sought, apparently no court has repudiated the basic distinction...": Ailes, E.H., *op. cit.* at page 400.

[258] Indeed the subtleties of the human intellect are equally capable of arguing that the laws of science only exist in the human mind: Persig, *Zen and The Art of Motorcycle Maintenance,* New York (1974).

[259] Cook, "Substance'..." *op. cit.* at pages 343-344.

[260] "If the practical convenience to the court in applying the local rule of law is great, and the effect of so doing upon the rights of the forum will be held to be controlling." 3 Beale, *The Conflict of Law,* (1935), 1599-1601; "In determining the legal consequences of certain conduct or events it has seemed reasonable to apply 'foreign substantive law' because of some factual connection of the situation with the foreign state; but Footnote Continues on Next Page:

course, suggest that inconvenience is the only factor [261] and must necessarily be balanced against other elements:

> "...the overriding policy is to apply the foreign substantive law, and if this will be defeated by slavish adherence to the domestic distinction between substance and procedure, it behoves the court to consider whether in the circumstances the adherence is necessary."[262]

Thus, it is submitted, the distinction should be determined in order to, where possible, apply the foreign substantive law, and this choice may be to some extent case and circumstance-specific. The purpose of procedural rules is to provide the

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on the other hand it would obviously be quite inconvenient for the court of the forum, though not unfair to the litigants concerned, to take over all the machinery of the foreign court for the 'enforcement,' as we say, of the 'substantial rights': Cook., *Logical...*, *op. cit.* at page 154; A similar point is made in an Introductory note to the American Restatement, "...all-inclusive reference to the foreign law is never made. The difficulties involved would be very great; so great as to be impossible in many instances. A heavy burden would be thrown upon the courts of the forum, and the orderly administration of justice there would be hampered and delayed. A limitation upon the scope of the reference to the foreign law is thus necessary. Such limitation excludes those phrases of the case which make administration of foreign law by the local tribunal impracticable [or] inconvenient...of local policy. In these instances, the local rules of the forum are applied and are classified as matters of procedure...": Introductory Note to Chapter 12 of the Restatement, *Conflict of Laws*, (1934).

[261] Cook has also said, "...the distinction between 'substantive' and 'remedial and procedural law,' as that distinction is involved in legal problems...is drawn for a number of different purposes, each involving its own, social, economic and political problems.": Cook., *Logical...*, *op. cit.* at page 154; Lorenzen makes a similar point when he says, "...courts would do well to keep in mind the real meaning of the rule that all matters of procedure are governed by the local law of the forum. The sole object of the rule is to enable the courts to operate the judicial machinery in the customary manner...There is no reason...why a matter affecting the merits of the case or the operative effects of facts when once proved should not be controlled by the law governing the substantive rights of the parties, provided it is of the nature to pass conveniently and without ethical shock through the legal machinery of the forum." Lorenzen *op. cit.* at page 34; Morgan perhaps goes further when he says, "[T]he influence of a rule upon the outcome of litigation, depends quite as much on the method of its application and the disposition and capacity of the tribunal applying it as upon its content. In these circumstances it is essential to an intelligent pursuit of the general objective that the problem of conflict of laws as to the allocation of function, sufficiency of evidence, presumptions, and burden of proof be accurately analysed. Uniformity of decision in matters where there are so many imponderable and varying factors cannot be expected, but it is not too much to ask that the diversity be based upon considered judgment of the relevant factors rather than acceptance of attractive phrasing of vague concepts or a judicial hunch. The time is past when the decision of important questions should turn on mere classification or on the willingness or unwillingness of judges to pour enlarged meaning into old definitions. It is time to abandon both the notion and the expression that matters of procedure are governed by the law of the forum. It should be frankly stated that (1) the law of the locus is to be applied to all matters of substance except where its application will violate the public policy of the forum; and (2) the law of the locus is to be applied to all such matters of procedure as are likely to have a material influence upon the outcome of litigation except where (a) its application will violate the public policy of the forum or (b) weighty practical considerations demand the application of the law of the forum.": Morgan, "Choice of Law Governing Proof" (1944) 58 Harv. L. R. 153, 195.

[262] *Cheshire and North, op. cit.*. In the passage immediately preceding this quote the authors state, "[The line] should be drawn in the light of the relevant circumstances, one of which is that the purposes of private international law, as distinct from municipal law, requires fulfilment...The crux of the matter is - Why is the distinction between substance and procedure made in private international law? The answer presumably is - For the convenience of the court. The court, when seized of a 'conflict of laws' problem, though bound to apply the *lex causae*, cannot be expected to import all the relevant rules concerned with such matters as service of process, evidence and methods of enforcing judgments..."

means by which the rules of substance, and the principles of justice which underline them, can be achieved. To allow these procedural distinctions to take precedence, necessarily places a strait-jacket on these principles. One of the necessary consequences flowing from this dynamic freedom is the fact that the distinction for domestic purposes need not necessarily accord completely with the split for conflict of law purposes.

It is therefore suggested that we can identify four points. First, that the line between substance and procedure is necessarily blurred, not least because procedural rules may, in the fullness of time, come to be seen as substantive.[263] Second, as already discussed, the position of that line is a question of choice. Third, that it should be positioned so as best to serve "our purpose." In the light of the above discussion, this will normally mean that the courts should identify as much of the foreign law as substantively as possible without unduly inconveniencing itself.

One caveat must, however, be borne in mind. Allowing the distinction between substance and procedure to be drawn in order to do justice and to enforce the principle behind the relevant substantive rule is, broadly, acceptable. However, it is an approach which is not without danger, because it is almost an invitation to the courts to draw the line so as to achieve a desired result whether or not this is indicated by authority and whether or not the underlying principle of the substantive rule is universally or even generally agreed. The call to justice, as we have seen above, has been one of the constraints on the general acceptance of the concept of unjust enrichment theory in domestic law. It would undoubtedly be a retrograde step if a call to unspecified justice to the exclusion of other legal elements were to require these old battles to be re-fought in the conflict of laws arena ,and the underlying logic of this position appears to have been accepted to some extent by

[263] "Bracton has fifty times as much on actions as he has on the law of persons, and it is under this head that we must search in his pages for much of what we now call substantive law.": Street, *The Foundations of Legal Liability*, 1 (1906); Forms will frequently...become substance.": *Warren v Lynch* (N.Y.) 239, 245 (1810); "Substantive law is canonised procedure. Procedure is unfrocked substantive law.": Arnold, T. "45 Harv. L. Rev. 617 at 645 (1932); "The rule that, if a man abuses an authority given him by the law, he becomes a trespasser, *ab initio*, although now it looks like a rule of substantive law and is limited to a certain class of cases, in its origin was only a rule of evidence by which, when such rules were few and rude, the original intent was presumed conclusively from the subsequent conduct.": *Commonwealth v Rubin* 165 Mass. 453, 455, 43 N.E. 200 (1896), *Per* Judge Holmes.

the courts in recent years.[264] However, bearing this in mind, it is submitted that the use of a specific conception of justice defined by the goals identified in the chapter can avoid these problems.

Some commentators have suggested that restitution, as a generally remedial response, should be considered to be procedural and thus ruled by the *lex fori.*[265] This, it has been argued, would produce four major advantages. First, it would greatly simplify the process. However, this is an argument which could be put forward for all areas of law. The fact that it is not accepted is testament to its ability to cause injustice of the type discussed in the first half of this chapter. Second, it is claimed that much of the English law concerned with restitution is indeed remedial. There is an element of truth to this suggestion, but it represents a change of focus. Most specifically, it gives acceptance to the view that the defining characteristic of restitution/unjust enrichment is its restitutionary nature as opposed to the necessary underpinning of unjust enrichment. The discussion in Chapter Four, it is suggested, shows that such an approach is problematic. Third, it can, perhaps reasonably, be argued that a similar position is found in civil systems.[266] Again there is some truth in this suggestion, but it is not, in itself, significant enough to be determinative of the issue. Finally, it has been suggested that because restitution is concerned with society's fundamental view of justice it should, wherever possible, be governed by the law of the forum. In this context, it should be noted that the forum's rules could come to determine questions of restitution in two ways. First, we could argue that all questions of restitution are procedural/remedial and thus established learning determines that they are governed by the *lex fori.* Equally, we could decide that such questions are to be characterised within a grouping known as restitution, and decide that such a group is governed by the rules of the forum. The result will in most cases be exactly the

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[264] *Chase Manhattan Bank NA v. Israel-British Bank (London) Ltd.* [1981] Ch 105,124; *McKain v Miller & Co (SA)* (1991) 174 C.L.R. 1, 48; Bird op. cit. at pages 84-85.

[265] Gutteridge, H.C. and Lipstein, K., *op. cit.* at page 91, "It [*lex fori*] gives uniform treatment irrespective of the personal law of the party or any fortuitous elements which may be present in any particular case. It also relieves the trial judge of the unenviable task of probing into perplexing questions of foreign law."; Bennett, T.W. *op. cit.* at page 144.

same, and therefore it is convenient to consider both these approaches within this section.[267]

With regard to the importance of the forum's rules in the context of restitution, Ehrenzweig asks whether we are to believe, "...that these conceptions of rightness and justice can, without compelling reason, be sought in other than a court's own legal system".[268] It appears that for Ehrenzweig, this proposition is closely related to his belief that restitution is purely remedial.[269] This is a position that, with regard to English law, has been considered and doubted above: this area is equally defined by its trigger. Moreover, this study has already concluded that the purpose of the conflict of law rules is to promote justice by taking cognisance of the rules of relevant foreign jurisdictions. As a result, it is clear that as a general proposition, unless we are to ignore all foreign factors in a case, the present author must accept (as Ehrenzweig must also believe) that the use of rules other than those of the *lex fori* must in some cases promote justice. The question therefore becomes whether there is some factor within the restitution which makes it of particular importance to apply the *lex fori.* Ehrenzweig holds that, "...if 'justice' as a corrective of 'formal law' is the common rationale of restitutionary rules, the forum's conceptions of this justice must ordinarily prevail."[270] Certainly restitution's connection to justice appears particularly defined because of its underlying stance against unjust enrichment. But as we have seen, certainly with regard to the English law important as the trigger is the terminology is chimerical: it could equally be replaced by "reversible" or taken to mean "falling within one of the decided categories in which restitution is possible." If this is not restitution's special claim to justice, then what is? The suggestion that one legal topic is more closely associated with a country's concept of justice can only be considered to be a criticism of that system rather than a reason to treat the chosen subject in a particular way. Nor, it is submitted, does

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[266] "Even the civil law systems might be amenable to such an approach. The enrichment law they inherited was based mainly on the *condictiones* of Roman law, which were simply specialised actions for claiming a certain thing...": Bennett, T.W. *op. cit.* at page 144.
[267] However, these two approaches can be usefully borne in mind during this and the following chapter.
[268] Ehrenzweig, "Restitution in the Conflict of Laws, Law and Reasoning..." 36 N.Y. Univ. L.R. 1298, 1305.
[269] "Laws providing restitution are merely the remedial device by which a result conceived as right and just is made to square with principle and with the symmetry of the legal system.": Ehrenzweig, "Restitution in the Conflict of Laws, Law and Reasoning..." *op. cit.* at page 1314.

the fact that restitution can be seen as a methodology for redressing problems created by other areas necessarily require us to give it a special status. In other words, we must take a view with regard to all subjects as to whether justice is best promoted by applying only the rules of the forum or by taking cognisance of foreign rules or not. Most civilised legal systems have, with the exception of problems clearly in breach of public policy,[271] taken the former view with regard to most, if not all, legal areas. To do otherwise with regard to restitution, it is submitted, is inconsistent with the analysis found in Chapter Four which sees restitution as a subject comparable to other subjects within the law of obligations, and potentially devalues the very basis of the conflict of laws as we understand it today.

Nevertheless, Ehrenzweig believes (as do some unjust enrichment theorists) that any paucity of authority concerning his proposition is a function of it rarely being argued before the courts because it is so obviously correct. With respect, this argument is similar to a starving man claiming he is on a diet. However, Ehrenzweig does produce what he believes to be authority for the application of the *lex fori* in cases of unjust enrichment: specifically,[272] *Fibrosa* v. *Fairbairn* [1943],[273] *Boissevain* v. *Weil* [1946][274] and *Cantiere San Rocco* v. *Clyde Shipbuilding and Engineering Co.* (1923).[275] In *Fibrosa* v. *Fairbairn*, a Polish company attempted to recover an advance payment made to an English company under a contract which was frustrated by the Nazi occupation of Poland at the beginning of the Second World War. Ehrenzweig views the court's decision to allow recovery as a demonstration of the House of Lords' willingness to apply English Law.[276] The fallacy in this argument is clear.[277] The laws of England and Scotland may well have been applied. However, to extrapolate this into the suggestion that the courts were applying a logical system to the effect that all restitutionary issues are subject to the

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[270] Ehrenzweig, "Restitution in the Conflict of Laws: Laws and Reason..." *op. cit.* at page 1305.
[271] *Re Fuld's Estate (No.3)* [1968] P 675, 698.
[272] Ehrenzweig is of the opinion that these cases represent the law before the Law Reform (Frustrated Contracts) Act 1943.
[273] [1943] A.C. 32.
[274] [1946] 1 K.B. 482.
[275] (1923) S.C. (H.L.) 105.
[276] And a similar argument is applied to the Scottish Courts in *Cantiere San Rocco v. Clyde Shipbuilding and Engineering Co.*
[277] See Bird *op. cit.* at pages 105-106; Blaikie *op. cit.* at pages 115-117.

lex fori, is extremely misleading.[278] It is therefore submitted that Ehrenzweig's theoretical justification for the application of the *lex fori* is flawed, and the authority which he claims for its application is at best misleading.[279]

We might note that the requirements of justice are not the only principles under which the imposition of the *lex fori* can be justified. Thus, it is established that the English courts do not "...stir to collect taxes for another country or to inflict punishment for it."[280] It may be possible to argue that rules arising from unjust enrichment are of a penal nature,[281] and the penal exception has been used by some commentators to argue, by analogy, that tort should be subject to the *lex fori*.[282] Bird disputes this position on the basis that unjust enrichment is not concerned with wrongs and does not seek to punish the defendant.[283] She can only fully justify this position by drawing a clear separation between autonomous restitution and "restitution for wrongs" and ignoring the latter.[284] This, in the present author's submission, is not only unnecessary with regard to the present argument but also a step too far with regard to restitution in general. Nevertheless, it is difficult to argue with her underlying premise, that restitution is not fundamentally in the nature of a penal law. This is supported by the belief, stated by Dicey & Morris, that the "best explanation"[285] of the rule is that the enforcement of such claims is, "...an assertion

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[278] "In neither case was foreign law pleaded, and to say of the latter case that Scots law was applied as the *lex fori* and without further discussion is to imply a dispassionate analysis of the competing choice of law alternatives, a task which was not, in the absence of a case founded on foreign law, undertaken.": Blaikie *op. cit.* at page 117.

[279] Demonstrating that courts, for a number of reasons, have a tendency to apply their own law, but not adequately showing that they are doing so in consideration of this, or any, theory. Indeed they show little more than that the question was not raised.

[280] *Regazzoni* v. *K.C. Sethia* [1956] 2 Q.B. 490, 515; Thus Dicey & Morris (Dicey & Morris, Rule 3.) state, "English courts have no jurisdiction to entertain an action:
(1) for the enforcement, either directly or indirectly of a penal, revenue, or other public law of a foreign State; or
(2) founded upon an act of state."

[281] *Ogden* v. *Folliott* (1790) 3 T.R. 326; *A-G. for Canada* v. *Schulze* (1901) 9 S.L.T. 4; *A-G of New Zealand v Ortiz* [1994] A.C. 1, 32, 53; Leflar (1932) 46 Harv. L.R. 193.

[282] Bird, J. "Choice of Law" *op. cit.* at page 103.

[283] "This analogy is questionable in relation to tort but is untenable in relation to unjust enrichment, which, although it imposes involuntary obligations, does not concern wrongs and specifically avoids punishment of the defendant by limiting the measure of recovery to his gain at the expense of the plaintiff. There is no basis on which it could be asserted that the entire law of unjust enrichment forms part of the mandatory law of England.": Bird, J. "Choice of Law" *op. cit.* at page 103.

[284] Or more correctly by saying that the "entire" law of enrichment cannot be mandatory.

[285] Dicey & Morris, 12th ed. *op. cit.* at page 101.

of the rules of one state within the territory of another..."[286] It appears clear that few jurisdictions would consider restitution to be of a penal nature, and as this is a decision which, as far as cases heard in this country are concerned, is made with regard to English law alone,[287]it is possible to state that for the purposes of this study the suggestion that the *lex fori* should apply because restitution is analogous to a penal rule is unfounded.

In conclusion, it is submitted that neither the general nature of restitution, nor issues of convenience or justice, nor more specific factors (like those associated with penal rules) either individually or in combination, provide sufficient basis for us to accept the argument that restitutionary issues should be generally characterised as procedural.

5.3.2: A LOGICAL APPROACH TO TRACING.

In Chapter Three we noted the ambiguous nature of tracing within English domestic law. Many commentators refer to it as merely an identification process, and yet it is also discussed in terms of being a remedy. Moreover, if many of the attributes which the courts appear to assign to it are correct, then it is not unreasonable to suggest that tracing goes beyond the question of identifying where rights reside, to the question of where they *should* be available. In other words, the true status of tracing within our system is less than certain, and this has inevitable consequences when its standing with regard to the conflict of laws is considered.

Dicey & Morris[288] state that with regard to tracing the existence of an obligation to restore benefit and the precise legal concept by which it is to be restored, is governed by the law indicated by Rule (2)(c). Moreover, the characterisation of the relevant "concept" is to be done by virtue of the *lex fori* but with regard to the purpose served by the "concept" in the foreign jurisdiction. However, Dicey &

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[286] *Government of India* v. *Taylor* [1955] A.C. 491, 511, *per* Lord Keith.
[287] Dicey & Morris, 12th ed. *op. cit.* at page 101; *A-G of New Zealand* v. *Ortiz* [1994] A.C. 1, 32; *Metal Industries (Salvage) Ltd.* v. *Owners of S.T. "Harle"*, 1962 S.T.L. 114, 116.
[288] Dicey & Morris, 11th ed. *op. cit.* at pages 1354-1356; Dicey & Morris, 12th ed. *op. cit.* at pages 1477-1488.

Morris appear to equate tracing with the constructive trust, and base much of their reasoning upon *Chase Manhattan Bank*. Given the discussion above, both of these factors must lead us to treat the analysis with, at least, a modicum of caution.

A recent case with which we have become familiar has thrown some light upon the question of tracing which must be carried out through more than one jurisdiction. In *El Ajou* v. *Dollar Holdings* [1993] [289] Millett J. rejected the possibility of tracing at common law as a result of the mixing and electronic transfer which occurred to the relevant funds. In order to succeed, the Plaintiffs were therefore forced to rely upon the equitable rules. However, it was argued that this was impossible because the funds had passed through jurisdictions which failed to recognise equitable ownership.[290] Millett J. was of the opinion that the point did not fall to be decided because questions of foreign law had not been pleaded.[291] However, he went on to suggest that even if the argument were open to DLH (the first defendant) he would reject it.[292] His basis for such a position was two-fold. First, an equitable claim for "knowing receipt" was to be classified as a "receipt-based restitutionary claim." This being the case, it was governed by Dicey and Morris, rule 203(2)(c): i.e. the place of the enrichment. As the defendants received the money in England, the case was to be decided by English law.

He went on to note that "...although equitable rights may found proprietary as well as personal claims, it has long been established that they are classified as personal rights for the purpose of private international law."[293] As a result of equity's ability

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[289] *El Ajou* v. *Dollar Land Holdings plc and another* [1993] 3 All E.R. 717.

[290] The submission being that, "the equitable remedy depends upon the continuing subsistence of the plaintiff's equitable title, and cannot be invoked where the money is transferred to the recipients in civil jurisdictions...which do not recognise the trust concept or the notion of equitable ownership.": [1993] 3 All E.R. 717, 734, *per* Millett J.

[291] "In the absence of evidence, foreign law is presumed to be the same as English law. In the present case no question of foreign law has been pleaded and no evidence of foreign law has been tendered.": [1993] 3 All E.R. 717, 736, *per* Millett J.

[292] *Ibid.*

[293] [1993] 3 All E.R. 717, 737. It is argued in the appendices that this approach may not be logical in all circumstances (see Stevens, R. *op. cit.* at pages 183 - 184). In support of his position Millett J. relied upon a passage by Lord Selborne L.C.. Specifically, "The Courts of Equity in England are, and always have been, Courts of conscience, operating in personam and not in rem; and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or *ratione domicilli* within their jurisdiction. They have done so as to land, in Scotland, in Ireland and in the Colonies, in foreign countries...": *Ewing* v. *Orr Ewing* (1883) 9 App. Cas. 34, 40, *per* Lord Selborne L.C.; *Cook Industries* v. *Galliher* [1978] All E.R. 945, [1979] Ch. 439.

to act upon the conscience of the Defendant, DLH were susceptible to the court's equitable jurisdiction.[294] DLH's position that each successively mixed account must be susceptible to an equitable charge, even if correct, was flawed because it did not matter where the accounts were held: the pertinent question was whether the account holders were in the jurisdiction.[295] However, the premise upon which this argument was based was itself also incorrect:

> "It is not necessary that each successive recipient should have been within the jurisdiction; it is sufficient that the defendant is. This is because the plaintiff's ability to trace his money in equity is dependent on the power of equity to charge a mixed fund with the repayment of trust moneys, *not upon any exercise of that power.* The charge is itself entirely notional...An English court of equity will compel a defendant who is within the jurisdiction to treat assets in his hands as trust assets...Where they have passed through many different hands in many different countries, they may be difficult to trace; but...neither their temporary repose in a civil law country nor their receipt by intermediate recipients outside the jurisdiction should prevent the court from treating assets in the legal ownership of a defendant within the jurisdiction as trust assets."[296]

Stevens is critical of this decision on the basis that if the Plaintiffs had no proprietary interest then no enrichment "at their expense" is discernible, and if they did have such an interest then the normal rules applicable to such a claim should apply.[297] It appears clear from the nature of the claim that the action was not based on such a proprietary interest. It is less clear, however, why Stevens believes that the absence of such a claim necessarily prevents the benefit being at the plaintiff's expense. We have seen with regard to common law money had and received that, arguably, the plaintiff may follow his property through many different hands. Equally, with regard to equitable ownership, the movement of assets seen in the instant case should not in itself have prevented the Plaintiff's action in the absence

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[294] "DLH is, therefore, answerable to the court's equitable jurisdiction as regards assets situated abroad, even in a civil law country. *A fortiori*, it is amenable to the court's equitable jurisdiction as regards assets which were formerly in a civil law country but which it has received in England in circumstances which are alleged to render it unconscionable for it to retain them.": [1993] 3 All E.R. 717, 737, *per* Millett J.

[295] [1993] 3 All E.R. 717, 737, *per* Millett J.

[296] *Ibid.*

[297] "If the plaintiff in *El Ajou* had no proprietary interest in the money received, it is difficult to see how the gain made by DLH was made at the defendant's expense. The proprietary question should be decided in

Footnote Continues on Next Page:

of what Stevens describes as a proprietary interest. However, he is correct to suggest that there was no enrichment if, as appears to be the case, he is approaching the question in a technical sense. Nevertheless, this question has been discussed in Chapter Four and we have noted that Birks has suggested that the courts have been willing to accept enrichment in a practical sense.[298]

To some extent Stevens appears to be unhappy with Millett J.'s analysis of the case with regard to equitable rather than restitutionary principles. However, as we have seen above, this may not be inconsistent with Millett's former belief that such questions are matters of terminology rather than substance. To a large extent Millett J.'s analysis ensures that he is correct in stating that, "There is no need to consider any other system of law."[299] However, in a wider context Stevens is also correct in his assessment of Millett J.'s concentration upon jurisdiction rather than the question of what rules should apply as, "unhelpful".[300] the case certainly appears to do little to clarify the approach which should be taken in circumstances wider than its relatively narrow scope. Moreover, we might question whether the suggestion that "knowing assistance" is a "receipt-based restitutionary claim" entirely matches the belief that dishonest and or knowledge are pre-requisites.[301]

Unfortunately, this discussion brings us little nearer to a fundamental understanding of tracing's relationship to procedural law and therefore to the conflict of law rules which should apply to it. We have seen in Chapter Three that, in a domestic context, the majority view[302] sees tracing as purely identificatory (and this is clearly Millett's opinion[303]). The question is, therefore, whether tracing fulfils the criteria considered in the previous section, to the extent that it should be considered procedural for the purpose of the conflict of laws. With regard to the question of

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accordance with normal choice of law principles. If a proprietary interest was sought in the end product surviving in DLH's hands, this would be the approach taken.": Stevens, R., *op. cit.* at page 213.

[298] Chapter Four: *The Relationship Between Restitution And The Law Of Property.*

[299] [1993] 3 All E.R. 717, 737, *per* Millett J.

[300] Stevens, R. *op. cit.* at pages 183.

[301] See Chapter Three.

[302] As we have seen, it is true both of those who embrace unjust enrichment theory and those who do not.

[303] Although as Bird (Bird, J. "Choice of Law" *op. cit.* at page 86) points out he has on occasion described equitable tracing as "a cause of action" (Millett, *op. cit.* at page 72) and a remedy (*Ibid.*). It is, however, Footnote Continues on Next Page:

convenience it has been suggested that, "Tracing is a collection of technical rules: an English court should find it as convenient to apply foreign rules as it does to apply its own tracing rules."[304] This, it is submitted, is clearly correct: the application of another country's tracing procedure might be somewhat onerous, but not to an extent which should defeat any competent tribunal. We must therefore ask whether there are any questions of justice or principle which should see us categorise tracing as procedural and thus governed by the *lex fori*. Stevens suggests of tracing that, "[it] enables the plaintiff to show that the enrichment the defendant received or which survives in his hands was at his expense...this is as substantive an element of the claim as proving the enrichment is unjustified."[305] This is, of course, a variant of the argument that a right is only as big as the means of enforcing it, and could to some extent be applied to all areas of procedure. However, in the context of tracing, and the discussion carried out in chapters Three and Four, it does appear apposite. There is no doubt that tracing is far more closely connected to the substantive rights of the issue than most of the rules which we normally consider to be procedural.[306] It is for this reason that tracing is widely (although wrongly) referred to as the tracing remedy.[307] We have noted in the above section that the line between substance and procedure is often blurred. This being the case tracing is, at the very least, on the border of these categories, and on balance is best viewed as substantive. It is not a rule which governs the application of a remedy but a methodology without which (in all but the simplest cases) no remedy can exist. Moreover, we have concluded in Chapter Three that in many circumstances tracing does not limit itself to whether a party has rights in property (or personally) but whether they should have such rights. These elements, taken together, suggest that whatever the confused domestic characterisation of tracing, for conflict of law purposes it should be seen as substantive.

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likely that this can be considered to be a slip of the pen or an example of Millett's apparent belief that terminology does not change substance.

[304] Bird, J. "Choice of Law" *op. cit.* at page 86.

[305] Stevens, R., *op. cit.* at page 186.

[306] Bird correctly points to the fiduciary relationship requirement in equitable tracing to demonstrate the way in which tracing is "interwoven" with the "plaintiff's rights": Bird, J. "Choice of Law" *op. cit.* at page 86.

5.3.3: THE QUESTION OF "RESTITUTION FOR WRONGS".

The question of "restitution for wrongs" has been considered in some detail in Chapter Four. It was noted that some doubt exists as to whether the law of England recognised restitutionary damages for wrongs outside the misuse of property. It was concluded that, to some extent, the answer to this question will only become clear when it is further considered by the courts. However, as a matter of principle it is possible to consider how "restitution for wrongs" could be categorised by the courts (should it be fully embraced) for the purposes of the conflict of laws.

In this context it should be noted that the "wrong" in "restitution for wrongs" can be seen as playing two roles. It provides a cause of action and it negates the symmetry between expense and benefit which we normally require in autonomous restitution. This second element, for the purposes of categorisation, could be seen as having two effects. First, it merely adds the possibility of a restitutionary response to a legal element firmly entrenched within another area of law, or second, we could argue that it is of such importance that the cause of action should itself be seen to be part of the law of unjust enrichment. Birks appears clear in his belief that the wrong's connection to restitution is merely as a facilitator of a restitutionary response and not as a restitutionary cause of action.[308] The confusion which may exist is that although this is Birks' stated position, it does not necessarily comply with his overall approach. Thus, as we have seen, he treats the wrong as a factor which vitiates the need for a symmetry of loss and gain and which brings the dispute within a unified conception of restitution/unjust enrichment. This is partly explained by the desire (which it is argued above is unfounded) to see all restitutionary actions bound by one simple definition.[309] It would, perhaps, be more enlightening (although less elegant) to suggest that autonomous restitution can be encapsulated by such a definition and that in certain circumstances causes of actions in other areas of law can lead to restitutionary responses. However, assuming we avoid the

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[307] Hanbury and Maudsley *op. cit.* at page 564. It has been noted that in a domestic context, characterisation is often of little import and that limited weight should be placed on determinations made in such circumstances.

[308] Birks, *Introduction, op. cit.* at page 313.

[309] e.g. a person who has been unjustly enriched at the expense of another is required to make restitution to the other.

potential confusions which this can cause and follow the stated position of Birks (and most other commentators), it is clear that the primary importance of the relevant wrong is founded in the originating area of law rather than in its connection to restitution. In other words, a case arising out of, for example, a tortious wrong has a more relevant connection to the law of tort than the law of restitution even if it results in restitutionary damages.[310] This is true domestically, it is submitted, whether we are categorising the subject descriptively, prescriptively or with regard to convenience. It is for similar reasons to be regarded, at least in the absence of other factors, as the preferred methodology for categorising actions in the context of conflict laws. The question which arises, therefore, is whether there are other factors which should lead us to modify this position. First, we must remember that a single dispute might found actions based in areas of law which give rise to restitutionary damages *and* actions which might correctly be described as being based upon autonomous restitution. In such a situation it is clearly necessary for the court to carefully determine the various causes of action within the context of the foreign element giving rise to the dispute: this should not, however, represent a serious difficulty.

However, some commentators do not accept the view that "restitution for wrongs" is merely a way of describing a wrong determined by another area which can give rise to a restitutionary response, and this position can be further subdivided.[311] One camp, it has been argued,[312] believes that although the cause of action in, for example, tort and "restitution for wrongs" is identical, "...when a plaintiff seeks restitution for a wrong, his cause of action is in restitution...".[313] However, it appears they are not saying (using the analysis above), that the restitutionary factor should be given more importance than the cause of action, but that in such cases

[310] This is in line with the stated position above: i.e. that the defining characteristic of the area is the fact that the law is responding to unjust enrichment rather than responding in a restitutionary manner.
[311] Bird, J. "Choice of Law" *op. cit.* at pages 73-74.
[312] *Ibid.*
[313] Bird, J. "Choice of Law" *op. cit.* at page 72. Blaikie examines another aspect of this question when he says, "...it is easier, though analytically incorrect, to refer the question of contribution between tort-feasors, assuming a quasi-contractual classification of the issue, to the system of law governing the tort. Therefore, while the two questions should be independently solved, there may be a tendency to make the solution of one depend on the solution of the other. But, strictly speaking, the quasi-contractual obligation should be dependent on the tort only for its existence, not its solution.": Blaikie, J. *op. cit.* at page 114.

(although the causes of action in tort and restitution are the same) the cause of action is itself restitutionary. The alternative position is that "restitution for wrong" cases are best seen as entirely and independently part of the law of restitution/unjust enrichment.

Thus although the present author might contend that some of the distinctions are the result of inexact terminology rather than principle, some commentators[314] argue that we can identify three clear approaches: (a) "restitution for wrongs" is merely a methodology by which restitutionary damages can result from causes of action firmly based in and categorised by other areas; or (b) "restitution for wrongs" contains independent causes of action unreliant upon other areas; or (c) the causes of action in other areas and "restitution for wrongs" are the same, but where restitutionary damages are concerned the latter characterisation is correct.

We have discussed possibility (a) in some detail in Chapter Four, and it is probably reasonable to suggest that this is the majority view among English theorists, the most notable exception being Beatson who argues for the second possibility.[315] Bird[316] finds support for position (c)[317] in the American Restatement, the work of Palmer,[318] Friedman,[319] Goff and Jones[320] and *United Australia Ltd* v. *Barclays Bank Ltd* [1941].[321] The present author would suggest that the problems concerning older restitution/unjust enrichment cases, combined with the equivocation found in these specific cases, militates against placing too much weight on their conclusions and that the authors cited by Bird, although informative, do not address the issue in specifically this context.

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[314] Bird, J. "Choice of Law" *op. cit.* at pages 72-75.
[315] Ibid.; Beatson, "The Nature of Waiver of Tort" in *The Use and Abuse of Unjust Enrichment*, Oxford, (1991).
[316] Notably, Bird, J. "Choice of Law" *op. cit.* at pages 72-73.
[317] With regard to tortious wrongs.
[318] Palmer, *The Law of Restitution*, (1978), 51.
[319] Friedman, G.H., *Restitution*, 2nd ed., (1992), 355-356.
[320] Goff & Jones, *op. cit.*, at page 714.
[321] [1941] A.C. 1 and *Chesworth* v. *Farrar* [1967] [1967] 1 Q.B. 407.

We must now, therefore, ask what the effect of positions (a)-(c) would be on the categorisation of "restitution for wrongs".[322] The answer to this question is easiest with regard to proposition (a). If this is correct then the relevant wrong is more closely connected to the cause of action than restitution. Indeed, the restitutionary element of the dispute is no more than a remedial alternative. This being the case, and in the light of the above discussion, it is logical to categorise the problem with regard to the originating law. In other words a dispute arising out of, for example, tort which gives rise to a restitutionary response should be categorised as tortious and subject to the usual rules.[323]

Position (b) would appear to support categorisation by virtue of restitution or unjust enrichment. However, it is difficult to generate much enthusiasm for such an approach. Thus, the present study has doubted the logic of the suggestion that the "wrong" in "restitution for wrongs" can legitimately be used to make the area analogous to autonomous restitution by subtraction. Equally, authority for such a position is limited.[324] However, possibility (b) seems to contain further intricacies which hark back to the argument of McBride and McGrath.[325] Specifically, Beatson[326] divides restitution for wrong cases into two areas: (i) those cases in which the defendant has taken possession of, or misused, the defendant's property; and, (ii) non-property based areas.[327] It will be remembered that McBride and McGrath argued that the law of England does not recognise restitutionary responses for wrongs, and those cases which appear to endorse such a position are merely a misunderstanding of property-based cases. Beatson's argument with regard to position (i) is, therefore, not unrelated to McBride and McGrath's. Thus, (even if he is correct from a domestic point of view) it must necessarily raise the question (from a conflict of law perspective) of whether under his determination,

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[322] In answering this question it should be remembered that it would be legitimate to come to the conclusion that we prefer one explanation for domestic purposes and yet categorise by different methodology for conflict of law purposes.

[323] This position must of course be viewed in the light of the above discussion that the courts categorise issues and not cause of actions: *Macmillan Inc.* v. *Bishopgate Investment Trust plc. (No.3)* [1996] 1 All E.R. 585; Bird, J. "Choice of Law" *op. cit.* at pages 73-74.

[324] See Chapter Four.

[325] McBride, J. and McGrath, P., *op. cit.* at page 34; see Chapter Four.

[326] Beatson, "The Nature of Waiver of Tort" in *The Use and Abuse of Unjust Enrichment*, Oxford, (1991).

[327] For example, the breach of a fiduciary duty.

such cases should be categorised as part of the law of property. This question will be discussed in further detail below. However, at the moment we can make the initial determination that such cases may have a closer connection to property than restitution/unjust enrichment. With regard to the second category of non-property based "restitution for wrongs", we have seen that authority is even more limited, and it has been correctly argued that Beatson himself makes the case for proposition (ii) "Less confidently...".[328] If it were to be accepted, it seems clear that we should categorise questions of non-property based "restitution for wrongs" and autonomous restitution in the same manner. However, given the paucity of authority in support of "restitution for wrongs" and the problems involved in splitting this controversial area into two different groupings for the purpose of characterisation, it is submitted that this approach has little to recommend it.

To summarise position (b), therefore, it has been noted above that the methodology we use to categorise legal elements for the purposes of the conflict of laws need not be convergent with our domestic motivations. However, the uncertain nature of "restitution for wrongs" within our system must have some bearing upon our understanding of the subject. The present author is unable to find any persuasive support for the proposition that "restitution for wrongs" outside the area of property can be founded upon an independent cause of action within the general umbrella of unjust enrichment. The argument in favour of such an approach is little stronger with regard to property-based cases and, this being the case, it is suggested that where problems occur with such cases[329] they will be best viewed according to the rules of property. In other words, the present author would doubt this position in a domestic context and suggest that its value as a tool for characterisation is even more limited.

Position (c) is to some extent an indistinct hybrid of (a) and (b). However, if it is correct then characterisation is potentially problematic. The argument that the elements of the cause of action are the same in, for example, tort and "restitution

[328] Bird, J. "Choice of Law" *op. cit.* at page 74.
[329] And it is likely that such disputes will be rare.

for wrongs" and yet the former characterisation is to be adopted where restitutionary damages are claimed, seems circular. Moreover, if we are to accept this (in the author's view, illogical) interpretation, it would seem to do little to indicate a rational argument in favour of characterisation with regard to restitution (whatever that means in this context), as opposed to the wrong or some *sui generis* category.

The belief that the cause of action in "restitution for wrongs" is in the "wrongful behaviour" which is founded in the originating area is not only the majority view, but is both the simplest and most rational approach.[330] This being so, it is reasonable in this particular case to suggest that the factor which defines actions in this area is the cause of action, not the damages. Although the ability to claim restitutionary damages is significant, it should not outweigh the importance of the underlying cause, and beyond the question of damages it has been argued above that the connection between "restitution for wrongs" and unjust enrichment in the context of restitution by subtraction has been overemphasised. Generally, with regard to the conflict of laws it is usual to categorise a dispute with broad regard to the cause of actions. It is therefore submitted that cases concerned with "restitution for wrongs" should as a rule be categorised by virtue of the area of law which gives rise to the relevant wrong.

This position is however subject to one caveat. We have seen in Chapter Four that doubts and disagreements exist as to whether an action in "restitution for wrongs" could be defeated by a formality required for the originating wrongs[331] for example, time limits imposed on the bringing of a tortious action. It is undoubtedly correct to argue as Burrows does that, "...it is not necessarily the case that the rules (even though expressed as applying to wrongs) are applicable to *all* remedies..."[332] However, it must be the case, if we are to have an integrated system of law, that rules imposed for policy reasons *should* apply to all remedies. If, however, this is not the case then it would suggest that "restitution for wrongs" and other

[330] Position (a).
[331] Birks, *Introduction*, *op. cit.* at pages 346-355; Burrows, *Restitution*, *op. cit.*, at pages 17-18.

originating subjects do, in practice if not in theory, create independent causes of action. Such a determination must have a consequential effect on our characterisation of the former.

5.3.4: A LOGICAL APPROACH TO DISPUTES INVOLVING PROPRIETARY CLAIMS IN A RESTITUTIONARY CONTEXT.

We have seen in Chapter Four that the division between restitution and property law in this country is at the very least problematic. Moreover, the status of a logical proprietary restitutionary remedy has generated much debate. As a result the question of how a particular legal element in this area should be characterised domestically is at best uncertain. Thus, until these issues are comprehensively illuminated by the English courts, we cannot say with any certainty how they will be categorised in the context of the conflict of laws. We can, however, arrive at some tentative conclusions as a matter of principle.

It has been suggested that, broadly speaking, a legal element should be characterised with regard to its trigger, rather than its response. Thus, if a proprietary interest gives rise to a restitutionary response it should normally be characterised as proprietary. What, however, is the situation if, as Birks suggests,[333] unjust enrichment can give rise to a proprietary right? As a matter of principle we might suggest that the cause of action is unjust enrichment and the dispute should be characterised as restitutionary.[334] The present author would, however, suggest that this is one situation in which we should consider a move away from such an approach. This view is taken for several reasons. First, from a practical point of view, until this area is fully considered by the courts the domestic uncertainty surrounding it will make the characterisation of the subject by virtue of unjust enrichment at best problematic and at worst unworkable. For the moment, however, it is likely that the situation will remain confused. Thus, for example, Burrows identified a constructive trust based on equitable wrongs as an example of "proprietary restitution." However, we might equally characterise it as proprietary,

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[332] Burrows, *Restitution*, *op. cit.*, at pages 17-18.
[333] See Chapter Four.

or part of "restitution for wrongs", or with regard to its nature as a constructive trust. This being the case, it might be suggested that characterisation can only be undertaken on a case-by-case basis which takes cognisance of the relative importance of the various interpretations, but potentially with a logical emphasis on the *lex situs.*

A further two reasons for such an approach are correctly identified by Stevens.[335] Specifically, first, that jurisdictions based on the Roman tradition associate restitution with the law of obligations and do not accept "proprietary restitution." Second, whatever the trigger, the logic of having the transfer of movables regulated by the *lex situs* is unchanged. Thus, it is not unreasonable (at least until we fully delineate the relationship between restitution and property) to believe that the law of the jurisdiction with control of the assets may have a role to play in their transfer and that such an approach would comply with the parties' reasonable expectations.[336]

However, Stevens' solution is based on the belief that the trigger is proprietary, while the reclamation is restitutionary. He does not consider the possibility of restitution giving rise to property rights. Such a possibility may well suggest that a major reassessment of the area would be necessary. As a result, the conclusion that "proprietary restitution" should be seen as governed by the usual property rules is only a stop-gap solution. It is based primarily on the uncertainty in this area. If the courts clearly and logically identify a proprietary remedy based on the trigger of restitution/unjust enrichment, it may be that the need to logically characterise such an element as restitutionary for conflict of laws purposes will outweigh Stevens' other objections. In other words, the application of the *lex situs* may make practical sense, and legal sense where a proprietary right creates a restitutionary remedy. However, if we reach a situation in which unjust enrichment can clearly give rise to proprietary rights, we might consider whether practical sense should give way to legal theory, and a uniformity of approach.

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[334] In the sense that the word "restitution" connotes an area rather than a description of recompense.
[335] Stevens, R., *op. cit.* at pages 182-183.

5.3.5: A LOGICAL APPROACH TO THE CHARACTERISATION OF CONSTRUCTIVE TRUSTS.

It might be suggested that the constructive trust is (generally) the methodology by which property claims are enforced, and therefore the discussion in the previous section should, of necessity, apply to them. However, they have such a distinct nature and have generated such discussion and controversy that they warrant independent comment.

Dicey & Morris take the view that constructive trusts are restitutionary and, as a result, Rule 201 applies.[337] However, there is little doubt, in the light of the above discussion, that this view appears overly simplistic.[338] Thus we have seen that difficulties arise both with regard to the nature and triggers of constructive trusts. Specifically, therefore, it might be questioned whether such trusts are substantive or remedial and whether they are concerned with property, restitution, equity or obligations.

With regard to the former question, *Westdeustche Landesbank Girozentrale* v. *Islington London Borough Council*[339] suggests that in the English system there is no single answer: both remedial and substantive constructive trusts are recognised. This being the case, the question arises as to whether we should we treat remedial and substantive trusts differently for the purposes of the conflict of laws. In *Chase Manhattan Bank v. Israel-British Bank (London) Ltd.*[340] Goulding J. was of the opinion that, at least domestically, the importance of the split between right and remedy was limited:

> "Within the municipal confines of a single legal system. right and remedy are insolubly connected and correlated, each contributing in historical dialogue to the development of the other, and save in very

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[336] *Ibid.*
[337] *Dicey and Morris*, 11th ed. *op. cit.* at page 1097; see Stevens, *op. cit.* at page 215.
[338] See, for example, Stevens, *op. cit.* at page 215; Barnard *op. cit.* at pages 474-477.
[339] [1996] 2 W.L.R. 802, 838.
[340] *Chase Manhattan Bank v. Israel-British Bank (London) Ltd* [1981] Ch. 105.

> special circumstances, it is idle to ask whether the court vindicates the suitor's substantive rights or gives the suitor a procedural remedy as to ask whether thought is a mental or cerebral process." [341]

However, he appears to go beyond this by apparently arguing that even in the US, a constructive trust is necessarily substantive by virtue of its creation by substantive rather than remedial rules.[342] Whether this is a fully accurate description of US law is, as Goulding J. appeared to accept, a difficult question.[343] However, it is submitted that it is not unreasonable to suggest that even remedial constructive trusts should be treated as substantive for the purpose of the conflict of laws. Thus Barnard suggests, first, that "...a remedy is predicated on, and serves to vindicate substantive rights...".[344] We have previously seen the argument that a right is only as big as its remedy and concluded that although it has power, it is inconclusive. Perhaps as a consequence, Barnard bolsters the argument with the suggestion (which we have also noted above) that the line between substance and procedure[345] is to be drawn with regard to whether the interest of justice will be compromised by a court attempting to apply foreign rules. He provides both Canadian[346] and Australian[347] authority for this proposition. These cases are ambiguous for our present purposes; nevertheless the underlying rationale is, it is submitted, sound. The remedial constructive trust is very closely related to both the substantive institution and the party's underlying rights. Moreover, it is unlikely that the application of foreign rules would be of such a degree of complexity that it should be allowed to outweigh the potential advantages of doing so.

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[341] [1981] Ch. 105, 124; it should be noted that the judge considered New York and English law to be substantively the same, and therefore a decision on the specific issues raised was not necessary.
[342] *Op. cit.* at page 127.
[343] *Op. cit.* at page 123.
[344] Barnard, L., *op. cit.* at page 476. Burrows makes a similar point about *Chase Manhattan* when he says, "It may be doubted, however, whether the 'substantive institution as against a remedy' debate over the constructive trust was of relevance. For even if one were indisputably concerned with a remedy, the category of procedural law drawn for the purpose of the conflict of laws is surely concerned with how one goes about obtaining relief (i.e. practice and procedure) and does not encompass the law on remedies. That is, it would have been consistent to treat the constructive trust as a remedy while accepting that it fell within the substantive and not procedural law.": Burrows, *The Law of Restitution*, London (1993), 497.
[345] For the purposes of the conflict of laws.
[346] *Pettkus v. Becker* (1981) 117 D.L.R. (3d) 257.
[347] *United States Surgical Corp. v. Hospital Products International Pty. Ltd.* [1982] 2 N.S.W.L.R. 766.

Having established that a substantive interpretation is to be favoured, we must now ask to what legal category the constructive trust belongs? Again *Chase Manhattan* is informative. Thus, we have seen that Goulding J. was of the opinion that it was the payer's retention of an equitable interest which operated on the conscience of the transferee and facilitated the imposition of a constructive trust. However, in *Westdeutsche Bank,* Lord Brown Wilkinson was of the view that there could be no retention of equitable property in money where, "...prior to the payment to the recipient bank, there was no existing equitable interest..." and that no effect could be had upon a person's conscience if he was unaware of a mistake.[348] His Lordship considered that the decision could be justified on the basis that, although mere receipt of money in ignorance of the mistake was not enough to give rise to a trust, retention of it after such knowledge was available could give rise to a constructive trust.[349] Millett suggests that this cannot be correct. He argues that the plaintiff had intentionally, though mistakenly, given up all beneficial interest in the money and that notice of the existence of a ground for restitution is merely notice of a personal right and does not give rise to a proprietary remedy. For this reason he suggests that *Chase Manhattan* was wrongly decided and is critical of *Westdeutsche Bank.*[350] Moreover, he makes the general point that, "Only equity provides proprietary remedies, so we must turn to equity for the answer. It is my thesis that the law of restitution tells us only that there is a right of recovery...in order to discover whether there is a proprietary right we must turn to the law of property."[351] However, as we have seen in Chapter Four, Birks has suggested that *Chase Manhattan* can be explained by *de facto*, if not *de jure*, unjust enrichment. We have noted above that Birks' solution provides a theoretically logical approach. However, as a matter of authority, the present author would suggest that Millett is correct. Until these issues are further debated by the courts, it may be impossible to reach a conclusive determination on these issues. However, this debate is included to demonstrate that the constructive trust is susceptible to a number of logical interpretations.

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[348] [1996] 2 W.L.R. 802, 837.
[349] [1996] 2 W.L.R. 802, 837-838.
[350] Millett., P., "Equity's Place in the Law of Commerce", *op. cit.* at pages 22-23.
[351] *op. cit.* at page 21.

Moreover, even in less controversial areas it is possible to question Dicey & Morris' view that the constructive trust is necessarily restitutionary. Thus, as Stevens points out, some constructive trust cases do not appear to have a restitutionary nature[352] and a range of different triggers seem to be at work. As a result, it is submitted that the attempt to define an all-encompassing characterisation for the constructive trust is doomed to failure.[353] Thus, the courts must examine the issues at a more detailed level. This will require them to determine the basis upon which the imposition of the constructive trust is asserted, and characterise them by virtue of that right or trigger. This again requires the courts to accurately analyse and explain the nature of their decisions and make potentially difficult determinations where competing explanations apply.[354] Nevertheless, it is, in the present author's view, the only logical approach to legal elements which can arise in a range of circumstances and which have no other overriding relationship.

We have now considered the purpose of the conflict of laws, the nature of characterisation and its practical application. However, characterisation is, as we have seen, only a step along the way. We must now consider whether the application of law which flows from such characterisation is undertaken in a logically defensible way and what reforms can be suggested. This will be the task of the next, and final, chapter.

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[352] Stevens *op. cit.* at page 215; Re Rose [1952] Ch. 449; *Pettit v. Pettit* [1970] A.C. 77. However, as this study demonstrates, the present author would not agree with the characterisation of various cases proposed by Stevens at page 215.
[353] For a differing view see Bernard, *op. cit.*.
[354] Stevens *op. cit.* at page 216.

CHAPTER SIX: RESTITUTION/UNJUST ENRICHMENT AND THE CHOICE OF LAW RULES.[1]

6.0: INTRODUCTION.

> "Given the theoretical disputes that have also raged regarding the basis of the law of restitution, it is not surprising that the question of what are the correct choice of law rules for restitution does not admit of a straightforward or uncontroversial answer."[2]

> "I...believe that the law should apply to all citizens, one standard for natives and others not differently." [3]

The earlier chapters of the study have identified the principles which underline, bind together and explain the English tracing response to fraud. They then considered how such potentially diverse concepts, which arguably have had (until recently) no accepted category within English domestic law, could effectively be categorised for the purpose of the conflict of laws. The difficulty of this task should not be underestimated given the confusion which has dogged this area over several centuries. Nevertheless, it must be remembered that characterisation, in this context, is not an end in itself. Even if one can logically group these areas in a way which emphasises their similarities rather than their differences, this exercise will only be of practical value if it leads to a just and logical application of rules to a dispute containing a foreign element. Unfortunately this procedure is also, potentially, problematic in the extreme.[4] The present chapter will consider the various possibilities available to solve these problems, and attempts to identify the difficulties associated with each. These various possibilities will then be tested

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[1] See generally, Gutteridge, H.C. and Lipstein, K, *op. cit.*; Ehrenzweig, "Restitution in the Conflict of Laws, Law and Reasoning..." 36 N.Y. Univ. L.R. 1300; von Mehren, A.T; "Choice-of-Law Theories and the Comparative-Law Problem" 23 A.J. Comp. L. 751; Cohen, S. "Quasi-Contract and the Conflict of Laws" (1956) 31 L.A. Bar Bull. 71; Zweigert and Muller-Gindullis "Quasi Contract", Chapter 30, Vol. III of Lipstein, K. (Ed) *International Encyclopaedia of Comparative Law* (Tubingen, 1974); 64 Blaikie, J. *op. cit.*; Bennet, T.W. *op. cit.*; Bird, J. "Choice of Law" *op. cit.*.

[2] Burrows, *Restitution*, *op. cit.* at page 491.

[3] Former US President George Bush, to the Singapore Broadcast Corp., 24 April 1994.

[4] "It is not always possible to deal with matters of conflict in a way which is either elegant in the legal sense or logical. Rules which are designed to have extra-territorial effect must often be moulded on lines which offend an orderly mind because their purpose may be to meet a situation which is complicated by differences in the structure of society and differing economic methods.": Gutteridge, H.C. and Lipstein, K, *op. cit.* at page 82.

against the priorities and goals identified in the earlier chapters of this study, before attempting to suggest a logical approach for the future. The purpose of this exercise is to discover whether restitution/unjust enrichment provides not only a logical solution to the domestic deficiencies in our present system but also represents a comprehensive international solution.

6.1: THE PRIMARY RULES THAT MAY BE APPLICABLE TO RESTITUTION/UNJUST ENRICHMENT.

Gutteridge and Lipstein identify four broad methodologies open to a particular system. Specifically:

> "(A) The domicile either (i) of the party who is impoverished, or (ii) of the party who has been enriched.
> (B) The *lex loci actus*, i.e., either (i) the law of the place in which the unjustifiable enrichment occurs, *or* (ii) the law of the place in which the transaction takes place which subsequently results in the enrichment.
> (C) The proper law of the quasi-contractual obligation ascertained by means of the presumed intention of the parties and by way of analogy to the case in contract.
> (D) The *lex fori,* i.e., English Law." [5]

With some additions and modifications these are the possibilities which will now be discussed.

6.1.1: PERSONAL LAW.

Where the parties share a common personal law, it might be considered logical to apply this shared law to any dispute between them. Equally, where the parties have different personal laws it is, arguably, reasonable to suggest that a party should not be forced to defend himself with regard to an unfamiliar set of rules: thus the defendant's personal law should apply. Indeed, these arguments (with regard to jurisdiction) appear to find some favour in the Brussels and Lugano Conventions and this approach does, at least *prima facie,* have the advantage of simplicity. Moreover, it can be supported by an argument similar to that used by Ehrenzweig in favour of the *lex fori* approach: i.e. restitution is based upon notions of justice and a party has a right to have his personal law decide such issues.[6] As a matter of justice it is not entirely clear why we should assume that it is wrong to force a party to defend himself in an unfamiliar environment, but reasonable to require a plaintiff,

[5] Gutteridge, H.C. and Lipstein, K, *op. cit.* at page 88. Many of the arguments concerning the applicability of the *lex fori* were addressed in Chapter Four with regard to the spilt between substance and procedure.
[6] Blaikie, J., *op. cit.* at page 118.

whose case may be extremely strong, to attempt to enforce his rights in such a way. Moreover, from a practical point, identifying the relevant personal law may be problematic and from a jurisprudential perspective simplicity may not be the greatest virtue. With these caveats in mind, in order to identify a party's personal law one could refer to various connections: for example, nationality, presence, residence, habitual residence, domicile, domicile of choice, domicile of origin or domicile of dependence.

The use of national law in this context is necessarily problematic. With regard to federal jurisdictions like the United States or non-federal states which utilise more than one legal system,[7] there are clear difficulties in identifying the relevant national law. At a mundane level such an approach can be compromised by citizens who maintain duel nationality. On a more fundamental level, with regard to the present study, the party's national law may be totally unrelated to the disputed enrichment.[8]

To a limited extent, these problems can be addressed by ignoring purely historical connections and referring to a party's governing law by consideration of his presence, residence, habitual residence or domicile.[9] The presence of a party within a particular jurisdiction is clearly of importance, with regard to the jurisdictional issues involved in a particular case. However, in suggesting no social, economic, historical or defined temporal connection to a particular jurisdiction, it is at a common-sense level of little apparent use in determining the rules that should apply within a particular jurisdiction. Nor does it, of necessity, logically connote any relevant connection to a particular dispute.

Residence appears to overcome some of the problems associated with nationality and presence. Thus, while nationality may identify no real connection to a particular system, residence does (at least) show that the party has made a demonstrable choice to associate himself with the jurisdiction of his residence. Equally, by

[7] For example, the United Kingdom.
[8] Even in 1941 Gutteridge and Lipstein were able to summarily dismiss this possibility in the following terms, "A solution of this nature would be unacceptable for reasons which have been stated so often that it is unnecessary to repeat them.": Gutteridge, H.C. and Lipstein, K., *op. cit.* at page 83.
[9] This could include, domicile of choice, origin or dependence.

introducing a degree of temporal permanence it counters one of the main arguments against the use of presence. Perhaps as a function of these elements Smith notes that two characteristics can be used to demonstrate residence: duration and intention.[10] Neither is, however entirely convincing in itself.[11] As a result, Smith suggests:

> "If we interpret intention, as we do in other areas of the law, not simply in terms of desire or aspiration but in terms of realistic purpose or the objective of bringing about a result, we have the basis for marrying intention and residence into a coherent concept of 'home' which would satisfy the requirements of a test for personal law."[12]

However, as Smith himself accepts, intention is a difficult test and his formula does not define "...the necessary intention and residence which will suffice."[13] Indeed, although he is correct to suggest that intention is an integral part of many areas of law, it should not be forgotten that it is rarely an uncontroversial one.

Despite these problems, in the English system, ordinary residence has been taken to imply some continuity of presence, excepting temporary or accidental absence.[14] However, different interpretations of residence and/or different types of residence ensure that one can be resident in more than one country at a time. Equally, the English system has recognised not only "residence" but also "ordinary" and "habitual" residence. In *Shah* v. *Barnet London Borough Council*[15] Lord Scarman said of "ordinary residence", "[it] refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration."[16] However, it may still be possible to be an ordinary resident of more than one country at any particular time. As with nationality this is necessarily, in the absence of further clarification, problematic if one is to use residence as a relevant connecting factor. A potential solution to this problem is to ask where the party is

[10] Smith, R., *Conflict of Laws*, *op. cit.* at page 20.
[11] One may intend or wish to live in a country without actually doing so; one may be living in a country for a long period involuntarily: Smith, R., *op. cit.* at page 20.
[12] Smith, R., *op. cit.* at page 21.
[13] *Ibid.*
[14] *Levene* v. *I.R.C.* [1928] A.C. 217 H.L; Collier, *op. cit.* at page 58.
[15] *Shah* v. *Barnet London Borough Council* [1983] 2 A.C. 309.

"habitually resident." It requires no proof of intention and is shown by "regular physical presence which must endure for some time."[17] As such, it is said to represent a compromise between domicile and the *lex patriae*. Again, however, using this definition, it appears that a party can be "habitually resident" in more than one country.[18]

In the simplest terms, a person's domicile is his "permanent home." Unfortunately this is clearly too imprecise to be legally useful. In 1858, Lord Cransworth V-C attempted to give meaning to the concept by suggesting that a person is domiciled in the country which he regards as his permanent home.[19] But again this goes only a short way to giving a usable indication for the purposes of the conflict of laws. In response to this flexibility of thought, the courts set about defining domicile in a manner which arguably moved the debate too far in the other direction.[20] However, there is little profit in examining these technicalities in detail, and a brief consideration of their structure will suffice for the purposes of the present discussion. Within the umbrella concept of domicile there are three more detailed components: domicile of origin, domicile of dependence and domicile of choice. The domicile of origin is determined by the domicile of one of the relevant party's fathers[21] at the time of birth. The domicile of origin will stay with a person throughout his life and is generally used as a supplemental tool where other definitions of domicile do not apply. The domicile of choice is, as its name suggests,

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[16] [1983] 2 A.C. 309, 343.

[17] *Cruse* v. *Chittum* [1974] 2 All. E.R., 940.

[18] In *I.R.C.* v. *Lasaght* [1928] A.C. 234 H.L. the defendant was ordinarily resident in Ireland where he usually lived, but also ordinarily resident in England where he spent approximately seven days per month in hotels.

[19] *Whicker* v. *Hume* (1885) 7 H.L.C. 124, 160.

[20] "Domicile in its present form is a concept whose time is passed. In the nineteenth century when the English courts were trying to decide between nationality and domicile, the concept of domicile which then obtained was much more like the concept of habitual residence than the highly technical concept [accepted today]...In the event domicile won the day and the English courts spent the rest of the century and the early part of this one refining the concept...[it]...took on an increasingly legalistic dimension with all sorts of unfortunate consequences which remain with us today.": Smith, R., *op. cit.* at page 23; it is worth noting that a person must be domiciled in a recognised legal area. Thus, as Collier notes, this, "...coincides with a state such as France, Italy or the German Federal Republic if that state possesses only one system of law. But this is not so if the state is a federal state or one which, like the United Kingdom, contains several different districts, each having its own legal system. Thus, a person must be domiciled in, say Iowa or California and not the United States of America, or England or Scotland, not the United Kingdom. If an Englishman goes to the United States intending to stay there permanently but does not settle in anyone of the...states of the Union, he continues to be domiciled in England (*Gatty* v. *Attourney-General* [1951] P.444.).": Collier, *op. cit.* at page 40.

the place in which a party (over sixteen years of age[22] and free of mental incapacity) resides in with the intention of making it his permanent home.[23] The advantage of this methodology is said to be its ability to identify a single applicable system. The final possibility with regard to domicile is that of dependence. This applies to a legitimate child under sixteen[24] and depends upon the domicile of his father.[25]

All these possibilities potentially present difficulties, nevertheless such problems have not prevented a number of commentators, both in this country and abroad, from suggesting that the personal law, in some or other of its guises, should be used to determine the applicable law in cases involving unjust enrichment. Thus Burrows says that: "Where the loss (or wrong) and gain occurred in different countries other factors must be taken into account, such as domicile, residence or place of business of the parties."[26] Equally, the *American Restatement* lists, "Domicile, residence, nationality, place of incorporation and place of business of the parties..."[27] as relevant connecting factors in certain circumstances.

The underlying rationale of the personal law is what Bird describes as, "...the mistaken view that people carry their own laws with them, no matter where they are and no matter what activities they are engaged in."[28] This goes to the fundamental problem with this approach: it cannot guarantee to identify any deep-seated connection with the dispute, the cause of the dispute or the underlying relationships from which the dispute grew. This is true in general but is, perhaps, particularly relevant with regard to unjust enrichment. Its apparent attraction is that, despite potential problems, the application of logical rules can make it easy to identify. This

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[21] The mother's domicile will be determinant where the child is illegitimate or the father is dead at the time of birth.
[22] Domicile and Matrimonial Proceedings Act 1973 s. 3(1).
[23] *In bonis Raffenel* (1863) 2 Sw & Tr 49; *Winans* v. *Att-Gen* [1910] A.C. 27; *Re Lloyd Evans* [1947] Ch 695; *Re Flynn* [1968] 1 All E.R. 49; *I.R.C.* v. *Duchess of Portland* [1982] Ch. 314.
[24] A child who marries below this age acquires his own domicile: Domicile and Matrimonial Proceedings Act 1973 s. 3(1).
[25] Subject to several possible exceptions: Dicey & Morris, *op. cit.*.
[26] Burrows, *Restitution*, *op. cit.* at page 492; equally the American Restatement makes limited reference to the personal law; see also Zweigert and Kotz, *op. cit.*.
[27] Rule 221(2)(d); Lipstein also notes that, "...the domicile of the person enriched is the test preferred by the Austrian and the Czecho-Slovak Courts..." Gutteridge, H.C. and Lipstein, K, *op. cit.* at page 85.
[28] Bird, J. *op. cit.* at page 107; Bird also notes that one could argue that the parties might have the expectation that their personal law will apply. This is at best a weak argument, indeed in many cases of unjust enrichment the parties may be unaware of each other's personal laws: *Ibid.*

simplicity is, however, a mirage, given the different methods which can be used to identify a relevant personal law and the possibility of multiple defendants.[29] As a result, it is reasonable to suggest that the personal law is potentially of primary importance with regard to questions of personal status, for example, capacity to marry or entry into certain contracts,[30] but its relevance with regard to the present study must remain limited.[31]

6.1.2: THE LAW OF THE PLACE (LEX LOCI).

The law of the person fails for our purposes, mainly because it cannot reliably establish a close enough link to the fundamental core of the relevant problem. If we examine tracing arising from fraud from the restitutionary viewpoint,[32] we are concerned with an expense, a gain and a factor which makes that gain unjust. The physical location of any of these factors is likely to have a closer connection to the fundamental dispute between the parties, than their personal law. The truth of this position, perhaps combined with the previous popularity of the vested rights theory,[33] has prompted various commentators to suggest that physical location might be a more appropriate element than the personal law. The most commonly cited locations are (a) the place of impoverishment; (b) the place of enrichment; and (c) the place in which the act that caused the enrichment took place. The *lex loci* approach was particularly popular in the United States during the early part of the twentieth century[34] but has also found favour in Europe[35] and in the United

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[29] Bird, *op. cit.* 107.

[30] Smith, R., *op. cit.* at page 34.

[31] Gutteridge and Lipstein say, with regard to the domicile, "This seems inappropriate. Suppose that A, a domiciled Frenchmen, enters into a contract with B, a domiciled Englishman, for the hire of a seat from which to view a coronation procession in England. A pays 5000 francs in advance to B in Paris, but the procession is subsequently abandoned. To apply either the French Law (the law of A's domicile) or English law (the law of B's domicile) would seem to be arbitrary, for why should either domicile be preferred to the other? Moreover, it is conceivable in cases of this kind that A might be unaware of the exact domicile of B or *vice versa* or that the parties would, in the present state of the law, have to take counsel's opinion before they could in any way be sure of their ground.": Gutteridge, H.C. and Listen, K, *op. cit.* at page 89.

[32] As it was concluded above that we must.

[33] Bird, *op. cit.* 108.

[34] See, for example, *Restatement on the Conflict of Laws*, (1935), rules 452, 453, "Where a person is alleged to have been unjustly enriched, the law of the place of enrichment determines whether he is under a duty to repay the amount by which he is enriched."; Beale. J.H., *A Treatise on the Conflict of Laws*, (1935), 1429-1430; Equally, the Second American Restatement states that, "(2) Contacts to be taken into account in applying the principles of §6 to determine the law applicable to an issue include:...(b) the place where the benefit or enrichment was received.(c) the place of the act conferring the benefit or enrichment was done...": *Restatement of the Law Second: the Conflict of Laws 2nd* (1971) § 221.

[35] EEC Preliminary Draft Convention on the Laws Applicable to Contractual and Non-Contractual Obligations, art. 13, (1973) 21 A.J.C.L. 587; see also Bird *op. cit.* at page 108.

Kingdom.[36] However, it is arguable that this approach should be rejected as a function of its history: i.e. jurisdiction-selecting choice of law rules of this type are based upon the vested rights theory which, as we have seen, is now discredited.[37] This argument has power and it cannot simply be dismissed as, for example, Bird does, by saying that despite the theoretical problems it may still be effective.[38] We could equally claim that the application of a law which has some connection and whose territory has the largest economy, "...may still point to the law most closely connected with the obligation under consideration..."[39] The relevant question is why? Having said this, the importance of a rule which is capable of advancing the requirements of justice, even if it suffers from some theoretical difficulties cannot be underestimated. Indeed, the validity of this position has been discussed above with regard to Dicey & Morris's refusal to engage in a detailed discussion of the theories underlying the conflict of laws. As a result, it is intended to examine the applicability of the *lex loci* before deciding whether its apparent theoretical defects should be allowed to outweigh its practical advantages.[40]

6.1.2.1: Place of the Impoverishment.

In dealing with unjust enrichment it is perhaps most natural to examine the place of the enrichment the case for looking at the place of impoverishment seems less clear cut. However, Cohen has championed the former approach and suggests that the place of impoverishment is as easy to apply as the place of impoverishment and is more likely to lead to the "seat of the obligation."[41] This approach seems

[36] Gutteridge, H.C. and Listen, K, *op. cit.*.

[37] Blaikie, *op. cit.*; Thus, Bennet takes the view that, "...the most cogent criticisms of the *lex loci delicti rule* is its presupposition of vested rights doctrine; and it is this criticism which highlights the illogicality of the *lex loci condictionis*. If we attempt physically to locate enrichment by holding, for example, that it occurs in the place where payment was made or where the enrichment occurred, it suggests that the law of the place creates a right which the forum is then bound to enforce. The problems with this thinking, and with the vested rights doctrine in general, is, of course, the circularity of reasoning, a problem that is evident here. How does the forum know that a right to restitution has arisen until the appropriate *lex cause* has been selected.": Bennet, T.W. , *op. cit.* at page 149.

[38] Bird, J. *op. cit.*, at page 108.

[39] *Ibid.*

[40] Or indeed whether the theoretical defects have been overemphasised or misunderstood.

[41] "It is submitted that the place of the loss rule is at least as easy to apply as the place of the enrichment rule and that it will more often lead to the law of the place which is the real seat of the obligation. Seldom if ever will the place of the loss have only a casual connection with the transaction giving rise to the quasi-contractual obligation. Adoption of the place of loss or injury rule would obviate the need for several different rules to govern quasi-contract obligations arising out of different fact situations.": Cohen, "Quasi-Contract and the Conflict of Laws" 31 L.A. Bull. 71, 78; Cohen is the most prominent (and perhaps only) commentator to propose a universal rule of this type.

unorthodox because we are more familiar with unjust enrichment theorists emphasising the plaintiff's gain, rather than the defendant's loss. Nevertheless, it has been argued above that this emphasis (in part at least) serves the needs of the theorists rather than the parties to the dispute or justice. As a result, it cannot be dismissed out of hand on the grounds that it appears to be at variance with the prevailing academic view of unjust enrichment.[42]

One of the most important advantages claimed for the place of impoverishment is that it may be easier to identify than the place of enrichment.[43] Bird takes a contrary view[44] and uses *Hong Kong and Shanghai Banking Corp. v. United Overseas Bank*[45] to illustrate her point.[46] However, it does not seem unreasonable to suggest that problems with such cases could be overcome, for example, by holding that a party is impoverished at the point at which their money is fraudulently dealt with by a party, or is dealt with by a party in a manner which goes beyond their authority, or in a manner which compromises the defendant's rights. Mrs Untalan was an employee of the Plaintiff; it therefore seems likely, for example, that under the first test the impoverishment arose in Singapore and under the second test it would depend upon the conditions of her employment. Such determinations may well be easier in unjust enrichment claims that involve complex money laundering techniques than attempting to discover the place of enrichment. In other words, the place in which a fraud is initiated may be easier to identify than the place of its completion or the place at which the funds eventually come to rest.[47]

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[42] Indeed, even theorists such as Burrows accept that enrichment, in this context, has wrongly been emphasised to the detriment of the "at the expense of" element.: Burrows, *The Law of Restitution*, *op. cit.* at pages 497-500.

[43] Cohen, "Quasi-Contract and the Conflict of Laws" 31 L.A. Bull. 71, 78.

[44] Bird *op. cit.* at page 113.

[45] *Hong Kong and Shanghai Banking Corp.* v. *United Overseas Bank* [1992] 2 S.L.R. 495. In this case a Mrs Untalan fraudulently transferred the Plaintiff's money from the Manila branch of a Bank to an account of the same Bank in New York. The money was then transferred at Mrs Untalan's request to the Plaintiff's account in Singapore. Subsequently, she withdrew the money and deposited it with the Defendant's Singapore branch.

[46] "It is not obvious whether the plaintiff was impoverished in Manila, where the fraud was commenced, or in Singapore, where the money was first withdrawn from one of the plaintiff's branches...": Bird *op. cit.* at page 113.

[47] The final resting-place of the funds and the place of enrichments might be considered to be potentially different. However, similar problems will be experienced in identifying them.

Nevertheless, Cohen's apparent suggestion that it should be adopted because it might lead to the correct solution in more cases than its rivals, does little to reassure one that it is underpinned by any overriding theoretical justification. Moreover, as Blaikie[48] points out, part of the reason for Cohen's proposition appears to be his belief that the only alternative is the adoption of "several different rules"[49] but this does not appear to be entirely tenable, and even if it is, it remains a far from conclusive argument for his approach. As a result, while the details of Bird's argument with regard to Mrs Untalan may be strained, her suggestion that, "...it is unreal to suppose that Mrs Untalan's liability should depend on the answer to this question"[50] is broadly correct. The question is whether this is more true for the place of the impoverishment than, for example, the place of the enrichment.

This range of difficulties, along with a general lack of authority militates against the adoption of the place of impoverishment as a logical single rule. It may, however, be of value within the framework of a multi-rule system. Thus, as we have seen above, Burrows suggests the application of the law of a particular place, where the enrichment and impoverishment occur. This will be discussed in greater detail below however, one point should be made at this juncture. We are trying to discover a rule, or set of rules, which best identify the laws which are most likely to bring about justice as between the parties. Enrichment and loss are at the core of the law of restitution. If, therefore, both elements occurred in the same location it is not, *prima facie*, unreasonable to apply the law of that place. Bird, however, argues that, "Given the difficulty of finding an appropriate rule for the residual cases,[51] it is preferable to focus on either the place of enrichment or the place of impoverishment."[52] For the moment, comment on this will be limited to the suggestion that it seems somewhat incongruous to avoid a rule which comes relatively close to achieving its aim[53] in favour of a wider and less exact rule, merely on the basis that the former rule will be more inclusive (as a direct result of its inexactitude) and therefore avoids the need for subsidiary rules.

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[48] Blaikie, J., *op. cit.* at page 122.
[49] Cohen, S. *op. cit.* at page 78.
[50] Bird *op. cit.* at page 113.
[51] i.e. those cases in which the enrichment and impoverishment occurred in different places.
[52] Bird *op. cit.* at page 112.
[53] i.e. identifying the place with the best/closest connection.

6.1.2.2: The Place of the Enrichment.

We have noted above that restitution/unjust enrichment is normally considered to be a receipt-based subject. As a result, if we are to found our approach on location, the place of the enrichment would appear, at first sight, to provide the most logical methodology. For this reason it has proved to be a central factor in the approach of a number of commentators.[54] For example, Gutteridge and Lipstein argue that the *lex loci actus* is the "...best solution..." and, "...there seems little doubt that the *locus* is the place in which the payment of the money or the transfer of property occurs which constitutes the unjustifiable enrichment."[55] Despite recognising difficulties[56] with this approach the authors argue that the reason for adopting the place of enrichment is that it will, "...in the great majority of instances be the law which has the closest connection to the enrichment."[57] Bird makes a similar point when she says that in cases where no pre-existing relationship exists, "...it is closely connected to the obligation to make restitution and forms a proper basis for the imposition of liability."[58] She also argues that the place of enrichment's potential connection to the defendant may have the desirable effect of preventing him from defending himself in an unfamiliar jurisdiction.[59] Thus we have three connected factors, specifically: (a) restitution/unjust enrichment is a receipt-based subject; (b) the place of the enrichment will have a close connection to the obligation to make restitution; and (c) it is connected to the defendant.

It has been argued above that (c), although of consequence, should not be over emphasised. Equally, it has been suggested in Chapter Four that the receipt-based nature of restitution should be treated with caution.[60] Bird embraces this approach

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[54] See, for example, Beale, *op. cit.* at 1429 - 1430.

[55] Gutteridge, H.C. and Lipstein, K, *op. cit.* at page 89. Equally, Dicey and Morris (sub-Rule 201(2)(c)) and Bird (sub-Rule (1)(d)) look to the place of the enrichment in certain circumstances. Section 453 of the First American Restatement also stated, "When a person is alleged to have been unjustly enriched, the law of the place of enrichment determines whether he is under a duty to repay the amount by which he has been enriched."; Bennet, T.W. , *op. cit.* at page 146.

[56] Gutteridge, H.C. and Lipstein, K, *op. cit.*, at pages 89-90.

[57] *Ibid.*

[58] Bird, *op. cit.* at page 114; the place of the enrichment is the basis for the law in relevant rules in France and Belgium, "...on the ground that this translates mere facts into juridical issues.": Bennet, T.W. , *op. cit.* at page 146.

[59] *Ibid.*

[60] See, for example, Hedley's suggestion that despite questions of theory the courts are often more concerned with loss (Hedley, S., "Unjust Enrichment" (1995) *op. cit.*.) and Burrow's argument that, this approach

because, "...enrichment is at the heart of the action."[61] However, this is not, or should not be, the end of the story. Enrichment is a tool that theorists have used to analyse the obligation to make restitution within our system, and it is the method by which the plaintiff's potential recompense is measured.[62] This should not, however, blind us to the other aspects of the area. It is entirely possible for a party to be enriched by gift or contract in circumstances which have no connection to restitution. The area is given life by the enrichment's coincidence with a factor that makes it "unjust." It is this element which gives restitution/unjust enrichment its unique place within the *corpus juris.*[63] Equally, although the remedy may be largely based on the enrichment, it cannot occur without a corresponding, although not necessarily commensurate, loss. As a result, it is suggested that (a) the place of the enrichment as the defining characteristic of restitution/unjust enrichment should not be over-emphasised, and (b) that (partly as a result of (a)) as a matter of principle it is not logical to argue that the law of the place of the enrichment will necessarily have a closer connection to the core of the relevant dispute than other possibilities.[64] As Blaikie notes, "...the place may be a matter of accident and will often lack any substantial connection with the facts giving rise to the enrichment...".[65] It is difficult to argue with this proposition: although the place of enrichment has some benefits, the process is relatively random and the law identified may have little or no material connection to the defendant, the plaintiff, the relevant relationship or the core of the dispute.[66] This proposition has been judicially accepted in *Arab Monetary Fund v*

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unnecessarily, ...plays down the importance of the 'at the expense of' element of unjust enrichment.": Burrows, *Restitution*, *op. cit.* at page 492.

[61] *Ibid.*

[62] In this sense its importance goes to remedy rather than cause of action.

[63] "It is precisely the character of the enrichment as unjustifiable which gives the claim for enrichment its form and content...the question of whether the act is unjustifiable is identical with the question of whether a claim for enrichment exists." Zweigert and Muller-Gindullis, "Quasi Contract": Chapter 30, Vol. III of Lipstein, K. (Ed) *International Encyclopaedia of Comparative Law* (Tubingen, 1974), §24; Bennet, T.W. *op. cit.* at page 161.

[64] Indeed, Dicey and Morris accept that in some circumstances the place of impoverishment may have a closer relationship: Dicey & Morris, 11th ed. *op. cit.* at page 732; Bird, *op. cit.* at page 114.

[65] Blaikie, J. , *op. cit.* at page 120.

[66] "..the rule neglects the important legal connection between the enrichment and the transaction/relationship on which it was based...by ignoring the unfair operation of legal rules - the very purpose of certain enrichment actions - the relevance of the legal transactions out of which the enrichment remedies arise is suppressed. Seen in this light, the place of the payment or the place of the ultimate enrichment is incidental to the claim.": Bennet, T.W. , *op. cit.* at page 149.

Hashim [1993],[67] in which it was noted that although the enrichment was received in Switzerland:

> "...Dr Hashim has no connection with Switzerland apart from his interest in the JOJ account, and the money paid into that account was dispersed to a number of other jurisdictions, presumably on his instructions and for his enjoyment there. Switzerland was at best a temporary staging post for the money and never its journey's end."[68]

On a practical level we have seen above the potential difficulties associated with identifying the place of impoverishment. It was noted that the place of enrichment may in fact be more difficult to identify in the context of modern commercial or money laundering activity.[69] Equally, however, the difficulty of pointing to the place of enrichment should not be over-emphasised. We could, for example, as noted above solve the relevant problems by the introduction of relatively simple rules: thus we might determine that the place of enrichment is the place where the relevant property vested,[70] or was dealt with in a manner contrary to the rights of the owner or, for example, where an employee who ultimately receives property first dealt with it in a manner inconsistent with his contract of employment. Such factors are, of course, the same elements which the court would now look to, and all that is being proposed is a more formalised and clarified approach. But in this context, Bennett argues that although the "conflation" of law and fact involved in the law of the place may be acceptable in some areas:[71]

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[67] [1993] 1 Lloyd's Rep 543; Stevens *op. cit.* at page 219.
[68] [1993] 1 Lloyd's Rep 543, 565, 566, *per* Evans J.
[69] "Is it the place in which the alleged debtor was first enriched, the place in which the goods or the money first came into his possession? Or, if he carried the goods or money to other countries where he continues in this state of enrichment, and perhaps enjoys the fruits or profits, is the place of enrichment now to be selected from among these latter countries.": Blaikie, J. , *op. cit.* at page 120. Indeed Bennet argues that even in simple cases the identification may be at best arbitrary. Thus, he draws attention to an example in the First American Restatement: "A takes B's logs into State X, believing them to be his own, and transports them to State Y, where he makes them into boxes, and they are given up to him. A sues B in X for the increased value caused by his labour. By the law of X, A has a valid claim for the increased value; by the law of Y he has not. Judgment for B." Bennet says, correctly, of this, "This solution appears to be arbitrary. Why select the law of the place where the act - the process of *specificatio* occurred? Why not instead, choose the law of X, especially if that happened to be the place where the logs were originally situated?": Bennet, T.W., *op. cit.* at page 147.
[70] *Hong Kong and Shanghai Banking Corp.* v. *United Overseas Bank* [1992] 2 S.L.R. 495.
[71] Bennet give the example of marriage, "Marriage, however, is not merely a fact; it is a juridical act in that the law invests a specific ritual with legal significance.": Bennet, T.W. , *op. cit.* at pages 150-151.

> "...can enrichment be reduced to such a (relatively) simple notion as a juridical act? If enrichment is reduced to a crude factual formula, such as the place where money was paid, the concept still suffers an inevitable distortion."[72]

With respect this is a mistake of focus. The problem is not that enrichment cannot be reduced to a judicial act. It should be possible to do just that. The problem is that even with such an approach, some problem cases may arise in which the law of the place is still difficult to identify, and more importantly,[73] the place of enrichment even if identifiable may be relatively random with little or no connection to either the parties or the core of the dispute.

Having identified these problems, it should be noted that Dicey & Morris' sub-rule 201 (2)(c) has received some judicial approval. Thus, for example, Bird[74] identifies its use in *Arab Bank New York Ltd v. Barclays Bank* [1952],[75] *Re Jogia* [1988],[76] *El Ajou v. Dolar Holdings* [1993],[77] *Hong Kong and Shanghai Banking Corp. v. United Overseas Bank* [1992],[78] *Thir v. Pertamina* [1994][79] and *Chase Manhattan Bank Na v. Israel-British Bank Ltd* [1981].[80] With respect this authority is perhaps not as strong as Bird suggests. Thus, for example, although *El Ajou* does indeed accept the rule, it is not a question which Millett J. believed was a necessary part of his judgment and the same is true of the decision in *Re Jogia*. Equally, although Stevens[81] accepts the authority of some of these cases[82] he suggests that Rule 201 (2)(c) is not accepted in *Arab Monetary Fund v. Hashim* [1993],[83] *Rousou v. Rousou* [1955][84] and *Macmillan v. Bishopgate* [1995].[85] Perhaps for this reason Burrows views Dicey and Morris' approach to be "...by and large free from

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[72] *Ibid.*
[73] As Bennet notes.
[74] Bird, *op. cit.* at page 113.
[75] [1952] 2 T.L.R. 920, 924.
[76] [1988] 1 W.L.R. 484.
[77] [1993] 3 All E.R. 717, 736.
[78] [1992] 2 S.L.R. 495.
[79] [1994] 3 S.L.R. 257.
[80] [1981] Ch. 105, 109, 112.
[81] Stevens *op. cit.* at page 219.
[82] Specifically, *Re Jogia*, *El Ajou*, and *Thahir*.
[83] [1993] 1 Lloyd's Rep 543.
[84] [1955] 1 W.L.R. 978.
[85] [1995] 1 W.L.R. 978.

authoritative guidance..."[86] The present author would broadly agree with this and at its strongest it must be accepted that such authority is not uniformly consistent. However, whatever the basis in authority for the rule it should not be allowed to stifle the present debate, where we are concerned with principle over historical development. In this context it is submitted that the place of the enrichment should be treated with caution and cannot be accepted without careful consideration of the other possibilities, merely because it has a technical connection to what is said to be the subject's receipt-based nature.

6.1.2.3: Place in Which the Act Responsible for Conferring the Enrichment or Benefit Occurs.

This possibility is indicated by the American Restatement in situations where other connections are doubtful:

> "Particular weight in the choice of law process will be given to the state where the act conferring the benefit or enrichment was done in situations where the place where the benefit or enrichment was received cannot be identified or where the place differs from that where the act conferring the benefit was done and bears little relation to the occurrence and the parties."[87]

However, it is reasonable to suggest that beyond this, the place of the act has received relatively little support. However, when placed in the context of its counterparts we might ask whether such neglect is valid. Like other solutions based upon the location of a particular event or factor it may, in certain circumstances, be difficult to identify. Equally, in some cases it may not always point to the place with the closest connection. But, when viewed alongside the place of the impoverishment or enrichment, this defect is perhaps less stark. Thus, for example, we have seen that, particularly in a modern financial environment, the place of the enrichment may be arbitrary, may have no real connection to the centre of the dispute and is arguably the product of an over emphasis on the receipt-based nature of restitution. The place of the act, on the other hand, may not in isolation provide a perfect remedy, but it does derive from a logical nexus between goal and solution. As a

[86] Burrows, *The Law of Restitution*, 497.
[87] American Restatement, *op. cit.* 732-733.

result, it will normally point to a legal system which has a direct connection between the dispute and the behaviour which gave rise to it, which is more than one can say with confidence of the other variants of the *lex loci actus.*

6.1.3: LEX FORI.

In 1941 Gutteridge and Lipstein were of the opinion that the advantages of the *lex fori*[88] were clearly outweighed by its disadvantages[89] and the fact that the *lex fori* is presently considered to be a topic worthy of consideration in this context is almost entirely due to the vociferous advocacy of Ehrenzweig.[90] His position is based on the premise that unjust enrichment is merely remedial and intricately connected to the forum's conception of justice. These arguments were extensively discussed in Chapter Five[91] and it is submitted that the same considerations apply. Specifically, it was argued that the two pillars of Ehrenzweig's position are untenable: restitution is not uniquely tied to concepts of justice (all laws should be intimately connected to the forum's view of justice) and the discussion in chapters Two to Four demonstrates that the rules of restitution/unjust enrichment, as Blaikie puts it, "...bear the hallmarks of substantive rules of private law..."[92] Ehrenzweig's view may lead to a uniformity of approach but it will also lead to a lack of uniformity with regard to result. Moreover, it is likely to create injustice, may encourage forum shopping[93] and goes against the tenets of the conflict of laws discussed in Chapter Five.

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[88] Gutteridge, H.C. and Lipstein, K, *op. cit.* at page 91.

[89] i.e. the encouragement of forum shopping and the "...type of recalcitrant debtor who has carried to a fine art the practice of evading those jurisdictions in which he might be held liable.": Gutteridge, H.C. and Lipstein, K., *op. cit.* at page 88.

[90] See, for example, Ehrenzweig, A. "Restitution in the Conflict of Laws..." *op. cit.*.

[91] See specifically, the relevant section on substance and procedure.

[92] Blaikie, *op. cit.* at page 117.

[93] Gutteridge and Lipstein point out that the use of the *lex fori* can lead to, "...a scramble, wholly incompatible with the dignity of the law, by each party to commence proceedings in that country whose law was most favourable to him" (Gutteridge, H.C. and Lipstein, K., *op. cit.* at page 91). However, in the absence of a uniform code, forum shopping is, potentially, an inevitable aspect of any system and some modern commentators are wont to see it as an acceptable litigatory tool rather than an affront to the law's self esteem (Juenger, F.K., "What's Wrong with Forum Shopping" (1994), S.L.R., Vol. 165, 3). Nevertheless there is little doubt that the authors are correct in suggesting that the *lex fori's* advantages are limited, and in the main are restricted to the practical, "It gives uniform treatment irrespective of the personal law of the parties and fortuitous elements which may be present in any particular case. It also relieves the trial judge of the inevitable task of probing into perplexing questions of foreign law.": Gutteridge, H.C. and Lipstein, K., *op. cit.* at page 91.

6.1.4: THE PLACE OF THE CONTRACT OR PRE-EXISTING RELATIONSHIP.

The present study is primarily concerned with questions arising out of fraud. In such a case there may be no underlying or pre-existing relationship between the parties, and where such a relationship does exist, it is arguable the core of the enrichment arises out of activity which is outside anything contemplated by the relationship. This should not, however, blind us to the fact that the majority of restitution/unjust enrichment actions will involve the existence of a pre-existing relationship which will normally be of a contractual nature.[94] As such, the methods by which the law should take cognisance of such a relationship is clearly central to an understanding of the area in a wider context. Indeed, even in the narrower area with which this study is primarily concerned it is probably true to say that the majority of frauds and mistaken payments can be referred to a pre-existing relationship.

The *Second American Restatement* directs the courts to look to the "local law of the state which... has the most significant relationship to the occurrence and the parties."[95] The contacts to be taken into account in this endeavour are headed by "the place where a relationship between the parties was centred."[96] The relationship will, "...usually be one of contract, agency, trust or tort."[97] However, the nature of the rule is limited by the statement that the relevant law should only apply where,

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[94] Hay subdivides contractual relationships (actual or intended) as follows, "...(a) where the contract has not come about (e.g. because of mistake), has become frustrated, impossible or illegal, or has been rescinded; (b) a quasi-contractual remedy will also lie in favour of the plaintiff who has breached after part performance and is unable to recover *ex contractu*, for instance because the pre-requisites for 'substantial performance' have not been met; (c) problems of contractual subrogation; (d) claims against third-party beneficiaries (upon failure of consideration in, or for set-offs arising from the main contract), and (e) claims for refunds for overpayment or multiple payment of a debt also belong in this category.": Hay, P., "Unjust Enrichment in the Conflict of Laws: A Comparative view of German Law and the American Restatement 2d" (1978) 26 A.J. Comp L.3, 7-8.

[95] *Restatement of the Law Second: the Conflict of Laws 2nd* (1971) § 221.

[96] § 221 (2)(a).

[97] The relevant comment to §6(2) states, "[This] place...provided that this relationship was substantially related to the receipt of enrichment, is the contract that, as to most issues, is given the greatest weight in determining the state of the applicable law. The relationship will usually be one of contract, agency, trust or tort; it may, however, be of a still different sort, such as the relationship between corporation and director, between donor and donee, between bailor and bailee or between life tenant and remainderman. Considerations of practicality and convenience will often dictate that all rights of the parties stemming from the relationship should be determined by the same law. Frequently, the act or acts on account of which recovery is sought will have been done in reliance upon what are believed to be certain legal attributes of the relationship as, for example, that it constitutes an enforceable contract. This, however, is only common, rather than a necessary characteristic."

"...the receipt of the enrichment was substantially related to the relationship."[98] Dicey & Morris state that, " ...if the obligation arises *in connection* with a contract, its proper law is the proper law of the contract."[99] It can be noted that "in connection" is potentially much wider than "substantially related to."[100] However, Dicey & Morris are concerned only with contractual, rather than other legal relationships.

There is clear merit in the position of the *Restatement*: in many cases the law of the relationship may be relatively easy to identify; the relevant jurisdiction may have an interest in the regulation of all the legal elements which arise out of the relationship;[101] there is logic in the suggestion that where enrichment is substantially a result of the relationship the law giving rise to that relationship should apply; and, this being the case, it is reasonable to assume that in many disputes the parties will expect that law to apply. Nevertheless, despite the potential advantages of the law of the relationship it is clearly not without its difficulties. Thus, in complex commercial transactions the place of the relationship may not be obvious,[102] resulting in competing claims as to where it is centred. Equally, if we are not to limit ourselves to a specific contractual relationship, then we may well see a range of competing relationships each in some way connected to the enrichment. In the same context, any particular place which is indicated by the relationship may not be intricately connected to the enrichment:[103] arguably the situation in many cases of fraud. Thus while, for example, cases of overcharging under a contract are obviously closely connected to the legal relationship, other frauds may be virtually unrelated to any possible agreement. Equally, it is a truism that any fraud is necessarily extra-contractual and in, perhaps most cases, it is fictitious[104] to suggest that the parties had a presumed intention as to what would happen in the case of

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[98] § 221 (2)(a).
[99] Dicey & Morris, Rule 221 (2)(a) (italics added).
[100] Hay notes that German law also defines relationship widely, "The German reference to '*Rechtsverhatnis*' clearly goes beyond contract and even extends to property-based relationships." Hay, P., *op. cit.* at pages 7-8.
[101] Bird *op. cit.* at page 131.
[102] If the purpose of the place of the relationship is to enforce the party's expectations, then Hay's suggestion that not only existing relationships should be considered but also relationships which the parties mistakenly believe to exist should be accepted: Hay, P., *op. cit.* at page 45. However, this will do little to clarify the problem of competing centres of the relationship.
[103] Thus, for example, the place in which a contract is signed may have little to do with the seat of the relevant dispute: Gutteridge, H.C. and Lipstein, K., *op. cit.*.
[104] Although not necessarily unreasonably so.

fraud. And, as already noted, in some frauds there may be no, or at most a tenuous, relationship between the parties.

Nevertheless, the advantages with regard to uniformity and the satisfaction of legitimate expectation mean that the difficulties associated with this approach should not, without further investigation, lead us to ignore its advantages. The primary problems can be relieved by ensuring that a strong connection exists between the enrichment and the relevant relationship. Thus, as we have seen, the *Restatement* requires that the relationship and enrichment should be *substantially* connected. However, it is clear that the definition and interpretation of such a test are still potentially problematic. Thus, for example, Bird states that, "the law of the relationship should only be applied where the unjust enrichment is strongly connected, by way of causation, to the relationship",[105] and goes on to say that, "it should be relied on where the enrichment in question would not have occurred *but for* the relationship."[106] Bird clearly believes these tests to be synonymous. However, it is not impossible to imagine situations in which "strongly connected, by...causation" would lead to a different result to "but for." This being the case, without a rigidly defined test, the place of the relationship will, in many cases, remain too uncertain to provide a useful tool. However, if such a test is possible, it is clear that the relationship will have a potentially valuable role to play.

In discussing the place of the relationship or contract, we should remember that this can take a wider meaning and in certain circumstances the parties will themselves have contractually agreed the law which is to apply to disputes arising out of the contract. This is perhaps a step removed from the position that the law of the relationship should govern a claim in unjust enrichment, but it is possible to suggest that similar arguments apply. Thus, it is said that non-lawyers do not make a distinction between contractual disputes and restitutionary ones, and that notwithstanding this they would still want their post-contractual relationships governed by the same law as the contract.[107] In the abstract this is unconvincing.

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[105] *Bird op. cit.* at page 133.
[106] *Ibid.*
[107] Bird, *op. cit.* at page 124.

Most international contracts are produced by lawyers who do, or should, appreciate the difference between contract and restitution. Moreover, the suggestion that the parties always want the same law assumes a generality of approach and a lack of sophistication which does not necessarily reflect reality. Nevertheless, the present author would accept that where the parties have evinced an intention to have contractual disputes governed by a particular legal system, the courts *may* find in the wording of such an agreement an intention that conflicts associated with unjust enrichment should be governed by the same system.

However, as we have seen in Chapter Four, the relationship between contract and restitution can no longer be fully embraced, and as a result some commentators have deprecated the use of the contractual relationship as an indicator of the law governing the restitutionary dispute.[108] The primary reasoning is that restitution and contract are separate claims. The parties' agreement that a particular rule should apply to the contract is not an indication of their desire to see restitutionary disputes governed by the same rules. Collier says of this argument, "...the claim is not as such to be treated as contractual; one is only seeking to apply the law which did or would have governed the original transaction so as to subject all aspects and consequences of the same unitary situation to the same law."[109] However, this would seem to misrepresent the argument. Those commentators who object to the imposition of the law of the contract do not appear to do so because they believe that the dispute will be "treated as contractual" but because they do not agree that all issues flowing from the same transaction should be treated in the same way. Notwithstanding this, it is suggested that the previous contract or relationship can be a powerful guide to the law which the parties expected to apply, but that it cannot be mechanistically applied as an inflexible rule. There is a logical distinction between contract and restitution, and where the connection between the contractual and restitutionary issues is not sufficiently clear or where the parties have evinced an intention which with regard to *restitutionary disputes* is not sufficiently clear

[108] Cohn *op. cit.* at page 74.
[109] Collier, "The Draft Convention and Restitution or Quasi-Contract" in *Harmonisation of Private International Law by the E.E.C.* (Ed. Lipstein), (1978), 88.

from the contract, the courts should accept that other possibilities must be considered.

Before moving on, this is a convenient place to discuss Zweigert's championing of the *lex causae condictionis* and Blaikie's retort. Zweigert suggests that the law which governs the movement of assets between the parties and which declares that movement to be unjust, should govern the claim. At first sight there is merit to this proposition as it appears to identify a clear connection between a particular dispute and the relevant system which will, at least normally, have an interest in the legal issues raised. However, Blaikie suggests that this makes the solution a mere appendix of the law of contract: "...is it not wrong in principle always and without exception to apply to the subsequent enrichment that law which governed the preceding contract."[110] In the context of the above discussion the answer to the question, as phrased, must be 'yes'. But is it not possible that such an approach, while (again) not suitable as a logical single rule, would be of value within a wider framework? Before we answer this question we might briefly consider what Blaikie perceives to be Zweigert's answer to his question. Specifically:

> "The existence of a duty to perform, which has failed, or the belief in the existence of such a duty even if it never materialised, provided the basis for a loss of the asset on the part of the loser and a corresponding gain on the part of the enriched person. Consequently it is legally possible and advisable to apply the law which governs the performance."[111]

In meeting this proposition Blaikie's response is scathing. Particularly with regard to the suggestion that there should be no test of the belief's reasonableness. Thus he suggests that in the absence of such a test:

> "This is remarkable. Is there no objective check on the reasonableness of the belief in the existence of such a duty? If there is not, it is presumably proposed to apply the system of law governing a legal relationship which is declared never to have come

[110] Blaikie, J., *op. cit.* at page 127.
[111] Zweigert, *op. cit.* at page 12.

> into existence and in whose existence the party impoverished had no reasonable cause to believe."[112]

With respect, this appears to be a criticism which could reasonably be levelled against the underlying legal system rather than the choice of law regime. For example, let us assume that I pay £1000 to A under the unreasonable belief that under the laws of country B, I am (for whatever reason) duty bound to do so. Unaware of my mistake, A dissipates the money or irrevocably changes his position in reliance on it. We might argue that logically in these circumstance the lack of reasonable belief should be a bar on my ability to recover the £1000, but should it also prevent a decision that the laws of county B (which I, however mistakenly, relied on) should not apply. The answer would appear to be 'no'.

Nevertheless, there is some truth in Blaikie's other objection, *viz.*, that the *lex causae conditionis* is as apparently mechanistic as the "jurisdiction selecting" methodologies and *may* not have the closest connection to the core of the dispute. However, whether this is truer for this methodology than for others is open to question. Indeed it might be questioned whether it is not also a defect in Blaikie's favoured solution of the "...proper law of the obligation to restore the benefit..."[113] In the present author's submission, perhaps the strongest criticisms against the *lex causae conditionis* is that in practice, if not in theory, it is likely to over-emphasise the connection between restitution and contract.[114]

[112] Blaikie, J. , *op. cit.* at page 127.
[113] Blaikie, J. , *op. cit.* at page 126.
[114] A criticism which could also be levelled against Blaikie's approach.

6.2: THE SEARCH FOR AN ACCEPTABLE APPROACH.

Let us assume that the world has only two countries, England and the United States, and each country has only an extremely limited number of laws. We could create a conflict rule for each of these laws. Thus the United States might hold that mistaken payments are lost to the payer, while English law states that they are recoverable and the relevant choice of law rule holds that disputes arising out of mistaken payments will be governed by the law of the place of the recipient's domicile. This would lead to a system in which states could finely tune their rules to ensure that they conformed to the principles underlying the relevant law and predictability of result could be maximised. Unfortunately, such a model would be impossible in the real world: it could not acceptably cope with more than two hundred countries each possessed of thousands of laws. Moreover, even if it were possible, it would do little more than simplify one area while creating greater complexity in others.[115] As a result, as we have seen, the modern conflict of laws approach is to group laws with regard to wider categories to which rules can be applied. With regard to the present discussion, despite the numerous problems involved, in a domestic context the civil response to fraud will, it has been argued above, be predominantly subsumed by restitution/unjust enrichment. Some have argued that this is a far from ideal solution, grouping as it does a range of traditionally unconnected elements. However, if as seems likely, unjust enrichment is a more logical explanation for these elements than their traditional rationale, then such an approach is both necessary and inevitable. This does, however, create a number of problems which have been discussed above, but bear brief repetition. Specifically, these are (a) the apparent divergence of restitutionary elements; (b) the fact that restitutionary elements can be grouped within other areas of law (property, contract, quasi-contract, etc.); (c) the different roles given to restitution and unjust enrichment in differing jurisdictions; (d) the wide range of factual circumstances

[115] "Ideally, every individual rule of Private Law should be served by its own rules of Private International Law or it should disclose its territorial or personal limitations. The immense variety of rules of substantive law make this a practical impossibility and the parallel existence of such unilateral rules of Private International Law spread among a multitude of countries would create intractable problems of overlaps and *lacunae* which only an overriding international system of choices of law could solve.": Lipstein, *op. cit.* at page 93.

which can give rise to restitutionary responses; and (e) the difficulty of determining what factors are of sufficient import to link a case to a place before the relevant national legal system has itself been determined.[116]

We might consider whether the grouping known as restitution/unjust enrichment can be furnished with its own single, all-encompassing rule. Thus, for example, we might say that all cases of unjust enrichment should be governed by the law of the place of impoverishment.[117] In similar vein, *The First American Restatement* stated that, "Where a person is alleged to have been unjustly enriched, the law of the place of enrichment determines whether he is under a duty to repay the amount by which he is enriched."[118] However, in the first part of this chapter we have noted that no single rule seems to adequately point to the heart of the relevant dispute in all the circumstances which can give rise to restitutionary claims. It has been suggested that in a historical context the Second Restatement can be seen as a reaction to the overly regimented, and theoretically outdated, approach taken in the First Restatement.[119] This development mirrors the change in academic thinking from the vested rights theory to the local law theory along with a general growth in the belief that the courts should place greater emphasis on the question of doing justice as between the parties.[120] This change of approach, from the view that the courts were merely applying an unbending structure of rules to a wider ranging enquiry, also marked the beginnings of a more flexible approach: one which also meant that they had less need to use, "...whatever techniques they had at their disposal - *renvoi* and characterisation were two - in order to select some other, more obviously relevant

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[116] Equally, the supplementary nature of some restitutionary rules potentially means that the subject's relationship to the conflict of laws is of a special character, "Most legal rules are supposed to operate directly on human activity. The rules of enrichment are often of a secondary order. They presume that the first order rules have resulted in a certain situation - the creation or failure of a contract, passing of property, imposition of liability or whatever; they then seek to correct or undo these consequences by allowing restitution of the cash or property that has been given.": Bennet, T.W. , *op. cit.* at page 167. In the context of chapters Three and Four the present author would argue that Bennet over-emphasises the secondary nature of the rules of restitution (at least in an English context), nevertheless with regard to the conflict of laws it is a factor which should be borne in mind.

[117] See, for example, Cohen, S. *op. cit.*.; Ehrenzweig, "Restitution in the Conflict of Laws, Law and Reasoning..." *op. cit.*.

[118] *The First American Restatement*, 453. This is the basis of Belgian, French, Italian and Russian law: Bennet, T.W. , *op. cit.* at page 146.

[119] Bennet o*p. cit.* at pages 152.

[120] *Ibid.*

system."[121] Thus, a number of commentators have noted that the methodology to be found in the American Restatement and Dicey & Morris represents a movement away from a "rule" or "classificatory" based approach to a "functional/result selective" approach.[122] By this they are referring to the fundamental distinction in this area: specifically, between rigid rules forcing the courts into uniform although potentially unjust results,[123] and the more flexible approach which allowed the court to take into consideration a range of factors with the intention of deciding which were the most important questions with regard to the case in point. The key questions associated with this area are therefore, first, whether as a matter of principle we should be primarily concerned with certainty or flexibility (a question largely dependent upon which of these approaches is most likely to achieve the priorities identified in the present study) and, second, which primary factors (place of contract, place of relationship, etc.) should be used to achieve these goals.

In this context, the effectiveness of a single rule is a multifaceted question. It is dependent, as all questions are, on what we are trying to achieve. The single rule, as noted above, contains a number of problems.[124] However, they may not be insurmountable. Thus, if we are looking for consistency of approach and result then the single rule has much to commend it. However, we have identified as the primary motivation of the conflict of laws, the desire to do justice and fulfil reasonable expectations between the parties. To return to the example of fraud, it does nothing to uphold these principles to apply the law of the place that the fraudster has determined should be the location of enrichment or payment. In other words, legal factors, underlying relationships and relevant transactions should be given more weight than arbitrary events.[125] Furthermore, the balance between these factors will vary depending upon the circumstances of the case, in ways which the single-rule approach cannot accommodate. As a result, it seems unlikely that a single rule can

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[121] Bennet *op. cit.* at pages 153.

[122] Bennet *op. cit.* at page 154 (Bennett in fact uses the phrases "rule orientation" and "approach orientation"); Hancock and Nadelmann (Eds.), *XXth Century Comparative and Conflicts Law,* (1961), p.367; Reese, L.M. "Choice of Law: Rules or Approach" (1972) 57 Cornell L.R. 315; Edwards, "Choice of Law in Delict...", (1979) 96 S. African L.J. 58, 67; Richmond and Reynolds, *Understanding Conflict of Laws,* (1984), 201.

[123] Which the court may try to avoid by manipulating other aspects of the process, like characterisation.

[124] For example, we develop a logical method of overcoming the identification problems associated with finding the place of the enrichment.

[125] Or events which (like the fraudster's choice of location) justice suggests should not be given weight.

be discerned which could adequately deal with the range and complexity of potential enrichment claims while giving sufficient weight to the necessary questions of justice between the parties, and with a few exceptions the belief that a single rule approach is too inflexible is now largely accepted.[126]

A range of responses has been suggested which allows the connections discussed above to be used in a manner which avoids or minimises the problems associated with the single-rule approach. The underlying rationale of such methodologies is commonly said to be the search for the "proper law." Blaikie identifies two structures within this overall approach:[127] (a) the proper law can be equated with the law of the claim for enrichment; and (b) it can be equated with the law of the place of the transaction or event which gave rise to the claim.[128] Equally, as part of the search for the "proper law", two possible structures are also available. At one end of the spectrum some commentators advocate a modified single rule approach in which the courts group cases of unjust enrichment into narrower categories (e.g. unjust enrichment concerned with land, unjust enrichment arising in connection with a contract) and apply laws found as result of such a determination. Others suggest a looser arrangement of rules which amount to flexible guidelines. This range of possibilities again demonstrates that the central difficulty associated with this area is that any rule strict enough to provide a viable element of predictability may be too inflexible to cope with the range of cases which can be thrown up by unjust enrichment claims. On the other hand any general guidelines which can encompass all possible circumstances are likely to be so flexible as to give little indication of how the courts might react to a particular set of circumstances. It is with this dilemma in mind that the present discussion is conducted.

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[126] "...such a rule is too inflexible to deal with the diverse factual and legal contexts in which unjust claims for unjust enrichment arise.": Bird, J. "Choice of Law", *op. cit.* at page 99. Equally, Blaikie notes, "...it is clear...that no single, territorially-based choice of law rule is likely to be appropriate in all the manifold situations in which claims for unjust enrichment can arise": Blaikie, J., *op. cit.* at page 122. This position is clear with regard to factual situations. Bird's belief that the range of "legal contexts" is too wide is a little more worrying. At a theoretical level one might argue that this statement does not fit well with her stated belief (shared by other unjust enrichment theorists) that "...restitution is unified and explained by unjust enrichment" (Bird, J., *op. cit.* at page 66). If this is true, then we might argue that at a fundamental level a single rule should be identifiable. However, at the factual pragmatic level it is difficult to disagree that, at this stage of its development, restitution/unjust enrichment is too wide ranging to happily fit with a single rule.

[127] "...this proper law approach is discussed at two different levels which, often are not distinguished with sufficient clarity.": Blaikie, J., *op. cit.* at page 122.

The *Second American Restatement*[129] can be broadly viewed as a flexible attempt to indicate the law of the claim for enrichment. Thus it holds that the "...rights and liabilities..." of the parties are to be determined by the law of the state which "...has the most significant relationship to the occurrence and the parties."[130] These questions are to be judged in the light of § 6[131] and the relevant contacts are found in § 201 (2):

> "Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
> (a) the place where a relationship between the parties was centred, provided that the receipt of the enrichment was substantially related to the relationship,
> (b) the place where the benefit or enrichment was received,
> (c) the place the act conferring the benefit or enrichment was done,
> (d) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
> (e) the place where a physical thing, such as land or a chattel, which was substantially related to the enrichment, was situated at the time of the enrichment."

It might be noted that Bird[132] considers the Second American Restatement to be an attempt to find the applicable law, "on a case by case basis by reference to a number of relevant contacts and the broad aims of private international law", rather than a traditional attempt to find the "proper law." This is a question which probably amounts to little more than a semantic problem concerning the correct definition of "proper", and Bird accepts that, "The dividing line between the...structural approaches is not rigid."[133]

The contacts mentioned in the American Restatement are to be evaluated according to their relative importance with respect to the particular issue. Bennett emphasises

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[128] *Ibid.*
[129] *Restatement of the Law Second: the Conflict of Laws 2nd* (1971) § 221.
[130] Rule § 221 (1) states, "(1) In actions for restitution, the rights and liabilities of the parties with respect to the particular issues are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6."
[131] These include ease of determination and application of the relevant law, uniformity, predictability, the needs of interstate and international systems, the policy of the forum and other interested states, the principles underlying the area of law and the protection of justified expectations.
[132] *Op. cit.* at page 100.
[133] *Op. cit.* at page 101.

the words "significant relationship" in § 221(1) and suggests that the words demonstrate that, "the law governing restitution is the law of the place where the parties' relationship was centred, provided that the receipt of the enrichment was substantially related to the relationship."[134] It may be arguable that this is a slight change of focus. The *Restatement* in fact says that the laws of the *State* with the most *significant relationship* to the occurrence and the parties shall apply. The relationship between the parties is merely one of the contacts to be taken into account in applying §6. Nevertheless, Bennett is correct to suggest that the approach does emphasise the relationship between the parties and that it incorporates what he describes as the "'centre of activity test' and the method of interest analysis".[135]

It has been suggested that the primary advantage of this approach is that it allows the court to recognise the existence of a previous transaction which was "governed by law upon which the parties continue to be entitled to rely" without forcing them to do so. [136] Depending upon one's viewpoint, this flexibility is, of course, also the fundamental flaw in this approach. Of necessity it means that the application of the Second Restatement cannot guarantee to produce uniform and predictable results. It has also been noted[137] that the Restatement asks the courts to consider factors[138] which are both potentially extremely complex and may also point to the "...applicability of several legal systems."[139]

Dicey & Morris take a somewhat different, and less flexible, approach more closely resembling a single rule, with sub-rules intended to accommodate differing circumstances. Rule 201's stated intention is to identify the proper rule of the obligation. Where the obligation arises in "connection" with a contract, the proper law of the contract is applicable, and where it arises with regard to land, the *lex*

[134] Bennet o*p. cit.* at pages 153-154.
[135] *Ibid.*
[136] Blaikie, *op. cit.* at page 123.
[137] Blaikie, *op. cit.* at page 124.
[138] For example, the policies and interests of the forum and other interested states.
[139] Blaikie, *op. cit.* at page 124.

situs is favoured. In the absence of these two elements the law of the country where the enrichment occurs is applicable.[140]

Rule 201 is open to a number of criticisms. The question of whether a restitutionary claim should fall to be considered with regard to the law of the place of the contract has been discussed above. In summary, the relevant arguments in favour of this approach are that it is said to reflect the intention of the parties, identifies a relationship which is closely connected to the unjust enrichment and draws all the disputes likely to arise out of the relationship within one arena. However, in a proportion of cases even where a pre-existing contractual relationship is present the restitutionary action will not arise from the contract, and the wording of the relevant provision[141] does little to mitigate the potential problems which this could cause. Moreover the rule suggests that restitution is a subset of contract to an extent which may no longer be appropriate with regard to the development of unjust enrichment theory in this country.[142] The defects in the use of the place of enrichment have been noted in some detail above. Equally, given the arbitrary

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[140] Dicey and Morris Rule 201:

"1. The obligation to restore the benefit of an enrichment obtained at the other person's expense is governed by the proper law of the obligation.

2. The proper law of the obligation is (semble) determined as follows:

(a) if the obligation arises in connection with a contract, its proper law is the proper law of the contract;

(b) if it arises in connection with a transaction concerning an immovable (land), its proper law is the law of the country where the immovable (land) is situated (*lex situs*);

(c) if it arises in any other circumstances, its proper law is the law of the country where the enrichment occurs."

This approach has found favour in a number of Commonwealth jurisdictions, most notably Australia and Canada: see, for example, *US Surgical Corp.* v. *Hospital Products International* [1983] 2 N.S.W.L.R. 157, 192; *Etler* v. *Kertesz* (1961) 62 DLR 2d 209, 223-224. Blaikie says of the examples connected with this rule in the 10th edition of Dicey and Morris, "It is noteworthy that of the seven 'illustrations' of the Rule, only two are vouched by authority. This is unusual in Dicey and Morris but is doubtless the product of a paucity of authority.": Blaikie, J. "Unjust Enrichment in the Conflict of laws" [1984] J.R. 112. Stevens (Stevens, R., "The Choice of Law Rules of Restitutionary Obligations", *Restitution and the Conflict of Laws,* Ed. Rose Mansfield Press (1995), 180, 181) argues that, "In examining Rule 201 three assumptions are made. First, that restitution as a matter of English domestic law is a coherent body of law concerned with reversing the unjustified enrichment of the defendant of the plaintiff's expense. Secondly, that this body of law corresponds with similar areas present within other systems. Thirdly, that choice of law rules are necessary and that the limits on the court's jurisdiction do not mean that the *lex fori* should always be applied." It is suggested that in the light of the present study such assumption, while not necessarily perfect, are reasonable.

[141] Requiring merely a connection to, rather than, for example, the enrichment being dependent upon or substantially the result of the contract.

[142] "This may reflect the old implied contract thinking about restitution. Where the claim is brought in unjust enrichment by subtraction following the discharge of a contract for breach or frustration - most obviously for failure of consideration - there is no good reason why the proper law of the contract should govern the independent restitutionary claim rather than a specially thought out restitutionary choice of law rule.": Burrows, *op. cit.* at page 25. This question will be discussed further below; for the moment it should be

nature of the place of enrichment, it might be suggested that in using this factor as an alternative to the place of contract or *situs*, the rule seems to be changing its emphasis from a quest for the proper law, to one of convenience or simplicity.

It has been suggested that paragraph (c) relies on a false assumption: specifically that the only possible conduits of the proper law are the place of the contract, the *lex situs* and the place of enrichment."[143] As a result of these and other problems discussed above, Blaikie concludes that the rule, "...would be better regarded as a list of examples of ways in which the proper law of the obligation to restore might be discovered...[it] might be bettered by treating the proper law of a proceeding contract as an indication rather than a determinant of the proper law of the obligation to restore."[144]

Despite potential criticisms, it is not unreasonable to suggest that, taken together, Dicey & Morris' Rule 201 and The *American Restatement Second* § 221 can be seen as representative of the generally accepted approach in most common law jurisdictions. However, partly as a result of the defects noted above a number of commentators have recommended alternative approaches. The most recent of these is Bird, who has proposed a set of rules based upon the actual or supposed relationship between the parties and the place of enrichment:

> "1. As a general rule the actions in unjust enrichment are governed by:
> (a) the governing law of the contract, where there is or was a contractual relationship between the parties, or both parties were under the mistaken assumption that there was such a relationship between them, and the enrichment would not have occurred but for that real or supposed contract;
> (b) the law of the relationship, when there is or was a legal relationship between the parties, or the parties assumed that there was such a relationship between them, and the enrichment would not have occurred but for that real or supposed relationship;
> (c) the *lex situa*, where the enrichment arises from a transaction in relation to land; or

noted that Burrows' position is, perhaps, more dismissive of the importance of the pre-existing contract than other commentators.

[143] Blaikie *op. cit.* at page 125.

[144] *Ibid.*

(d) in the remaining cases, the law of the place of enrichment.

2. However,
(a) if, in the circumstances of the particular case and in light of the purpose of the sub-rules in paragraph 1, another law is clearly more appropriate than identified by reference to the sub-rules in paragraph 1, that other law should be applied; or,
(b) if the law identified in paragraph 1(d) cannot be identified with precision, the law with which the obligation to make restitution is most closely connected should be applied."[145]

Bird makes it clear that the sub-rules in paragraph 1 of her rule set are placed in a hierarchical structure intended to reflex the lessening strength which she perceives to be between the relevant law and the unjust enrichment claim.[146] The intention of the sub-rules in paragraph 1, as Bird sees them, is to ensure the fulfilment of the party's intentions or expectations and, in the absence of such expectations, to identify the law most closely connected to the unjust enrichment.[147] Sub-rule (d) is intended to reflect Bird's view that the place of enrichment is better than its alternatives not only because it has fewer defects, but also because it will be the place to which "most" residual cases will be "most closely" connected.[148] While Paragraph 2 is clearly intended to give the courts a wide level of flexibility.

Burrows, without laying down a formalised rule structure, outlines a framework with specific regard to contractual disputes. First, he suggests that any express choice of law clause in a relevant contract should be adhered to where the validity of the relevant clause is not in dispute.[149] His second proposition arises from the difficulty of deciding whether a request for rescission is best considered as part of the law of restitution or contract (and thus governed by s. 2 (2) of the Contracts (Applicable Law) Act 1990). According to Burrows this should be decided on the

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[145] Bird, J., *op. cit.* at page 135.
[146] *Ibid.*
[147] Bird, J., *op. cit.* at page 136; Bird also sees the potential of the rules in the paragraph to limit the role of characterisation as a practical advantage.
[148] *Ibid.*
[149] "...while the parties may not have anticipated the particular dispute in question, they can be taken to have chosen the law of a particular country to cover *all* disputes arising in relation to a contract. And this reasoning can be applied to restitutionary claims arising in connection with a contract as well as to 'pure' contract disputes.": Burrows, *op. cit.* at page 493.

basis of whether the, "escape from the contract or the restitutionary consequences of wiping away the contract is *primarily* in issue."[150] If this is in doubt then the statute should take precedence. Burrow's third and final proposition equates a breach of contract with restitution for wrongs and suggests that in such circumstances the restitutionary and contractual issues are so closely related that the provisions of the 1990 Act should apply. In other cases, Burrows is in favour of applying the law of the place where the loss and gain occur if this happens in the same jurisdiction.[151] Where loss and gain occur in different countries he advocates the consideration of domicile, residence, place of business, or as a last resort the *lex fori.*[152]

Most other authors[153] in this area have restricted themselves to indicating favouritism for one or other single rule approach. Thus, as we have noted above, that Gutteridge and Lipstein favour the law of the place of enrichment[154] while Ehrenzweig looks to the *lex fori.*[155] Blaikie is in support of the proper law of the obligation to restore the benefit. This, he argues, will allow the courts to take cognisance of a previous relationship without being bound to do so. Rabel,[156] Zweigert[157] and Collier[158] all look to the legal origin of the enrichment (the *lex causae conditionis*) and Bennett, probably correctly, describes this as, "...the most popular choice of law rule."[159] Hay, on the other hand, has concentrated upon the application of the *American Restatement* to questions of unjust enrichment. In doing so he divides possible claims into (a) those arising out of contractual

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[150] *Ibid.*

[151] Equally, with regard to restitution for wrongs he argues in favour of "...the law of the country where the wrong and gain occur, rather than being the choice of law rule for the wrong.": Burrows, , *op. cit.* at page 492

[152] *Ibid.*

[153] Who have not embraced Dicey & Morris or the American Restatement.

[154] Gutteridge and Lipstein *op. cit.*.

[155] Ehrenzweig, "Restitution in the Conflict of Laws, Law and Reasoning..." 36 N.Y. Univ. L.R. 1300.

[156] "Should it not be possible to localise internationally the duty of restitution by contemplating the legal origin of the enrichment rather than its territorial origin or the vicissitudes of its future development.": Rabel, *The Conflict of Laws: A Comparative Study*, 2nd ed., Vol. 3, 380; see Blaikie *op. cit.* at page 126.

[157] Zweigert and Kotz, *op. cit.*.

[158] Collier, Harmonisation of Private International Law by the EEC, (Ed. Lipstein), (1978).

[159] Bennet, T.W. , *op. cit.* at page 167. Bennet also concludes that, "...the *lex causae* rule offers a refreshingly straightforward solution to the choice of law. In light of this and compared to the strength of arguments in its favour, the main objection...is not particularly convincing."

relationships; (b) voluntarily conferred benefits;[160] (c) claims related to tort;[161] (d) equitable remedies.[162] He believes that the proper law of the pre-existing relationship or contract should apply to (a) and the law of a pre-existing relationship or the *lex rei sitae* to (b). Hay disparages the Restatement's approach to the choice of law for the tortious claims found in category (c). Instead he favours the German *Rechtsverhaltnis* approach which looks to the law which governs the "shift of assets." [163] In the absence of such an identifiable law, the German approach is to look to the law of the tort.[164] Hay accepts that the German and American approaches are aimed at the "same objective" but considers the latter to be "much less successful."[165]

Hay's methodology has been criticised on the basis that its theoretical vagueness will, in practice, necessarily lead to a return to a more formalised and mechanical approach.[166] Although this is probably correct, we have noted that this is a recurring problem in most, if not all, formulations. Bennett makes a more serious criticism of Hay's approach when he argues that being based on the underlying tortious or contractual relationships, "one can be forgiven for thinking that if these are, in fact, the main criteria for choice of law, they should be reflected in the choice of law method."[167] Equally, the discussion in chapters Three and Four of the present study

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[160] "As a result of the absence of a *general* doctrine of *negotiorum gestio* in American law virtually the only other cases falling into this category are: the provision of necessities to another…third party donee situations not resulting from a third party beneficiary contract, and improvements made by one upon land while in possession of it, which improvements now inure to the benefit of another. All other illustrations given in the comments to the *Restatement* in some way relate to tort...": Hay, P., *op. cit.* at page, 24.

[161] Specifically, those regarding conversion, tortious subrogation, workmen's compensation actions and contribution amongst tortfeasors.

[162] Bennet describes this as "the final category" (Bennet *op. cit.* at page 157) rather than equitable remedies and it is probably correct to suggest that Hay's terminology is somewhat problematic. Within this category Hay included equitable liens, constructive trusts, and tracing.

[163] "...despite differences in terminology...all formulations display common elements. It is the unauthorised use of the property of another which raises the restitutive claim for adjustment. The unauthorised use, the shift in assets, necessarily occurs, in the case of tangible property, where the property is located and the tortious act occurred: that is, all tests coincide. Differences may arise only in the case of intangible property (for instance chose in action) where place of acting, place of loss, place of enrichment need not coincide. Yet, with the exception of the possibility of fortuitous *locus actus*, the enrichment will ordinarily occur, and the claim arise, where the 'shift in assets' takes place (at the *situs* whose law determines the entitlement to the assets or at the place where the benefit is received). The test of the 'shift in assets'...thus encompasses both of these case situations well as the case of tangible property in which the shift of assets takes place at the situs.": Hay *op. cit.* at pages 30-31.

[164] Hay, *op. cit.* at page 34.

[165] Hay, *op. cit.* at page 31; In Hay's formulation category (d) is covered by the *lex rei sitae*.

[166] Bennet, *op. cit.* at page 158

[167] Bennet, *op. cit.* at page 158-159.

would suggest that we may find issue with Hay's four categories of restitutionary action.

6.3: CONCLUSION: A POSSIBLE APPROACH TO THE CONFLICT OF LAW RULES FOR RESTITUTION/UNJUST ENRICHMENT.

Throughout this study certain principles and goals intended to inform our approach to this area have been identified. Generally speaking we have concentrated on a detailed examination of our technical response to civil fraud and mistaken payments, and a wider examination of the questions surrounding restitution and the conflict of laws. Broadly it has been suggested that our civil reaction to fraud and mistaken payments should have three foundations: (a) it should logically allow a plaintiff to identify property he owns (or has rights over) which is wrongly in the hands of another; (b) it should provide a rational method by which the courts can determine when justice and policy require that the plaintiff should be allowed to treat property as if it belongs to him; and (c) it should identify when a plaintiff has (and/or should have) personal rights stemming from his ownership of, or rights over, an asset. With certain reservations it has been argued that restitution/unjust enrichment provides probably the best (and certainly the most readily available) method by which such goals can be achieved at this point in time.[168] In response to this determination the nature and boundaries of restitution have been examined in some detail. In Chapter Four it was argued that generally the questions of justice which apply to this area domestically should also apply to cases involving a foreign element, and detailed questions of characterisation in this area were considered.[169] In the present chapter it has been suggested that, used in isolation, none of the connecting factors which could be employed to determine the applicable system of laws with regard to questions of restitution/unjust enrichment is entirely satisfactory. It is now therefore necessary to discuss which of these factors (or combination of factors) can most adequately achieve the goals identified in the preceding chapters. The purpose of the present discussion is not to create an unimpeachable or universally applicable rule. Such a formulation may not, as yet, be achievable.[170] It is, however, intended to be a working through of the principles discussed above, in the more formalised

[168] And in the foreseeable future (with regard to structural changes in the nature of fraudulently and mistakenly obtained assest which will soon occur).
[169] With specific regard to the expectations of the parties and the needs of international commerce.
[170] Not least because so many gaps still exist in our domestic understanding of restitution/unjust enrichment.

context of the practical rules applicable to the conflict of laws. Some suggestions are refinements of generally accepted principles.[171] Others[172] are intended to create a forum for discussion, highlight avenues for further research and emphasise the fact that alternatives exist to more traditional approaches.

It has been argued above that the central difficulty in the formulation of an adequate rule in this area is the balance between flexibility and predictability. The range of legal and factual elements which can go to make up a restitutionary claim suggests that a mechanistic and inflexible approach must necessarily lead to injustice. For this reason, it is submitted that no single rule will adequately meet the needs of the present area. However, movement in the opposite direction clearly contains its own pitfalls. Thus, for example, we might question the extent to which a more flexible rule should also explicitly contain provisions for judicial discretion. Bird, for one, argues for such a provision. Thus, as we have seen, paragraph 2 of her rules states if, "...in the circumstances of the particular case...another law is clearly more appropriate...that other law should be applied."[173] This is to be decided in the light of the purposes of the sub-rules in paragraph 1.[174] At first sight this may appear reasonable and we might suggest that a provision of such a kind should be incorporated into any proposed rules. Indeed, Bird finds support for her position from other areas of the conflict of laws.[175] However, this is a question of delicate balance. It might be argued that the courts have sufficient flexibility in the application of such rules without an explicit provision. It would be naive, for example, to assume that in difficult cases they do not identify the issue in dispute and formulate the characterisation of that issue without an eye to the influence of

[171] For example, the use of the law governing the contract.
[172] For example, the use of the place of the act causing the enrichment.
[173] Bird *op. cit.* at page 135.
[174] *Ibid.*
[175] Most specifically she quotes Lord Wilberforce to the effect that, "[t]here must remain a great virtue in a generally well understood rule covering the majority of normal cases provided that it can be made flexible enough to take account of the varying interests and considerations of policy which may arise when one or more foreign elements are present...flexibility can be obtained...through segregation of the relevant issue and consideration whether in relation to that issue, the relevant foreign rule ought, as a matter of policy or as Westlake said of science, to be applied. For this purpose it is necessary to identify the policy of the rule, to inquire to what situations, with what contacts, it was intended to apply; whether or not to apply it, in the circumstances of the instant case, would serve any interest which the rule was devised to meet...No purely mechanical rule can properly do justice to the great variety of cases where persons come together in a foreign jurisdiction for different purposes with different pre-existing relationships, from the background of different legal systems." *Boys . Chaplin* [1971] A.C. 356, 391.

such determinations. Equally, as we have seen, questions of public policy provide the courts with some measure of flexibility. On the other hand, it is clear that we should not force the courts to manipulate such issues in order to overcome unreasonably inflexible rules. Nevertheless, if we examine Bird's rules, it is submitted that their structure, combined with the nature of the "but for" tests, provides the courts with sufficient flexibility with regard to sub-paragraphs (a) and (b) without the necessity of paragraph 2 and that it should be possible to formulate similar provisions with regard to sub-paragraphs (c) and (d). As presently formulated it seems likely that many cases will involve argument from at least one of the parties that the provisions of paragraph 2 are appropriate. If this is to be the case, then it is suggested that greater guidance of the type found in the *Second American Restatement*, would be of aid in the application of such flexibility.[176]

If we now turn to the formulation of a viable rule, perhaps the most logical approach is to begin with the question of enrichments derived from land. Dicey & Morris are of the opinion that an enrichment arising in connection with a transaction concerning land is governed by the *lex situs.*[177] The *American Restatement* takes a wider view, holding that the law of the place, "...where a physical thing, such as land or chattel... was situated at the time of the enrichment" should apply.[178] The breadth of this formulation is again tempered somewhat by a "substantially related" requirement. The consideration of the location of a chattel is acceptable for systems like that envisaged by the Restatement, which attempt to define a range of guidelines. However, it is doubtful whether its incorporation into a stricter regime would move the search for a just solution forward. The question of land is, however, different. In the absence of other clear intentions,[179] there is certainly merit in looking to the *lex situs* with regard to enrichments arising out of land. It is likely that the parties to such a transaction will envisage it being governed by the *lex situs,* and it also true to suggest that the state in which land is located has a legitimate

[176] For example, it is suggested that the words "...in the light of the purposes of the sub-rule in paragraph 1..." (Bird *op. cit.* at page 135) are relatively meaningless without further explanation: for example, is the law of the contract favoured because it is most closely related to the restitutionary obligation or because it upholds the parties' expectations?

[177] Dicey & Morris, Rule 221 (2)(b); Bird takes almost exactly the same view: "enrichment actions are governed by...the *lex situs*, where the enrichment arises from a transaction in relation to land" (Rule (1)(c)).

[178] § 221 (2)(e).

[179] For example, contractual terms.

interest in the regulation of transactions concerning real property within its boarders. As a result the present author would accept that in disputes substantially related to land or transactions closely concerned with land, the *lex situs* should apply.[180]

If this study were concerned only with the law related to fraud we could, should we so desire, largely ignore the influence of contract: even where a pre-existing contractual relationship exists we could argue that any fraud is necessarily extra-contractual. Equally, there are good theoretical reasons for limiting the influence of contract within the whole area: the action is in restitution/unjust enrichment not contract, and the case for a separation of the two has largely been accepted. Nevertheless, we are presently concerned with the whole panoply of restitutionary actions, and questions of contract must be addressed not least because, in some circumstances, the parties will expect the law of the contract to apply to any dispute which arises between them. This being the case, we have several levels of connection which we might use. Thus, for example, the *American Restatement* holds that the place of the relationship is relevant where, "...the receipt of the enrichment was substantially related to the relationship";[181] Dicey & Morris look to the law of the contract where, "...the obligation arises in connection with a contract";[182] Bird, on the other hand, looks to the "...governing law of the contract..." where "...the enrichment would not have occurred but for..." the contract.[183]

It has been suggested above that Dicey & Morris' "connection test" is too wide, and does little to tell us how close the connection needs to be, or the nature of the connection itself. By itself such a connection does little to guarantee that the law applied will have the closest relationship to the unjust enrichment. It is likely that this problem is a function of the subject's history, which is reflected in the

[180] It should be noted that to some extent Dicey & Morris (and a greater extent) Bird see the existence of a pre-contractual relationship (and even a mistaken non-contractual relationship), as more important than location in transactions involving land. In the light of the above discussion it is submitted that this a reasonable approach.
[181] § 221 (2)(a).
[182] Rule 201 (2) (a).
[183] Sub-paragraph (1) (a).

publication's evolution: until relatively recently restitution or quasi-contract was treated as a sub-set of contract. As result of this history it could be argued that today's authors still over-emphasise the importance of the relationship between contract and restitution/unjust enrichment.

Bird's "but for" test effectively begins to separate the two subjects, but is not without its difficulties. Thus, even in cases where the contract is relatively peripheral to the unjust enrichment it would still be possible to argue that the circumstances which gave rise to the enrichment would not have occurred in the absence of the contract. In other words, it is again potentially too wide.[184] An event may not occur "but for" another occurrence, but this does not mean that the two are closely connected: the present research would not have been conducted "but for" the establishment of the Nottingham Trent University or the evolution of mammals, but on any practical level the connection is tenuous. The effect is that once again restitution/unjust enrichment and contract are, at a theoretical level, too closely aligned. In a practical context, it has been suggested that Bird's formulation would see contractual cases frustrated by a lack of capacity brought within the restitutionary formulation when it appears clear that they should be resolved with regard to the usual conflict rules for capacity.[185]

However, although the linkage should not be overemphasised, neither should it be ignored. Many restitutionary claims will be closely connected to a contract, and of these a sizeable proportion of the protagonists will have expected the law of the contract to govern all disputes between them. This being the case, it is suggested that the law governing the contract should necessarily apply where the enrichment is a direct consequence of the contract between the parties, and as the Restatement puts it, the enrichment was received, "in the course of the performance of the contract."[186] It will be noted that this suggestion refers to the law governing the

[184] Indeed, it appears that Bird uses these words because they are wide enough to encompass cases in which the enrichment was relatively independent from, but "causally connected" to, the contract (Bird *op. cit.* at pages 129-130) because the parties would have expected the law of the contract to apply. It is suggested, however, that in the example given by Bird (*Arab Monetary Fund* v. *Hashim* [1993] 1 Lloyd's Rep 543) the argument that the parties had expectations as to what law would apply to the enrichment, is at best speculative.
[185] Stevens, J, *op. cit.*
[186] Comment d, 730.

contract, not the place of the making of the contract.[187] This formulation is used to indicate that where the parties have contractually agreed that any dispute between them should be governed by a law other than the law of the place of the contract, that agreement should logically apply to actions for restitution/unjust enrichment which are a direct result of the relevant agreement. The primary purpose of such a provision would therefore be to fulfil the expectations of the parties. In a similar vein, it is submitted that Hay is correct to argue that where the parties mistakenly believe that a contractual relationship exists between them, the dispute should be treated as if the contract was valid.[188]

Clearly the next question is: what is the effect of a pre-existing, non-contractual relationship between the parties? As we have seen, Dicey & Morris make no reference to such a relationship, while the *American Restatement* refers *only* to relationships rather than contractual relationships and is willing to consider a range of possible connections. Bird treats the contractual and non-contractual relationships in exactly the same way and states that the law of the relationship should apply where the "but for" test is satisfied.

It is submitted that having accepted the importance of the contractual relationship, Dicey & Morris are mistaken to ignore other legal relationships. Thus, for example, it is difficult to argue that a trustee/beneficiary relationship is necessarily less important than a contractual one, and it must be assumed that this neglect is again the product of over-emphasising the connection between contract and quasi-contract. It is therefore suggested that, in many cases, the place of a pre-existing relationship will provide a logical guide as to the law which is most central to the dispute and the law which the parties would have expected to govern an enrichment had they turned their mind to the subject. However, it is equally suggested that, again, Bird's "but for" test is too wide for pre-existing relationships: the vast majority of unjust enrichments would not have occurred "but for" a pre-existing relationship, but it may well not be the strongest connection to a particular jurisdiction. The "substantially related" test of the Restatement is more acceptable,

[187] Bird uses similar phraseology.
[188] Hay *op. cit.*

but the present author would prefer a "direct connection" test as favoured above for contractual relationships.

For transactions which do not involve a contract or a connection to land, both Bird[189] and Dicey & Morris[190] use the place of enrichment as a "catch all" category. The present author has already suggested that the place of enrichment over-emphasises the receipt-based nature of restitution, may be difficult to identify and, in many cases, will have little connection to the core of the dispute.[191] Nevertheless, it is undoubtedly true that a mechanistic means of dealing with non-contractual, non-land based disputes does have some advantages with regard to predictability and simplicity. In this context, it is suggested that in isolation, the place of enrichment or impoverishment may have no connection to the core of the dispute. The least worst alternative is the place of the act which gave rise to the obligation to return the enrichment. Bird notes that the main objection to this possibility is that, "...unlike tort, liability in unjust enrichment centres not on the doing of an act by the defendant, but on the enrichment of the defendant and the impoverishment of the plaintiff. The focus of the action is not on the causal acts, and thus they are not closely connected to the obligation to make restitution."[192] The present author would take issue with this. Restitution/unjust enrichment is made up of three elements: an impoverishment, a benefit and a factor which makes the transaction unjust. The benefit and the loss are of themselves in some ways irrelevant. They are elements in every gift but do not give rise to a legal right to restitution. It is the unjust factor which gives rise to a possible claim.[193] It is nevertheless true that benefit/loss have generated a great deal more debate than their counterpart within our system. This, however, can be explained (a) because they are less established and therefore more controversial than the factor giving rise to injustice (this being based upon traditional authority) and (b) because the theorists have used it as a

[189] Rule (1) (d).
[190] Rule 201 (2) (c): "If it arises in other circumstances, its proper law is the law of the country where the enrichment occurs."
[191] Indeed, we might argue that Birks' admission that the courts have accepted factual rather than technical enrichment (i.e. that the defendant can be enriched by possession of an asset, the property in which still resides in the plaintiff) further weakens the receipt based nature of restitution.
[192] Bird, *op. cit.* at page 111.
[193] True this factor might be a set of circumstances rather than an act, but this does not make them less identifiable or less significant. It is also true that these circumstances or acts might be identified as being different from the act "giving rise to" the enrichment. However, the two are likely to be connected.

convenient way of differentiating their subject from other areas. It has, however, been suggested above that the receipt-based nature of the subject is over-emphasised and has not, as yet, overly exercised the minds of the judiciary. The emphasis placed upon the place of enrichment is more representative of an acceptance of theoretical dogma than a logical search for the proper law of the dispute. Given the fact that restitution is not purely concerned with impoverishment and enrichment, it is not intrinsically unreasonable to look at other elements, and in this context the act is a viable alternative which, although not part of the traditional definition of restitution/unjust enrichment, underpins all its elements. As a result, the place of the act is, in a wider range of cases, likely to have a connection (to a greater or lesser extent) to the impoverishment, enrichment and the factor making the transaction unjust. This connection gives the place of the act a theoretical validity to match that claimed for the place of the impoverishment or enrichment.[194] Equally, in the context of practicality it is suggested that the place of the act is likely to identify a law closely associated with the core of the dispute in more cases than the alternative possibilities. Moreover, even if the greatest domestic emphasis has been put upon loss and benefit, this does not mean that they should of necessity form the foundation of our conflict rules: here we are primarily concerned with finding the proper law of the dispute not exclusively providing a logical domestic structure for the subject.

Bird cites two further objections to the *lex loci actus*. The first is that it is incapable of dealing with omissions. There is clearly some merit in this argument, but it fails to explain why it should be excluded from a logical framework of other rules. Second, she suggests that it may be difficult to identify.[195] As we have seen, this is a problem with all attempts to identify the *lex loci*. However, where the *lex loci actus* is identifiable, it is more likely to be closely connected to the core of the dispute and less likely to represent an arbitrary choice: advantages which cannot be claimed for Bird's chosen approach. It is therefore suggested that the law of place of the act is a

[194] This is particularly so when we remember that we are attempting to find an approach which provides a principled approach to the problems associated with the conflict of laws rather than extend the theoretical aspects of our domestic understanding of restitution/unjust enrichment into the wider arena.

[195] See the example of *First Wisconsin Trust Co.* v. *Schround* (1990) 916 F 2d 394 (7th Cir). However, it is clear that none of the attempts to discover the *lex loci* is capable of adequately dealing with all the difficult cases which commentators can identify.

legitimate factor to consider when no previous relationship exists between the parties. Nevertheless, it is accepted that where the *lex loci actus* proves impossible to logically identify, the courts should not be precluded from examining the place of enrichment or impoverishment. Although the latter of these has proved less than popular, it is suggested that the discussion above[196] demonstrates that there is no overriding reason for holding it to be insignificant.

In light of the above discussion and the analysis in the preceding chapters, the following rule is suggested:

Disputes concerned with restitution/unjust enrichment are governed by the following rules:[197]

(1) Where an enrichment is directly connected to a contract or relationship[198] *the law governing that contract or relationship should apply. If the contract specifically states that the law of a particular place should govern disputes between the parties, this should be respected except where the relevant clause was clearly confined to contractual disputes.*[199]

(2) Where the dispute is substantially related to land or a transaction closely concerned with land, the lex situs should apply.

(3) In other cases the law of the place in which the act giving rise to the enrichment occurred should apply.

(4) In other cases[200] *the courts should apply:*

(a) The law of the place of the enrichment; or

(b) The law of the place of the impoverishment.[201]

As noted above, this formulation is intended to stimulate further debate and represents a starting point for further research. The present author would not suggest it is an ideal solution to all the problems that can arise from restitutionary cases. Indeed, such perfection may unattainable. All possibilities show a tension

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[196] Notably in Chapter Four.

[197] These rules are given in order of importance unless a contra indication is given.

[198] The same rules should apply where the parties mistakenly believe that a contract or relationship exists between them.

[199] The purpose of this section is to apply the law that the parties expected to apply to any potential dispute. Where it is clear that neither party anticipated the law of the contract applying to non-contractual disputes, the courts should look to other factors.

[200] i.e. where rules (1) - (2) are not applicable and the place in rule (3) cannot be satisfactorily identified.

[201] Elements (a) - (b) are not hierarchical and should be applied by the court with regard to: (i) the expectations of the parties (thus, for example, if enrichment and impoverishment occurred in the same

between flexibility and uncertainty. Equally, none can unfailingly to point to the system most closely related to the core of the dispute in all of the wide-ranging circumstances which can arise in restitution. What, then, can we reasonably expect? First, that the relevant rule should recognise the relationship between restitution and contract without over-emphasising it. Second, it should not emphasise the theoretical aspects of our domestic understanding of the subject at the expense of the practical requirements of finding justice in an international context. Finally, and perhaps most problematically, the formulation should point to the law which has the closest connection to the core of the dispute. This requirement is difficult because it is not absolute not least, because more than one such core may exist. This being the case, upon what criteria are we to base an assessment of a proposed formulation? This study has mildly deprecated the view that a rule should be favoured because, although it lacks principle, it will result in an acceptable solution in more cases than other possibilities. However, as noted above, the problems within this area mean that as unsatisfactory as this approach may be, it is perhaps unavoidable. As a result, we must seek an approach based in principle and then ask whether it provides a better practical solution in more cases than its rivals.

Taking these factors into consideration it is submitted that the above formulation provides a logical solution to the problem of finding the legal system which is most closely associated to the core of restitutionary disputes. It is not suggested that it is the only solution, and the formulations proposed by other commentators (discussed above) have much to commend them. Indeed, the purpose of this chapter is not to suggest that a single unbending approach is preferable to any other, but to ask whether a methodology could be found which would allow us to state with certainty that the move towards a restitutionary explanation for certain elements of our legal system will also promote the interests of justice in an international context. It is submitted that the present chapter demonstrates that such an eventuality is potentially problematic, but can be attained if the courts and commentators take an "organic" approach. Specifically, we must accept that no part of this area can be considered in practical or theoretical isolation. If this approach is taken, then it is

country, the courts, in the absence of other factors, might reasonably assume that the parties expected the law of that place to apply); (ii) the ease of identification.

submitted that restitution/unjust enrichment can provide a more logical solution to legal problems, both domestic and international, than the quasi-contractual approach that preceded it.

CONCLUSION

> "To find the point where hypothesis and fact meet...to shake off the old ordeal and get ready for the new; to question, knowing that never can the full answer be found...this is what man's journey is about..."[1]

A.N. Wilson once suggested that, "There are no whole truths, all truths are half-truths. It is trying to treat them as whole truths that plays the devil."[2] To some extent this statement is borne out by the present work, which sets out to prove a contention, a truth. It is submitted that this has been achieved. However, this is in no sense the whole story. Like any work of its kind, this thesis is not only an interpretation of what we know but also a record of what is, as yet, unknown. Both elements are of equal value: we cannot address the faults in a system until we have identified them.

We began with the proposition that tracing as a result of fraud is an intrinsically difficult process that is likely to become increasingly complex in the near future. We then suggested that our system could only meet such changes by evolving with regard to a logical development of restitutionary principles, rather than relying exclusively on traditional mechanistic authority. Chapters One and Two began to demonstrate the efficacy of this argument by examining some of the factors present in fraud which necessarily hinder asset recovery. Some of these elements, like secrecy, are intrinsic in all fraudulent activity. Others are the intentional or unintentional result of judicial decision. Yet more are the by-product of social, economic and technological[3] changes which are occurring throughout the global community. As a paradigm of such developments we identified the potential influence of electronic cash. But this is merely one example; there are a multitude of influences which, individually or collectively, will facilitate the trans-national movement of assets, without assisting those wishing to trace them.

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[1] Lillian Smith, *The Journey,* Ch. 15 (1954).
[2] Whitehead, A.N., *Dialogues of Alfred North Whitehead,* Prologue (ed. by Lucien Price, 1954).
[3] It will be remembered that a majority of respondents to the present survey who believed fraud had increased and expressed an opinion, believed it had done so as the result of the greater use of information technology.

Through the consideration of statistical, academic and other sources, this study highlighted a range of factors which make the identification and recovery of assets lost to fraud a challenging process. These observations were largely confirmed by the empirical research detailed in Chapter Two. Thus we found that a majority of respondents saw fraud as an important and increasing problem. They also placed significant emphasis on the recovery of assets, whilst believing that civil courts are an inefficient means of achieving this. When asked why this was the case, an overwhelming majority cited the complexity of legal rules. However, domestic considerations were not the only concern, and we saw that a significant body of opinion believed that fraud against their foreign assets was more serious than that perpetrated against their domestic interests, that frauds with a foreign element had increased in the last five years and that moving assets abroad made the recovery process yet more problematic. In other words, a range of sources confirmed that tracing resulting from fraud is an intrinsically complex process and, perhaps more importantly, began to identify the reasons why.

The next inevitable question was whether our tracing rules present a logical solution to these problems or whether, as the survey seems to suggest, they exacerbate them. This was largely the purpose of Chapter Three. However, it is not a question which can be answered in a generalised manner. This is an area which must be able to react to a plethora of complex circumstances and, as a result, is replete with technical minutiae. Thus, many of the criticisms and reforms suggested by commentators are issues of detail, and to a large extent this is true of the present study. However, there are also wider issues of principle which are of equal importance. For example, we have asked whether rules originally designed to solve problems associated with the mixing of coins in a bag can acceptably respond to value held exclusively as electronic information. In a similar vein, we questioned whether property rules adequately explain the modern usage of tracing techniques, or if we can discern a logical relationship between property law, tracing and the constructive trust. Ultimately we enquired whether a system which places strong emphasis on authority without being able to unambiguously point to a uniform foundation of legal principle could logically respond to the changes which will influence tracing in the near future. This is a difficult question which can be

understood on a number of levels and can only be answered by developing a clear appreciation of what we are trying to achieve. However, it is submitted that in the context of this study, Chapter Three was able to highlight a range of problems which suggest that our present system suffers from a variety of internal illogicalities and self-contradictions. Moreover, we saw that it is often ill-defined and misunderstood, while also potentially creating results which are dependent upon the methods used by the fraudster, rather than the merits of the case or the justice of the situation. In summary, therefore, it was suggested that our present tracing system contains a number of defects which are likely to be exacerbated by changing modern conditions.

Despite these observations, flaws in a system do not decisively militate against it, unless a better alternative exists. The question which therefore presented itself in Chapter Four is one which has become increasingly common in recent years; specifically, whether the law of obligations is in need of reorganisation, and if so, whether restitution/unjust enrichment provides a more satisfactory foundation than traditional alternatives. Again this is a question which is easy to pose, but difficult to analyse. Thus, for example, we have noted that little unanimity exists as to what we mean by restitution/unjust enrichment, the ways in which it relates to other areas and whether it is a generic conception analogous to a cause or action, or a common thread running through many areas, but defining none. Even if we are willing to side-step these difficulties, restitution/unjust enrichment still presents us with formidable problems. Thus it is at least arguable that no conclusive authority exists for its acceptance, and no overriding argument of principle is available to suggest that it should prevail over other possible interpretations.[4] At a more detailed level, concepts like subjective devaluation, at least instinctively, appear to be a function of theoretical requirements, as opposed to practical utility. Nevertheless, subjective devaluation can at least find almost uniform acceptance among unjust enrichment theorists. Not all elements of the subject can claim such support. Many have created heated debate, with free acceptance providing a perfect example. To this catalogue of problems one must add the relationship of restitution to other areas in general

[4] See Hedley, "Unjust Enrichment", *op. cit.*.

and property law in particular. All these issues would seem to militate against restitution/unjust enrichment as a fully formed part of the law of England. However, these problems cannot be determinative. As O'Connell points out, underlying these difficulties is the split between principle and authority: "The arguments for and against the existence of the doctrine in English law are merely expressions of the far deeper differences between that school of thought which seeks to expand the common law by reference to its ultimate ethico-juridical principles, and that which is content to contain it within certain clearly defined paths which permit only limited deviation."[5]

Nothing in this study is intended to suggest that we should not travel down the clearly defined paths of authority.[6] However, even in developed legal systems it is possible to arrive at a cross-roads where difficult choices must be made. It may be that one route has less foundation in authority and, should we choose to take it, will require us to reassess the nature of the path already walked. However, this does not mean that we must desert the virtue of authority for our future travels. At this point in time, and with regard to some areas, we have the choice between a traditional view and restitution/unjust enrichment.[7] The latter is replete with authority but gives limited guidance as to where we are going. To take this analogy to its limit, traditional authority provides us with the ability to travel from A to B to C but, arguably, does not gives us the guidance we need when we are asked to travel directly from A to Y. Restitution is less well supported and defined by authority. It also contains a number of flaws and inconsistencies, perhaps more than the traditional interpretations. However, we might argue that such problems are less objectionable in a newly developing area, than one which has been subject to specific judicial consideration for several hundred years. However, the definitive argument in favour of some form of restitutionary approach is, it is submitted, the subject's ability to provide us with a map, a logical body of principle which gives us the means to travel from where we are now, to new and novel situations without straining change by analogy to breaking point. Only in this way can we begin to

[5] O'Connell, *op. cit.* at page 3.
[6] "Wisdom lies neither in fixity nor in change, but in the dialectic between the two." Octavio Paz, *Times*, 8 June 1989.

fully marry previous authority with the ability to adapt to quickly changing circumstances. As a result, this study has reached the cautious conclusion that restitution/unjust enrichment provides the best, and most developed, way in which to analyse our understanding of the law of obligations beyond the realms of contract and tort.

However, the primary purpose of this study is to identify previously neglected relationships and to draw together a range of apparently disparate subjects. In this context, we have noted that cases with a foreign element create specific problems for both our tracing techniques and restitutionary methodologies. As a result, the effectiveness of restitution/unjust enrichment cannot be viewed in purely domestic terms. In this context we have noted with some surprise how little academic attention has been paid to restitution's place in the conflict of laws.[8] Thus, for example, in 1941 Gutteridge and Lipstein were able to state, "The situation which is created when rules of quasi-contract are in conflict has been neglected by English writers and has also received little attention on the Continent."[9] This was, perhaps, to be expected considering the nascent state of this area of law in England at the time. What is far more surprising is that in 1992 Bernard could still state that, "There has been little analysis of this issue by Commonwealth conflicts scholars."[10] And another commentator could note that "'Neglected' is the epithet most often associated with the conflict rules governing enrichment."[11] As a result, Chapter

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[7] This is, of course, not to suggest that these are always necessarily contradictory.

[8] Indeed, few areas better exemplify Francis Bacon's belief that, "Where there is much dispute, there is often little enquiry."

[9] Gutteridge, H.C. and Lipstein, K. "Conflicts of Laws in Matters of Unjustifiable Enrichment", (1941) 7 Camb. L.J. 80. Indeed, no choice of law rules with regard to unjust enrichment were formulated until the late 1940s. *Dicey* 6th ed. page 754. Before this edition the subject was considered to be part of the law of tort (*Dicey* 5th ed. page 783); see Bennett, *op. cit.*, at page 154.

[10] "It is a curious feature of the private international law of Scotland that the choice of law problems presented by unjust enrichment have received little attention either in reported cases or in the writings of commentators...those authorities [which do exist] provide no conclusive guidance as to the choice of law rule which should be applied."

[11] Bennett, T.W. "Choice of Law Rules in Claims of Unjust Enrichment" [1990] I.C.L.Q. Vol. 39, 136. These perceptions appear to be borne out by a demonstrable lack of serious academic consideration of the area, "Of the three leading English texts on conflict of laws, two ignore enrichment (C.G. Cheshire and P.M. North, *Private International Law* (1979) and J.H.C. Morris, *The Conflict of Laws* (1984)) and the third (Collins, L. (Ed), *Dicey and Morris on The Conflicts of Laws* (1987), pp. 1340-1357) deals with it only briefly (ten pages out of a total of sixteen hundred). In the United States the topic is dealt with thoroughly in one article only (Hay, .P, "Unjust Enrichment in the Conflict of Laws: a Comparative View of German Law and the American Restatement 2d (1978) A.J. Comp. L. 3), has scant mention in the textbooks and merits only one section in the Second Restatement on the Conflict of Laws (§ 221).": Bennett, T.W. "Choice of Law Rules in Claims of Unjust Enrichment" [1990] I.C.L.Q. Vol. 39, page 138.

Four began from first principles by starting to highlight the goals to which a logical system should aspire and assessing some of the defects with our present methodologies. It was noted that the purely theoretical justifications for the conflict of laws do not provide a comprehensive explanation for the subject and that, as a result, some modern writers have limited their importance. In light of this, we identified justice, uniformity and the desire to uphold reasonable expectations and the intentions of the parties as the primary motivators of the conflict of laws.

It was argued that one of the primary difficulties presented in achieving these goals is that of characterisation. The reason for this is two-fold. First, characterisation's status within the conflict of laws is both controversial and complex. Thus as Bland has noted, "...classification seems "difficult" in a sense different, for example, from the rule against perpetuities...where at least, it is possible eventually to arrive at some intelligible solution. Classification, on the other hand, seems akin to those questions in jurisprudence which ask: "Is Right or Duty paramount in a legal system?" or, even, "What is Law?"; questions...to which there is no one conclusive answer, either because the question is misunderstood, or because the various solutions propounded are not answers to the same questions, but different answers to different questions."[12] Second, as we have seen, restitution and its related techniques are not well defined even in a domestic context. These complexities ensure that it is difficult to identify a universal formula capable of explaining how restitutionary elements should be categorised for the purposes of the conflict of laws. Equally, we have seen that the English courts have done little to resolve these problems, which is, perhaps, unsurprising given the range of areas upon which restitution impinges.[13] As a result, the present study eschews, as the courts have done, the attempt to find a universal approach and examines the relevant issues as discrete entities. In this manner we were able, it is submitted, to divine a route by which the factors which comprise and flow from tracing as a result of fraud could

[12] Bland, *op. cit.* at page 10.

[13] "Given the existence of the law of restitution, there must be a choice of laws rule which indicates which State's law should apply to restitutionary claims having an international element. However, there has been little academic or judicial consideration of what the content of such a rule should be. This is especially true of England where there is a surprising paucity of relevant cases and where the sparse academic treatment largely pre-dates maturation of the English law of restitution.": Bird, J. "Choice of Law", *Restitution and the Conflict of Laws*, Ed. Rose, Mansfield Press, (1995).

be characterised. Moreover, these elements often border the further reaches of restitution/unjust enrichment[14] and will therefore represent some of the most difficult characterisational problems created by the subject. As a result, if we are correct in suggesting that we can find a rational characterisation for those elements, we have necessarily gone some way towards proving the logical consistency of the whole subject.

Nevertheless, although the ability to characterise a subject is important from a theoretical perspective, its practical importance is limited unless it leads to a methodology which can create a more satisfactory means of solving disputes. As a result, the final chapters of this study examined the conflict of laws rules applicable to the area. We noted that a range of methodologies and techniques can be used, and suggested that the primary problem which we face in selecting the most appropriate, is the balance between certainty and flexibility. This is undoubtedly an issue throughout the conflict of laws.[15] However, it is particularly pronounced with regard to restitution, as a function of the area's wide-ranging nature. As a result, the "multiple suggestion" approach taken by the *American Restatement* is initially attractive. However, ultimately the present author would suggest that the requirements of certainty augur for a more formalised multiple rule approach. In this context, it is submitted that it is relatively uncontroversial to suggest that where the dispute is substantially related to land (or a transaction closely concerned with land) the *lex situs* should be applied.

Equally, it is clear that many cases of restitution will arise from, or be closely related to, a contract between the parties. It is accepted that the applicable law should, in many disputes, be the same for both the contractual and the restitutionary dispute. However, it must be remembered that the two areas are separate and can take divergent paths. In this context, it is submitted that the "directly connected to" test is not without its problems, but does allow the courts to recognise the relationship between restitution and contract without over-emphasising it.

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[14] For example, as we have seen, tracing and the constructive trust straddle the split between restitution and property law.
[15] And potentially all legal subjects.

More controversially, this study suggested that the place of the act causing the enrichment could be used as the primary solution for cases unconnected with land or a contract. It must be accepted that, to some extent, there is no overriding argument of principle in favour of this approach. However, it is submitted that this question highlights the importance of this study's approach, which is primarily to bring together a range of disparate subjects. Thus, most commentators who accept, for example, the law of the place of the enrichment base their pronouncement on the simple proposition that restitution is a receipt-based subject.[16] However, by fully investigating the nature of restitution we have found that this argument is at best inconclusive. As we have seen, Hedley seriously doubts the subject's receipt-based nature. Moreover, even Birks is less than phlegmatic in his support of subjective devaluation[17] and is willing to see it limited, whilst Burrows explicitly states that receipt has been over-emphasised at the expense of impoverishment. If there is a limited theoretical connection to the place of the enrichment, it is also true to say that the practical connections are less than pronounced, and the belief it will be easily identified is overly optimistic. This being the case, the claimed theoretical defects in the place of the act are put into perspective and we can begin to identify its advantages. Specifically, it will, in a range of cases, point to a law which has a close connection to the centre, core or motivator of the dispute. Not least because it will, to a greater or lesser extent, underpin the enrichment, impoverishment and unjust factor. It is submitted that given the goals we have identified, the importance of such an advantage cannot be underestimated.

Finally, it was suggested that if all else fails, the courts should look to the place of the enrichment or impoverishment. However, this suggestion was made primarily because, as a matter of practicality, one of these places should be identifiable and represent the intentions of the parties, rather than as a function of domestic restitutionary theory.

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[16] Bird, J. "Choice of Law", *Restitution and the Conflict of Laws*, Ed. Rose, Mansfield Press, (1995).
[17] Which is a necessary corollary of a fully receipt-based subject.

Despite these considerations, it cannot be denied that no formula yet proposed provides the perfect balance between certainty and flexibility, whilst also unfailingly pointing to the proper law of the dispute in the full panoply of circumstances which restitution can embrace. Nevertheless, the analysis in chapters Five and Six suggests that an acceptable basis for future academic and judicial development is attainable. Moreover, it is submitted that such a determination allows us to conclude that theory, academic comment and changing judicial perceptions indicate that restitution/unjust enrichment is the logical vehicle by which to understand and recategorise the defects in the law of obligations both domestically and in the international environment.

Thus it is submitted that the proposition with which we began has been demonstrated throughout this study. Tracing resulting from fraud is an intrinsically complex process, further complicated by the changing world environment. The most appropriate way in which to counter these problems is to develop our rules primarily with regard to the law of restitution/unjust enrichment. However, as we noted at the beginning of this conclusion, this is not the whole story and this study has considered a range of factors beyond the original thesis which bear mention. Perhaps most importantly, we have throughout in various guises been concerned with the characterisation of legal elements and subjects. It has been suggested that this is one of the primary and most fundamental aspects of legal reasoning. We have seen that even the most careful of commentators can, on occasion, make assumptions concerning the nature of characterisation which are at best unhelpful. Thus, it is sometimes suggested that the use of descriptive characterisation can free one from the usual constraints of creating an internally logical system and allow the use of artificial formulae which create discrete subjects without changing the existing order. For example, we have seen that Birks argues that he can create artificial divisions between the laws of property and restitution, or force restitution and unjust enrichment to quadrate because he is not suggesting how things should be, but merely creating a "textbook" categorisation. We have argued that the importance of linguistic labels and substantive perceptions ensures that both descriptive and prescriptive characterisation have the effect of altering the elements thus categorised. As Mathews correctly says of Birks' suggestion that the elements

which he describes as restitutionary are brought together merely by virtue of pre-existing common characteristics, "When Professor Birks says that reordering legal subjects gives a *better* understanding, we must be clear what he means: he means it gives a *different* understanding, resulting (sooner or later) in different legal rules, which he thinks would be better than the ones we now have. So we have legal scholars making new rules."[18] This has, it is submitted, the effect of placing greater responsibilities on those who would forge new legal categories than they have often been willing to accept.

If doubts have been expressed as to the appropriateness of academic characterisation, it is clear the judiciary has not escaped unscathed: "The decider stands off from the problem for a moment, contemplates his navel and concludes 'this specimen looks like a tadpole', or a minnow, or a chameleon. The conclusion reached is thought to be so obvious ('can't you see that's a minnow?') that supporting reasoning is not necessary. Taxonomy, however, is not without its difficulties: tadpoles and minnows both have fins and gills, but not every minnow grows up to be a toad."[19] There is no doubt that within the present study we have identified examples of such a process in a range of restitutionary cases. Thus, for example, the courts have used the terminology of restitution/unjust enrichment, whilst apparently placing equal importance on the older language of quasi-contract: *Lipkin Gorman* v. *Karpnale Ltd.*[20] They have characterised cases as restitutionary, whilst applying property law: *Macmillan Inc.* v. *Bishopgate Investment Trust plc. (No.3)*. They have claimed to be basing their decisions on restitutionary principles, without specifically explaining how the circumstances of each case gives rise to the requirements of benefit, expense and injustice: *The Trustee of Property of F.C. Jones & Sons (a firm)* v. *Jones*.[21] Thus, such cases straddle the boundaries of property and restitution, new methodologies and traditional authority, without explaining how these factors are related and which is exerting influence at any particular point in a judgment. The long-term dangers of this approach are apparent. The unjust enrichment theorists are vociferous in their championing of the subject

[18] Matthews, "The Legal and Moral Limits..." *op. cit.* at page 17.
[19] Cramton and Currie, *Conflict of Laws, op. cit.* at page 89.
[20] [1991] 3 W.L.R. 10 (H.L.).

and the courts have given it apparent support. This will result in a change of emphasis from a traditional analysis to a restitutionary one, and diminish the likelihood of solutions to problems within the restitutionary sphere arising from other areas. This is a satisfactory situation only if restitution can adequately meet the new challenge, and this requires the courts to play a vigorous and exacting role. Thus it is incumbent upon them to clearly identify the principles with which they are concerned. If a case is susceptible to analysis with regard to "restitution for wrongs", tort, property or autonomous restitution, then it must be clearly stated, at every stage, which principles are at work.[22] Moreover, within each category the operative factor[23] must be identified. Equally, it should be recognised that this is a broad and interconnected area in which no one issue can be viewed in isolation. Only in such a manner can restitution develop as a logical system of law as opposed to a loose amalgamation of corrective procedures.

It has been said that all great swindles are simple.[24] Sadly, the nature of the world ensures that the same may never be said of all effective responses. Nevertheless, this thesis is ultimately a call for clarity, transparency and, where possible, simplicity in our approach to tracing and restitution. Undoubtedly the critical reader might be forgiven for arguing that some of the suggestions found in this work would add to the subject's complexity rather than reduce it. They might point to the belief that we cannot characterise a legal subject without effecting change and argue that this makes the task of legal development harder, not easier. Equally, it might be suggested that the attempt to view the area as a larger whole, encompassing many interconnected relationships, cannot be seen as a simplification. At one level the present author would have to confess that this is true of these, and many other, arguments contained within this work. However, simplicity should not be confused with naiveté, and the belief that this is a subject which can always be reduced to undemanding formulae would be naive. Thus, if obstacles have been placed in the way of certain theories or arguments it has been done, not with the intention of

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[21] [1997] Ch. 159.
[22] For what may be a step in the right direction see, *Banque Financière De La Cité* v. *Parc (Battersea) Ltd.* [1998] 2 W.L.R. 475.
[23] Enrichment, impoverishment and the unjust factor.
[24] O. Henry [William Sydney Porter], *The Gentle Grafter,* "The Octopus Marooned" (1908).

causing the traveller undue hardship, but in the hope of finding more plausible, if more arduous, routes. With this in mind we can, it is submitted, still attain a simplified, more easily understood and rational tracing regime.

However, the present work demonstrates that this can only be achieved if we rigorously focus on our objectives, continuously review them, relentlessly explain how they are to be achieved and unfailingly strip away all superfluous influences. This is undoubtedly a challenging undertaking. There is much work to be done and many avenues of research to be explored. Nevertheless, the task has been initiated within the law of England and if the present work can contribute to this process, whilst beginning to identify some questions for the future, it will have achieved its purpose:

> "As soon as you begin to say, "We have always done things this way—perhaps *that* might be a better way," conscious law-making is beginning. As soon as you begin to say, "*We* do things this way—*they* do things that way—what is to be done about it?" men are beginning to feel towards justice, that resides between... right and wrong."[25]

[25]Cam, H. "Law as It Looks to a Historian," lecture, 18 Feb. 1956, at Girton College, Cambridge University.

APPENDICES.

APPENDIX ONE: RIGHTS IN PROPERTY.

"Oh God, help me...this little once, O Lord. For Thou knowest my rights."[1]

Many of the problems associated with trans-national fraud litigation are a direct function of the divergent theories and histories associated with the concept of property around the world. These are too diverse and disparate to ponder in detail at this point,[2] however it is impossible to fully consider this subject without examining the underlying themes to be found in the English law of property and its associated disciplines. Most specifically, it is necessary to appreciate how and why we categorise assets and property (and the rights which might reside in them) in the ways that we do and, the potential effects created by this methodology.

The dictionary defines "property" as, "The condition of being owned by or belonging to some person or persons..."[3] In an everyday sense we use the word to denote a number of differing ideas. First, it is used with regard to physical assets which one owns or, perhaps, which one has a right to possess. Second, one can use the word to denote rights *in* a physical asset: for example, the right to fish a river. Finally, it may be used (a little less commonly) to describe one party's right to expect another party to perform a specific task: for example, to repay a debt.[4]

In a similar vein, if asked to categorise the property we own we might identify a number of differing forms of asset.[5] The first, and the most easy to recognise would be land. Second, and just as identifiable, would be physical, tangible or corporeal assets. Finally, there are intangible or incorporeal assets which would correspond

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[1] Firbank, R., *Caprice,* III.

[2] See generally Meek, C.K., *Land Law and Custom in the* Colonies, Oxford (1949); Powell, R.R., *Powell on Real Property,* New York, (1949) (Reprint 1986), Chapters 1-3; Olivecrona [1978] C.L.P. 228; Anger & Honsberger, *Real Property*, (Oosterhoff and Reyner (Ed.)), Ontario, (1985), Chapter 2; Munzer, S.R., *A Theory of Property*, Cambridge, (1990); Hammond, *Personal Property,* (1990), Chapter 2; see also the work of Professor Goode (notably Goode, "The Right to Trace and It's Impact in Commercial Transactions - I" 92 (1976) L.Q.R, 360 and Goode, "The Right to Trace and It's Impact in Commercial Transactions - II" 92 (1976) L.Q.R, 528) which is perhaps the most logical and comprehensive research done in this area by any common law author and which provides much of the theoretical underpinning of the present section.

[3] *The Shorter Oxford English Dictionary*, 3rd ed. (1988).

[4] Matthews, P. "The Legal and Moral Limits of Common Law Tracing," *Pressing Problems in the Law,* S.P.T.L. Seminars 1994, 13.

[5] Goode, "The Right to Trace and It's Impact in Commercial Transactions - I" 92 L.Q.R, 360.

with our third category of property above. It is therefore clear that the English system is capable of envisaging a number of distinct asset types each able to maintain an array of differing property rights within them. For example, we can easily accept that a piece of land co-owned by A, B and C, is used to secure a loan from bank D, while E has the right to live upon it and F has the right to remove wood. On the other hand, foreign jurisdictions are less comfortable with such a concept. Roman law, for example, generally views ownership as absolute.[6] As such the rights of D and E would be viewed as "burdens on the land rather than one of the bundle of rights which goes to make up the thing as a legal construction."[7]

Beyond these classifications, within our system, it is common to designate rights in property as being either personal or proprietary.[8] Unfortunately these terms, like much of the language commonly used in the area, have been used by both academics and the judiciary in a somewhat imprecise manner.[9] Thus, it is often stated that a real right is one which relates to a particular fund or identifiable asset, while a personal right is one which is enforceable only as against the defendant.[10] However, the suggestion that all remedies which make available to the claimant a particular piece of property are necessarily proprietary, is potentially overly simplistic. Professor Goode describes "real rights" as ones which, "...will inhere in

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[6] Thomas, *Textbook of Roman Law*, (1976).

[7] Matthews, P. "The Legal and Moral Limits of Common Law Tracing," *Pressing Problems in the Law*, S.P.T.L. Seminars 1994, 14.

[8] Rights *in personam* and rights *in rem*.

[9] "Unfortunately despite the brilliant analysis of rights and remedies made many years ago by Hohfield (*Fundamental Legal Conceptions as Applied in Judicial Reasoning*), his strictures against imprecision of thought and language have largely been ignored, with the result that phrases such as "rights *in personam*" "real remedies" and "personal remedies" have been used without proper regard to their meaning, leading to conclusions running entirely counter to the basic tenets of personal property law": Goode, "The Right to Trace and It's Impact in Commercial Transactions - I", *op. cit.* at 362.

[10] "By a personal claim is meant a claim enforceable against a defendant personally as distinct from a proprietary claim enforceable against a particular fund or a particular piece of property under the control of the defendant. In the former case the claim, if successful, will give rise to a judgement imposing a personal liability on the defendant which will be of little use if he is insolvent. In the latter the judgement will make available to the claimant a particular fund or piece of property controlled by the defendant. It will not involve the defendant in any personal liability over and above that which is implicit in his being required to give up to the plaintiff either the entirety or part of the fund which he has hitherto been claiming as his own.": Hayton and Marshal, *Cases and Commentary on the Law of Trusts*, 9th. ed. London (1991); quoted by Goode, "The Right to Trace and It's Impact in Commercial Transactions - I", *op. cit.* at page 363. [11] Goode, "The Right to Trace and It's Impact in Commercial Transactions - I", *op. cit.* at page 363; The terms "real rights," "proprietary rights" and "right *in rem*" are often used interchangeably. Goode, however, suggests that the modern use of "rights *in rem*" has been extended to cover not only rights against a "single person or limited number of persons" but also "all rights against persons generally (whether arising in relation to a *res* or not)" As a result, he holds that in order to avoid confusion the phrase should be abandoned completely.

a person by virtue of (1) possession of an asset (as opposed to a mere right to possess) or (2) ownership of an asset, whether the asset be tangible or intangible, and whether the ownership be legal or equitable, sole or shared with others."[11] Personal rights are those which fall outside this criteria.[12] These can usefully be further sub-divided into the following categories. First, purely personal rights which do not depend upon the recovery of an asset. Second, two categories which may be jointly termed *jura in personam ad rem.* Specifically, claims involving the possession of a particular asset and claims requiring the performance of acts (or potentially the execution of documents) which transfer the ownership of an asset.[13]

In identifying these last two categories of *jura ad rem* as personal Goode appears to be making a subtle distinction between proprietary actions as defined above and personal actions which require the transfer of possession or the performance of acts which result in the transfer of property. In other words, real remedies are only available where a current real right exists. A personal remedy in this context, on the other hand, will be designed to secure the recovery of a real right not currently held by the plaintiff: that real right will be dependant on subsequent court orders. In making this point it must be remembered that although personal possessory actions may well be based upon real rights they are not dependent upon them. Failure to make this distinction often leads to the suggestion that actions which may be merely possessory, are in fact necessarily real actions in themselves.[14] Goode points to such a usage by Salmond[15] and retorts that there is no need for the rights to arise out of a property right, even a contractual interest could suffice. As a result he comes to the conclusion that while rights at common law might be purely personal or possessory,

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However, it is suggested that this is overly constrictive (especially in the context of the present study), and generally unnecessary as long as the potential definitional inexactitudes are born in mind."

[12] i.e. those which do not depend upon existing ownership or possession of an asset even though they may be based upon a right to possess it.

[13] Goode, "The Right to Trace and It's Impact in Commercial Transactions - I", *op. cit.* at page 363.

[14] For a example see Paisley, "The Problems of Asset Recovery Within the Jurisdiction of England and Wales: An Overview", *The Journal of Asset Protection and Financial Crime*, Vol. 1, No. 4, 297.

[15] "The plaintiff must show that he has a right to the immediate possession of the chattel at the time of the commencement of the action, arising out of an absolute or special property in it.": *Salmond on the Law of Tort,* 16th ed.,114.

rights which require the transfer of ownership can only ever be equitable. Thus the crucial requirement of the common law remedy is the proof of a right to possess rather than a right to own (notwithstanding the fact that the action may well be founded on legal ownership). As a result, Goode reaches the conclusion that:

> "Since no common law remedy for recovery of an asset is founded on ownership, and since the only other form of real right known to the common law is possession, which *ex hypothesi* the plaintiff does not have, it follows that all common law remedies for the recovery of personality are personal. By contrast, equitable remedies for the recovery of personality may be real or personal."[16]

It is difficult to fault the logic of the argument, however, one further point must be made with regard to the final sentence of the above quote which suggests that equitable remedies may be real or personal.[17] There is authority which indicates that because equity acts *in personam*,[18] questions surrounding equitable ownership are necessarily divorced from questions of real rights. A number of commentators have made strong criticisms of this proposition.[19] Thus Stevens[20] (in a conflict of laws context) notes, correctly, that although equitable interests are not good against the whole world, in other practical senses English law treats equitable ownership as a proprietary right. Thus, for example, he points out that equitable property can be taxed,[21] stolen,[22] sold, inherited, and subjected to a right of immediate possession[23] like other property. It is also subject to the same rules regarding the risk of appreciation or depreciation as other property[24] and it gives priority over other creditors in cases of insolvency.[25] As a result, it is not unreasonable to suggest that common law remedies should not be considered to be concerned with more than *in*

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[16] Goode, "The Right to Trace and It's Impact in Commercial Transactions - I", *op. cit.*, at page 365.
[17] However it has been noted that this logic is often not followed in academic and judicial comment.
[18] *Webb* v. *Webb* [1991] 1 W.L.R. 1410; [1994] 3 W.L.R. 801.
[19] Goode himself states with regard to an analogous argument that, "Indeed we find such masters of equity as Hanbury standing the law on its head by asserting that the common law right to follow an asset is a right *in rem* and the equitable right to trace is a right *in personam* (*Essays in Equity,* pp. 9-14), beguiled by the magic of the great Maittland, whose constantly asserted "axiom" that equitable rights are merely *jura in personam* is arguably the most fundamental heresy ever perpetrated in English legal literature.": Goode, "The Right to Trace and It's Impact in Commercial Transactions - I", *op. cit.* at page 362.
[20] Stevens, R. "Choice of Law Rules of Restitutionary Obligations", *Restitution and the Conflict of Laws,* Ed. Rose. Mansfield Press, (1995), 183 - 184.
[21] *Baker* v. *Archer Shee* [1995] A.C. 844; Stevens, R. *op. cit.*.
[22] Theft Act 1968, s.5 (1); Stevens, R. *op. cit.*.
[23] *BBMB Finance (Hong Kong) Ltd* v. *Eda Holdings Ltd* [1990] 1 W.L.R 409; Stevens, R. *op. cit.*.
[24] *A-G Hong Kong* v. *Reid* [1994] 1 A.C. 324.
[25] *Re Kayford* [1975] 1 W.L.R. 279.

personam rights, whilst equitable remedies can be personal or contain elements of the proprietary.[26]

TRANSFER OF TITLE.

The above discussion emphasises the important part a plaintiff's retention of title can have in his eventual remedy. It is surprising therefore how little judicial consideration appears to have been given to the circumstances (particularly with regard to mistaken payments) which will prevent the passing of title.[27] Nevertheless, the rationale underlying this area is relatively simple. Specifically, that property passes where a transferee intends it to pass and a relevant mistake can render such intention ineffective.[28] The pertinent question of principle is therefore what form of mistake prevents property from passing?: the traditional answer being a "fundamental" mistake Williams for one, shows little inclination to doubt that fundamental mistake is a reasonable basis for the law in this area and confines himself to determining how to define such a mistake, identifying two possibilities. First, a mistake is fundamental if it was such as to negate the transferor's intention to transfer a specific asset to a specified person. In other words, it must be shown that the transferor did not "know what he was doing." The second possibility is to say that any mistake which is significant enough to ensure that in its absence the transferor would not have gone ahead with the relevant transaction is fundamental.[29] Williams suggests that principle and authority favour the former approach while accepting that, "the distinction between the two categories is one of degree..."[30]

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[26] In a domestic context it should, however, be noted that in *Macmillian Inc. v. Bishopgate Investment Trust plc. (No.3)* [1996], Staughton L.J., stated, "...it is said that while Macmillian do have an equitable title to the shares, equity acts in personam and gives effect to the title only by orders directed at those who would disturb it." *Macmillian Inc. v. Bishopgate Investment Trust plc. (No.3)* [1996] 1 All E.R. 585; [1996] 1 W.L.R. 387, 398.

[27] "The detailed rules stating when a mistake falls into one category or the other [i.e. mistakes which allow the passing of property, those which do not and those which create voidable transactions] are extremely complex and often scandalously uncertain.": Williams, G., "Mistake in the Law of Theft" [1977] C.L.J. 62, 63; Treitel, *The Law of Contract*, 4th ed.; Swadling, W.J., [1994] Restitution L. Rev., 80.

[28] Williams, G., *op. cit.* at page 63

[29] i.e. he did not know the quality of what he was doing

[30] Williams, G., *op. cit.* at page 63

Williams' arguments are logical and clear, however the case law cannot match this purity of thought. McCormack points out that it is possible[31] to find authority both for the suggestion that property subject to both forms of mistake should[32] and should not[33] pass and that, "...in no case has all the relevant authority from both the civil and criminal sphere been analysed."[34]

We have seen above that one of the more important cases in this is *Chase Manhattan Bank NA* v. *Israel-British Bank (London) Ltd.*[35] However, we have noted that our understanding of the effect of mistake in that case less than clear and it is true to say that this case fails to explain what form of mistake could be considered fundamental.[36] Moreover, there is the question of what form of mistake is necessary to ground a proprietary claim.[37] Equally, with regard to bankruptcy following a mistaken payment Goode states:

> "It would be unjust enrichment of the estate for the court to hold that a title to goods which was voidable prior to the bankruptcy should become converted into an indefeasible title upon bankruptcy. By contrast a seller who sells goods without reserving title or taking security for the price cannot complain of his status as an unsecured creditor, for if he has intentionally given up his proprietary rights before the buyer's bankruptcy there is no reason why these should be restored to him gratuitously by the law upon such bankruptcy."[38]

Goff and Jones take a similar line, stating that where a transaction is affected by an operative factor[39] (which allows the passing of legal title) the plaintiff will retain an equitable interest: again this is based upon the defendant's assumption of risk.[40]

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[31] Particularly with regard to mistaken payments involving incorrect amounts.
[32] *Moynes* v. *Coopper* [1956] 1 Q.B. 439; *R.* v. *Davis* [1988] Crim. L.R. 762.
[33] *R.* v. *Gilks* 1 W.L.R. 1341; *Chase Manhatten Bank N.A.* v. *Isreal-British Bank (London) Ltd.* [1981] Ch. 105; *R.* v. *Shadrokh-Cigari* [1988] Crim L.R. 465.
[34] McCormack, "Mistaken Payments and Proprietary Claims" [1996] Conv. March-April, 86, 93.
[35] [1981] Ch. 105.
[36] McCormack, *op. cit.* at page 93.
[37] "Was the mistake deemed sufficiently fundamental to prevent property from passing or is the fact that the monies were recoverable in a personal restitutionary action enough to ground a proprietary claim.": McCormack, *op. cit.* at page 96. In the absence of a mistake it is also possible for a transaction to occur which transfers no title upon the recipient: *The Trustee of Property of F.C. Jones & Sons (a firm)* v. *Jones*, *The Times*, March 13, 1996; [1997] Ch 159.
[38] Goode, 103 L.Q.R. 439, 440.
[39] "...mistake, compulsion, necessity, or in consequence of another's wrongful act or unconscionable conduct": Goff & Jones, *The Law of Restitution*, 4th ed. (1993), 94.
[40] "In many cases the recipient will be insolvent, and the plaintiff will be seeking to gain priority over his general creditors. If he can identify his money, his claim will normally prevail. Unlike the general creditors

They do however, go on to suggest that where the claim is not referable to an existing equitable claim then the courts should take cognisance of whether the case is between a solvent plaintiff and an insolvent defendant and whether the defendant had knowledge of the relevant facts giving rise to the restitutionary case.[41] A number of commentators have noted, it is suggested correctly, that this approach appears to replace questions of property with a call to reasonableness and augers against certainty.

Perhaps as a result of these problems Birks takes a different approach, relying on a surviving proprietary base.[42] Thus he makes the distinction between a fundamental mistake which will prevent the passing of property and an "insufficiently fundamental" one which will not, resulting in the ability to bring a purely personal action. It is submitted that this approach makes logical sense and has the advantage of keeping the focus of attention upon the original property rights and the relevant transaction rather than, for example, the state of the defendant's knowledge. It has also been argued that this goes some way to explaining why the plaintiff should be able to trace his asset through mixtures and substitutions where he has a right *in rem* but not where his claim is personal.[43] Thus, from Birks' perspective the plaintiff can bring an action *in rem* first, where the equitable title vests in the plaintiff creating a "...trust like relationship" and second, where the plaintiff retains both the legal and equitable titles.[44] Although this approach goes some way to providing a logical structure it is not free from the difficulties alluded to above:

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he has not taken the risk of the recipients insolvency": Goff, Lord & Jones, *The Law of Restitution,* 4th ed. (1993), 94.

[41] Goff & Jones, *The Law of Restitution,* 4th ed. (1993), 94-101.

[42] "...The only satisfactory basis for raising a restitutionary proprietary right in the asset...is as follows: the circumstances of the original receipt by the defendant must be such that, either at law or in equity, the plaintiff retained or obtained the property in matter received by the defendant, then continued to retain it...": Birks, *An Introduction to the Law of Restitution,* Oxford, (1985), 378; "The phrase 'proprietary base' is used to capture this idea: if he wishes to assert a right *in rem* in the surviving enrichment, the plaintiff must show that at the beginning of the story he had a proprietary right in the subject matter, and that nothing other than substitutions or intermixtures happened to deprive him of that right *in rem*": *Ibid* at page 379.

[43] "...where at the moment of the original receipt, the property passes to the recipient so that, at the moment, the plaintiff is already reduced to a claim *in personam*, which would have to rank with other unsecured personal claims, the law has already thereby decided that, on those facts, he shall not have the advantage of any right *in rem*.": Birks, *An Introduction to the Law of Restitution,* Oxford, (1985), 378. 384. This will be discussed in the subsequent chapters.

[44] Birks, *An Introduction to the Law of Restitution,* Oxford, (1985), 378. 384. Although we have seen that this view may be changing.

> "...Birks talks about a mistake being sufficiently fundamental to prevent property from passing. So we are back to the notion of "fundamentiality." This concept has been criticised. For instance, the majority o fjudges in the High Court of Australia in *David Securities Pty Ltd.* v. *Commonwealth Bank of Australia*[45] said that the idea of "fundamentiality" was extremely vague. Insistence upon this factor only served to focus attention in a non-specific way on the nature of mistake, rather than the fact of enrichment."[46]

At this point in the discussion we might conclude that Birks' position is both logical and in line with restitutionary principles.[47] Its main failing is the fact that the courts have yet to fully define what is constituted by a fundamental mistake. Despite McCormack's misgivings as to the suitability of this concept, it does not seem unreasonable that the passing of property should be governed by the presence of such a mistake despite its restitutionary context. Nor is it necessarily true to suggest that the present lack of authority demonstrates that a workable definition of "fundamental mistake" is impossible to achieve. The dictionary defines "fundamental" as "of or pertaining to the foundation, basis or groundwork; serving as the foundation or base."[48] Considering the multitudinous and complex problems we expect the courts to solve, it should be possible for them to discern whether or not a mistake goes to the foundation or basis of a transaction: i.e. did it negate the transferor's intention or merely relate to his motivation. It is suggested that a definition formulated along the lines accepted by Williams is not unreasonable. A mistake which ensures that property is transferred to a party to whom the transferee did not intend it to pass will in most circumstances be fundamental, as will one which sees the transfer of the wrong property. Equally, mistakes of the type Williams describes as motivational, should not normally be sufficient to alter the usual transference of property. It may however, be necessary for the courts to lay down rules beyond the basic definition. It might, for example, be argued that in a complex transaction, a mistake resulting in double payment may not go to the foundation of the transaction.[49] We might nevertheless believe that justice requires the payee to receive recompense. In these borderline areas it may well be that as a

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[45] *David Securities Pty Ltd.* v. *Commonwealth Bank of Australia* [1992] 66 A.L.K.R. 768, 777
[46] McCormack, "Mistaken Payments and Proprietary Claims" [1996] Conv. March-April, 86, 94.
[47] For the applicability of restitutionary principles in the present study see Chapter 3.
[48] *The Shorter Oxford Dictionary,* Oxford, 3rd. ed., (1983), 817

matter of practicality the courts should look beyond the pure questions of property and mistake and consider the ancillary question suggested by Goff and Jones.[50]

[49] Although it is submitted that such circumstances would be rare.

[50] For example, the rights of third parties; "Any resolution of the policy question must involve full consideration of the position of unsecured creditors of the payee. All too often they have been left out of the equation": McCormack, "Mistaken Payments and Proprietary Claims" [1996] Conv. March-April, 86, 97. The above discussion provides a necessary foundation to the debate which will take place in this present chapter. However, the question of how we are to make a distinction between the laws of property and restitution will require a more detailed examination of the passing of property rights and the effect of such determinations: See Chapters Three and Four.

APPENDIX TWO:

PUBLISHED ARTICLES ARISING FROM THIS STUDY.

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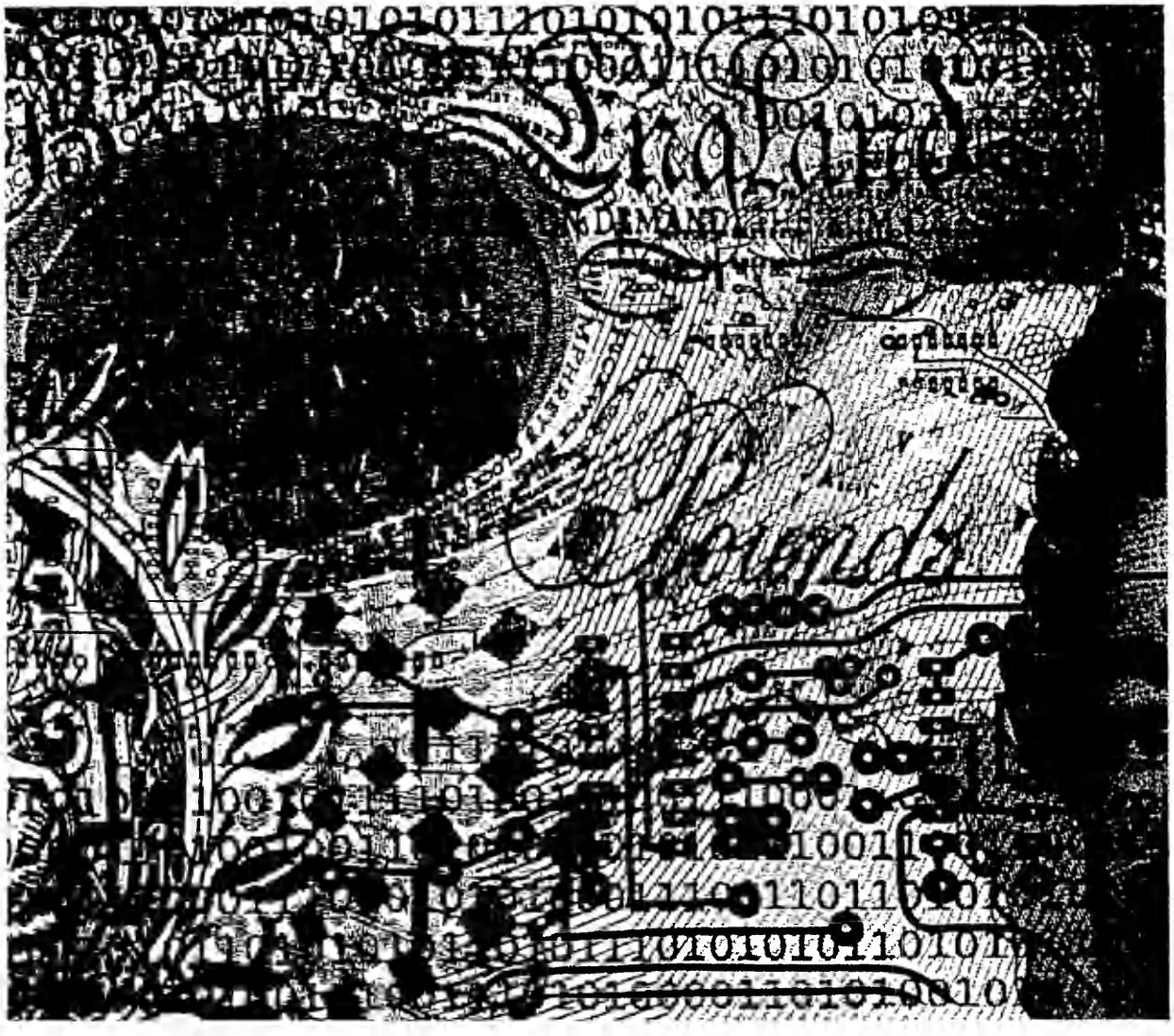
NEW LAW



Electronic cash and fraud

Breach of the peace • Doc Brief

Negligence in residential care

Taxing Matters • Conveyancing fees

Electronic cash—welcome to the future

Ian W Hutton charts a course for lawyers

Swindon might seem a strange place to go looking for the future. Nevertheless, three months ago, the National Westminster Bank began a scheme there which will change the way we use, understand and regulate our currency. It is called Mondex and its generic name is electronic cash (e-cash). E-cash, money stored on smart cards and passed over computer networks, is currently the hot topic of conversation in every major bank in the world. It is, they claim, the key to a bright new economic future that will make our lives easier, cheaper, and more secure.

Strangely though, not everyone agrees. Some experts have described e-cash as "untraceable" and "impossible to police", they say that it will lead to "monetary anarchy" and is "a mass experiment that could ... shake the foundations of global financial systems and even governments". Perhaps this is why drug dealers, fraudsters and money launderers are also taking a keen interest in this new form of money. Indeed it seems that only the authorities remain blissfully unconcerned. When Alan Binder, Vice-Chairman of the US Federal Reserve, was recently asked his opinion of digital cash, his two-word reply was both simple and worrying: "Digital what?"

This article will answer that question before considering whether e-cash will create the revolution that many predict and if so, how governments, financiers and most importantly lawyers should react to this brave new world.

What is money?

Today, our understanding of economics and commerce is inexorably linked to our belief in a system of locally acceptable, government-backed notes and coins. Our familiarity with this medium is so strong that we consider past currencies based upon seashells, cattle or cloth to be at best underdeveloped and at worst laughably eccentric. However, viewed objectively, our system can appear equally quaint. Currency dealers transmit millions of pounds around the globe at the touch of a button and yet it can take days for a £5 cheque to clear. Central banks spend small fortunes designing, producing and transporting paper money that can then be forged, stolen or destroyed with comparative ease. Travelling abroad, even within the single European market, can require an interminable amount of time-consuming and expensive money changing. Nevertheless, our long acquaintance with paper money means that we rarely ponder its limitations, seldom ask whether it could be improved upon and never even consider that alternatives may exist.

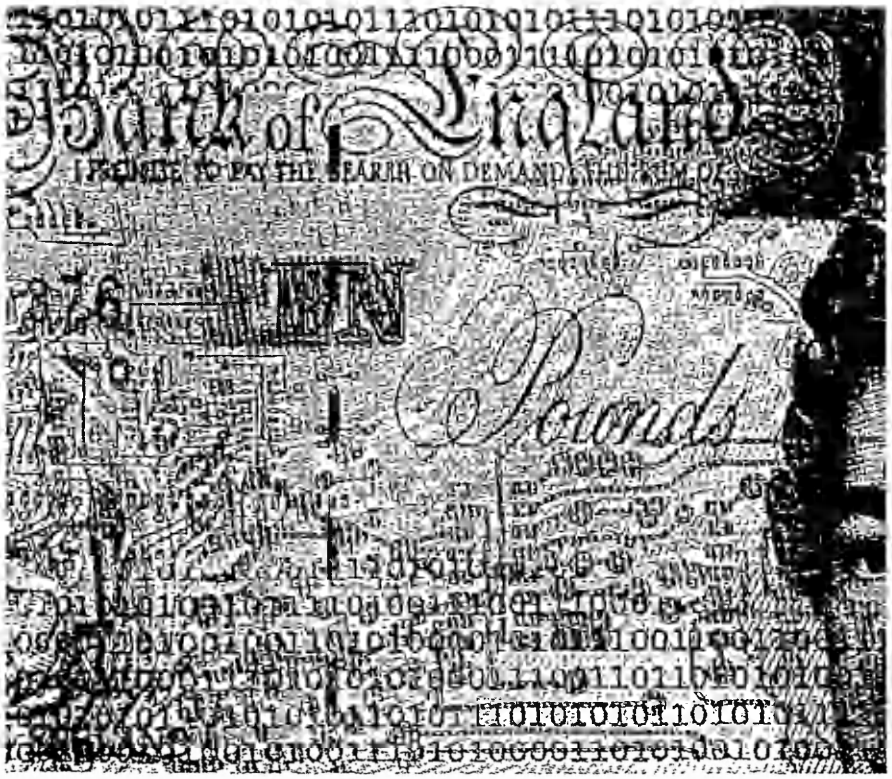
"It seems that only the authorities remain blissfully unconcerned. When Alan Binder, Vice-Chairman of the US Federal Reserve, was recently asked his opinion of digital cash, his two-word reply was both simple and worrying: 'Digital what?'"

Money has three basic purposes: it is a medium of exchange, a standard of worth and a store of value. Beyond this it should be cheap and simple enough to facilitate small transactions, and yet flexible enough to cope with large deals and an infinitely scaleable number of users. Although other refinements are possible, any trusted medium, publicly or privately produced, which to a greater or lesser extent satisfies these criteria, can act as legal tender. The history of money, in its progression from seashells, to spices, to precious metal coins, to the tokenised currency we use today proves one thing: any new form of money that improves upon the characteristics discussed above will quickly and comprehensively replace its predecessors. With the creation of electronic cash we might now be, as Richard K Crone of KPMG Peat Marwick has suggested, "In the beginning stages of the cash-replacement cycle."

What is electronic cash?

In simple terms electronic cash uses binary digits to represent value. These numbers are then placed onto smart cards, hard drives or other electronic storage devices before being transferred in return for goods and services. There are upward of twenty such systems under development around the world. However, from a legal perspective we can usefully place them all into one of two categories. On one side are systems that, like credit and debit cards, record transactions at a central location. Such an implementation is currently under development by Mastercard and Visa. Unfortunately, central collation not only limits the extent to which these systems resemble paper money but also increases transactional costs to the point where small purchases may be uneconomical, and raises potential data collection problems. The alternative systems require no central verification and thus function in a way very similar to traditional cash. At present, the most advanced of these is the National Westminster Bank's Mondex system. Should the experiment currently under way in Swindon, which presently involves several hundred retailers and six thousand consumers, prove successful then a nationwide launch will begin in 1997.

Mondex employs a computer chip, which is charged with units of value from banks, cash dispensers, or modified home telephones. Unfortunately, this specialised hardware requirement will, initially at least, limit Mondex's ability to facilitate electronic commerce over computer networks. In an attempt to overcome this problem other developers have created forms of e-cash which are purely software based. The most advanced of these (Digicash) uses two encryption keys, a private one known only to its owner and a public one that can be widely distributed. A bank encodes a number representing e-cash value with its private key—if the user can decode this number using the matching public key then he has infallible proof that the currency was issued by the bank. The encryption techniques are extremely complex. However, it is true to say that Digicash is both unforgeable (assuming the bank retains its private keys) and provides a level of privacy greater even than paper money. Indeed in many cases it will be impossible to determine who spent a particular unit of currency over a computer network, even where banks, merchants



and the authorities collude.

All of the above implementations can, to a greater or lesser extent, satisfy many of the requirements we expect of money. Moreover, electronic cash provides a number of significant advantages over its traditional counterparts. Estimates suggest that handling cash costs UK banks and retailers well over four billion pounds per year excluding fraud. E-cash on the other hand has the potential to be cheaper to hold, handle and use while being more difficult to forge than paper money. It can be earmarked for specific purposes while providing either complete confidentiality or transparency. It can be used for transactions of any size, is physically convenient to store and is likely to be internationally acceptable. As a result of these improvements, the Chief Executive of Mondex has suggested that electronic cash could gain up to sixty per cent of the traditional market within a ten to twenty year period.

The future

Progress is moving at such a pace that predictions are inevitably speculative. However, it is likely that over the next few years a great deal of trade will be conducted via our computer and television screens. The Internet and services like "pay per view television" will become major engines of commerce and provide the initial impetus for the introduction of e-cash. If, however, the perceived advantages materialise, we will quickly see a cross-over into traditional business transactions. During this period we are likely to experience a plethora of competing currencies backed by anything from gold, to cash, to trusted shares. At first these will be at parity with one of the traditional currencies, but they could eventually float freely. We may well see the emergence of internationally acceptable currencies, the supply of which national governments will be unable to control. For similar reasons we could see banks becoming truly international entities or, alternatively, being replaced by other financial organisations or even software and computer companies. As one financier has pointed out, "banking is essential to the modern economy; banks are not."

"We are likely to experience a plethora of competing currencies backed by anything from gold, to cash, to trusted shares. At first these will be at parity with one of the traditional currencies, but they could eventually float freely. We may well see the emergence of internationally acceptable currencies, the supply of which national governments will be unable to control."

The legal implications

All these potentialities will have legal ramifications. The most important questions will, however, resolve into one fundamental issue: confidentiality. Here we can discern diametrically opposing problems depending on which systems become popular. Those based around central recording are so similar to traditional credit/debit cards that some observers have suggested that they are simply an attempt by the banks and their associates to protect their dominant position. As one commentator put it:

> "Make no mistake, this is not digital cash ... This gives the credit agencies and government(s) complete traceability of all purchases, automatic reporting of spending patterns, automatic reporting of about-to-be-outlawed businesses, and invasive surveillance of all inter-personal economic transactions." (May, CT *Cyberpunks-list 6929*).

Whatever the motives of Visa *et al* may be, it is certainly true that these systems will generate an unprecedented amount of information every time we make even the smallest purchase. Modern data processing techniques will facilitate comprehensive record keeping on where we go, the books we read, the clubs we join and the people with whom we associate.

On the other hand, Digicash type systems will create the opposite problem: they will potentially facilitate instant, large-scale movements of money around the world that will be absolutely private, totally anonymous and which will leave no audit trail.

Our present laws for protecting (Data Protection Act 1984) and collating information (primarily Parts II-IV of the Criminal Justice Act 1993 and the Money Laundering Regulations 1993, SI No 1933) were fashioned under the assumption that certain transactions (for example, small cash purchases) would be confidential while others would be open to examination. As such they represent a balance between what information is technically available, what information we believe should remain private, and what information government and other organisations need to prevent crime. If this balance between confidentiality and transparency is to be radically affected by new technology then we must corre-

spondingly reassess these competing needs and redraw the relevant laws and regulations appropriately. Unfortunately, creating a system capable of protecting the new forms of information created by Visa systems while stripping away the anonymity of Digicash will be a task worthy of Solomon.

Moreover, although our current laundering regulations are comprehensive, sheer volume of trade often means that financial organisations can do little more than look out for large cash movements. As a result launderers take a great deal of care to ensure that large sums of dirty cash are introduced into the financial markets in amounts small enough to avoid suspicion. Traditionally this can require a great deal of time, expense and manpower; e-cash systems on the other hand can be programmed to perform this complex task automatically.

The ease of movement and lack of traceability associated with Digicash systems also has inevitable consequences for tax collecting authorities. As Eamonn Butler of the Adam Smith Institute has noted:

> "I think it is completely impossible to police this ... it's going to be impossible for any national, or even international, authorities ... It's the ultimate global back pocket economy—it can't be traced ... No tax authority can keep on top of that ... the idea of government trying to regulate it is just out of the window." (BBC's *The Net*, June 5, 1995)

Anyone who believes that such problems will necessarily require governments to control e-cash at source should remember that, for example, Digicash is no more than a piece of encryption software which codes and then recognises numbers. As the US authorities have discovered in the past, such software is extremely difficult to ban or even regulate. We are also likely to see electronic cash being attacked by both thieves and fraudsters. All e-cash systems emphasise security, but for a number of reasons any breach leaves them uniquely vulnerable. For example, a lost Mondex card, unlike a credit card, results in the loss of all the money it contained. Any hacker clever enough to gain access to a bank's e-cash accounts could, in theory, empty them in a matter of minutes. Similarly, although private encryption keys may make e-cash unforgeable, while they remain secure, their loss could be catastrophic. It is true to say that:

> "An adversary who gains even brief access to a cryptographic key can generate counterfeit tokens that are indistinguishable from valid tokens ... so it would be necessary to completely replace all tokens in circulation. Like the failure of a dam, system failure is a low probability but high cost of damage event."[1]

This increased globalisation of financial networks and crime will also create serious jurisdictional problems. Thus, for example, our rules for asset tracing and recovery along with international agreements designed to facilitate cross-border evidence gathering and judgment enforcement were often developed at a time when fraudsters absconded on the next steamer with their ill-gotten gains stuffed in a suitcase. They need to be radically modernised if they are to cope in a world where it is possible to initiate fraud from a computer located in one country, against a hard drive in another, while depositing the proceeds on smart cards around the globe in a matter of seconds.

"When physical location no longer matters, financial organisations are inclined to move into jurisdictions with the most advantageous regulatory regimes. Indeed the Internet has already witnessed the formation of a virtual casino, designed to circumvent local gaming laws."

Similar trans-national difficulties will arise with regard to regulation. Currently, financial services in this country operate within a framework of self-regulating organisations recognised by the Securities and Investment Board under the auspices of the Financial Services Act 1986. However, experience shows that when physical location no longer matters, financial organisations are inclined to move into jurisdictions with the most advantageous regulatory regimes. Indeed the Internet has already witnessed the formation of a virtual casino, designed to circumvent local gaming laws. Nevertheless, arguably, even though a financial organisation is based overseas its activities within our shores can be controlled by national regulation. Proponents of this position might like to consider recent reports that unauthorised financial service providers have been breaching s 57 of the Financial Services Act by advertising on the Internet. When questioned on the subject the Securities and Investment Board are reported to have said, "the Internet, what's that then?" The journalist involved in that exchange concluded:

> "[the SIB] actually had no idea what the Internet was, no knowledge of the amount of financial services advertising on it and no policy on the subject. Although ... it was obvious that they agreed with our analysis of the situation—that the Act was being broken." (*Internet Magazine*, "Inner City Crime", May 1995).

If any of these scenarios appear worrying then it should be remembered that, in the short term at least, we will see Digicash, Visa and Mondex type systems coming to the market, trailing in their wake the full range of problems discussed above. At the moment we have a window of opportunity in which to consider these challenges. We must decide how we wish to respond to e-cash, what value we are to place on individual confidentiality as against the transparency necessary to prevent crime and how we are to mould our present framework of laws, regulations and international agreements in order to reflect these requirements. However, should governments, financiers and lawyers fail to act with sufficient alacrity we will be placed in the unenviable position of playing catch up with hi-tech money launderers, fraudsters and tax evaders around the world. Unfortunately, as the quote from Alan Binder at the beginning of this article starkly illustrates, the authorities appear to have little appreciation of the speed of progress or the magnitude of change to come. In closing, it is difficult to argue with Peter Dawes (Managing Director of Pipex, the UK's largest Internet service provider) who, when asked whether governments were treating the subject with sufficient importance, responded:

> "No, I get the distinct impression that they think this is all a bit of science fiction and that the problem won't happen for ten, fifteen, twenty years. The problem's going to happen at the end of this year." (BBC's *The Net*, June 5, 1995).

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[1] *Camp, Sirbu, Tygar, "Privacy, Anonymity and Reliability in Electronic Cash Transactions", Carnegie Mellon University, January 1, 1995.*

THE LAW OF RESTITUTION

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Introduction

There is a legal subject that some eminent jurists hold to be as important as contract or tort. They claim that it is an essential component of all civilised legal systems (*Fibrosa Spolka Akyjno v. Fairbairn Lawson Coumbe Barbour* [1943] A.C. 32, 61, *per* Lord Wright) and has been fully accepted by the House of Lords. And yet, it still goes untaught on many, perhaps most, undergraduate and professional courses. It warrants only three text books in this country and, more often than not, they are shelved under contract. Even more surprisingly, some commentators doubt its very existence. However, even these cynics are coming to accept that a working knowledge of its principles is becoming essential for anyone with an interest in tracing subrogation, failed contracts, constructive trusts, mistaken payments and a whole range of other areas.

The subject is restitution, and its underlying rationale is that a party who is enriched at the expense of another in circumstances which society believes to be unjust should be forced to return his gains. The aim of this article is to provide a basic users' guide to this subject which, depending on one's point of view, is either essential or non-existent. Unfortunately, at its present state of development, restitution has a basic backbone of principle, but its details, boundaries and scope remain uncertain: few, if any, of the concepts enunciated below would find unanimous support even amongst those who fully embrace the subject. As a result, what follows is an attempt to outline what might be described as the "majority" view of restitution, while highlighting some of the more prominent problems and disagreements which presently exist.

History

The history of most legal topics is of little value in explaining their modern application. However, restitution has so recently emerged from, and is still so influenced by, its historical ties that a brief discussion of its development is essential.

Restitution, can nominally trace its genesis back to Roman law's acceptance of obligations imposed *quasi ex contractu*. This phrase, but not necessarily its nature, later became Anglicised into quasi-contract and was used as a way of enforcing legal duties which did not easily fall into the usual categories of law (see, *Slade's* case (1602) 4 Co. Rep 92a, 1072). Thus, for example, where A mistakenly paid money to B, the courts would imply a promise on the part of B to repay the relevant sum and treat it like any other debt incurred under contract. In a similar way the implied promise could be used to force a defendant who intervened in the affairs of another to act with care, to require a party to pay a reasonable price for work done or services rendered, or to enforce judgment debts, customary obligations, and statutory and local penalties.

By the time Lord Mansfield delivered his judgment in *Moses v. Mcferlan* ((1760) 2 Burr. 1005) quasi-contract was well established, but not without its problems. Most specifically, (a) when should the courts imply a binding promise? and (b) how closely was the subject tied to contract? The short answer to the former question was, "when it was just to do so" ("... every man hath engaged to perform what his duty or justice requires of him") and the resultant uncertainty has remained a problem for the subject to this day. With regard to the second question, the fictional relationship to contract grew to be of central importance:

"When it [the law of England] speaks of actions *quasi ex contractu* it refers merely to a class of action in theory based on a contract which is imputed by a fiction of law. The fiction can only be set up with effect if such a contract would be valid if it really existed." (*Sinclair v. Brougham* [1914] A.C. 339, 415, *per* Lord Haldane L.C.).

In other words, "[the] 'implied contract' ceased to be a simple and undesirable means to a desirable end and became the

'basis of the law of quasi-contract' " (Goff & Jones, *The Law of Restitution*, (4th ed. 1993), 9). It is difficult to over-emphasise the detrimental effect of forcing restitution into the straitjacket of a subject to which, at a fundamental level, it had little relationship. However, it was not until the beginning of this century that courts begin to realise that, "... the ghosts of the past [were standing] in the path of justice clanking their medieval chains" (*United Australian Ltd v. Barclays Bank Ltd* [1941] A.C. 1, *per* Lord Aitkin) and started to question the basis of quasi-contract.

> *"It is difficult to over-emphasise the detrimental effect of forcing restitution into the straitjacket of a subject to which, at a fundamental level, it had little relationship."*

But if the subject's rationale was not the implied promise and its structure was not that of contract, then what was it? Any continental or United States law student would have answered the question without a second thought, but it was not until the publication of *The Law of Restitution* by Goff and Jones, in 1966 that unjust enrichment was brought to the forefront of the English legal mind.

> *"The law of restitution is fundamentally concerned not with the plaintiff's loss, but with the defendant's gain."*

In the subsequent 30 years there has been an explosion of interest in restitution, during which time quasi-contract has died (although the influence of the old cases cannot be ignored) and, arguably, a majority of commentators would now agree that, "... a person who has been unjustly enriched at the expense of another is required to make restitution to the other." Unfortunately, while the arguments of principle may be accepted, in the detail of the area there is a residual mass of confusion and disagreement; its boundaries and relationships to other areas of law remains doubtful; the objective meaning of "unjust enrichment" can still provoke debate, and; the interrelationship between unjust enrichment as a high level principle capable of triggering restitution and the low level mechanisms by which restitution is achieved, remains complex. Equally, even those academics and practitioners who do whole-heartedly embrace unjust enrichment theory are unable to agree as to whether it serves a subsidiary role, is a "great unifying principle underlying the whole range of restitutionary remedies" or is simply a pragmatic way of grouping previously disparate subjects. Before beginning to touch on some of these problems we will first consider the less controversial elements which go to make up the modern law of restitution.

The structure of restitution

From the above definition we can identify three essential elements to a restitutionary action:

- an enrichment or benefit to the defendant;
- at the expense of the plaintiff;
- in circumstances which make the enrichment unjust.

An enrichment or benefit

The law of restitution is fundamentally concerned not with the plaintiff's loss, but with the defendant's gain. But how do we identify and measure gain? Money presents no problem, it is the means by which we gauge value and it is not open to the defendant who receives money to claim that he did not want it or that he will not spend it: whatever his subjective feelings on the matter he has objectively been enriched (although the situation may be slightly more complex where the money is paid to a third party: *Hirachhand Punamchand v. Temple* [1911] 2 K.B. 330; *James v. Isaacs* (1852) 12 C.B. 791).

However, while the benefit and value of money may be incontrovertible, goods and services are more problematic. I receive a car which does not run. Is this a benefit because I could sell it for scrap or a detriment because it clogs up my driveway and annoys the neighbours? Someone sends me unsolicited goods; am I enriched? Someone else irons my shirts but I don't normally bother; have I gained

anything? Assuming that I am enriched then, by what measure? Should I pay the market value for what I receive, a reasonable sum or what I believe it is worth?

Professor Birks has attempted to answer these questions by reference to what he describes as "subjective devaluation." Thus he suggests that in certain circumstances benefit is a personal factor: an asset's or service's value is to be measured according to what the recipient considers it to be worth. In such cases the market value is not relevant; the defendant can hold, "... that he has a continuing liberty to choose how to apply his particular store of value and that ... he simply had not made his choice" (Birks, *An Introduction to the Law of Restitution*, (1985), 110). Thus the argument holds, that the defendant whose shoes have been cleaned without his knowledge, may not feel the need for clean shoes or may have been intending to clean them himself. For this defendant, the market price of a shoe-shine should not be an issue; the only relevant factor is the price at which he would have been willing to pay for such a service.

However, to allow a defendant to identify his own price in all circumstances, is clearly not without its difficulties. As a result, according to Birks, the defendant is prescribed from resorting to subjective devaluation where, (a) he has freely accepted the benefit, or (b) has received an incontrovertible benefit.

(*a*) *Free acceptance of goods and services*

Goff and Jones state that:

"... he [the defendant] will be held to have benefited from the services rendered if he, as a reasonable man, should have known that the plaintiff who rendered the services expected to be paid for them, and yet he did not take a reasonable opportunity open to him to reject the proffered services" (Goff and Jones, *The Law of Restitution*, (4th ed. 1993), 19).

So, for example, where A allows B to clean his shoes knowing the latter mistakenly believes that he will be paid, A must indeed pay a reasonable price. Other commentators, however, argue that while this may be just with regard to a mistaken party, it seems to create problems where the plaintiff knew that his services had not been requested but went ahead regardless, on the off-chance that he might get paid: in this situation, why should the defendant's freedom of choice be compromised by forcing him to either overtly reject the services or pay for them.

Partly as a result of these problems, some commentators have held that "free acceptance" is not "established by authority" is "unwarranted in principle", "... does not have a place in the law of restitution" and "is inconsistent with ... other areas of law" (Burrows "Free Acceptance and the Law of Restitution" 104 L.Q.R. 576; Burrows, *The Law of Restitution*, (1993); Mead, "Free Acceptance: Some Further Considerations" 105 L.Q.R. 460). Space dictates that a detailed examination of these arguments is not possible. However, it should be noted that such problems are common in this area. Commentators are want to propagate theories which are of practical assistance in limited circumstances as if they are universal principles. This habit is a function of restitution's, as yet, undeveloped nature combined with the determination of some commentators to deny this historical fact by overstating the subject's theoretical completeness. Certainly, both Burrows and Mead are correct in suggesting that a topic which, at least *prima facie*, has serious flaws with regard to principle and which is generally unsupported by authority should be treated with the utmost caution.

(*b*) *Incontrovertible benefit*

The second test of enrichment simply asks whether the defendant has received an incontrovertible benefit; if he has, he is enriched. An incontrovertible benefit will arise where (i) the defendant has been saved an inevitable expense or (ii) where he has made a realisable gain.

(*i*) *Saving of an inevitable expense*

A party has been saved an inevitable expense where "no reasonable man would fail to find that ... [he] ... had been saved a necessary expense" (*Craven-Ellis v. Cannons Ltd* [1936]). Two points should be noted about this test. First, it is in the negative: thus if *any* reasonable man would deny a necessary saving, there is no incontrovertible benefit. Secondly, it begs

the question as to what is necessary. Birks suggests a test similar to that used in contract to determine whether infants must pay for goods and services: indeed he goes so far as to state that the courts should discount only "unrealistic or fanciful possibilities" (*Monks v. Poynice Pyt. Ltd* (1987) 11 A.C.L.R. 637); *Craven-Ellis v. Cannons Ltd* [1936]).

(ii) *Realisation in money*

Where a defendant receives a benefit which he then converts into money he is incontrovertibly benefited by the value he receives. The question of whether this also applies to a benefit which is only realisable raises a number of possibilities:

- Birks suggests that only a realised gain is an incontrovertible benefit.
- Goff & Jones argue that a benefit which is readily realisable will suffice.
- Burrows holds that a benefit will have accrued where it is "reasonably certain that he [the defendant] will realise the positive benefit."

All three approaches have their weakness and the courts have provided little authority as to which is correct. Burrows criticises Birks' solution as placing an unacceptable emphasis on the date of trial. Unfortunately, his own proposition could potentially suffer from the same problem while introducing a large element of uncertainty regarding the meaning of "reasonably certain". Equally, Burrows criticises Goff & Jones' solution for placing an unnecessary burden on the defendant who does not wish to immediately realise the benefit. If a decision must be made it appears that Goff & Jones have arrived at the lesser of three evils, and one which best fits the commercial realities of the modern world.

Before moving on we should note one or two of the more prominent problems potentially associated with the concepts of enrichment as described above:

- while Birks uses the tests of "free acceptance" and "incontrovertible benefit" to determine whether a defendant can resort to subjective devaluation, other commentators use these tests merely as a way to show the *existence* of an enrichment.
- some commentators use "free acceptance" both as a test of enrichment and a factor which can demonstrate that an enrichment was unjust.
- as an alternative to "free acceptance" Burrows offers the "bargained for test" and the "reprehensible seeking-out test." The former suggests that "A defendant can be regarded as negatively benefited where the plaintiff performs what the defendant bargained for"; the latter holds that a defendant is enriched where he has sought out a benefit even though he has evinced no intention to pay for it.
- on a practical front, the evidential problems associated wtih subjective devaluation should not be under estimated.
- subjective devaluation may well be an inevitable consequence of the enrichment based nature of restitution, but its problems are not limited to the practical. For example, consider a doctor who renders emergency treatment to an unconscious patient who later dies on the way to the hospital. Can we detect "free acceptance" or "incontrovertible benefit" (or a "bargain" or "reprehensible seeking out" for that matter) and if not, then can we assume that the value of the treatment, making no difference to the patient's ultimate death, can be subjectively devalued to nothing?

The benefit of a service which is not fully provided remains problematic: for example, what is the situation when a mechanic begins to repair a car but fails to make it run before it is stolen. Birks considers that the defendant has benefited from the mechanic's time and labour. Beatson doubts that services which fail to produce an end product are of benefit. Burrows places himself firmly between the two by saying that subject to a *de minimis* requirement, services are of benefit when the end product of the service begins to be received: for example, when a hair-dresser cuts the first strands of hair.

At the expense of the plaintiff

If someone takes £5 from my wallet there is no doubt that his enrichment is at my expense. But, what if my mistreated wife give a local vandal £100 to paint my Rolls Royce bright pink. The value of my car has gone down, but is there an actionable restitutionary connection between the

third party's gain and my loss? Alternatively, does a party who makes money by infringing my intellectually property rights do so at my expense?

The law of restitution has come to recognise two ways by which a party can be shown to have suffered an expense, and these define a fundamental split in the structure of the subject between "autonomous restitution" and "restitution for wrongs". Autonomous restitution will occur when the defendant subtracts from the plaintiff's "store of value" (as in the wallet example) and accounts for the vast majority of all restitution cases.

Restitution for wrongs, does not require a specific causal connection between a loss to the plaintiff and the defendant's enrichment, and normally occurs in circumstances that other areas of law have accepted as wrong: for example, breach of fiduciary duty, interference with property, breach of confidence and breach of intellectual property rights. The primary importance of this distinction is that the victim of a relevant wrong may have a claim to profits resulting from the defendant's gain.

It should be noted that this split is far from perfect. Some "wrongs" will not lead to restitution (my Rolls Royce may well have to remain pink). Equally, confusion can result from the fact that although some "wrongs" lead to restitutionary remedies they are not themselves strictly part of the law of restitution. Moreover, some commentators argue that the law of England does not recognise restitutionary responses to wrongs (see, McBride, J. and McGrath, P., "The Nature of Restitution", *Oxford Journal of Legal Studies*, Spring 1995, Vol. 15, 34, 44). However, it is now, probably, reasonable to suggest that a majority of academics accept this division and that it should be kept in mind during any consideration of the area.

Unjust enrichment

The term unjust enrichment has, with its apparent call to morality and inconsistent judge-made law, caused no small measure of difficulty. However, it is now generally accepted that "unjust" means that the enrichment should fall into a category which has been predetermined by the courts as being actionable and for which relevant authority exists. These, categories vary slightly between different commentators but, for example, Burrows identifies the following factors which may make an enrichment "unjust":

- Mistake.
- Ignorance.
- Duress.
- Compulsory Discharge of Another's Liability.
- Necessity.
- Failure of Consideration.
- Incapacity.
- Illegality.
- *Ultra Vires* Actions of Public Authorities.
- Retention of Another's Property.
- Unjust Enrichment by Wrongdoing.

Some of these categories are more controversial and/or problematic than others but they provide an acceptable guide as to when the litigator should begin to consider that restitution may have a bearing upon the case before him.

Problems

The above discussion is intended to give a flavour of restitution's most important themes. However, the questions surrounding its boundaries, components and indeed very existence have been described as some of the most intractable to be found in recent legal history. Space dictates that many of these difficulties can be no more than touched upon in an article of this kind. However, what follows is a brief consideration of some of the more prominent complications.

What is the subject's relationship to other areas of law?

Restitution has claimed as its own, techniques, remedies and whole areas of law

A party defending an action for restitution may, in appropriate circumstances, be able to rely on a number of defences: for example, illegality, incapacity, bona fide purchaser or estoppel. However, the defence which has been given most attention in recent years is "change of position." In *Lipkin Gorman v. Karpnale Ltd* ([1991] A.C. 548), Lord Goff defined the defence in the following terms, "... [it] is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full."

which were previously thought to be the exclusive domain of other subjects. It is therefore, not surprising that many battles concerning the boundaries and content of restitution have been, and are still being fought. Its relationship to the laws of property, contract, tort and obligations have generated a large amount of heat but, as yet, little light. Of these, perhaps the most fundamental debate has concerned the relationship of restitution to the law of property. Assume that A takes B's car; if B's ability to bring an action to enforce his continuing proprietary rights against the car is considered to be part of restitution, then that subject necessarily subsumes much of what we now consider to be the law of property. Burrows appears to accept not only the logic of this position but also its necessary consequences. Birks on the other hand, contends that restitution can only occur if, at the moment of the defendant's receipt, new rights are created: "If at that moment [the defendant's receipt of the enriching benefit] the law passively preserves pre-existing rights, there is no restitution (Birks, *An Introduction to the Law of Restitution*, (1985), 14). So rules which merely preserve B's existing ownership are part of the law of property, those which reverse rights created at the time of receipt are part of the law of restitution.

Goff and Jones suggest that:

"A restitutionary claim may be granted in order to revest title in the plaintiff; a plaintiff may, in an action for money had and received, rely on his legal title, having rescinded a contract. In equity he may submit that the defendant is a constructive trustee of, or that a lien be imposed over, certain assets ... Such restitutionary claims must be carefully distinguished from a pure proprietary claim where the plaintiff asserts that the property which he has identified in the defendant's hands belongs, and has always belonged, to him." (*Op. cit.* at page 68).

Thus, again, they make a distinction between cases in which title is revested from those which are purely proprietary. However, this position, when viewed alongside the contention that restitution is concerned exclusively with the reversal of unjust enrichment, appears to suffer from a logical defect:

"[they] ... would ... not include cases of vindication of existing ownership ... but would seemingly include all cases of *revesting*, whether they reverse unjust enrichment or not ... Claims to property transferred by the plaintiff by reason of fraud or other flawed motive are to be restitutionary, and not part of property law, where property passes at law. Similar claims where property does not pass at law are not to be restitutionary. But the former category included cases where there is no unjust enrichment; the latter includes cases where there is." (Mathews, P., "Tracing the Proceeds of Fraud", *Pressing problems in the Law, Laundering and Tracing*, S.P.T.L. Seminars (1994), 56).

Birks' formulation, as he admits himself, is an artificial mechanism intended to place a concrete divide between the laws of restitution and property in order to prevent the creation of a subject which is simply "too big." As such it is arguably the easiest solution to a potentially imposing problem. However, whether this intellectual and technical distinction is one which can be maintained in the practical world of litigation is yet to be seen.

Is the law of restitution concerned exclusively with unjust enrichment?

Restitution is the law's response to a particular event or trigger. There are, generally speaking three possibilities as to what this trigger might be:

- unjust enrichment and nothing else.
- something other than and isolated from unjust enrichment.
- unjust enrichment and other legally significant events.

It is possible to logically argue that a subject which would satisfy many of the goals which restitution sets for itself could exist in the absence of any theory of unjust enrichment (Fuller and Perdue, "The Reliance Interest in Contractual Damage" (1936) 46 Yale L.J., 52). Equally, it is possible to argue that while the primary trigger for restitution is unjust enrichment, other legal elements are also capable of giving rise to restitutionary responses (Dawson, J.P., "Restitution Without Enrichment" 61 B.U.L. Rev. 563; *contra* Kull, A., "Rationalizing Restitution" 83 *California Law Review*, 1191). However,the majority view in this country is expressed

by Birks when he says: "Restitution and unjust enrichment identify exactly the same area of law. The one term simply quadrates with the other." (Birks, *op. cit.*, at page 17; see also Hedley, S., "Unjust Enrichment" (1995) 54(3) C.L.J., 578).

As a matter of simplicity and practical logicality there is no doubt that Birks' position is attractive. Unfortunately, modern authority has little to say on the matter and some of the older quasi-contract cases seem to auger against it. As a result the proponents of this position have been forced into a number of intellectual contortions in order to maintain their arguments in the face of the older judgments. This apparent slight of hand is unfortunately characteristic of an area whose advocates use modern restitution theory for much of their subject's content, but of necessity are forced to rely on old quasi-contract cases for its legal authority. Thus for example, Burrows, says of the courts previous acceptance of quasi-contract

"... this approach is fictional and says nothing about why the promise should be implied ... it is surely contrary to the rule of law for judges to reach decisions without properly explaining their reasoning. (Burrows, *The Law of Restitution*, (1993), 2–3).

This, is clearly correct, and yet he goes on to suggest that although the courts were using the language of quasi-contract they were, in fact, speaking of unjust enrichment: "... it is believed that, whatever language has overtly been adopted, the courts have throughout been applying the principle of unjust enrichment" (Burrows, *The Law of Restitution*, (1993), 3).

With the greatest respect, the courts cannot avoid indicating "why the promise should be implied" while at the same time also clearly demonstrating that they were "throughout" concerned with unjust enrichment. If the courts believed they were dealing with a form of contract they *were* dealing with a form of contract, and not something which was only fully recognised many years later. In other words the old cases may have been played out in the same ball park, but the rules and equipment have necessarily changed. Commentators who pretend otherwise are sacrificing reality for fictional consistency (because they believe restitution cannot stand as a matter of principle?) and must, like some of the older cases, necessarily be treated with caution.

"The old cases may have been played out in the same ball park, but the rules and equipment have changed. Commentators who pretend otherwise are sacrificing reality for fictional consistency."

Is the restitution of unjust enrichment gained at the expense of the plaintiff an established part of the law of England?

Until recently even the unjust enrichment theorists were reserved in claiming that restitution was a fully accepted part of the laws of this country. This has, however, recently changed. Most hold that following *Lipkin Gorman v. Karpnale Ltd* ([1991] 3 W.L.R. 10 (H.L.).) and *Woolwich Equitable Building Society v. Inland Revenue Commission* ([1993] A.C. 70) it "cannot now seriously be denied that the subject is as important and central ... as contract and tort" and "any argument to the contrary ... [is] authoritatively silenced." (Burrows, *The Law of Restitution* (1993), Preface).

There can be little doubt that following these decisions (and indeed for many years before) the judiciary have accepted the language of restitution, but have they also accepted the intellectual baggage which goes along with it? Hedley suggests with regard to the two cases above:

"What we do *not* see is any of the paraphernalia of 'unjust enrichment' theory as expounded by its academic supporters. The phrase 'unjust enrichment' is used almost entirely unadorned, as if no further explanation were required. Some judges have, indeed declared that it is simply a matter of labels, and the plaintiffs must bring themselves within some 'recognised head' of restitution, meaning that they must justify their claim in the same way as if 'unjust enrichment' had never been heard of; indeed, Lord Goff himself is often cited to that effect. For many judges, then, references to 'unjust enrichment' are simply a neat label for traditional rem-

edies, but with no implication for the content of those remedies. 'Unjust enrichment' no more refers to a particular theory of liability than 'debt' does." (Hedley, S. "Unjust Enrichment", [1995] C.L.J. 578).

The present author would argue that a consideration of references to unjust enrichment and restitution in many (although not all) recent cases demonstrates this argument to be correct: (see, Hutton I., "Extending Common Law Tracing" [1996] *The Litigator*, 312, 314). The language and some of the precepts of restitution/unjust enrichment have been accepted, but the belief that our courts have unambiguously embraced a logically structured and fully fledged addition to the *corpus juris* is not yet proven.

"If the courts are willing to make the hard decisions necessary to turn a largely theoretical subject into a practical legal tool then restitution can represent a major force for removing injustice in our system."

Conclusion

In 1871 the Great Dissenter, Oliver Wendel Holmes Jr. confidently stated, "We are inclined to think that tort is not a proper subject for a law book" ([1871] 5 Am. L.Rer. 304–341). Within a few short years Mr Holmes, was forced to recant. This article has contended that restitution/unjust enrichment has not yet been *fully* embraced (or understood?) by the law of England. However, this is not to suggest that, as with tort, the situation will not quickly change. Whatever the arguments propounded in this article there is little doubt that *Lipkin Gorman* has been widely perceived as the final acceptance of the subject. This will undoubtedly lead to a continuing growth in academic interest and, more importantly, an increased number of unjust enrichment cases coming before the courts. We can assume, therefore, that in the next few years many of the doubts and questions surrounding restitution will be resolved. During this process, some commentators will argue that these problems have already been solved. Indeed, they will hold that their view of restitution/unjust enrichment is an immutable fact of nature which we must accept unchanged. This is not the case, the area is far from set in stone: we still have the ability to choose whether or not we accept restitution lock, stock and barrel, cherry pick its most desirable aspects or, perhaps, even turn our backs on it completely. If the courts accept this, and are willing to make the hard decisions necessary to turn a largely theoretical subject into a practical legal tool then restitution can represent a major force for removing injustice in our system. If, on the other hand, they follow the course of intellectual least resistance by accepting the simplest formulation or listening to the commentator who shouts the loudest, then restitution has the potential to stifle the development of a logical response to a range of pressing practical and legal problems for decades to come.

Hedley Byrne sense.[22] It should yield to other specific duties which are inconsistent or to the dictates of policy. Will it happen?

JOHN HODGSON*

THE ENGLISH COURT'S POWER TO GRANT MAREVA RELIEF IN SUPPORT OF AN ACTION UNDERWAY BEFORE A FOREIGN COURT

Mercedes-Benz AG v. *Leiduck*
[1995] 3 All E.R. 929

Throughout history the first instinct of the successful fraudster has always been to stuff his swag into a suitcase and climb aboard the first steamer out of Southampton. Even relatively honest defendants are sometimes tempted to avoid disadvantageous national court judgements by moving their assets to a more friendly jurisdiction. In an economic sense this has never been easier. During the last twenty years we have seen the general removal of exchange controls, the growth of multi-national corporations, the implementation of free trade zones and the invention of technology that facilitates the transfer of money around the world at the touch of a button. Today's fraudster is likely to shun Southampton and ring a friendly Cayman Island banker instead.

As a result we have recently seen the English courts make a concerted effort to remain effective in this new environment of trans-national trade and litigation. One of the primary weapons in this task has been the Mareva injunction and in this context the recent advice delivered by the Privy Council in *Mercedes-Benz* v. *Leiduck*[1] is of particular interest.

The Facts

In order to facilitate the sale of 10,000 cars in the Russian Federation, Mercedes, the plaintiff, advanced $US20m to Leiduck, the first defendant (a German citizen), and a Monaco corporation controlled by him. In breach of his guarantee Leiduck misappropriated the loan and applied it in favour of one of his companies incorporated in Hong Kong. The relevant Monaco court took the defendant into custody and attached his assets within its territory, but found that it had no power to make a similar order regarding

22 This of course denies general validity to *White* v. *Jones*, although it may be a legitimate anomaly.

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1 [1995] 3 All E.R. 929.

assets in Hong Kong. As a result the plaintiff applied, *ex parte*, for a world-wide Mareva injunction restraining the defendant from dealing with his assets in Hong Kong, pending the resolution of the Monaco action. He also applied for leave to serve the writ outside the jurisdiction under RSC Ord 11, r(1)(b) and (m).[2]

The question of interest which eventually came before the Privy Council[3] was whether the court could permit the issuing of a writ or other originating process claiming Mareva relief against a foreigner who was out of the jurisdiction, in support of an action underway in a foreign court.[4]

The Mareva Injunction

The Mareva injunction[5] is a freezing order preventing a party from dealing with assets in such way as to frustrate a judgement (or potential judgement). The court's right to grant such an order is normally attributed to the Supreme Court of Judicature Act 1873.[6] However alternate heritages are sometimes suggested[7] and until recently[8] its legitimacy was still in doubt. Unfortunately this relatively short and, some would say, dubious history[9] means that the injunction often sits uneasily with the traditional rules concerning interim relief.[10] This unease was exemplified by the difficulties Lord Nicholls experienced in reconciling the traditional rules (specifically those laid down in *The Siskina*)[11] with the novel facts of the instant case.

The Questions of Law

The problem facing the court involved two questions of law: (a) whether the court had the legal power to grant a Mareva injunction in support of a

2 Which corresponds to the identical rules of court in England and Wales.

3 It should be noted that the majority appeared to feel that the case could also have been decided in favour of the respondent because technically "... no leave to effect the service of such a document (a Mareva under Ord 11 r(1)) was ever sought, and no such document was ever served". *Op. cit.*, at page 936, *per* Lord Mustill.

4 It should be born in mind that the eventual decision of the Monaco court (which was expected in a matter of days) would itself have been enforceable in the Hong Kong court under RSC Ord 11, r(1)(m).

5 *Mareva Naviera SA* v. *International Bulkcarriers SA* [1980] 1 All E.R. 213.

6 Section 25(8) of which bestows the power to issue injunctions ". . . in all cases in which it appears to the High Court to be just or convenient to do so".

7 See the arguments of Lord Denning M.R. in *Rasu Maritima SA* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina) and Government of Indonesia (as interveners)* [1978] QB 644.

8 When the Mareva injunction was given statutory recognition by Section 37 of The Supreme Court Act 1981 which uses the words "...just *and* convenient...".

9 See Meagher, Gummer and Lehane, *Equity Doctrines and Remedies*, 3rd ed., 1992, para. 2186.

10 "...the old High court of Chancery would not have entertained a bill for Mareva relief . . .", S. Gee, "Mercedes and Mareva" S.J. 27 October 1995, 1076.

11 *Siskina (cargo owners) v. Distos Cia Naviera SA. The Siskina* [1979] A.C. 210.

judgement being sought in a foreign court,[12] and; (b) whether the injunction could be served outside the jurisdiction.[13]

Territorial Jurisdiction

Lord Mustill (speaking for the majority)[14] felt that the problem could be solved by reference to the territorial question alone. This is to be regretted not only because it represents a missed opportunity to investigate the nature of the Mareva injunction, but also because if Lord Nicholls' (dissenting) argument is correct, the answer to the former question necessarily impinges upon the latter.

The court's territorial jurisdiction centred around RSC Ord 11, r1(1)(b), which states that a court may grant service of a writ out of the jurisdiction where "an injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction (whether or not damages are claimed in respect of a failure to do or the doing of that thing)". The majority took the view that the sub-paragraph could not be read literally, ". . . Regard must be paid to their [the words] intended spirit".[15] This lead to the conclusion that the Mareva injunction was *sui generis* and sub-paragraph (b) was not intended to include such orders where the necessary jurisdiction was based only on the presence of assets within the territory. It applied only to claims based upon, ". . . a legal right which the defendant can be called upon to answer, of a kind falling within Ord 11, r 1(1) . . .".[16] Ord 11 was confined to ". . . originating documents which set in motion proceedings designed to ascertain substantive rights . . .".[17] It might be argued that this appeal to the spirit of Ord 11, r(1), while apparently ignoring the underlying rationale of the Mareva injunction itself (by failing to consider the question of subject-matter jurisdiction),[18] is at the very least inconsistent. Nevertheless, the majority took the view that the appeal could be decided without going beyond this narrow and technical interpretation of the sub-paragraph.

Lord Nicholls on the other hand argued that the question of territorial jurisdiction was necessarily dependant upon the subject matter jurisdiction: i.e. whether the court had the power to issue an independently standing Mareva injunction in the relevant circumstances. If it could, then RSC Ord

12 Subject matter jurisdiction.
13 Territorial jurisdiction.
14 Lord Goff of Chieveley, Lord Mustill, Lord Slynn of Hadley and Lord Hoffman.
15 *Op. cit.*, at 938.
16 *Op. cit.*, at 940.
17 *Op. cit.*, at 941.
18 The majority did touch upon the origin and nature of the Mareva but came to the conclusion that, "The most that can be said is that whatever its precise status the Mareva injunction is quite a different kind of injunction from any other". *Op. cit.*, at 940.

11, r 1(1)(b) would be ". . . apt to apply to a Mareva injunction which comprises the sole relief sought in the action . . . A Mareva . . . is a novel form of injunction, but this affords no reason for excluding it from sub-para (b), applying as this sub-paragraph does to all forms of injunctions".[19]

Subject Matter Jurisdiction: Lord Nicholls' View

In considering the principles underlying the question of subject matter jurisdiction Lord Nicholls postulated a hypothetical case in which two Hong Kong residents and citizens entered into a contract containing a clause which required all disputes to be determined in a foreign court. Could the Hong Kong court grant a Mareva in support of such an action?: "Justice and convenience suggest that the answer to the question is Yes".[20] Unfortunately, if these high aspirations were to prevail, his Lordship needed to overcome a considerable barrier placed in his way by *The Siskina*.[21] Most importantly, Lord Diplock's finding that a Mareva could not stand independently of a cause of action within the court's jurisdiction.[22]

At first sight this is a persuasive argument; the concept of free standing interim relief seems, intuitively at least, paradoxical: interim to what? Nevertheless, to his credit his Lordship decided to meet the authority of *The Siskina* head on. First, Lord Diplock had considered the Mareva, to be ". . . ancillary to a substantive pecuniary claim for debt or damage". This, Lord Nicholls, agreed was correct ". . . but only in the sense that the whole enforcement process can be so described".[23] Second, the court in that case had not been called upon to consider the two questions of jurisdiction separately.[24] Finally, and most importantly, *The Siskina* was decided when the injunction was in its infancy: it had grown and developed in a way which, "makes it easier than formerly to see the Mareva jurisdiction in its wider, international context".[25]

Moreover, as his Lordship pointed out, the English courts have taken a flexible approach in this area[26] and have in certain circumstances accepted anticipatory interim orders against parties who at that time have done no

19 *Op. cit.*, at 951 (although such jurisdiction would apply only to acts or omissions confined within the territory).
20 *Op. cit.*, at 944.
21 *Op. cit.*
22 *Op. cit.*, at 256, "The right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened, by him of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action".
23 *Op. cit.*, at 946.
24 *Ibid.*
25 *Ibid.*
26 *British Airways Board v. Laker Airways Ltd* [1983] 3 All E.R. 375.

wrong.[27] He conceded the normal position was that ". . . the right to obtain an interlocutory injunction in aid of substantive relief sought in an action is not normally regarded as a cause of action . . . The claim to interim protective relief is ancillary to the underlying cause of action, and in that respect it has no independent existence of its own".[28]

However, he opined that the situation changed where the substantive dispute is tried before a foreign court. The purpose of the Mareva was to prevent the prospective judgement debtor from taking steps to prevent enforcement, irrespective of the underlying cause of action. This being the case: "If the Hong Kong court will make its enforcement process available in respect of a foreign judgement, then in principle that must surely encompass Mareva relief".[29] Any other position would be "pointlessly negative".[30] Insomuch as the underlying cause of action is a factor, it is one which goes toward discretion not jurisdiction.

This was the case not only in principle but also in law. Cases decided since *The Siskina*[31] provided ". . . highly persuasive voices that the jurisdiction to grant an injunction, unfettered by statute, should not be rigidly confined to exclusive category by judicial decision".[32] Most specifically his Lordship relied on the *Channel Tunnel Group Ltd* v. *Balfour Beatty Construction Ltd*[33] in which Lord Browne-Wilkinson had said:

> Even applying the test laid down by *The Siskina* the court has power to grant interlocutory relief based on a cause of action recognised by English law against a defendant duly served where such relief is ancillary to a final order whether to be granted by the English court or by some other court . . .

Thus both principle and authority lead Lord Nicholls to conclude that:

> . . . a writ may be issued claiming only interim relief ancillary to a final order being sought from some other court or arbital body . . . if the consequence is that in such a case, where the court is seized only of a claim for interim relief, that claim must bear the burden of being labelled a cause of action . . . let that be so.[34]

27 See for example, *Norwich Pharmical Co* v. *Customs and Excise Comrs.* [1974] A.C. 133 and *quia timet* injunctions.
28 *Op. cit.*, at 949.
29 *Op. cit.*, at 945.
30 *Op. cit.*, at 949.
31 *Castanho* v. *Brown & Root (UK) Ltd.* [1981] A.C. 557 at 573; *South Carolina Insurance Co* v. *Assurantie Maatshappij 'de Zeven Provincien' NV* [1987] A.C. 24 at 44; *Channel Tunnel Group Ltd* v. *Balfour Beatty Construction Ltd* [1993] A.C. 334 at 340-341 and 344.
32 *Op. cit.*, at 946.
33 *Op. cit.*, at 341.

Conclusion

In truth, this case raises a simple question: should a dishonest defendant be allowed to use English law to frustrate an action underway in a foreign court, when the English (or Hong Kong) court will readily enforce the eventual judgement? Principle strongly suggests no, traditional authority yes. With respect to the majority it is submitted that in this case the former should be favoured. The Mareva injunction is a recent and unique form of relief specifically introduced to meet new and novel situations. To suggest that its development should be constrained by traditional rules created in an entirely different context is to unacceptably place consistency above both logic and justice.[35] It is true that the majority themselves seem to have been swayed by the desire to do justice to the respondent.[36] However in doing so they fail to give full weight to the fact that the case concerned jurisdiction not discretion.[37] Even if empowered with the necessary jurisdiction the court would still be expected to grant an injunction only where it is ". . . just and convenient to do so"[38] and can use its discretion to refuse relief even where the usual requirements are met.[39] Moreover the court will normally require the plaintiff to make an undertaking to pay damages to the defendant should the injunction subsequently be found to have been wrongly granted.[40]

Lord Nicholls' arguments are therefore both powerful and persuasive. If however they cannot prevail as a matter of authority then it is to be hoped that the House of Lords or Parliament will reconsider this area at the earliest possible opportunity. The present situation was eloquently summarised by his Lordship when he said:

34 *Op. cit.*, at 949.
35 In Lord Nicholls' words: ". . . as the world changes, so must the situations in which the courts may properly exercise their jurisdiction to grant injunctions . . . jurisdiction must be principled, but the criterion is injustice. Injustice is to be viewed and decided in the light of today's conditions and standards, not those of yesteryear", *Op. cit.*, at 946.
36 For example, it was suggested that accepting the appellants' arguments would force the respondent ". . . to chose between submitting to a judgement in default or appearing before the court, which had no other jurisdiction over him, to argue that his assets should not be detained." *Op. cit.*, at 930.
37 It is also at least arguable that in a modern commercial context the location of a defendant's assets can be of more import than his/her physical location or nationality, and should therefore be considered connection enough to establish jurisdiction. Note, for example, Rupert Murdoch's willingness to renounce his Australian nationality rather than lose control of his US media interests. For a discussion of this argument see, Davidson, P.F. "Jurisdiction Based on the Presence of Assets in Germany: A Case Note" (1992) I.C.L.Q. Vol 41 at 632.
38 37(1) of The Supreme Court Act 1981.
39 *Rasu Maritima SA* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* [1978] QB 644.
40 See the 1994 Practice Direction on Mareva Injunctions and Anton Piller Orders 4 [1994] All E.R. 4.

The defendant's argument comes to this: his assets are in Hong Kong, so the Monaco court cannot reach them; he is in Monaco, so the Hong Kong court cannot reach him. That cannot be right. This is not acceptable today. A person operating internationally cannot so easily defeat the judicial process. There is not a black hole into which a defendant can escape out of sight and become unreachable.[41]

IAN HUTTON*

PURE ECONOMIC LOSS: A NEW PERSPECTIVE?

Marc Rich & Co AG and Others v. *Bishop Rock Marine Co Ltd and Others*

[1994] 3 All E.R. 686 and [1995] 3 All E.R. 307

In historical terms claims for "pure" economic (or financial) loss have generally been unsuccessful in the tort of negligence. The law of tort in general is mostly concerned with physical loss and economic loss consequential upon that physical damage. Loss of a purely economic nature is recoverable elsewhere however, for example, in the law of contract and indeed in some torts, such as deceit, conspiracy and interference with contractual relations.

At common law the traditional position is that where negligence leads to so-called "pure" economic loss, i.e. financial loss which is not the direct result of physical loss, that loss may well not be recoverable. Consequential loss i.e. financial loss which is the direct result of physical damage (whether to person or property) is generally recoverable.

Thus, in *Cattle* v. *Stockton Waterworks*,[1] the plaintiff had contracted with a landowner to build a tunnel under his land and was unable to recover extra expenses incurred in finishing the work after the defendant (a waterworks) had negligently flooded the land. The decision went against the plaintiff because his "only" loss was connected to his liability under the contract to finish the job on time. No tangible property of his had been damaged; nor had he suffered any personal injury. Any financial loss flowing from either kind of damage would have been recoverable.

On this view of the law, it seems that in order to succeed in a claim for

[41] *Op. cit.*, at 943.

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[1] (1875) L.R. 10 Q.B. 453.

pure economic loss a plaintiff must bring his or her case within some recognised exception to the general rule.

Modern judicial opinion is not, however, unanimous on this point. In *Murphy* v. *Brentwood District Council*[2] Lord Oliver reviewed a long line of cases from *Cattle* v. *Stockton Waterworks Co*[3] to *Leigh and Sillavan Ltd* v. *Aliakmon Shipping Co Ltd, The Aliakmon*,[4] and took the view that, in those cases, the plaintiffs' failures were not because the losses sustained were "economic", but because the claims fell foul of the remoteness of damage rule, or because it was felt that to allow those claims would open the floodgates. He concurred with the view of Brennan J. in *Sutherland Shire Council* v. *Hayman*[5] that the critical question was "whether the scope of the duty of care in the circumstances of the case is such as to embrace damage of the kind which the plaintiff claims to have sustained".

In the same case Lord Keith expressed the contrary view, that recovery for pure economic loss is possible *only* if the plaintiff falls within some recognised exception to the general rule (such as liability for negligent misstatement), which forbids recovery.

More recently, the Court of Appeal and the House of Lords had to consider the following facts in *Marc Rich & Co AG and Others* v. *Bishop Rock Marine Co Ltd and Others*.

The plaintiffs were owners of cargo carried in a ship which went down at sea as a result of a cracked hull. This fault had developed during the earlier part of the voyage and at one point the ship put into port and temporary repairs were carried out. The defendants, who were surveyors of ships, had inspected the vessel after the repairs were done, and had passed it as sea-worthy. It sank after resuming its journey.

It is important to understand the status of the defendants, because *Marc Rich* is one of the so-called "hard" cases that are often encountered in the tort of negligence. In shipping terms they are known as a "Classification Society"; these societies (the defendants being one of the biggest in the world) provide services, for example in surveying, to those ship owners who register with them. They set standards of safety, etc, and are therefore very important to ship owners in connection with insurance and matters concerning governmental regulation. Ship owners must abide by the rules set by the society with which they are registered, but the society can only make recommendations to the ship owners, who are not forced to follow the recommendations. The only sanction which a society can apply is the suspension or withdrawal of classifications.

[2] [1991] 1 A.C. 398.

[3] (1875) L.R. 10 Q.B. 453.

[4] [1986] A.C. 785.

[5] [1985] 60 A.L.R. 1.

case are rather more complex but, in essence, the sum of £2.45 million was advanced on security of a property valued at £3.5 million when a valuation of £2 million would have been more realistic. The property was sold for only £345,000 at auction in February 1993, almost three years after the original advance was made. Again, his Lordship found that the recoverable loss against the valuer was the difference between the negligent valuation (£3.5 million) and the realistic value of the property (£2 million) and not the plaintiff's total loss which amounted to over £3 million. It is worthy of note that the instructions sent to the valuer in this case were rather more detailed than those conventionally used. Having said this, his Lordship concluded that "the contract did not ... impose a different liability from those in the other cases".

In all three cases the extent of the loss suffered by the lender was confined to their having less security than they would have done had the valuation been correct.

Where Do We Go From Here?

- In reaching this judgment, the House of Lords have provided much needed clarification as to the nature and extent of the conventional duty upon a valuer in respect of a lending transaction. Inevitably, money lenders will now be re-appraising the commercial value of their existing portfolio of cases and insurers will be amending their reserves.
- There is nothing to stop a prudent lender prescribing more widely a valuer's obligation but this will require: (a) the provision of more detailed and careful instructions and (b) the supplying of the valuer with further additional information not ordinarily within his or her knowledge. Whilst this remains a possibility, it is unlikely to be practical so far as many lenders are concerned given the time constraints and economic considerations. However, such an approach may well become much more prevalent in relation to high value commercial property transactions. Valuers should be on their guard and take careful note of the precise terms of their instructions.

Richard Beverley, partner
Freeth Cartwright Hunt Dickins

EXTENDING COMMON LAW TRACING?

Over the length and breadth of the country law students have recently been sitting down to their exams. Those with the initiative to spend some time trawling through old papers will have found that trust lecturers have an enduring fondness for questions concerning the nature and workings of asset tracing. They rarely tire of asking students to "compare and contrast common law and equitable tracing" or of inquiring why "common law tracing stops at the door of the bank?" This yearly repetition may, partly, be a sign of laziness, but it also reflects a growing interest in the techniques of tracing among practitioners and the judiciary: fuelled no doubt by the increased complexity and internationalisation of fraud and insolvency cases coming before the English Courts. In this context the recent Court of Appeal case of *The Trustee of Property of* F. C. *Jones & Sons (a firm) v. Jones* (*The Times*, May 13, 1996) potentially raises a number of new and interesting questions.

F. W. J. Jones was a partner in a failing potato growing business. In 1984 a supplier obtained judgment against the firm and, following an act of bankruptcy, in due course the partners were declared bankrupt. However, before the declaration (but after the act of bankruptcy) Mr Jones gave his wife cheques to the value of £11,700, drawn on an account, jointly held, with another partner, at the Midland Bank. These cheques were deposited by Mrs Jones with a firm of commodity brokers in order to facilitate her dealings on the London Potato Futures Market. Mrs Jones was clearly more accomplished at dealing in potatoes than her husband was at growing them: she received cheques to the value of £50,760 from the brokers, which she paid into a call deposit account with R. Raphael & Sons Plc.

The Official Receiver brought an action to recover the money, Raphaels interpleaded and the money was paid into court: the relevant issues were directed to be tried with the trustee in bankruptcy as the plaintiff. After an unexplained delay of nine years the case finally came before the High Court. The trustee claimed that the original £11,700 had vested in him at the date of the act of bankruptcy by virtue of

section 37 of the Bankruptcy Act 1914. This meant that Mrs Jones had no title to the original money and that, as a result, she was also liable for the profit. Counsel for Mrs Jones accepted that she could not take advantage of section 40 of the Bankruptcy Act 1914 and was liable for the £11,700. However, he claimed, correctly, that no equitable proprietary action could be brought for the profit as no fiduciary relationship existed between Mrs Jones and the trustee.

It has recently become fashionable to suggest that the rules of common law tracing are now obsolete. Advocates of this position use the court's willingness to find a fiduciary relationship in almost all circumstances, along with the common law's numerous deficiencies, to suggest that the equitable rules are always preferable. The instant case proves the fallacy of this position.

Unfortunately for the trustee if he was to make use of common law tracing, traditional thinking suggests that he would need to rely on an action for money had and received. Counsel for Mrs Jones noted this, and argued that the personal nature of that action would render the profits irrecoverable. This is at best only technically correct. It is more logical to view common law tracing as being potentially concerned with property based actions which result in remedies incapable of ensuring the return of specific assets. In other words, in appropriate circumstances, the plaintiff brings a proprietary claim with a personal remedy.

However, it is also true to say that the remedy is receipt based and that all the elements necessary to bring the action are complete when the relevant sum is received. This being the case, it is difficult to see how the trustee could claim profits made after the initial receipt of the £11,700. Millett L.J.'s interesting solution to this problem was to suggest that: "... I do not accept the main submission of counsel that the only action at law which was available to the trustee was an action against Mrs Jones for money had and received."

Relying on a number of previous cases (*Re Dennis* [1995] 3 W.L.R. 367; *Re Gunsbourg* [1920] 2 K.B. 426; *Re Hart, ex p. Green* [1912] 3 K.B. 6) his Lordship opined that:

"... from the date of the act of bankruptcy the money in the bankrupt's joint account ... belonged to the trustee. The account holders had no title to it at law or in equity. The cheques they drew in favour of Mrs Jones were not 'void' or 'voidable' but, in the events which happened, they were incapable of passing any legal or equitable title ... the result was to affect the identity of the debtor but not the creditor and to put Mrs Jones in possession of funds to which she had no title. A debt formally owed by Midland Bank apparently to Messrs F. W. J. Jones and A. C. Jones but in reality to their trustees ultimately became a debt owed by Raphaels apparently to Mrs Jones but in reality to the trustee."

His Lordship (after accepting that the lack of a fiduciary relationship was fatal to any equitable claim) went on to say that:

"It would, however, be a mistake to suppose that the common law courts disregard considerations of conscience. Lord Mansfield C.J., who did much to develop the early law of restitution at common law, founded it firmly on the basis of good conscience and unjust enrichment."

As a result, notwithstanding the fact that any action for money had and received would be both out of time and incapable of acting against the profit, the court allowed the trustee to trace through the cheques from her husband into the proceeds now held by Mrs Jones's bank. His Lordship went on to note:

"If Mrs Jones ... had any entitlement to demand payment from the brokers, this was because of the terms of the contract she made with them. Under the terms of that contract it is reasonable to infer that the brokers were authorised to deal ... on her account, to debit ... and credit it ... and to pay her only the balance standing in her account ... the chose in action ... was not a right to payment ... of the original amount ... but a right to claim the balance, whether greater or lesser than the amount deposited; and it is to that chose in action that the trustee now lays claim."

As a result, "the common law has adequate remedies to enable him to recover his property". This solution raises a number of interesting points:

- His Lordship was very careful to state that the case did not involve an action for money had and received although the relevant circumstances appear to be very similar to those which would normally give rise to that action. Unfortunately, he failed to fully explain what it did involve (except that it was concerned with conscience). Nor is it immediately apparent why a void or voidable transfer should be treated differently from one passing no title at all.
- Considering Millet L.J.'s reluctance to find that the Court was concerned with money had and received, Nourse L.J. was refreshingly direct when he stated that:

> "I recognise that our decision goes further than the House of Lords in *Lipkin Gorman v. Karpnale* ([1991] 2 A.C. 548), in that it holds that the action for *money had and received* entitles the legal owner to trace his property into its product, not only in the sense of property for which it is exchanged, but also in the sense of property representing the original and the profit made by the defendant's use of it (italics added)."

Under normal circumstances it might be difficult to understand how his Lordship could reconcile the receipt based nature of even an extended version of money had and received with the ability to recover the profit in the instant case. However, he makes it clear that he is relying on an enhanced version of the "exchange product" theory espoused in *Lipkin Gorman*. Unfortunately, as we shall see below, this methodology is not without its problems. Both Millet L.J. and Nourse L.J. suggested that, to a greater or lesser extent, their judgments were based upon "conscience". The importance of conscience is obvious with regard to equitable tracing where a fiduciary relationship exists. However, Millet L.J. has repeatedly stated that common law tracing is no more than an identification process: it is not immediately obvious what role conscience should play in the identification of property rights. Moreover, the facts of the case do nothing to suggest that Mrs Jones acted in anything but good faith: there is no reason to believe that she knew of her husband's defective title or that she acted dishonestly. As a result, we must assume that their Lordships are making a call to a higher justice or morality. This an admirable sentiment, but it is at least arguable that the consequential loss of certainty has been one of the major factors preventing the development of a viable system of restitution in the country.

To some extent Millet L.J. seems to base his judgment on unjust enrichment ("... if she were to retain the profit made by the use of the trustee's money, then, in the language of the modern law of restitution she would be unjustly enriched at the expense of the trustee.") However, Professor Birks states that where a defendant receives £100 and profitably invests it the point of making £10,000:

"... the only wealth to which he [the plaintiff] can establish any claim without relying on a wrong committed by the defendant is that wealth was indeed subtracted from him. Thus in the example of the invested money ... you can only identify £100, plus user over time represented by interest ... In order to establish any connection at all with the £10,000 you would have to say that I obtained it by virtue of my wrong" (Birks, *An Introduction to the Law of Restitution*, (1985), p. 353).

In the absence of a breach of a specified tortuous or fiduciary duty it is not entirely clear from the instant case what wrong Mrs Jones had committed. If, on the other hand, the decision is based purely on property law principles then the introduction of unjust enrichment will do little to reassure those critics who presently doubt the intellectual rigour of restitution as a subject.

The case also highlights problems with what has, recently, come to be known as "exchange product" theory. This finds its origins in the judgment of Lord Ellenborough in *Taylor v. Plumer* ((1815) 3 M. & S. 562) and holds that, for example, where A unjustly obtains B's car and exchanges it for C's boat, A can bring an action against either the boat or the car. It has, until recently, been accepted (both by academics and the courts) that the case was concerned with common law tracing. However, a number of commentators have now, convincingly, established that Lord

Ellenborough was concerned exclusively with the rules of equity. In the instant case Millet L.J. became the first English judge to accept the veracity of this argument. However, he went on to note that the "mistake" had been accepted in subsequent cases and to depreciate the view that it should be allowed to undermine common law "exchange product" theory:

"... that is not how the English doctrine of *stare decisis* operates. It would be more consistent with the doctrine to say that, in recognising claims to substituted assets, equity must be taken to have followed the law, even though the law was not decided until later."

It is undoubtedly true that the theory has been given House of Lords approval in *Lipkin Gorman (a Firm) v. Karpnale Ltd* and is, therefore, unarguably now part of the law of England. Nevertheless, a number of commentators have demonstrated that *Lipkin Gorman* itself mistakenly interpreted the rules of common law tracing. One might, therefore, question whether this is the appropriate moment for the Court of Appeal to extend the principles laid down in an arguably mistaken case ("I recognise that our decision goes further than that of House of Lords in *Lipkin Gorman*", *per* Nourse L.J.) which was itself based upon a mistake.

None of the above is in anyway intended to suggest that the Court of Appeal's decision in the instant case cannot be justified as a matter of principle or that it is not the best solution possible, given the state of the law as it now stands. The Court were faced with a situation in which they believed that the retention of the enrichment would be unjust, but were unable to use the rules of equity because of the fiduciary relationship rule. Given these factors the Court had little choice but to proceed as it did. Indeed, in the light of the judiciary's usual preference for authority, however irrelevant, over principle in this area, the Court's decision is to be applauded.

However, the case starkly illustrates not only the illogicalities which are ever present in this area but also the tensions which currently exist between the needs of modern commercial litigators and tracing rules developed two hundred years ago. Even to the casual observer, it is clear that the rules of common law and equitable tracing need to be radically revised if they are to provide a meaningful solution to the problems created by modern international commerce and fraud. This is clearly illustrated by the common law's inability to trace money through mixtures: a five-year-old who receives £10 through the bank clearing system as a birthday present from his uncle, knows exactly where it came from, the common law of England may not.

It could be that these problems can largely be solved by combining the equitable and common law rules and removing the requirement for a fiduciary relationship. Indeed, in the instant case Millet L.J. made a call for such a change when he said:

"The fact that there are different rules at law and in equity is unfortunate ... but unnecessary differences should not be created where they are not required by the different nature of legal and equitable doctrines and remedies. There is, in my view, even less merit in the present rule which precludes the invocation of the equitable tracing rules to support a common law claim; until the rule is swept away unnecessary obstacles to the development of a rational and coherent law of restitution will remain."

Moreover, it may be that this case will do something to bring this change closer. However, the present author would suggest a more radical and wide-ranging reform is necessary. When the tracing rules were developed we had no clear understanding of the nature of restitution and the creation of clearing systems, electronic cash, money laundering and off-shore tax havens were still two hundred years in the future. If the law is to remain relevant we must start from first principles and move onto a root and branch redevelopment. We must decide whether our system is to place the identification of unjust enrichment at its centre or not. If it is, then what do we mean by identification? Is it concerned purely with the location of property rights or is it also concerned with causation? What is the effect of dishonesty by one or more of the parties? How are we to balance the rights of creditors against the rights of those

parties unjustly deprived of their assets? Once we have examined these and other principles, goals and objective we must develop a system which achieves them and sweeps away all unnecessary obstructions: there is no place in modern law, for tracing rules which are incapable of working when money is moved via an electronic transfer. Until this process, at least, begins we might suggest a new exam question for those hard-pressed lecturers already thinking of what to put on next year's paper:

"Describe a logical method by which unjustly acquired assets could be traced (no reference to the present English system need be made)."

Ian Hutton

APPENDIX THREE: THE QUESTIONNAIRE SURVEY USED IN THIS STUDY, INCLUDING COMMENTS MADE BY RESPONDENTS.

The questionnaire survey used in the present study was conducted during the latter half of 1997. It was proceeded by a limited trial conducted earlier in the year. The trial consisted of two elements. First a number of draft questionnaires were sent at random to companies identified in the *Times One Thousand* list of Britain's largest companies measured by turnover. These companies were asked to both fill in the questionnaire and provide their comments on it. Second, a small number of specified individuals holding positions of responsibility in leading United kingdom companies, comparable to those who it was expected would eventually complete the questionnaire, were approached for their views.

The primary effect of the trial was to identify ambiguous questions and overly complex questions. Equally, in one case a particular question was added as a result of comments made by a respondent. The trial therefore led to some fine tuning which primarily, although not exclusively concerned with making the questionnaire easier to understand and complete.

The intention of the questionnaire was to examine the nature and volume of commercial fraud in this country and to assertion the view of the victims of such fraud. The underlying purpose of this approach was the belief that in order to determine assess out system for recovering lost assets, it is necessary to fully understand the nature of the problem. Moreover, although it is possible to consider this issue in the abstract, any conclusion would at best be compromised without an understanding of the priorities of the victims of fraud and the "consumers" of our systems for tracing.

The primary reasons for limiting the questionnaire to the victims of commercial fraud are examined in the main body of this work. Primarily it is suggested that the victims of commercial fraud are likely to represent the majority of those bringing

litigation before the English courts. In other words, there is a connection between the financial assets of the victim, the scale of the loss and the decision as to whether litigation is an acceptable approach in the light of the cost of such activities and the likelihood of recovering the assets in question. with regard to cost and other factors. The only entities that are likely to suffer fraud on a similar scale are public and governmental authorities. It was considered that the nature of such bodies, the forms of fraud they are likely to suffer and the factors informing their retain to fraud were sufficiently different to those involved with commercial fraud to suggest that they two formed different groups which could not be usefully compared within the scope of this study.

Having identified a the subject matter of the study the appropriate sample was relatively self selecting. Large-scale commercial fraud can only be suffered by commercial entities of a certain size. It was therefore felt that by taking a sample of 750 of the largest companies by turnover operating in Britain, this criteria would be satisfied whilst maintaining a sample which, by its nature mirrored the profile of large businesses in the UK.

The questions which are incorporated into the questionnaire was a number of underlying purposes. First, they were it was intended to test the propositions indicated by the other elements of the research whilst also identifying possible areas for post-doctoral study. Second, they focus on the levels of fraud suffered by British companies over the last five years; their experience of the criminal and civil legal responses to fraud; the process of asset recovery in an international context and the business perceptions which surround these elements. In this regard the survey is particularly concerned with the importance which companies place upon fraud; the manner in which fraud affects their business; the priorities which inform their responses to fraudulent activity; their beliefs about future trends in the growth or otherwise of fraud and the underlying factors which they believe influence fraud in general and the law's response to it in particular. Finally, the questions examined the wider issues of the subject, including the effectiveness alternative or complimentary methodologies (e.g. the criminal authorities) and the involvement of third parties.

The result of the survey are fully considered in the main body of this work. However, some of the most significant results can be summarised as follows:

- 96% of respondents to the relevant question had specific systems to prevent fraud
- 75% believed that they had taken all reasonable steps to combat it.
- Of the companies expressing an opinion, 46% had suffered fraud which they considered to be serious in the last five years
- Of the companies expressing an opinion 35% had suffered such fraud in the last year.
- 38% of those companies who had suffered fraud, and responded to the relevant question, had recovered less than 5% of their losses (other than by recourse to insurance) while 72% had recovered less than 50%.
- 95% of all respondents considered fraud to be an important problem for their businesses
- 36% of respondents who expressed an opinion believed that fraud against their company had increased in the last five years while only 22% believed it had decreased.
- The most popular reasons for this increase were, the increase in complexity of business, the fall in society's standards and the lack of criminal sanctions.
- 38% of those companies expressing an opinion believed that fraud against them would increase over the next five years.
- 49% of respondents who expressed an opinion believed that fraud with a foreign element had increased in the last five years.
- 23% believed that fraud against their foreign interests was more serious than that perpetrated against their UK interests.
- 41% of those who expressed on opinion said that there were some countries in which they would not trade as a result of concerns about fraud.
- 33% of those who had suffered fraud in the last five years were aware that some lost assets had been moved abroad.
- 96% of those who expressed an opinion believed that moving assets abroad would make recovery more difficult.

- 54% of those companies who expressed an opinion said that there were circumstances in which they would consider not informing the criminal authorities of a fraud against them.

- 23% of those who had had reported a fraud to the police in the last five years, and responded to the relevant question, were less than satisfied by their response.65% of companies expressing and opinion believed that sentences in fraud cases were either too lenient or much too lenient.

- 66% of those expressing and opinion believed that the criminal law was less than effective or very ineffective in combating fraud.

- 63% of those who expressed an opinion believing that the civil courts were not an effective means of recovering assets lost to fraud.

- 42% of those respondents expressing an opinion, said that third parties other than the fraudster were partly responsible for their losses.

The bare statistics produced by the survey, do however, to some extent, give only part of the story. For this reasons, respondents were, whenever possible asked to comment and expand upon there answers. Such comments represent an interesting insight into the priorities of parties professionally concerned with preventing fraud and combating its consequences.

General Comments.

- "Fraud is regarded as a victimless crime (particularly by many serving police) and until society is made to realise this simply is not so, it will continue...There must be co-operation and exchange of information between all institutions, including police."

- "Materiality does not justify the adverse publicity."

- "Fraud is too complicated for ordinary jurors to comprehend."

- "Cost [of pursuing recovery through the courts] v probability of recovery too low."

- "Television glamorises techno-crimes."

- "This questionnaire should be read with the knowledge that banks who issue credit cards etc. have many frauds with relatively low individual losses per case. The judicial system also varies in terms of sentences etc. according to the type of offence."

- "The standard [of the criminal authorities] is low in some instances."
- "The [criminal justice] system is ineffective but we would still report."
- "More effective preventative measures need to be taken – e.g. vetting employees, contractors, suppliers more thoroughly. Less proof required in respect of 'knowingly', 'dishonestly', 'believing' the mere fact that a fraudster makes a false or misleading entry in a document should be sufficient proof."
- "Focus of organised crime on industry – drugs, money laundering etc."
- "Fraud is considered by police to be a victimless crime."
- "Fraud should be a police priority."
- "Time-scales for investigation and reports, through to possible prosecution are very long and invariably costly; end result does not justify resources used, other than to act as a deterrent."
- "Burden of proof very high (and complex)."
- "More resources for prosecution."
- "[We would inform the criminal authorities] after we had investigated it to satisfy our needs: if the police are involved immediately it is impossible (often) to find out exactly what happened for months, so remedial action (to plug the control weaknesses etc.) is impossible."
- "Many companies avoid disclosure of fraud due to the risk of adverse publicity – allowing fraudsters to strike again. There should be a legal obligation to disclose and a right of access to information on disclosures."
- "An accepted definition of what is and what is not fraud, is required. Much fraud is hidden in bad debt."
- "It is difficult to provide the evidence for a conviction, therefore evidence rules too complex. For a minor fraud, not worth the effort."
- "The law (criminal) is geared towards injury to the person not property."
- "Restitution orders are always only a proportion of the loss suffered by the victim. The system in Scotland is much better."
- "Private industry must lobby to improve legislation to facilitate prosecution. This requires co-operation with and support of, law enforcement. Gone are the days when everything was handed over to the police and we expected

them to deal with it. We must educate and take responsibility internally and within all our industry sectors."

- "Criminal Prosecution Service drops many of the cases raised by ourselves and the police."
- "For the bulk of the frauds we suffer, it [prosecution] is not cost effective."
- "Involvement of the authorities may be counter-productive to other corporate interests."
- "CPS are totally ineffective and police forces are generally unsupportive."
- "Civil sanctions are too easy to evade."

Suggestions of how to improve the civil / criminal response to fraud.

- "1. Greater awareness of what is meant by 'fraud'
  2. Greater use of compensation orders…
  3. Faster, more streamlined prosecutions."
- "Greater public awareness. Fraud affects every single member of the community and threatens the very fabric of society. Falling standards of morality, decency etc. require dramatic improvement. Fraud is inspired by greed and those responsible must be ostracised and made to suffer the consequences."
- "Companies should employ professional investigators who can sell a case to the police and can do all the preliminary investigative work."
- "Trials should be about seeking the truth as opposed to appearing to be a game played to rules which often preclude the facts being known. Legislation should attempt to simplify the definition of offences and take on board the effects of new technology."
- "Simplify the presentation of the case."
- "Streamlined fast track procedures."
- "Professional juries or three judges who have qualifications in accountancy. No trials within trials all evidence is disclosed! Companies Act reviewed and stricter penalties for bankruptcy fraud."
- "A judges panel in serious fraud trials."
- "Use expert witnesses, scrap juries, don't use the CPS."

- "The only way to ensure both the civil and criminal response is correct is to have investigators and lawyers who know our systems intimately. We are using computers in court in Kingston in a non-SFO trial for the first time."

- "A clear responsibility for fraud in the police force. I took three days to find a police officer willing to accept responsibility for the theft of a cheque in the post. If they had acted immediately they would have apprehended / or stopped the funds being removed from the account."

- "A greater willingness by the courts to seize assets to recover losses."

- "Fraud is often too complex for the ordinary juror. It would save time and money if the evidence was heard by a panel of judges. This would also reduce the time spent on legal debate and the admissibility of evidence."

- "Expand SFO. Improve resources at CPS – Beef up FIG – more in-house investigations. Engagement of accountants (specialists) by police. Expand Fraud Squads – do not move police on after a few years, just after they get to know what they are doing. Much harsher sentences, seizure powers, professional juries – i.e. fraud expert judge and jurors."

- "Huge case load of CPS and lack of resources of qualified staff."

- "Simpler definition of fraud. Greater deterrent. Greater power to trace proceeds of fraud and subsequent recovery for beneficiaries."

- "In serious fraud cases, the criminal trial should not be held with a jury but before two Senior Judges with experience of serious fraud cases."

- "Expert juries rather than lay juries."

- "Improved police training so that they can understand fraud and how it is committed. This is also true of the Crown Prosecution Service. Greater police resources allocated to fraud."

- "Entire investigation and pre-trial process needs to be speeded up – changes reduced to bare minimum and investigations conducted not merely by police but by experienced company / commercial lawyers. Jury trails retained, but length of trails dramatically reduced presented by prosecution in such a way that lay juries can understand them."

- "You need specialists who can understand the complex business and IT systems in today's current environment."

- "Jury of experts (accountants, not lawyers!)."

- "Avoid trial by jury…Clarify the law."

- "Inquisitorial system and speedier access to civil courts."

THE QUESTIONNAIRE.

Centre for Advanced Litigation Fraud Questionnaire: Ian Hutton - Nottingham Law School.

The following questionnaire is designed to examine the business community's perception of fraud:

1. Its results are entirely confidential and no answers will be attributed to individuals or companies (either expressly or implicitly) unless express written permission to do so is given below.

2. If for any reason you wish to omit some questions please feel free to do so - a partially completed survey is still of immense help.

3. Answers should be placed in the relevant spaces _____ or boxes ☐ according to the instructions given in the questionnaire.

4. When completed the questionnaire should be returned in the stamped addressed envelope provided, or to:

Ian Hutton,
The Centre for Advanced Litigation,
Nottingham Law School,
Belgrave Centre,
Chaucer Street,
Nottingham NG1.

All information given in response to this questionnaire will be treated as strictly confidential unless express permission for disclosure is given by the respondent.

If you consent to having your views attributed to you and your company please tick this box: ☐

If you do not tick this box, it will be understood that you and your company wish to maintain complete confidentiality.

A report summarising the results of this survey will be produced. If you wish to receive a copy of the report please tick this box: ☐

1. ABOUT YOUR COMPANY.

Please specify the name of your company, your name and your position in the company. All information given in response to this questionnaire is confidential unless permission for disclosure is expressly given by the respondent. If you do not wish to give your name or the name of your company it would still be very helpful if you could complete the questionnaire.

The Name of Your Company _____

Your Name_____ **Your Position**_____

Approximately how many people are employed by your company (please ignore this question if you gave the name of your company)?

1 - 499	500 - 4,999	5,000 - 9,999	10,000 - 24,999
25,000 - 49,999	50,000 -74,999	75,000 - 99, 999	100,000 - 150, 000

More than 150,000 - Please Specify_____

What is the approximate yearly turn-over of your company in pounds sterling (please ignore this question if you gave the name of your company)?

1 - 9 million	10 - 24 million	25 - 49 million	50 - 99 million
100 - 249 million	250 - 499 million	500 - 999 million	1 -5 billion
5 - 10 billion	10 - 20 billion	20 - 40 billion	

What type of business is your company involved in? (please tick one box). If your business is involved in more than one area please tick the category which you consider constitutes your core business.

Banking		Construction		Chemicals/Pharmaceuticals	
Commodity Trading		Defence		Distribution	
Financial Services		Food / Leisure		Electrics	
Engineering		High Technology		Industrial	
Insurance		Mail Order		Medical	
Printing		Retail		Textiles	

Other - please specify_____

Has your company been the victim of a fraud which you consider to be serious:

In the last **Year?**	Yes	No	Don't Know
In the last **Five Years**?	Yes	No	Don't Know

If the answer to these two questions is no, please disregard subsequent questions requesting details of frauds suffered in the last five years.

2. HOW MUCH FRAUD HAVE YOU SUFFERED?

Approximately, how many instances of fraud which you consider to be serious has your company suffered in the last five years?

0		1 – 4		5 - 9		10 - 14		15 - 19		20 -24	
25 - 29		30 – 34		35 - 39		40 - 44		45 - 50			

Don't Know ☐ More than 50 - please specify_____

Approximately, how much do you believe your company has lost to fraud in the last five years (whether or not it was subsequently recovered)?

Under £10,000 - please specify_____

£10,000 - £24,999		£100,000 - £249,999		£1 Million - £1.9 Million		£5 million - £9.9 million	
£25,000 - £49, 999		£250,000 – £499,000		£2 million - £2.9 million		£10 million - £19.9 million	
£50,000 - £99,999		£500,000 - £999,999		£3 million - £4.9 million		£20 million - £30 million	

Don't Know ☐ More than £30 Million - please specify_____

What was the approximate value of the worst single fraud suffered by your company in the last five years (whether or not it was subsequently recovered)? ☐

Approximately, what proportion of the money lost to fraud in the last five years do you believe was recovered by legal or other actions (not including sums recovered by virtue of insurance)?

Under 5%		10% - 19%		20% - 29%		30% - 39%		40% - 49%	
50% - 59%		60% - 69%		70% - 79%		80% - 89%		90% - 100%	

Please answer the following questions concerning assets you have lost to fraud

To your knowledge were any of the assets lost to fraud in the last five years moved abroad?	Yes	No	Don't Know
Do you believe that moving assets abroad makes their recovery more difficult?	Yes	No	Don't Know

Please answer the following questions concerning your company's attitude to fraud (tick one box per question).

How important a problem do you consider fraud to be?	Very Important	Quite Important	Important	Quite Un-important	Very Un-important
Do you believe that the level of fraud against your company has increased or decreased in the last five years?	Increased	Decreased	Remained the Same	Don't Know	
Do you believe the level of fraud against your company will increase or decrease in the next five years?	Increase	Decrease	Remain the Same	Don't Know	
Do you believe that fraud with a foreign element* has increased or decreased in the last five years?	Increased	Decreased	Remained the Same	Don't Know	
Are there any countries which you would not trade in as a result of concerns about fraud there?	Yes	No	Don't Know		
If you trade abroad do you consider fraud against your foreign interests to be more or less serious than that occurring in the UK?	More Serious	Less Serious	Same	Don't Know	

***(e.g. fraud perpetrated by foreigners, or against your foreign interests, or in which assets were moved abroad).**

If there are any countries which you would not trade in as a result of fraud could you give relevant details (e.g. name of country and type of fraud).

If you believe that the level of fraud against your company has increased in the last five years, why do you believe this to be the case? (tick as many boxes as you feel appropriate).

Fall in society's standards of honesty		External economic circumstances (e.g. recession)		Increased trade abroad		Inefficient criminal/police authorities	
Lack of internal controls		Fall in employee's standards of honesty		Increase in complexity of business		Lack of criminal sanctions (e.g. low sentences, worse rates of detection)	
Increased volume of trade		Lack of awareness of problem by management		Greater use of information technology		Greater use of technology (other than information technology)	

Other causes - please specify:

If you believe that the level of fraud against your company has decreased in the last five years, why do you believe this to be the case? (tick as many boxes as you feel appropriate).

Rise in society's standards of honesty		Greater use of information technology		Better internal controls		Increased efficiency of police/criminal authorities	
Decreased volume of Trade		External economic circumstances		Decreased trade abroad		Decrease in business complexity	
Rise in employee's standards of honesty		Greater use of technology (other than information technology)		Increased awareness of problem by management		More effective criminal sanctions (e.g. higher sentences, higher rates of detection)	

Other causes - please specify:

Please indicate how you would rate the importance of the following factors upon the discovery of a serious fraud against your company (tick one box per row).

	Very High Importance	High Importance	Important	Low Importance	Very Low Importance
Identify the perpetrator					
Stop further losses					
Recover the lost assets					
Terminate the employment of an internal fraudster					
Ensure the bringing of criminal charges					
Control the dissemination of information about the fraud					
Prevent similar fraud being committed by other fraudsters					

Please specify any other priorities you consider to be of importance:

Please answer the following questions concerning your company's opinion of the criminal authorities.

Are there any circumstances in which you would consider not informing the criminal authorities of a fraud against your company?	Yes	No	Don't Know
Did you report the last fraud against your company?	Yes	No	Don't Know

If there are circumstances in which you would not inform the criminal authorities, please indicate why (tick as many boxes as necessary).

Involvement of the authorities may lessen the chances of recovering the lost assets	
Involvement of the authorities is likely to increase adverse publicity	
Involvement of the authorities is likely use an unreasonable amount of the company's resources	
Greater confidence in the effectiveness of internal investigators	
Belief that the police/criminal authorities are ineffective	
Belief that the criminal system is ineffective	
The company has a policy of not reporting frauds under a certain value	

Others-Please Specify:

Please answer the following questions regarding your experience of fraud in the last five years (please tick one box per row).

Have you reported a case of fraud to the police in the last five years?	Yes	No	Don't Know		
If you have, how satisfied have you been by their response?	Extremely Satisfied	Quite Satisfied	Satisfied	Quite Un-satisfied	Very Unsatisfied
Have you reported a case of fraud to the Serious Fraud Office in the last five years?	Yes	No	Don't Know		
If you have, how satisfied have you been by their response?	Extremely Satisfied	Quite Satisfied	Satisfied	Quite Un-satisfied	Very Unsatisfied
As a result of your experiences of the criminal authorities in the last five years would you be more or less likely to involve them in the future?	More Likely	Less Likely	No Effect	Don't Know	
Do you consider the involvement of the criminal authorities to be of help in the recovery of lost assets?	Yes	No	Makes No Diffe-rence	Don't Know	
Did your latest reporting of fraud lead to a criminal conviction?	Yes	No	Don't Know		
Do you believe the criminal law is providing an effective response to fraud?	Very Effective	Quite Effective	Effective	Less Than Effective	Very Ineffective
Do you believe the Civil Courts are an effective means of recovering assets lost to fraud?	Very Effective	Quite Effective	Effective	Less Than Effective	Very Ineffective
What is your opinion of sentences in fraud cases in general?	Much Too Lenient.	Too Lenient	About Right.	Too Severe.	Much Too Severe.
Does your company have specified systems to prevent fraud?	Yes	No	Don't Know		
Do you believe that your company has taken all reasonable steps to combat fraud?	Yes	No	Don't Know		

If you believe that the criminal law is not effective, who or what is to blame? (tick as many boxes as you feel necessary).

Jury Trials		Lawmakers	
Police		Lawyers	
Serious Fraud Office		Judges	
Jurors			

Others - please specify_____

If you believe that the Civil Courts do not provide an effective means of recovering assets lost to fraud, who or what is to blame? (tick as many boxes as you feel necessary).

Judges		Lawmakers	
English legal rules too complex		Lawyers	
Lack of international co-operation		Foreign laws which are intended to prevent recovery	
Foreign legal authorities			

Others - please specify_____

Do you consider that the actions of parties other than the fraudster (banks, accountants, auditors etc.) were partly responsible for any losses you may have suffered due to fraud in the last five years?

YES	NO	DON'T KNOW

If yes, please specify which parties.

Banks		Present Employees		Consultants	
Lawyers		Sub-contractors		Auditors	
Accountants		Competitors		Former Employees	

Others - please specify_____

Do you have any suggestions which might improve either the civil or criminal response to fraud?

If you have any further comments regarding the subject matter of this questionnaire or fraud in general, please include them in the space below (please use extra paper if necessary).

Thank you for taking the time to complete this questionnaire. Please return it in the stamped addressed envelope or to the address on the front of this document.

APPENDIX FOUR: THE QUESTIONNAIRE SAMPLE.

THE UK'S TOP 1000

1-50

RANK	COMPANY NAME (Sector)	CAPITAL EMPLOYED £000	TURNOVER £000	PRE-TAX PROFIT £000	NUMBER OF EMPLOYEES	EQUITY MKT CAPITAL £000
1	HSBC Holdings *(Banks)*	24,182,000	16,904,000	3,672,000	109,093	26,083,000
2	Shell Transport and Trading Company[1] *(Oil, Gas & Nuclear Fuels)*	21,901,200	27,838,000	3,190,400	104,000	28,250,000
3	British Petroleum Company *(Oil, Gas & Nuclear Fuels)*	21,195,000	36,106,000	1,946,000	58,150	30,064,000
4	Abbey National *(Banks)*	17,463,000	6,911,000	1,026,000	17,510	8,510,000
5	British Telecommunications *(Communications)*	16,392,000	13,893,000	2,662,000	148,900	21,926,000
6	Barclays *(Banks)*	14,034,000	14,584,000	2,083,000	92,400	12,181,000
7	National Westminster Bank *(Banks)*	13,783,000	14,909,000	1,753,000	96,800	11,657,000
8	Halifax Building Society *(Other Financial)*	13,652,800	6,946,200	1,101,400	22,057	†
9	Hanson *(Conglomerates)*	13,256,000	11,184,000	1,275,000	65,000	10,502,000
10	British Gas *(Oil, Gas & Nuclear Fuels)*	12,778,000	8,601,000	986,000	54,754	11,123,000
11	Swire [John] & Sons Ltd *(Transport Services)*	10,966,000	4,375,000	804,000	40,161	†
12	Lloyds TSB Group *(Banks)*	10,094,000	11,330,571	1,628,571	91,044	16,840,000
13	B.A.T Industries *(Tobacco)*	9,293,000	6,751,000	2,384,000	27,245	17,533,000
14	Eurotunnel Group[2] *(Transport Services)*	9,011,752	298,592	L924,860	2,885	800,011
15	Magnox Electric[3] *(Electricity)*	8,791,000	2,889,000	1,068,000	9,426	†
16	RTZ Corporation *(Mines)*	7,953,000	5,155,000	1,424,000	34,763	10,007,000
17	Grand Metropolitan *(Brewers & Distillers)*	7,252,000	8,025,000	920,000	57,538	9,312,0(
18	British Airways *(Transport Services)*	6,689,000	7,177,000	327,000	53,060	5,149,000
19	Imperial Chemical Industries *(Chemicals)*	6,512,000	10,269,000	927,000	64,800	5,532,000
20	Cable and Wireless *(Communications)*	6,126,100	5,132,800	844,100	41,124	11,813,000
21	Guinness *(Brewers & Distillers)*	5,464,000	4,681,000	876,000	22,457	9,599,000
22	Commercial Union *(Insurance (Life / Non life))*	5,356,000	8,604,000	634,000	25,317	4,409,000
23	Land Securities *(Property)*	5,104,500	472,600	244,700	551	3,194,000
24	Bank of Scotland *(Banks)*	5,088,300	3,397,100	545,000	16,533	†
25	Royal Bank of Scotland Group *(Banks)*	5,074,000	4,528,000	602,000	25,870	3,635,000
26	Bass *(Brewers & Distillers)*	4,950,000	4,541,000	599,000	76,919	5,622,000
27	Peninsular and Oriental Steam Navigation Company *(Transport Services)*	4,885,000	6,571,100	320,400	66,924	3,854,810
28	British Steel *(Metal & Metal Forming)*	4,744,000	4,784,000	578,000	39,800	3,868,000
29	BTR *(Conglomerates)*	4,622,000	9,778,000	1,503,000	152,065	12,458,000
30	SmithKline Beecham *(Health & Household)*	4,406,000	7,011,000	1,623,000	52,400	18,934,868
31	Allied Domecq *(Brewers & Distillers)*	4,333,000	5,950,000	536,000	54,979	5,204,000
32	Marks and Spencer *(Stores)*	4,299,900	6,806,500	924,300	41,535	11,825,000
33	Tesco *(Stores)*	4,186,000	12,094,000	675,000	84,895	5,817,000
34	General Electric Company *(Electronics)*	4,121,000	5,843,000	891,000	82,251	8,124,000
35	Sainsbury [J] *(Food Wholesaling & Retailing)*	3,986,000	11,357,000	809,200	82,345	6,814,000
36	Standard Chartered *(Banks)*	3,898,000	3,471,000	661,000	26,953	5,531,000
37	Nationwide Building Society *(Other Financial)*	3,893,800	2,836,100	345,400	12,787	†
38	Great Universal Stores *(Stores)*	3,660,400	2,664,100	562,800	27,907	5,642,358
39	General Accident *(Insurance (Life / Non life))*	3,595,000	5,828,000	559,000	24,950	3,401,000
40	BAA *(Transport Services)*	3,571,800	1,158,600	366,100	8,171	5,537,000
41	National Power *(Electricity)*	3,545,000	3,953,000	705,000	5,447	†
42	Woolwich Building Society *(Other Financial)*	3,326,600	2,220,100	333,000	8,472	†
43	Sun Alliance Group[4] *(Insurance (Life / Non life))*	3,309,700	4,802,300	546,300	24,199	3,169,497
44	London Regional Transport *(Transport Services)*	3,243,400	1,155,200	100,600	34,431	†
45	Railtrack Group *(Transport Services)*	3,167,000	2,275,000	189,000	11,340	†
46	Severn Trent *(Water)*	3,164,500	1,076,400	267,500	10,628	2,178,000
47	Alliance & Leicester Building Society *(Other Financial)*	3,153,900	1,990,900	284,000	9,433	†
48	Royal Insurance Holdings[5] *(Insurance (Life / Non life))*	3,131,000	4,543,000	498,000	13,048	2,520,000
49	Unilever *(Food Manufacturing)*	3,124,000	9,123,000	895,000	308,000	10,783,000
50	MEPC *(Property)*	3,121,000	348,300	122,600	1,280	1,604,687

NOTES: [1]Based on 40% of Royal Dutch/Shell Group [2]Eurotunnel PLC/Eurotunnel SA units. [3]Formerly Nuclear Electric [4 & 5] Now Royal & Sun Alliance Insurance Group.
† Figure not disclosed or company unquoted, government controlled, a nationalised industry, a subsidiary or newly quoted.

51-100

THE UK'S TOP 1000

RANK	COMPANY NAME (Sector)	CAPITAL EMPLOYED £000	TURNOVER £000	PRE-TAX PROFIT £000	NUMBER OF EMPLOYEES	EQUITY MKT CAPITAL £000
51	ZENECA Group *(Health & Household)*	3,052,000	4,898,000	619,000	31,400	11,795,000
52	United Utilities *(Water)*	3,045,500	1,011,800	284,000	7,871	3,233,000
53	British Aerospace *(Aerospace)*	3,023,000	5,741,000	234,000	45,200	3,769,000
54	Glaxo Wellcome *(Health & Household)*	3,004,000	6,993,333	1,591,333	52,419	32,065,000
55	Ladbroke Group *(Hotels & Leisure)*	2,863,700	3,847,600	95,400	45,557	1,708,620
56	Guardian Royal Exchange *(Insurance (Life/Non life))*	2,847,000	3,706,000	812,000	13,824	2,480,000
57	Thames Water *(Water)*	2,837,800	1,173,600	303,700	10,473	2,321,000
58	Prudential Corporation *(Insurance (Life/Non life))*	2,823,000	8,041,000	1,044,000	22,864	7,936,000
59	BOC Group *(Chemicals)*	2,812,500	3,543,900	402,200	39,680	3,840,575
60	Whitbread *(Brewers & Distillers)*	2,800,700	2,698,015	280,309	54,376	3,470,000
61	British Land Company *(Property)*	2,771,300	211,000	49,100	280	1,666,000
62	3i Group *(Investment Trust)*	2,749,500	244,800	65,800	595	2,535,000
63	Rank Organisation *(Hotels & Leisure)*	2,729,000	2,240,571	564,000	39,158	4,218,000
64	Cadbury Schweppes *(Food Manufacturing)*	2,676,000	4,776,000	526,000	41,789	5,272,120
65	Post Office *(Communications)*	2,666,000	5,878,000	472,000	191,315	†
66	RMC Group *(Building Materials & Services)*	2,543,400	4,116,200	341,700	30,048	2,459,642
67	Associated British Foods *(Food Manufacturing)*	2,519,000	4,894,000	375,000	43,665	3,194,000
68	National Grid Group *(Electricity)*	2,503,500	1,428,300	610,600	4,871	†
69	LASMO *(Oil, Gas & Nuclear Fuels)*	2,500,000	637,000	144,000	1,296	1,690,000
70	Bradford & Bingley Building Society *(Other Financial)*	2,437,100	1,220,700	165,600	3,856	†
71	Redland *(Building Materials & Services)*	2,427,400	2,503,100	273,200	21,842	†
72	PowerGen *(Electricity)*	2,404,000	2,885,000	545,000	4,171	3,889,000
73	Anglian Water *(Water)*	2,308,900	720,100	216,100	5,733	1,596,000
74	Boots Company *(Stores)*	2,278,700	4,308,100	849,700	80,850	5,713,000
75	British Nuclear Fuels *(Oil, Gas & Nuclear Fuels)*	2,250,000	1,304,000	74,000	14,221	†
76	Scottish Nuclear Ltd[6] *(Electricity)*	2,248,000	580,000	150,000	1,860	†
77	Scottish & Newcastle *(Brewers & Distillers)*	2,227,800	2,021,500	264,000	44,256	2,884,864
78	Rolls-Royce *(Aerospace)*	2,219,000	3,597,000	175,000	43,200	2,761,000
79	Pilkington *(Other Industrial Materials & Products)*	2,214,000	2,676,000	L248,000	37,100	2,139,000
80	Enterprise Oil *(Oil, Gas & Nuclear Fuels)*	2,105,600	762,900	201,200	597	1,961,717
81	Argyll Group *(Food Wholesaling & Retailing)*	2,070,300	5,814,600	175,600	67,323	3,540,000
82	Tate & Lyle *(Food Manufacturing)*	2,060,700	4,424,513	305,230	17,743	2,020,878
83	Asda Group *(Stores)*	1,972,900	5,285,300	257,200	69,366	2,367,319
84	Lonrho *(Conglomerates)*	1,941,000	1,966,000	161,000	94,881	1,283,000
85	Slough Estates *(Property)*	1,938,500	183,400	70,700	444	1,021,309
86	Yorkshire Water *(Water)*	1,912,600	549,300	142,000	4,640	1,395,000
87	Foreign & Colonial Investment Trust *(Investment Trusts)*	1,829,671	52,594	39,415	n/a	1,704,257
88	Reckitt & Colman *(Health & Household)*	1,807,700	2,352,500	417,800	18,739	3,028,850
89	Arjo Wiggins Appleton *(Packaging, Paper & Printing)*	1,773,400	3,565,900	72,000	18,821	1,351,000
90	Siebe *(Engineering - General)*	1,761,600	2,146,200	275,100	32,309	3,737,000
91	Kingfisher *(Stores)*	1,756,200	5,181,064	305,819	43,580	3,562,644
92	Hammerson *(Property)*	1,676,700	177,100	57,700	356	999,096
93	Hyder *(Water)*	1,661,800	521,900	120,400	6,565	1,263,000
94	Blue Circle Industries *(Building Materials & Services)*	1,646,000	1,774,600	263,800	18,690	2,698,247
95	Telewest Communications *(Media)*	1,628,714	144,784	L114,665	2,776	1,425,943
96	Reed International[7] *(Media)*	1,587,500	1,824,500	368,000	30,400	5,553,000
97	Tarmac *(Building Materials & Services)*	1,541,800	2,482,400	20,300	19,981	953,006
98	South West Water *(Water)*	1,507,100	286,200	63,200	3,083	863,000
99	Pearson *(Media)*	1,464,700	1,830,400	365,100	19,422	3,470,463
100	Lucas Industries *(Engineering - General)*	1,457,300	2,796,000	30,400	48,504	1,661,890

NOTES: [6]On 31/3/96 and transfer of its Magnox station to Magnox Electric the company became a subsidiary of British Energy, first listed on 15/7/96. [7]Based on 50% of Reed/Elsevier Group. n/a – not available. †Figure not disclosed or company unquoted, government controlled, a nationalised industry, a subsidiary or newly quoted.

THE UK'S TOP 1000

101-150

RANK	COMPANY NAME (Sector)	CAPITAL EMPLOYED £000	TURNOVER £000	PRE-TAX PROFIT £000	NUMBER OF EMPLOYEES	EQUITY MKT CAPITAL £000
101	National Home Loans Holdings *(Other Financial)*	1,440,900	170,500	15,100	404	86,973
102	Burmah Castrol *(Oil, Gas & Nuclear Fuels)*	1,405,300	3,048,500	253,000	21,624	1,899,170
103	GKN *(Engineering - General)*	1,402,300	2,893,600	322,400	32,861	2,718,693
104	THORN EMI *(Hotels & Leisure)*	1,369,000	4,507,300	271,100	33,547	4,689,853
105	Britannia Building Society *(Other Financial)*	1,354,500	871,900	112,700	2,534	†
106	Coats Viyella *(Textiles)*	1,304,000	2,459,600	162,500	73,650	1,234,078
107	Sears *(Stores)*	1,294,200	2,143,700	153,800	28,091	1,446,000
108	Scottish Power *(Electricity)*	1,284,400	1,715,800	375,300	8,560	3,256,000
109	REXAM *(Packaging, Paper & Printing)*	1,265,000	2,391,000	180,000	27,400	1,909,000
110	Northern Rock Building Society *(Other Financial)*	1,253,100	870,100	147,000	2,652	†
111	Inchcape *(Transport - Manufacture & Distribution)*	1,240,200	6,295,900	17,400	37,240	1,314,653
112	Alliance Trust *(Investment Trusts)*	1,235,027	44,931	42,022	50	1,074,024
113	Trafalgar House *(Conglomerates)*	1,230,100	3,720,700	L320,800	34,302	580,988
114	Lewis [John] Partnership *(Stores)*	1,226,300	2,540,600	93,000	41,100	†
115	Scottish Mortgage & Trust *(Investment Trusts)*	1,219,205	48,114	27,183	n/a	969,435
116	Southern Water *(Water)*	1,200,500	384,600	143,400	3,728	1,165,000
117	Bank of England *(Banks)*	1,198,600	96,000	126,400	3,832	†
118	Associated British Ports Holdings *(Transport Services)*	1,197,200	235,900	88,400	2,215	1,100,092
119	United Biscuits (Holdings) *(Food Manufacturing)*	1,163,300	3,001,100	L100,600	38,257	1,353,879
120	Southern Electric *(Electricity)*	1,145,000	1,680,400	202,100	7,091	†
121	Witan Investment Company *(Investment Trusts)*	1,141,963	43,400	31,452	n/a	995,914
122	Greenalls Group *(Hotels & Leisure)*	1,140,504	765,866	100,706	16,586	1,044,745
123	T & N *(Engineering - General)*	1,136,800	2,091,500	120,100	42,657	860,481
124	Great Portland Estates *(Property)*	1,115,007	96,797	53,097	76	541,586
125	Burton Group *(Stores)*	1,105,500	1,878,800	98,600	39,285	1,517,569
126	Tomkins *(Conglomerates)*	1,095,900	3,725,500	303,000	46,096	2,779,581
127	Granada Group *(Media)*	1,086,600	2,381,200	351,300	37,262	4,104,377
128	Wessex Water *(Water)*	1,076,700	229,100	117,000	1,708	703,505
129	BPB Industries *(Building Materials & Services)*	1,073,000	1,328,300	163,300	11,041	1,567,000
130	Edinburgh Investment Trust *(Investment Trusts)*	1,043,235	57,492	38,122	n/a	1,056,692
131	Birmingham Midshires Building Society *(Other Financial)*	1,028,100	487,700	63,900	1,575	†
132	Reuters Holdings *(Media)*	1,021,000	2,703,000	599,000	14,182	9,894,890
133	Hambros *(Banks)*	1,003,000	780,000	37,100	8,991	562,617
134	Yorkshire Electricity Group *(Electricity)*	980,800	1,459,300	217,000	4,924	1,289,000
135	National & Provincial Building Society *(Other Financial)*	980,700	1,105,500	187,000	4,525	†
136	Vodafone Group *(Communications)*	962,000	1,152,600	371,100	4,364	7,412,000
137	Mirror Group *(Media)*	961,600	512,000	106,700	3,098	735,788
138	Wolseley *(Building Materials & Services)*	946,670	3,783,868	245,369	21,503	2,179,002
139	NFU Mutual Insurance Society Ltd *(Insurance (Life / Non life))*	944,300	577,000	116,900	2,242	†
140	Schroders *(Merchant Banks)*	938,300	1,370,700	197,300	4,396	2,556,212
141	Williams Holdings *(Building Materials & Services)*	932,100	1,598,500	228,300	16,899	2,241,707
142	Littlewoods Organisation *(Stores)*	920,148	2,463,265	116,001	21,743	†
143	Scottish Investment Trust *(Investment Trusts)*	909,899	33,884	21,400	n/a	689,474
144	Cookson Group *(Other Industrial Materials & Products)*	903,700	1,560,200	168,300	12,713	2,083,272
145	NFC *(Transport Services)*	901,800	2,200,600	38,600	35,575	1,031,092
146	BICC *(Engineering - General)*	894,000	4,063,000	L67,000	34,088	975,000
147	Hillsdown Holdings *(Food Manufacturing)*	889,000	3,453,200	L11,100	33,670	1,180,301
148	Harrisons & Crosfield *(Conglomerates)*	888,400	2,047,000	119,600	17,232	1,137,589
149	Brixton Estate *(Property)*	883,915	83,715	35,135	66	411,129
150	Electra Investment Trust *(Investment Trusts)*	881,925	38,124	16,518	59	637,003

NOTES: n/a – not available. † Market Capitalisation not available. Figure not disclosed or company unquoted, government controlled, a nationalised industry, a subsidiary or newly quoted.

RANK	COMPANY NAME (Sector)	CAPITAL EMPLOYED £000	TURNOVER £000	PRE-TAX PROFIT £000	NUMBER OF EMPLOYEES	EQUITY MKT CAPITAL £000
151	Caradon *(Building Materials & Services)*	878,500	2,093,700	114,300	27,170	1,346,462
152	Queens Moat Houses *(Hotels & Leisure)*	870,500	454,100	42,400	11,365	53,155
153	Isosceles *(Food Wholesaling & Retailing)*	862,600	3,156,300	L48,800	47,891	†
154	Scottish Hydro-Electric *(Electricity)*	862,100	833,100	168,700	3,584	1,230,000
155	Courtaulds *(Chemicals)*	861,400	2,130,800	151,100	19,000	1,776,000
156	Waste Management International *(Miscellaneous)*	860,865	1,180,783	23,125	18,332	1,290,565
157	Scottish Eastern Investment Trust *(Investment Trusts)*	859,791	27,504	15,871	n/a	636,768
158	Legal & General Group *(Insurance (Life / Non life))*	856,000	2,281,600	271,300	7,981	3,305,416
159	TI Group *(Engineering - General)*	837,700	1,480,000	184,800	22,400	2,155,541
160	Fleming [Robert] Holdings Ltd *(Merchant Banks)*	832,172	617,587	171,901	2,682	†
161	British Assets Trust *(Investment Trusts)*	828,422	38,702	26,412	n/a	341,084
162	Wimpey [George] *(Contracting, Construction)*	822,200	1,569,300	15,600	11,521	521,018
163	English China Clays *(Chemicals)*	802,900	885,900	95,100	6,804	971,173
164	London Electricity *(Electricity)*	802,100	1,209,400	172,400	4,908	1,150,589
165	East Midlands Electricity *(Electricity)*	779,500	1,369,000	214,000	6,151	1,188,000
166	Taylor Woodrow *(Contracting, Construction)*	774,000	1,154,100	46,000	9,568	453,257
167	Co-operative Wholesale Society Ltd *(Food Wholesaling & Retailing)*	773,600	3,011,800	31,400	3,790	†
168	Racal Electronics *(Communications)*	769,515	950,199	58,302	11,325	659,110
169	Dalgety *(Food Manufacturing)*	762,000	4,906,600	93,700	17,877	1,265,613
170	Bristol and West Building Society *(Other Financial)*	754,300	693,800	38,000	2,362	†
171	Gallaher Ltd *(Tobacco)*	750,700	5,030,200	273,800	19,867	†
172	Govett Oriental Investment Trust *(Investment Trusts)*	741,728	13,590	5,251	n/a	769,400
173	BBA Group *(Engineering - General)*	737,700	1,182,700	66,800	13,430	1,348,243
174	British Investment Trust *(Investment Trusts)*	731,069	49,721	31,790	150	698,880
175	Midlands Electricity *(Electricity)*	722,700	1,456,900	178,000	5,815	1,159,703
176	Smith [W H] Group *(Stores)*	710,600	2,638,460	98,996	33,625	956,200
177	Peel Holdings *(Property)*	709,222	74,275	11,501	359	316,910
178	Carlton Communications *(Media)*	708,200	1,579,600	246,700	9,338	2,857,052
179	Anglo & Overseas Trust *(Investment Trusts)*	707,134	20,336	13,554	n/a	692,288
180	Saur (UK) Ltd *(Water)*	704,529	114,169	23,042	1,435	†
181	Signet Group *(Miscellaneous)*	693,216	877,801	24,544	11,995	65,294
182	Mercury European Privatisation Trust *(Investment Trusts)*	680,180	25,115	21,602	n/a	513,632
183	Morrison [Wm] Supermarkets *(Stores)*	660,692	2,059,765	124,701	27,020	1,192,894
184	IMI *(Engineering - General)*	655,900	1,322,400	87,200	17,076	1,129,383
185	Chelsfield *(Property)*	647,816	69,140	10,629	208	276,077
186	Laporte *(Chemicals)*	646,600	1,067,800	24,500	7,631	1,301,579
187	RJB Mining *(Mines)*	637,396	1,461,346	173,083	9,507	938,363
188	Brent Walker Group *(Hotels & Leisure)*	603,200	1,710,000	L142,700	12,169	†
189	Smith [David S.] *(Packaging, Paper & Printing)*	584,600	1,028,800	99,700	9,066	862,814
190	Monks Investment Trust, *(Investment Trusts)*	583,043	21,381	11,372	n/a	467,880
191	Dixons Group *(Stores)*	580,500	1,646,900	100,300	10,578	1,122,031
192	Fleming Far Eastern Investment Trust *(Investment Trusts)*	576,433	12,397	3,784	n/a	557,928
193	Vaux Group *(Brewers & Distillers)*	574,979	258,914	31,832	6,771	2,164,610
194	Fleming Mercantile Investment Trust *(Investment Trusts)*	569,953	20,217	17,358	n/a	587,516
195	Manchester Airport *(Transport Services)*	566,074	199,321	25,576	2,200	†
196	Caledonia Investments *(Other Financial)*	556,000	54,900	44,500	1,030	629,000
197	RIT Capital Partners *(Investment Trusts)*	554,660	13,758	L1,127	n/a	405,252
198	Thomson Organisation Ltd *(Miscellaneous)*	553,900	500,100	48,700	7,727	†
199	Northern Electric *(Electricity)*	551,100	1,080,800	140,700	4,456	645,000
200	Northern Foods *(Food Manufacturing)*	547,200	1,971,300	16,400	27,805	1,049,000

NOTES: n/a – not available. †Market Capitalisation not available. Figure not disclosed or company unquoted, government controlled, a nationalised industry, a subsidiary or newly quoted.

THE UK'S TOP 1000

201-250

RANK	COMPANY NAME (Sector)	CAPITAL EMPLOYED £000	TURNOVER £000	PRE-TAX PROFIT £000	NUMBER OF EMPLOYEES	EQUITY MKT. CAPITAL £000
201	London Merchant Securities *(Property)*	536,175	48,963	49,371	73	249,806
202	Man [E D & F] Group *(Miscellaneous)*	534,600	280,600	78,300	3,604	416,302
203	Rugby Group *(Building Materials & Services)*	532,300	1,143,100	45,800	9,958	703,778
204	Bardon Group *(Mines)*	523,200	340,800	24,300	2,551	221,900
205	Murray International Trust *(Investment Trusts)*	522,693	26,979	20,810	n/a	459,159
206	Foreign & Colonial Pacific Investment Trust *(Investment Trusts)*	517,973	15,940	10,088	n/a	468,622
207	Scottish American Investment Company *(Other Financial)*	516,431	22,424	16,017	n/a	364,481
208	BET *(Miscellaneous)*	514,100	1,761,300	121,800	100,493	1,014,475
209	Orange *(Communications)*	505,051	228,716	L140,456	2,041	†
210	Millennium & Copthorne Hotels *(Hotels & Leisure)*	504,943	98,127	10,908	1,816	†
211	Greycoat *(Property)*	500,700	40,300	6,500	30	193,930
212	Cowie Group *(Transport - Manufacture & Distribution)*	498,227	1,000,575	55,832	6,382	462,783
213	Unigate *(Food Manufacturing)*	497,400	1,893,000	58,300	27,753	964,000
214	Storehouse *(Stores)*	493,200	1,079,100	91,200	10,046	1,429,000
215	Fleming Japanese Investment Trust *(Investment Trusts)*	490,979	5,507	104	n/a	399,967
216	Kleinwort European Privatisation Investment Trust *(Investment Trusts)*	489,795	18,127	16,235	n/a	401,354
217	Delta *(Electricals)*	487,000	1,018,500	53,100	13,618	598,239
218	Home Housing Association Ltd *(Property)*	486,072	55,190	15,851	700	†
219	Mercury World Mining Trust *(Investment Trusts)*	482,763	15,758	7,522	n/a	396,218
220	Stakis *(Hotels & Leisure)*	481,326	173,388	25,781	6,572	394,666
221	Burford Holdings *(Property)*	480,330	38,163	11,743	26	†
222	Morgan Crucible Company *(Other Industrial Materials & Products)*	468,900	847,800	85,000	13,007	915,887
223	Johnson Matthey *(Metal & Metal Forming)*	467,800	2,177,800	95,400	4,996	1,223,000
224	Smith & Nephew *(Health & Household)*	466,500	1,026,300	176,800	12,081	2,057,354
225	Yorkshire Building Society *(Other Financial)*	465,931	488,983	84,879	1,617	†
226	Marley *(Building Materials & Services)*	462,500	713,900	46,300	10,110	372,516
227	Fleming Overseas Investment Trust *(Investment Trusts)*	461,859	12,927	10,304	n/a	394,535
228	Sedgwick Group *(Insurance (Brokers))*	460,400	880,900	90,100	15,328	661,144
229	Meyer International *(Building Materials & Services)*	452,400	1,302,500	51,600	8,659	498,000
230	Videotron Holdings *(Media)*	451,684	57,490	L13,208	803	†
231	Templeton Emerging Markets Investment Trust *(Investment Trusts)*	451,197	15,438	7,731	n/a	469,416
232	Charter *(Building Materials & Services)*	447,700	1,127,700	97,500	13,118	749,534
233	Wassall *(Other Industrial Materials & Products)*	447,600	972,900	57,500	7,589	520,828
234	United News & Media *(Media)*	447,285	1,070,559	104,470	13,573	1,363,747
235	Kwik Save Group *(Food Wholesaling & Retailing)*	440,800	2,992,100	125,500	25,108	1,128,919
236	Salvesen [Christian] *(Food Wholesaling & Retailing)*	439,100	646,000	104,100	12,883	747,000
237	Wolverhampton & Dudley Breweries. *(Brewers & Distillers)*	435,227	237,292	43,486	9,840	362,995
238	Telegraph *(Media)*	434,434	254,826	35,472	1,059	568,162
239	FKI *(Engineering--General)*	428,175	798,618	55,370	11,228	681,254
240	Securicor *(Business Services)*	425,773	1,031,428	99,361	46,114	†
241	Albright & Wilson *(Chemicals)*	418,800	700,000	53,800	4,304	498,465
242	Clyde Petroleum *(Oil, Gas & Nuclear Fuels)*	416,200	140,600	37,100	130	235,232
243	Govett Strategic Investment Trust *(Investment Trusts)*	414,649	20,885	9,248	n/a	279,271
244	ICL *(Electronics)*	414,500	2,654,500	28,400	23,432	†
245	Scottish National Trust *(Investment Trusts)*	411,740	22,734	18,231	n/a	379,458
246	Portman Building Society *(Other Financial)*	410,200	264,300	36,000	1,146	†
247	Co-operative Retail Services Ltd *(Food Wholesaling & Retailing)*	405,340	1,348,487	22,479	15,318	†
248	Courtaulds Textiles *(Textiles)*	401,500	1,120,000	36,500	22,700	368,816
249	Lex Service *(Transport - Manufacture & Distribution)*	396,000	1,556,900	32,100	2,447	346,762
250	Kellogg Co of Great Britain Ltd *(Food Manufacturing)*	389,418	618,046	105,675	2,808	†

NOTES: n/a -- not available †Market Capitalisation not available. Figure not disclosed or company unquoted, government controlled, a nationalised industry, a subsidiary or newly quoted.

RANK	COMPANY NAME (Sector)	CAPITAL EMPLOYED £000	TURNOVER £000	PRE-TAX PROFIT £000	NUMBER OF EMPLOYEES	EQUITY MKT CAPITAL £000
251	Stephen [Robert] Holdings Ltd *(Textiles)*	387,800	640,800	31,600	6,832	†
252	Monument Oil and Gas *(Oil, Gas & Nuclear Fuels)*	386,713	25,699	12,178	42	383,820
253	Willis Corroon Group *(Insurance (Brokers))*	383,800	666,600	50,200	10,564	591,212
254	Pillar Property Investments *(Property)*	381,868	25,117	3,286	12	191,242
255	Laird Group *(Other Industrial Materials & Products)*	381,700	887,900	66,100	12,598	549,372
256	Premier Oil *(Oil, Gas & Nuclear Fuels)*	381,400	85,100	35,600	149	271,886
257	Northern Ireland Electricity *(Electricity)*	381,000	497,700	86,800	3,035	583,169
258	Vickers *(Engineering - General)*	380,500	1,143,800	75,000	9,627	850,901
259	TR Smaller Companies Investment Trust *(Investment Trusts)*	379,921	13,230	9,122	n/a	349,272
260	Bunzl *(Packaging, Paper & Printing)*	378,000	1,758,500	106,200	8,310	884,205
261	Provident Financial *(Other Financial)*	369,877	448,440	101,141	4,053	1,107,044
262	Scapa Group *(Textiles)*	369,700	437,300	46,100	6,692	558,000
263	Second Alliance Trust *(Investment Trusts)*	369,445	12,823	12,206	n/a	336,192
264	Merchants Trust *(Investment Trusts)*	368,854	20,449	15,634	n/a	296,402
265	Ibstock *(Building Materials & Services)*	367,415	250,030	26,108	3,701	190,672
266	Next *(Stores)*	367,000	773,800	141,900	12,542	1,707,241
267	British Vita *(Chemicals)*	364,714	875,645	35,715	9,609	472,106
268	Frogmore Estates *(Property)*	361,655	72,396	14,890	135	227,34
269	Cathay International Holdings *(Property)*	356,508	23,517	3,685	3,048	34,661
270	Chesterfield Properties *(Property)*	351,488	33,151	9,117	383	106,398
271	London and Manchester Group *(Insurance (Life / Non life))*	350,518	307,904	57,111	2,647	503,271
272	Close Brothers Group *(Merchant Banks)*	347,971	116,627	33,956	491	293,289
273	Lewis Trust Group Ltd *(Miscellaneous)*	345,966	349,394	48,182	6,819	†
274	Fleming American Investment Trust *(Investment Trusts)*	345,485	8,489	4,061	n/a	247,263
275	Booker *(Food Wholesaling & Retailing)*	344,700	4,222,900	82,800	21,625	807,844
276	Edinburgh Dragon Trust *(Investment Trusts)*	343,312	7,019	420	n/a	278,159
277	Transport Development Group *(Transport Services)*	341,872	510,353	36,080	9,092	278,068
278	Glynwed International *(Metal & Metal Forming)*	341,300	1,251,700	84,200	12,216	781,300
279	Bankers Investment Trust *(Investment Trusts)*	337,431	14,570	9,995	n/a	321,083
280	Coventry Building Society *(Other Financial)*	336,011	250,571	40,728	771	†
281	Smiths Industries *(Aerospace)*	334,300	882,332	135,396	11,718	1,640,249
282	AMEC *(Contracting, Construction)*	331,500	2,451,300	15,900	21,644	†
283	Sand Aire Investments *(Insurance (Life / Non life))*	330,700	16,900	39,400	12	†
284	M & G Income Investment Trust *(Investment Trusts)*	330,047	18,857	17,478	n/a	158,762
285	Iceland Group *(Food Wholesaling & Retailing)*	329,300	1,375,000	72,600	16,543	501,417
286	Hardy Oil & Gas *(Oil, Gas & Nuclear Fuels)*	328,415	51,346	L27,208	127	260,32
287	House of Fraser *(Stores)*	326,100	748,900	14,300	9,145	415,581
288	TR City of London Trust *(Investment Trusts)*	325,932	18,120	14,517	n/a	320,371
289	English & Scottish Investors *(Investment Trusts)*	323,515	10,612	7,179	n/a	356,004
290	Trinity International Holdings *(Media)*	319,291	167,934	27,509	3,903	470,895
291	CLS Holdings *(Property)*	319,244	28,598	8,258	21	99,252
292	Bilton *(Property)*	317,674	9,979	18,224	160	183,652
293	Albert Fisher Group *(Food Wholesaling & Retailing)*	311,900	1,649,900	31,100	9,407	384,431
294	De La Rue *(Packaging, Paper & Printing)*	311,400	747,100	146,600	8,012	1,602,000
295	American Trust *(Investment Trusts)*	309,548	8,022	7,200	n/a	318,125
296	First Leisure Corporation *(Hotels & Leisure)*	309,000	158,700	40,100	4,237	563,992
297	Greene King *(Brewers & Distillers)*	308,487	154,430	22,058	2,863	218,117
298	Dunedin Worldwide Investment Trust *(Investment Trusts)*	305,545	7,317	5,296	n/a	313,581
299	Hepworth *(Building Materials & Services)*	302,500	765,900	74,500	9,235	777,958
300	Ocean Group *(Transport Services)*	300,600	1,131,300	32,900	11,700	603,565

NOTES: n/a – not available. †Market Capitalisation not available. Figure not disclosed or company unquoted, government controlled, a nationalised industry, a subsidiary or newly quoted.

THE UK'S TOP 1000

301-350

RANK	COMPANY NAME (Sector)	CAPITAL EMPLOYED £000	TURNOVER £000	PRE-TAX PROFIT £000	NUMBER OF EMPLOYEES	EQUITY MKT CAPITAL £000
301	Barratt Developments *(Contracting, Construction)*	299,200	579,000	47,100	2,500	335,092
302	Murray Income Trust *(Investment Trusts)*	297,978	14,903	13,255	n/a	298,173
303	Securities Trust of Scotland *(Investment Trusts)*	297,977	19,383	14,084	n/a	287,501
304	Cumas *(Building Materials & Services)*	296,622	407,847	24,103	4,583	226,276
305	Daejan Holdings *(Property)*	296,413	32,304	23,917	142	193,915
306	Linpac Group Ltd *(Packaging, Paper & Printing)*	294,750	667,156	37,420	7,772	†
307	PSIT *(Property)*	292,537	25,470	14,435	46	160,880
308	Dunedin Income Growth Investment Trust *(Other Financial)*	290,168	20,429	11,462	n/a	236,629
309	Bryant Group *(Contracting, Construction)*	287,200	519,000	45,800	1,072	346,248
310	Throgmorton Trust *(Investment Trusts)*	284,920	14,067	9,444	98	247,350
311	Antofagasta Holdings *(Conglomerates)*	284,700	90,600	38,300	1,656	473,039
312	Bibby [J.] & Sons *(Conglomerates)*	284,453	721,893	32,305	6,485	187,543
313	Kleinwort Overseas Investment Trust *(Investment Trusts)*	282,167	6,452	4,525	n/a	251,831
314	London Insurance Market Investment Trust *(Investment Trusts)*	280,747	12,877	10,779	12	333,200
315	Hazlewood Foods *(Food Manufacturing)*	280,100	839,200	L37,600	9,838	213,993
316	Costain Group *(Contracting, Construction)*	279,900	974,200	L180,400	10,606	108,747
317	Wilson Bowden *(Contracting, Construction)*	278,800	228,200	29,600	964	331,8
318	Powell Duffryn *(Transport Services)*	277,900	696,000	36,900	7,751	409,0
319	Tops Estates *(Property)*	276,970	19,176	2,496	22	60,230
320	Laing [John] *(Contracting, Construction)*	275,100	1,186,300	20,100	6,425	293,922
321	Kleinwort Charter Investment Trust *(Investment Trusts)*	274,707	8,773	6,027	n/a	199,425
322	Clark [C. & J.] Ltd *(Miscellaneous)*	273,463	684,318	19,623	18,631	†
323	ASW Holdings *(Metal & Metal Forming)*	272,900	641,900	13,800	3,353	73,009
324	Dawson International *(Textiles)*	272,200	414,200	1,700	9,285	173,000
325	Minerva *(Property)*	272,174	25,534	L10,211	15	†
326	Bowthorpe *(Electronics)*	271,109	470,447	77,458	6,983	813,196
327	Highland Distilleries Company *(Brewers & Distillers)*	269,500	180,600	42,900	386	517,029
328	TR Technology *(Investment Trusts)*	269,277	6,803	4,957	n/a	244,133
329	Wilson (Connolly) Holdings *(Contracting, Construction)*	268,483	245,021	22,520	870	331,938
330	Southend Property Holdings *(Property)*	264,545	18,829	2,004	65	50,147
331	Unitech *(Electronics)*	263,900	365,500	36,400	6,420	261,976
332	Argent Group *(Property)*	262,610	19,069	2,700	23	189,606
333	National Parking Corporation Ltd *(Transport Services)*	262,328	279,340	50,144	4,192	†
334	WPP Group *(Business Services)*	261,000	6,013,700	85,300	19,198	1,209,000
335	Marston, Thompson & Evershed *(Brewers & Distillers)*	260,775	153,393	24,553	4,483	254,42
336	Thomson [D.C.] & Co Ltd *(Media)*	260,164	100,406	30,940	2,005	†
337	Murray Smaller Markets Trust *(Investment Trusts)*	259,261	6,516	4,734	n/a	255,011
338	Amersham International *(Health & Household)*	257,400	333,600	47,300	3,380	531,001
339	Hoops Ltd *(Food Manufacturing)*	257,388	1,596,123	11,988	5,795	†
340	EMAP *(Media)*	256,300	547,100	63,900	6,789	1,328,000
341	BTP *(Chemicals)*	256,000	346,942	37,307	2,954	†
342	Baring Tribune Investment Trust *(Investment Trusts)*	255,818	8,212	5,017	n/a	186,550
343	Takare *(Health & Household)*	254,726	110,268	21,806	9,037	225,280
344	Temple Bar Investment Trust *(Investment Trusts)*	254,206	15,053	11,522	n/a	220,003
345	Summit Group *(Business Services)*	254,204	42,345	L68,899	313	†
346	Hunting *(Oil, Gas & Nuclear Fuels)*	253,200	1,127,900	31,100	12,680	245,091
347	Toys 'R' Us Holdings *(Miscellaneous)*	251,973	264,393	28,697	3,302	†
348	Singer & Friedlander Group *(Merchant Banks)*	251,008	222,800	38,953	985	215,102
349	Haslemere Estates *(Property)*	249,958	39,030	12,567	n/a	†
350	APV *(Engineering - General)*	249,200	881,900	26,900	8,788	217,426

NOTES: n/a – not available. †Market Capitalisation not available. Figure not disclosed or company unquoted, government controlled, a nationalised industry, a subsidiary or newly quoted.

RANK	COMPANY NAME (Sector)	CAPITAL EMPLOYED £000	TURNOVER £000	PRE-TAX PROFIT £000	NUMBER OF EMPLOYEES	EQUITY MKT CAPITAL £000
351	Chubb Security *(Electronics)*	248,549	726,538	89,147	18,207	847,655
352	Berisford *(Food Wholesaling & Retailing)*	248,500	403,200	26,900	5,600	265,231
353	Evans of Leeds *(Property)*	248,098	24,996	10,716	60	152,150
354	Emerson Developments (Holdings) Ltd *(Property)*	245,874	56,133	6,259	385	†
355	Hays *(Business Services)*	244,600	808,400	110,300	8,959	1,280,962
356	St James's Place Capital *(Other Financial)*	244,200	18,700	18,700	78	318,302
357	Beazer Homes *(Contracting, Construction)*	243,700	413,200	55,700	2,278	367,903
358	McAlpine [Alfred] *(Contracting, Construction)*	243,637	757,263	L23,472	4,335	102,280
359	Paterson Zochonis *(Health & Household)*	242,833	286,778	25,126	4,379	197,948
360	Mersey Docks and Harbour Company *(Transport Services)*	242,308	138,013	31,747	1,578	379,417
361	Hickson International *(Chemicals)*	239,800	393,100	19,200	2,848	136,000
362	Mercury Asset Management Group *(Other Financial)*	236,339	255,018	111,526	853	1,613,722
363	Jarvis Hotels Ltd *(Hotels & Leisure)*	234,813	88,105	8,488	3,997	†
364	Allied Colloids Group *(Chemicals)*	232,761	355,976	50,340	2,965	693,082
365	Airtours *(Transport Services)*	232,222	1,317,791	59,066	9,896	499,376
366	Allied London Properties *(Property)*	231,564	39,202	11,058	93	88,379
367	Norcros *(Building Materials & Services)*	231,207	393,512	L51,030	6,759	152,098
368	Town Centre Securities *(Property)*	231,088	21,965	9,305	129	128,843
369	Scancem Group Ltd *(Building Materials & Services)*	230,775	376,351	22,372	2,658	†
370	Edrington Holdings Ltd *(Brewers & Distillers)*	230,668	101,188	40,460	801	†
371	Wembley *(Hotels & Leisure)*	229,943	122,617	L8,116	2,728	165,077
372	Camellia *(Agriculture)*	229,350	206,615	15,846	75,839	50,000
373	Argos *(Stores)*	227,565	1,435,800	124,375	16,465	1,815,457
374	Mansfield Brewery *(Brewers & Distillers)*	226,590	133,922	17,436	3,936	204,706
375	Berkeley Group *(Contracting, Construction)*	224,403	283,429	37,621	646	282,167
376	Scottish Metropolitan Property *(Property)*	223,567	19,565	8,523	26	100,460
377	London Pacific Group Ltd *(Other Financial)*	222,736	8,336	89,009	n/a	101,375
378	Derwent Valley Holdings *(Property)*	222,721	14,066	4,441	13	120,712
379	Five Arrows Chile Investment Trust Ltd *(Investment Trusts)*	222,453	8,470	4,496	n/a	167,617
380	Croda International *(Chemicals)*	222,000	458,800	25,300	3,794	456,418
381	Senior Engineering Group *(Engineering - General)*	221,787	490,693	22,133	6,108	279,535
382	Brunner Investment Trust *(Investment Trusts)*	221,692	7,430	5,249	n/a	159,360
383	Persimmon *(Contracting, Construction)*	221,236	249,429	22,752	908	238,458
384	Mowlem [John] & Company *(Contracting, Construction)*	220,700	1,457,000	L30,000	12,184	105,000
385	Wates City of London Properties *(Property)*	219,078	9,023	682	30	128,940
386	Mucklow [A. & J.] Group *(Property)*	217,683	21,489	10,211	29	139,056
387	Helical Bar *(Property)*	215,919	65,948	9,200	25	93,059
388	Electrocomponents *(Electronics)*	214,800	472,600	86,100	2,959	1,526,000
389	Fleming Income & Growth Investment Trust *(Investment Trusts)*	213,328	16,417	12,031	21	291,118
390	Intermediate Capital Group *(Other Financial)*	211,477	24,772	19,070	18	166,133
391	Grainger Trust *(Property)*	211,266	30,161	6,119	40	62,234
392	Premier Farnell *(Electronics)*	210,815	538,894	110,868	2,597	835,261
393	Crest Nicholson *(Contracting, Construction)*	207,005	301,090	6,215	1,100	67,989
394	Fleming Continental European Investment Trust *(Investment Trusts)*	206,863	4,919	3,391	n/a	190,505
395	London Park Hotels *(Hotels & Leisure)*	206,756	15,578	3,310	304	†
396	Calor Group *(Oil, Gas & Nuclear Fuels)*	206,700	272,500	35,200	1,823	431,446
397	Hemingway Properties *(Property)*	205,995	13,854	2,873	12	38,462
398	Foreign & Colonial Emerging Markets Investment Trust *(Investment Trusts)*	205,054	5,822	L1,417	n/a	204,769
399	Electric and General Investment Company *(Investment Trusts)*	204,829	6,014	4,302	n/a	181,338
400	Weir Group *(Engineering - General)*	204,153	622,006	45,504	8,117	425,216

NOTES: n/a – not available. †Market capitalisation not available. Figure not disclosed or company unquoted, government controlled, a nationalised industry, a subsidiary or newly quoted.

THE UK'S TOP 1000

401-450

RANK	COMPANY NAME (Sector)	CAPITAL EMPLOYED £000	TURNOVER £000	PRE-TAX PROFIT £000	NUMBER OF EMPLOYEES	EQUITY MKT CAPITAL £000
401	Lloyds Chemists *(Health & Household)*	203,113	1,081,526	42,194	15,097	278,326
402	EIS Group *(Engineering - General)*	202,784	422,874	20,276	6,951	185,147
403	Dartmoor Investment Trust *(Investment Trusts)*	201,834	10,351	7,607	4	56,376
404	Grant [William] & Sons Ltd *(Brewers & Distillers)*	201,354	226,727	34,992	1,059	†
405	Skipton Building Society *(Other Financial)*	199,806	236,668	27,225	963	†
406	TT Group *(Electronics)*	197,215	479,470	44,926	7,588	454,163
407	London Stock Exchange Ltd *(Other Financial)*	195,723	191,058	17,116	1,017	†
408	Asda Property Holdings *(Property)*	195,537	33,012	8,919	38	108,071
409	Stagecoach Holdings *(Transport Services)*	194,632	337,717	32,615	17,837	292,061
410	Interpublic Ltd *(Media)*	194,275	1,357,362	9,617	2,220	†
411	Baker Hughes Ltd *(Engineering - General)*	191,984	312,225	10,729	2,418	†
412	TR Property Investment Trust *(Investment Trusts)*	190,961	15,745	8,946	n/a	134,118
413	Yattendon Investment Trust *(Packaging, Paper & Printing)*	190,367	66,707	2,368	2,029	†
414	Cobham *(Aerospace)*	190,200	227,700	29,800	3,457	434,000
415	Scott Paper (U.K.) Ltd *(Packaging, Paper & Printing)*	189,908	294,238	7,336	1,404	†
416	Digital Equipment Co. Ltd *(Electronics)*	188,499	731,513	135,212	4,031	†
417	Fine Art Developments *(Packaging, Paper & Printing)*	188,469	340,111	38,728	4,930	366,446
418	Amstrad *(Electronics)*	187,041	271,565	3,057	1,111	288,(
419	Bellway *(Contracting, Construction)*	185,794	267,065	34,008	875	271,481
420	M & G Group *(Other Financial)*	185,213	946,144	51,993	803	838,757
421	McKechnie *(Engineering - General)*	185,152	532,589	45,296	7,390	415,951
422	Cattles *(Other Financial)*	184,374	294,322	28,208	1,764	292,684
423	MFI Furniture Group *(Health & Household)*	182,700	720,700	66,100	7,820	727,693
424	Halliburton Holdings Ltd *(Contracting, Construction)*	180,945	538,363	13,834	6,071	†
425	Development Securities *(Property)*	180,730	21,565	2,242	42	51,699
426	Foreign & Colonial Smaller Companies *(Investment Trusts)*	179,874	6,400	3,406	n/a	202,131
427	Cilva Holdings *(Transport Services)*	179,564	400,568	142,321	4,147	†
428	London Forfaiting Company *(Other Financial)*	179,248	1,382,651	27,088	121	221,909
429	Christies International *(Miscellaneous)*	178,489	191,868	21,538	1,650	346,013
430	Courts *(Health & Household)*	175,440	297,458	16,625	4,628	187,769
431	M & G Recovery Investment Trust *(Investment Trusts)*	175,392	7,651	6,852	n/a	186,930
432	Law Debenture Corporation *(Investment Trusts)*	173,763	14,332	8,152	57	214,744
433	Danka Business Systems *(Electronics)*	173,732	515,650	45,390	5,945	1,500,919
434	Geest *(Food Wholesaling & Retailing)*	173,200	659,800	1,600	7,396	135,038
435	Pacific Assets Trust *(Investment Trusts)*	171,796	2,777	590	n/a	132,818
436	Baird [William] *(Textiles)*	170,414	671,260	10,274	19,566	201,86.
437	Howden Group *(Engineering - General)*	170,117	438,247	30,561	5,202	224,113
438	Bourne End Properties *(Property)*	169,005	16,003	1,036	13	43,906
439	British Empire Securities and General Trust *(Investment Trusts)*	168,892	6,046	2,138	n/a	125,164
440	Sun Life Corporation *(Insurance (Life / Non life))*	168,600	1,563,900	90,200	3,243	†
441	Chelsea Building Society *(Other Financial)*	168,200	167,500	26,100	616	†
442	Spirax-Sarco Engineering *(Engineering - General)*	166,896	251,285	43,072	3,777	466,011
443	National Express Group *(Transport Services)*	166,694	317,744	41,538	8,219	347,897
444	Hewden Stuart *(Contracting, Construction)*	166,574	279,233	36,254	3,965	382,033
445	Marshalls *(Building Materials & Services)*	166,559	229,496	28,463	2,750	†
446	Davis Service Group *(Miscellaneous)*	165,667	342,944	24,092	17,432	220,863
447	Kwik-Fit Holdings *(Transport - Manufacture & Distribution)*	164,900	365,400	36,300	4,832	343,497
448	E.D.S. International Ltd *(Business Services)*	164,129	334,803	29,553	5,166	†
449	Felixstowe Dock and Railway Co *(Transport Services)*	163,119	89,740	20,707	386	2
450	Guardian Media Group *(Media)*	163,007	288,455	27,004	3,848	†

NOTES: n/a - not available. †Market Capitalisation not available. Figure not disclosed or company unquoted, government controlled, a nationalised industry, a subsidiary or newly quoted.

RANK	COMPANY NAME (Sector)	CAPITAL EMPLOYED £'000	TURNOVER £000	PRE-TAX PROFIT £000	NUMBER OF EMPLOYEES	EQUITY MKT CAPITAL £000
451	Low & Bonar *(Packaging, Paper & Printing)*	162,955	431,036	52,445	4,032	472,016
452	Graham Group *(Building Materials & Services)*	162,691	488,596	19,311	3,538	285,060
453	B.S.G. International *(Transport - Manufacture & Distribution)*	162,667	842,587	24,053	7,138	169,556
454	Capital and Regional Properties *(Property)*	162,526	10,537	4,743	54	67,480
455	Leeds & Holbeck Building Society *(Other Financial)*	162,137	202,809	15,384	704	†
456	Overseas Investment Trust *(Investment Trusts)*	161,082	3,657	2,324	n/a	134,073
457	Foreign & Colonial Eurotrust *(Investment Trusts)*	161,073	4,495	1,653	n/a	158,305
458	Travis Perkins *(Building Materials & Services)*	160,741	491,639	36,488	3,810	368,167
459	Fleming Claverhouse Investment Trust *(Investment Trusts)*	159,605	7,121	5,572	n/a	138,255
460	Westminster Health Care Holdings *(Health & Household)*	158,560	69,522	13,834	5,859	163,413
461	Britannic Assurance *(Insurance (Life / Non life))*	158,491	390,110	63,815	4,434	1,465,153
462	Western United Investment Co Ltd *(Food Manufacturing)*	158,100	252,600	1,500	800	†
463	London International Group *(Health & Household)*	157,700	318,100	15,200	7,960	424,000
464	Nurdin & Peacock *(Food Wholesaling)*	157,578	1,659,212	21,449	6,874	196,065
465	Caparo Group Ltd *(Engineering - General)*	155,300	420,200	25,500	3,492	†
466	Guinness Peat Group *(Other Financial)*	155,154	72,092	21,406	820	165,663
467	Bradford Property Trust *(Property)*	154,919	39,731	24,831	80	319,901
468	Medeva *(Health & Household)*	154,400	256,300	79,000	2,229	792,370
469	Fleming Emerging Markets Investment Trust *(Investment Trusts)*	154,265	2,647	L86	n/a	137,762
470	Warner Estate Holdings *(Property)*	153,979	16,148	8,558	46	104,222
471	UK Paper *(Packaging, Paper & Printing)*	153,500	335,000	15,400	1,736	†
472	Trocadero *(Hotels & Leisure)*	153,272	9,064	1,833	9	194,249
473	Bridon *(Metal & Metal Forming)*	152,900	333,900	0	3,465	88,053
474	Midland Independent Newspapers *(Media)*	152,672	98,337	16,263	1,904	170,958
475	British Borneo Petroleum Syndicate, *(Oil, Gas & Nuclear Fuels)*	151,823	38,387	13,634	43	157,318
476	UniChem *(Health & Household)*	151,274	1,402,725	49,428	6,376	420,631
477	Independent Insurance Group *(Insurance (Life / Non life))*	150,447	275,911	35,516	1,197	169,797
478	NSM *(Mines)*	150,121	123,300	6,051	1,160	60,852
479	Morland *(Brewers & Distillers)*	149,707	62,561	10,695	1,381	132,976
480	Thwaites [Daniel] *(Brewers & Distillers)*	149,625	80,278	7,303	1,766	†
481	Young and Co's Brewery *(Brewers & Distillers)*	149,488	72,038	5,310	1,737	68,504
482	Ascot Holdings *(Hotels & Leisure)*	149,058	47,484	51,811	1,049	39,756
483	Simon Engineering *(Engineering - General)*	148,900	319,100	8,400	4,334	118,000
484	TR Pacific Investment Trust *(Investment Trusts)*	147,156	3,003	987	n/a	151,116
485	Majedie Investments *(Investment Trusts)*	146,064	6,911	4,156	10	111,140
486	Royal Doulton *(Health & Household)*	145,943	242,833	15,220	7,332	167,757
487	Allders *(Stores)*	145,233	736,147	23,528	5,755	190,379
488	Babcock International Group *(Engineering - General)*	145,208	755,061	7,833	10,305	213,334
489	Shepherd Building Group Ltd *(Building Materials & Services)*	144,900	321,100	13,500	3,498	†
490	Monarch Holdings *(Transport Services)*	144,501	305,070	19,257	2,062	†
491	Waddington [John] *(Packaging, Paper & Printing)*	143,414	259,272	53,310	3,342	233,243
492	Fenwick Ltd *(Stores)*	142,599	181,377	21,208	1,893	†
493	Biwater Ltd *(Contracting, Construction)*	142,500	248,500	5,300	3,348	†
494	Thornton Asian Emerging Markets Investment Trust *(Investment Trusts)*	142,026	2,400	48	n/a	129,006
495	Body Shop International *(Health & Household)*	142,000	256,500	32,700	3,670	†
496	Raglan Properties *(Property)*	141,302	19,828	5,646	18	†
497	Leigh Interests *(Miscellaneous)*	141,195	117,475	9,092	1,792	†
498	Raine *(Contracting, Construction)*	140,952	510,064	L101,805	3,417	56,422
499	Finlay [James] *(Agriculture)*	140,467	166,065	3,619	35,674	61,641
500	Bloor Holdings Ltd *(Contracting, Construction)*	140,421	172,434	11,302	733	†

S: n/a – not available. †Market Capitalisation not available. Figure not disclosed or company unquoted, government controlled, a nationalised industry, a subsidiary or quoted.

THE UK'S TOP 1000

501-550

RANK	COMPANY NAME (Sector)	CAPITAL EMPLOYED £000	TURNOVER £000	PRE-TAX PROFIT £000	NUMBER OF EMPLOYEES	EQUITY/MKT CAPITAL £000
501	M & G Equity Investment Trust *(Investment Trusts)*	139,911	5,793	5,793	n/a	†
502	M & G Dual Trust *(Investment Trusts)*	139,911	5,792	5,792	n/a	141,673
503	Stanley Leisure *(Hotels & Leisure)*	139,865	293,147	16,969	3,749	206,184
504	United Friendly Group *(Insurance (Life / Non life))*	139,775	314,519	128,226	3,843	572,471
505	St. Ives *(Packaging, Paper & Printing)*	138,658	264,223	35,536	3,141	385,460
506	Astec (BSR) *(Electronics)*	137,291	371,756	28,109	12,007	356,543
507	Tanjong *(Hotels & Leisure)*	137,229	342,559	52,182	523	129,775
508	INVESCO *(Other Financial)*	137,008	196,767	50,825	1,549	677,210
509	Linton Park *(Agriculture)*	136,596	174,820	9,774	24,814	50,412
510	Frost Group *(Transport Services)*	134,874	451,495	11,114	111	212,139
511	Britton Group *(Other industrial Materials & Products)*	133,936	203,753	19,325	1,545	227,405
512	Gerrard & National Holdings *(Banks)*	133,485	283,988	23,452	736	203,360
513	G.T. Japan Investment Trust *(Investment Trusts)*	133,243	2,256	1,490	n/a	123,534
514	Scholl *(Health & Household)*	133,008	207,192	17,070	1,737	169,993
515	Redrow Group *(Contracting, Construction)*	132,476	214,200	30,275	843	239,183
516	Sema Group *(Business Services)*	132,373	677,726	36,927	8,734	801,838
517	Tibbett & Britten Group *(Transport Services)*	131,052	652,921	12,066	15,761	180
518	Aberforth Smaller Companies Trust *(Other Financial)*	130,641	5,276	3,662	n/a	110,
519	Avon Rubber *(Other Industrial Materials & Products)*	130,548	306,467	16,191	5,689	140,582
520	Bristol Water Holdings *(Water)*	130,489	62,076	9,675	779	93,092
521	UGC Ltd *(Transport - Manufacture & Distribution)*	130,024	774,399	28,925	3,340	†
522	Spring Ram Corporation *(Building Materials & Services)*	129,500	300,000	L43,600	4,503	122,505
523	CEF Holdings Ltd *(Electricals)*	129,484	437,820	16,479	3,863	†
524	Weetabix Ltd *(Food Manufacturing)*	129,276	239,729	31,272	2,439	†
525	Photo-Me International *(Engineering - General)*	128,884	193,085	14,464	2,411	147,484
526	Molins *(Engineering - General)*	128,700	285,500	29,800	2,952	263,189
527	Heywood Williams Group *(Building Materials & Services)*	128,602	562,504	38,664	6,006	256,349
528	Diamond Cable Communications	128,363	7,306	L6,970	25,400	†
529	Sidlaw Group *(Packaging, Paper & Printing)*	126,736	283,171	L112	2,301	115,363
530	Brown [N.] Group *(Miscellaneous)*	126,258	208,164	26,488	1,637	410,341
531	Wetherspoon [J D] *(Hotels & Leisure)*	126,072	68,536	9,713	1,660	196,224
532	Bibby Line Group Ltd *(Transport Services)*	123,972	81,536	5,758	1,322	†
533	Bulmer [H.P.] Holdings *(Brewers & Distillers)*	123,563	247,055	25,035	1,226	242,031
534	Inspec Group *(Chemicals)*	123,516	195,477	31,116	642	382,480
535	General Consolidated Investment Trust *(Investment Trusts)*	123,450	6,360	5,792	n/a	146,6
536	Taylor Clark *(Property)*	123,315	25,871	4,441	1,072	
537	Cheshire Building Society *(Other Financial)*	121,296	118,599	18,779	526	†
538	London Clubs International *(Hotels & Leisure)*	121,081	155,675	29,405	1,919	360,264
539	Scottish Television *(Media)*	120,945	100,524	20,181	615	286,297
540	First Choice Holidays *(Transport Services)*	120,700	933,600	1,300	3,564	134,605
541	Cater Allen Holdings *(Other Financial)*	120,285	646,312	25,888	473	145,066
542	EFT Group *(Other Financial)*	119,484	21,549	5,098	168	47,039
543	Newarthill *(Contracting, Construction)*	119,407	345,206	2,335	2,307	33,524
544	Fuller, Smith & Turner *(Brewers & Distillers)*	119,211	85,282	8,769	1,516	86,803
545	Mercury Keystone Investment Trust *(Investment Trusts)*	119,133	5,991	3,562	n/a	103,913
546	Matthews [Bernard] *(Food Manufacturing)*	118,937	302,036	18,738	5,270	117,715
547	Staveley Industries *(Engineering - General)*	118,200	342,200	20,200	5,142	243,000
548	Watmoughs (Holdings) *(Packaging, Paper & Printing)*	118,198	208,392	23,656	2,282	310,831
549	Macmillan Ltd *(Media)*	118,152	248,201	17,266	2,221	†
550	Westbury *(Contracting, Construction)*	118,109	169,217	12,604	497	167,314

NOTES: n/a – not available. †Market Capitalisation not available. Figure not disclosed or company unquoted, government controlled, a nationalised industry, a subsidiary or newly quoted.

TOP	COMPANY NAME (Sector)	CAPITAL EMPLOYED £000	TURNOVER £000	PRE-TAX PROFIT £000	NUMBER OF EMPLOYEES	EQUITY PLUS CAPITAL £000
551	TBI *(Property)*	117,817	17,647	4,127	15	62,841
552	McCarthy & Stone *(Contracting, Construction)*	117,600	67,300	9,200	369	78,267
553	Fleming International High Income Investment Trust *(Investment Trusts)*	117,525	6,310	5,450	n/a	122,261
554	Goode Durrant *(Transport Services)*	117,515	83,272	14,180	627	121,560
555	Life Sciences International *(Engineering - Instrument)*	117,418	204,795	20,708	2,529	153,508
556	Stylo *(Stores)*	116,954	171,593	3,787	5,447	47,489
557	Allied Textile Companies *(Textiles)*	116,846	211,421	18,905	3,595	156,643
558	Menzies [John] *(Stores)*	116,800	1,258,000	38,100	12,261	291,325
559	Derbyshire Building Society *(Other Financial)*	116,622	125,209	21,439	549	†
560	British Polythene Industries *(Chemicals)*	116,618	351,844	25,140	3,140	260,506
561	Schroder Split Fund *(Investment Trusts)*	116,098	5,950	5,820	n/a	113,121
562	Biotechnology Investments Ltd *(Other Financial)*	115,938	543	L1,924	n/a	55,905
563	Forth Ports *(Transport Services)*	115,743	47,305	15,348	774	230,667
564	Fenner *(Engineering - General)*	115,401	225,298	13,144	3,740	138,613
565	Schroder UK Growth Fund *(Investment Trusts)*	115,164	4,880	4,186	n/a	116,835
566	Automated Security (Holdings) *(Electronics)*	114,509	163,349	L7,408	3,006	47,419
567	Trafford Park Estates *(Property)*	114,366	21,211	10,426	33	63,084
568	Principality Building Society *(Other Financial)*	113,138	109,982	19,012	530	†
569	British Air Transport (Holdings) Ltd *(Transport Services)*	112,600	425,098	L937	2,470	†
570	Edinburgh New Tiger Trust *(Investment Trusts)*	112,415	3,220	2,662	n/a	78,400
571	Fleming Income & Capital Investment Trust *(Investment Trusts)*	112,263	6,894	6,326	n/a	157,505
572	British Printing Co Ltd *(Packaging, Paper & Printing)*	112,162	328,433	3,007	5,222	†
573	CP Holdings Ltd *(Conglomerates)*	111,933	216,599	18,216	2,739	†
574	River Plate & General Investment Trust *(Investment Trusts)*	111,510	7,244	6,463	n/a	114,121
575	Fidelity European Values *(Investment Trusts)*	110,923	2,586	563	n/a	100,618
576	Adwest Group *(Engineering - General)*	110,333	201,555	14,813	3,348	139,228
577	Heath [C.E.] *(Insurance (Life / Non life))*	110,255	171,964	19,056	3,380	113,881
578	Colaingrove Ltd *(Hotels & Leisure)*	110,246	84,778	5,034	1,039	†
579	TR European Growth Trust *(Investment Trusts)*	110,069	3,148	1,904	n/a	109,750
580	Watts, Blake, Bearne & Co. *(Mines)*	109,999	104,866	11,248	1,157	108,772
581	Dawsongroup *(Transport - Manufacture & Distribution)*	109,728	74,120	10,733	453	109,969
582	Midland & Scottish Resources *(Oil, Gas & Nuclear Fuels)*	109,628	43,089	L36,667	182	10,387
583	Newcastle Building Society *(Other Financial)*	108,652	106,334	14,788	422	†
584	West Bromwich Building Society *(Other Financial)*	108,341	103,865	9,074	527	†
585	Wickes *(Building Materials & Services)*	107,857	834,644	L258,026	5,360	472,969
586	Gartmore Shared Equity Trust *(Investment Trusts)*	107,405	5,668	4,734	n/a	125,002
587	Weir [Andrew] & Co Ltd *(Transport Services)*	107,400	265,175	6,732	1,003	†
588	Shanks & McEwan Group *(Miscellaneous)*	106,436	136,444	14,245	1,217	182,358
589	Community Hospitals Group *(Health & Household)*	106,232	63,428	8,542	2,781	81,087
590	Murray International Holdings Ltd *(Metal & Metal Forming)*	105,529	215,494	2,257	2,714	†
591	Candover Investments *(Other Financial)*	105,513	11,386	5,222	18	111,905
592	Fleming Enterprise Investment Trust *(Investment Trusts)*	105,439	4,716	2,681	n/a	91,600
593	Warnford Investments *(Property)*	104,996	11,440	6,601	18	78,336
594	Shires Investment *(Investment Trusts)*	104,719	8,529	5,919	n/a	68,522
595	Meggitt *(Aerospace)*	104,619	358,152	L21,451	5,448	197,507
596	Schroder Japan Growth Fund *(Investment Trusts)*	104,265	829	81	n/a	104,375
597	Friendly Hotels *(Hotels & Leisure)*	103,220	38,787	3,647	1,346	48,886
598	Tennants Consolidated Ltd *(Chemicals)*	103,102	140,943	12,578	804	†
599	Saville Gordon [J.] Group *(Other Industrial Materials & Products)*	102,419	34,559	6,614	173	54,514
600	Budgens *(Food Wholesaling & Retailing)*	102,081	283,032	2,561	3,228	53,698

NOTES: n/a – not available. †Market Capitalisation not available. Figure not disclosed or company unquoted, government controlled, a nationalised industry, a subsidiary or newly quoted.

THE UK'S TOP 1000

601-650

RANK	COMPANY NAME (Sector)	CAPITAL EMPLOYED £000	TURNOVER £000	PRE-TAX PROFIT £000	NUMBER OF EMPLOYEES	EQUITY MKT CAPITAL £000
601	Murray Ventures *(Investment Trusts)*	101,041	4,157	3,776	n/a	91,554
602	Gartmore Emerging Pacific Investment Trust *(Investment Trusts)*	100,809	2,850	384	n/a	83,029
603	Ellis & Everard *(Chemicals)*	100,700	513,500	13,300	1,882	212,347
604	Central European Growth Fund *(Investment Trusts)*	100,258	3,193	1,363	n/a	53,513
605	Shaftesbury *(Property)*	99,610	8,995	3,657	11	57,889
606	City Site Estates *(Property)*	98,897	10,684	902	11	6,621
607	Cairn Energy *(Oil, Gas & Nuclear Fuels)*	98,686	21,747	9,463	103	106,785
608	Bodycote International *(Engineering - General)*	98,208	180,392	18,942	1,371	240,000
609	Foreign & Colonial Enterprise Trust *(Investment Trusts)*	98,150	3,300	2,101	279	80,879
610	Marshall of Cambridge Ltd *(Transport - Manufacture & Distribution)*	98,083	306,358	2,651	2,797	†
611	Sherwood Group *(Textiles)*	97,593	179,637	17,218	3,375	117,869
612	Savoy Hotel *(Hotels & Leisure)*	97,338	96,046	10,563	2,645	292,734
613	Wace Group *(Packaging, Paper & Printing)*	97,168	311,925	20,495	4,328	237,078
614	Johnson Group Cleaners *(Health & Household)*	96,878	172,850	15,416	6,558	142,647
615	Diploma *(Electronics)*	96,400	216,100	27,400	1,546	240,221
616	Bullough *(Engineering - General)*	95,899	343,077	10,525	5,054	164,037
617	Wood [John] Group *(Oil, Gas & Nuclear Fuels)*	95,565	291,085	20,493	3,572	†
618	Matthew Clark *(Food Wholesaling & Retailing)*	95,425	299,285	111,349	1,161	08
619	Holliday Chemical Holdings *(Chemicals)*	94,715	158,496	12,089	1,457	171,653
620	Prowting *(Contracting, Construction)*	94,631	96,817	9,551	329	83,673
621	Abtrust New Dawn Investment Trust *(Investment Trusts)*	94,298	2,713	1,314	n/a	85,459
622	Evans Halshaw Holdings *(Transport - Manufacture & Distribution)*	94,078	834,795	13,569	3,348	91,851
623	Yeoman Investment Trust *(Investment Trusts)*	93,950	5,358	4,840	n/a	88,983
624	Compass Group *(Food Wholesaling & Retailing)*	93,900	1505,800	73,200	55,274	1,313,685
625	Dencora *(Property)*	93,897	24,453	3,111	69	33,037
626	Burtonwood Brewery *(Brewers & Distillers)*	93,808	48,716	3,501	965	33,884
627	Goldsborough Healthcare *(Health & Household)*	93,731	51,063	6,157	4,198	56,094
628	Blagden Industries *(Other Industrial Materials & Products)*	93,480	239,423	9,056	2,090	103,542
629	Eurotherm *(Electronics)*	93,400	195,400	34,100	2,167	505,344
630	Carclo Engineering Group *(Engineering - General)*	93,267	174,004	16,652	2,572	183,004
631	Fidelity Japanese Values *(Investment Trusts)*	93,029	736	281	n/a	78,955
632	St. Modwen Properties *(Property)*	92,909	20,814	10,027	63	63,732
633	3i Smaller Quoted Companies Trust. *(Investment Trusts)*	92,782	2,358	2,174	n/a	87,457
634	Bentalls *(Stores)*	92,654	86,026	1,202	1,138	42
635	CLM Insurance Fund *(Investment Trusts)*	92,633	3,809	2,207	n/a	81,941
636	Norwich and Peterborough Building Society *(Other Financial)*	92,282	114,184	12,208	748	†
637	Field Group *(Packaging, Paper & Printing)*	92,134	167,811	15,408	2,163	†
638	Pavilion Services Group Ltd *(Hotels & Leisure)*	92,076	122,273	4,901	1,294	†
639	McKay Securities *(Property)*	92,044	9,221	2,945	22	37,756
640	Bond Holdings Ltd *(Aerospace)*	91,670	87,119	7,147	919	†
641	Brunel Holdings *(Building Materials & Services)*	91,530	172,715	17,030	2,596	63,844
642	Israel Fund *(Investment Trusts)*	91,252	1,984	378	n/a	69,615
643	Polypipe *(Building Materials & Services)*	91,100	191,400	25,500	2,413	244,044
644	Vardon *(Hotels & Leisure)*	91,024	52,597	9,137	1,385	91,591
645	CrestaCare *(Health & Household)*	90,957	42,987	2,927	3,430	53,266
646	Tullett & Tokyo Forex International Ltd *(Other Financial)*	90,632	264,478	16,069	2,142	†
647	Henlys Group *(Transport - Manufacture & Distribution)*	90,291	451,565	25,315	3,025	261,778
648	Latin American Investment Trust *(Investment Trusts)*	90,228	2,959	L216	n/a	72,473
649	Huntingdon International Holdings *(Research & Development)*	90,184	76,930	L23,173	1,925	81,850
650	Gleeson [MJ] Group *(Contracting, Construction)*	89,771	191,838	8,452	1,589	83,234

NOTES: n/a – not available. †Market Capitalisation not available. Figure not disclosed or company unquoted, government controlled, a nationalised industry, a subsidiary or newly quoted.

RANK	COMPANY NAME (Sector)	CAPITAL EMPLOYED £000	TURNOVER £000	PRE-TAX PROFIT £000	NUMBER OF EMPLOYEES	EQUITY MKT CAPITAL £000
651	Herald Investment Trust *(Investment Trusts)*	89,580	1,806	810	n/a	82,550
652	Yule Catto & Co *(Chemicals)*	89,568	285,771	33,121	2,450	312,892
653	Tilbury Douglas *(Contracting, Construction)*	89,093	456,404	16,503	3,505	150,272
654	Perkins Foods *(Food Manufacturing)*	89,000	452,000	4,000	1,879	112,340
655	US Smaller Companies Investment Trust *(Investment Trusts)*	88,556	912	514	n/a	71,612
656	Yorkshire Chemicals *(Chemicals)*	88,481	124,231	10,571	1,113	116,958
657	Aberforth Split Level Trust *(Investment Trusts)*	88,472	3,815	3,396	n/a	84,337
658	Powerscreen International *(Engineering - General)*	88,425	196,837	29,044	1,270	386,049
659	Brake Bros *(Food Wholesaling & Retailing)*	88,407	466,291	27,068	3,781	340,171
660	Wagon Industrial Holdings *(Engineering - General)*	88,237	343,542	20,896	4,756	†
661	Renold *(Engineering - General)*	87,900	148,700	11,600	2,693	185,000
662	Readicut International *(Textiles)*	87,879	234,786	14,005	3,250	123,633
663	Foreign & Colonial Special Utilities Investment Trust *(Investment Trusts)*	87,595	3,858	2,799	n/a	30,000
664	North Atlantic Smaller Companies Investment Trust *(Investment Trusts)*	87,374	2,007	164	n/a	31,265
665	Pantheon International Participations *(Investment Trusts)*	86,918	2,073	1,521	n/a	70,414
666	Britannia Hotels Ltd *(Hotels & Leisure)*	86,714	25,656	3,829	1,246	†
667	BZW Convertible Investment Trust *(Investment Trusts)*	86,644	7,078	5,090	n/a	67,039
668	Miller Group Ltd *(Contracting, Construction)*	86,440	359,576	3,128	2,225	†
669	Moorgate Smaller Companies Income Trust *(Investment Trusts)*	86,414	4,564	3,953	n/a	84
670	Pendragon *(Transport - Manufacture & Distribution)*	86,342	508,898	11,320	2,146	104,417
671	Exeter Preferred Capital Investment Trust *(Investment Trusts)*	86,277	5,496	144	n/a	30,592
672	Fiscal Properties *(Property)*	86,010	6,148	1,650	7	24,510
673	Jersey Electricity Co Ltd *(Electricity)*	85,946	39,475	3,429	464	12,804
674	Schroder Income Growth Fund *(Investment Trusts)*	84,626	3,914	3,790	n/a	22,948
675	Edinburgh Small Companies Trust *(Investment Trusts)*	84,592	2,477	472	n/a	64,659
676	Ivory & Sime Enterprise Capital *(Investment Trusts)*	84,532	3,932	1,850	n/a	37,310
677	Independent Television News Ltd *(Media)*	84,444	85,124	9,356	667	†
678	Derby Trust *(Investment Trusts)*	84,403	3,378	2,910	n/a	70,507
679	HTR Japanese Smaller Companies Trust *(Investment Trusts)*	84,221	863	L495	n/a	76,566
680	Exco *(Other Financial)*	83,267	207,634	18,284	1,726	117,008
681	Lowland Investment Company *(Investment Trusts)*	83,258	5,339	3,350	n/a	81,855
682	Etam *(Stores)*	83,230	201,847	152	5,388	126,221
683	Virgin Retail Group Ltd *(Stores)*	83,065	27,487	5,179	117	†
684	Triplex Lloyd *(Engineering - General)*	82,441	190,501	8,314	3,661	83,670
685	Value and Income Trust *(Investment Trusts)*	82,425	6,316	2,833	n/a	58,155
686	BZW Commodities Trust Ltd *(Other Financial)*	81,702	1,682	562	n/a	64,083
687	Newman Tonks Group *(Building Materials & Services)*	81,500	277,800	27,200	4,440	152,131
688	Ann Street Brewery Ltd *(Brewers & Distillers)*	81,243	73,273	5,942	1,053	56,926
689	Lovell [Y.J.] (Holdings) *(Contracting, Construction)*	80,990	300,615	L32,393	1,567	6,789
690	Emess *(Electricals)*	80,900	165,500	8,300	2,043	77,382
691	TLG *(Electricals)*	80,700	354,800	19,100	4,211	285,000
692	Hardys & Hansons *(Brewers & Distillers)*	80,689	34,063	8,050	1,122	66,018
693	Vibroplant *(Contracting, Construction)*	80,624	67,727	9,429	1,131	48,032
694	Mid Kent Holdings *(Water)*	80,219	38,119	8,306	483	74,143
695	Finsbury Growth Trust *(Investment Trusts)*	80,199	3,105	1,915	n/a	63,656
696	City Centre Restaurants *(Hotels & Leisure)*	79,864	111,385	15,475	4,064	182,216
697	TR Far East Income Trust *(Investment Trusts)*	79,806	5,822	4,313	n/a	77,716
698	RoadChef *(Hotels & Leisure)*	79,765	102,161	3,291	1,122	†
699	London Industrial *(Property)*	79,642	9,936	2,427	57	48,186
700	Searle [G.D.] & Co. Ltd *(Health & Household)*	79,554	127,262	21,489	922	†

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RANK	COMPANY NAME (Sector)	CAPITAL EMPLOYED £000	TURNOVER £000	PRE-TAX PROFIT £000	NUMBER OF EMPLOYEES	EQUITY MKT CAPITAL £000
701	Rutland Trust *(Other Financial)*	78,840	104,648	12,630	1,115	97,876
702	Sheffield Forgemasters Ltd *(Metal & Metal Forming)*	78,606	121,686	8,052	1,689	†
703	Hoare Govett Smaller Companies Index Investment Trust *(Investment Trusts)*	78,457	2,814	1,808	n/a	119,925
704	Bestway (Holdings) Ltd *(Food Wholesaling & Retailing)*	78,384	484,473	14,984	807	†
705	Tait [Thomas] and Sons Ltd *(Packaging, Paper & Printing)*	78,358	109,976	12,363	537	†
706	Malvern UK Index Trust *(Investment Trusts)*	78,107	3,291	2,958	n/a	74,582
707	Croudace Holdings Ltd *(Property)*	77,910	39,159	9,500	278	†
708	Lamont Holdings *(Textiles)*	77,623	125,048	9,686	1,609	74,553
709	Watson & Philip *(Food Wholesaling & Retailing)*	77,283	497,836	18,468	6,400	219,914
710	Argus Press Ltd *(Media)*	77,099	78,577	3,551	1,017	†
711	Enterprise Inns *(Hotels & Leisure)*	76,952	24,638	5,659	28	†
712	INVESCO English and International Trust *(Investment Trusts)*	76,792	3,874	2,432	n/a	93,032
713	Bemrose Corporation *(Packaging, Paper & Printing)*	76,359	148,775	16,775	2,221	137,055
714	Higgs and Hill *(Contracting, Construction)*	76,326	252,091	17,613	1,437	43,737
715	Williamson [George] & Co Ltd *(Commodities Trading)*	75,950	42,440	4,334	27,343	†
716	Micro Focus Group *(Electronics)*	75,707	77,258	16,542	735	93,893
717	Baxi Partnership Ltd *(Engineering - General)*	75,482	86,709	12,577	1,428	†
718	Remploy Ltd *(Miscellaneous)*	75,375	134,344	193,774	10,538	
719	Acatos & Hutcheson *(Food Manufacturing)*	74,971	294,482	7,569	851	106,20-
720	Brammer *(Other Industrial Materials & Products)*	74,895	183,943	21,587	1,254	195,311
721	Suter *(Conglomerates)*	74,800	300,300	20,200	3,638	193,284
722	Premier Land *(Property)*	74,793	6,257	11,980	3	14,425
723	Baillie Gifford Japan Trust *(Investment Trusts)*	74,630	522	305	n/a	74,921
724	Jupiter European Investment Trust *(Investment Trusts)*	74,508	2,694	1,783	n/a	65,590
725	Claverley Co *(Media)*	74,458	138,761	10,111	1,830	†
726	Smaller Companies Investment Trust *(Investment Trusts)*	74,391	3,057	2,124	n/a	62,860
727	Vitec Group *(Engineering - Instrument)*	74,354	131,751	30,667	1,163	345,880
728	Manders *(Chemicals)*	73,764	154,805	11,610	987	109,513
729	Foreign & Colonial PEP Investment Trust *(Investment Trusts)*	73,676	3,423	3,003	n/a	77,899
730	Ashley [Laura] Holdings *(Textiles)*	72,200	336,600	10,300	4,173	305,710
731	Eldridge, Pope & Co. *(Brewers & Distillers)*	72,153	55,056	3,543	1,596	38,887
732	New Throgmorton Trust (1983) *(Investment Trusts)*	72,046	4,224	2,172	n/a	15,395
733	Devro *(Food Manufacturing)*	71,916	97,778	31,130	974	341,552
734	Wyeth [John] & Brother Ltd *(Health & Household)*	71,912	166,921	18,175	1,229	†
735	M & G Second Dual Trust *(Investment Trusts)*	71,663	3,221	3,221	n/a	73,300
736	Brunner Mond Holdings Ltd *(Chemicals)*	71,658	141,231	7,863	1,216	
737	Cenargo International Ltd *(Transport Services)*	71,629	28,914	3,079	25	†
738	Beta Global Emerging Markets Investment Trust *(Investment Trusts)*	71,451	1,969	12	n/a	65,180
739	Jupiter Extra Income Trust *(Investment Trusts)*	70,841	5,138	4,185	n/a	78,698
740	Inoco *(Property)*	70,841	22,690	4,012	38	21,684
741	Estates & Agency Holdings *(Property)*	70,819	505	1,337	5	22,017
742	Oxford Instruments *(Engineering - Instrument)*	70,655	125,195	18,022	1,409	†
743	Kingsway Group *(Building Materials & Services)*	70,594	119,693	5,007	1,353	†
744	Clark [Arnold] Automobiles Ltd *(Transport - Manufacture & Distribution)*	70,442	307,117	10,080	1,859	†
745	Vosper Thornycroft Holdings *(Engineering - General)*	70,349	248,850	25,024	2,639	265,566
746	Capital Corpn *(Hotels & Leisure)*	70,158	42,176	14,065	273	201,917
747	Walker [James] Group Ltd *(Engineering - General)*	69,710	81,007	3,546	1,898	†
748	Save & Prosper Linked Investment Trust *(Investment Trusts)*	69,497	2,263	2,263	n/a	65,125
749	Wainhomes *(Contracting, Construction)*	69,236	95,857	10,044	330	67,222
750	Appleyard Group *(Transport - Manufacture & Distribution)*	68,924	694,715	8,816	2,909	65,221

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RANK	COMPANY NAME (Sector)	CAPITAL EMPLOYED £000	TURNOVER £000	PRE-TAX PROFIT £000	NUMBER OF EMPLOYEES	EQUITY MKT CAPITAL £000
751	Shepherd Neame Ltd *(Brewers & Distillers)*	68,843	48,156	5,504	823	51,832
752	Yorkshire-Tyne Tees Television Holdings *(Media)*	68,727	261,773	21,644	1,087	352,751
753	Northington Group Ltd *(Other Financial)*	68,640	500,517	2,065	478	†
754	Gaymer Group Europe Ltd *(Brewers & Distillers)*	68,484	145,175	8,160	961	†
755	Tullis Russell Group Ltd *(Packaging, Paper & Printing)*	68,203	126,848	6,395	1,217	†
756	Arcadian International *(Hotels & Restaurants)*	68,145	20,447	1,685	988	59,712
757	Foreign & Colonial German Investment Trust *(Investment Trusts)*	67,966	1,577	617	n/a	53,849
758	BI Group *(Engineering - General)*	67,816	116,109	8,319	1,648	58,874
759	Dewhirst Group *(Textiles)*	67,540	278,908	22,306	7,930	234,138
760	Old Mutual South Africa Trust *(Investment Trusts)*	67,189	2,636	1,891	n/a	52,779
761	Hogg Robinson *(Transport Services)*	67,146	198,233	14,305	3,044	201,587
762	Investment Trust of Guernsey Ltd *(Investment Trusts)*	66,885	2,532	2,308	n/a	56,338
763	Alvis *(Aerospace)*	66,864	101,407	8,736	582	101,839
764	BSS Group *(Other Industrial Materials & Products)*	66,581	293,923	14,083	1,966	153,563
765	Angerstein Underwriting Trust *(Insurance (Life / Non life))*	66,521	3,001	2,625	n/a	63,450
766	Ex-Lands Properties *(Property)*	66,482	15,923	1,39	100	†
767	Martin Currie Pacific Trust *(Investment Trusts)*	66,408	1,364	255	n/a	61,863
768	Burn Stewart Distillers *(Brewers & Distillers)*	66,341	50,381	3,955	209	66,415
769	Firth Rixson *(Metal & Metal Forming)*	66,254	132,518	5,816	1,635	92,304
770	Crampton Holdings *(Health & Household)*	66,205	119,792	10,481	1,823	91,251
771	Mayflower Corporation *(Transport - Manufacture & Distribution)*	65,985	202,271	7,126	2,092	202,258
772	Cray Electronics Holdings *(Electronics)*	65,950	264,838	835	3,064	113,804
773	USM Texon Ltd *(Engineering - General)*	65,937	193,156	4,453	2,478	†
774	McDonnell Information Systems Group *(Business Services)*	65,931	148,911	7,157	1,772	40,500
775	Inveresk *(Packaging, Paper & Printing)*	65,880	129,954	8,289	849	92,497
776	MCIT *(Investment Trusts)*	65,740	5,127	3,761	n/a	25,200
777	Amicable Smaller Enterprises Trust *(Investment Trusts)*	65,707	2,119	1,463	n/a	59,353
778	Griggs [R.] Group Ltd *(Textiles)*	65,421	170,253	22,548	2,794	†
779	Halma *(Engineering - General)*	65,279	153,739	29,234	2,226	492,535
780	Plysu *(Other Industrial Materials & Products)*	65,251	99,543	6,475	1,537	81,777
781	South Staffordshire Water Holdings *(Water)*	65,243	59,953	14,275	710	107,980
782	London & Associated Properties *(Property)*	65,171	4,046	1,730	26	21,029
783	Birkby *(Transport Services)*	64,765	62,349	10,934	808	89,691
784	Eastern Counties Newspapers Group Ltd *(Media)*	64,676	117,982	10,378	1,871	†
785	Boot [Henry] & Sons *(Contracting, Construction)*	64,253	179,200	8,691	1,308	50,836
786	Ashbourne *(Health & Household)*	63,767	26,743	6,502	1,932	77,254
787	Yorkshire Food Group *(Food Manufacturing)*	63,723	174,360	5,907	1,400	35,639
788	Holt [Joseph] *(Brewers & Distillers)*	63,494	29,109	8,389	1,634	94,783
789	I&S Optimum Income Trust *(Investment Trusts)*	63,315	4,132	3,671	n/a	65,109
790	Ben Line Group Ltd *(Transport Services)*	63,132	25,792	5,784	244	†
791	Johnson Fry Holdings *(Other Financial)*	62,928	30,868	2,881	333	19,000
792	British Biotech *(Research & Development)*	62,814	3,191	L26,331	310	238,858
793	SIG *(Building Materials & Services)*	62,786	358,696	24,050	2,226	158,016
794	Fleming Geared Income & Assets Investment Trust *(Investment Trusts)*	62,744	3,588	3,356	n/a	51,845
795	Tay Homes *(Contracting, Construction)*	62,733	117,660	7,057	509	45,907
796	Cordiant *(Media)*	62,700	4,172,300	L22,600	10,570	40,157
797	Perry Group *(Transport - Manufacture & Distribution)*	62,347	414,289	6,548	2,515	37,008
798	Macfarlane Group (Clansman) *(Packaging, Paper & Printing)*	62,343	158,600	21,223	1,785	262,948
799	Dares Estates *(Property)*	62,252	5,705	L202	7	13,658
800	London and St Lawrence Investment Company *(Investment Trusts)*	61,920	2,880	2,661	7	56,737

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THE UK'S TOP 1000

801-850

RANK	COMPANY NAME (Sector)	CAPITAL EMPLOYED £000	TURNOVER £000	PRE-TAX PROFIT £000	NUMBER OF EMPLOYEES	EQUITY MKT. CAPITAL £000
801	Greenfriar Investment Company *(Investment Trusts)*	61,908	1,936	1,322	n/a	52,680
802	Kunick *(Health & Household)*	61,624	105,260	12,168	2,319	89,388
803	Volex Group *(Electricals)*	61,454	165,817	11,973	5,210	114,766
804	Moorfield Estates *(Property)*	61,294	7,789	665	6	21,155
805	Wyevale Garden Centres *(Miscellaneous)*	61,239	44,986	6,570	831	82,483
806	Associated Nursing Services *(Health & Household)*	61,186	20,565	2,653	1,375	27,166
807	Dwyer Estates *(Property)*	61,068	6,573	2,168	24	18,984
808	NTL Group Ltd *(Media)*	60,830	115,696	16,001	1,108	†
809	Warburtons Ltd *(Food Manufacturing)*	60,721	169,907	11,454	5,403	†
810	Continental Assets Trust *(Investment Trusts)*	60,686	1,641	963	n/a	39,110
811	Hall Engineering (Holdings) *(Engineering - General)*	60,673	192,556	7,717	1,680	74,848
812	O.C.S. Group Ltd *(Miscellaneous)*	60,453	248,762	13,719	37,902	†
813	Fairey Group *(Electronics)*	60,292	196,262	34,187	2,619	438,662
814	Countryside Properties *(Property)*	60,277	148,176	L10,609	521	51,168
815	Foreign & Colonial U.S. Smaller Companies *(Investment Trusts)*	60,217	652	63	n/a	53,685
816	London Scottish Bank *(Banks)*	60,201	39,215	7,886	868	98,690
817	HCG Lloyd's Investment Trust *(Investment Trusts)*	60,116	3,143	2,693	n/a	59,979
818	Hartstone Group *(Textiles)*	60,054	218,046	4,697	2,239	323
819	Concentric *(Engineering - General)*	59,651	141,553	11,284	1,974	104,952
820	Gibbs Mew *(Brewers & Distillers)*	59,642	38,475	4,436	286	56,355
821	Borden (UK) Ltd *(Chemicals)*	59,605	179,018	2,848	2,491	†
822	Five Oaks Investments *(Property)*	59,138	6,126	2,334	12	27,115
823	Mackays Stores (Holdings) *(Stores)*	58,908	126,285	18,123	2,463	†
824	Dunedin Smaller Companies Investment Trust *(Investment Trusts)*	58,851	2,327	1,673	n/a	54,768
825	Henderson Strata Investments *(Investment Trusts)*	58,660	1,205	523	n/a	58,520
826	Fleming Fledgeling Investment Trust *(Investment Trusts)*	58,501	1,320	515	n/a	49,775
827	Scotia Holdings *(Health & Household)*	58,397	15,644	L11,757	340	401,882
828	Port of London Authority *(Transport Services)*	58,374	27,254	1,695	440	†
829	Farnco Holdings Ltd *(Health & Household)*	58,315	177,220	10,894	3,437	†
830	Domino Printing Sciences *(Packaging, Paper & Printing)*	58,299	105,550	5,161	997	126,693
831	Bryan Brothers Holdings Ltd *(Transport - Manufacture & Distribution)*	58,204	107,027	629	542	†
832	Scottish Value Trust *(Investment Trusts)*	58,178	2,320	1,320	n/a	56,359
833	Logica *(Electronics)*	57,853	250,135	20,310	3,358	233,208
834	Baynes [Charles] *(Engineering - General)*	57,820	202,601	17,703	2,288	202,442
835	HTV Group *(Media)*	57,700	135,000	12,100	633	249,202
836	New London Capital *(Insurance (Life / Non life))*	57,636	3,420	2,274	n/a	52,200
837	Macallan-Glenlivet *(Brewers & Distillers)*	57,350	18,748	7,091	66	223,026
838	Wilson [F.G.] (Engineering) Ltd *(Engineering - General)*	57,301	165,472	20,863	1,026	†
839	Johnston Press *(Media)*	56,825	102,438	16,836	2,238	192,295
840	Scottish Asian Investment Co Ltd *(Investment Trusts)*	56,684	1,042	146	n/a	52,985
841	NatWest Smaller Companies Investment Trust *(Investment Trusts)*	56,681	2,718	2,002	n/a	51,920
842	Saga Leisure Ltd *(Hotels & Leisure)*	56,630	153,645	7,410	1,240	†
843	Kleinwort High Income Trust *(Investment Trusts)*	56,384	3,544	3,477	n/a	57,050
844	Kenwood Appliances *(Electricals)*	56,346	142,365	13,537	2,298	129,318
845	Prolific Income *(Investment Trusts)*	56,327	2,637	2,254	n/a	53,350
846	Second Market Investment Company *(Investment Trusts)*	56,142	2,156	1,337	n/a	49,447
847	Ruberoid *(Building Materials & Services)*	56,134	240,091	8,414	2,759	68,966
848	Grampian Country Food Group Ltd *(Agriculture)*	56,132	253,184	4,621	2,968	†
849	Morgan Grenfell Equity Income Trust *(Investment Trusts)*	56,064	3,090	2,511	n/a	52,901
850	Wells [Charles] Ltd *(Brewers & Distillers)*	55,925	88,067	3,690	1,203	†

NOTES: n/a – not available. †Market Capitalisation not available. Figure not disclosed or company unquoted, government controlled, a nationalised industry, a subsidiary or wholly quoted.

RANK	COMPANY NAME (Sector)	CAPITAL EMPLOYED £000	TURNOVER £000	PRE-TAX PROFIT £000	NUMBER OF EMPLOYEES	EQUITY MKT CAPITAL £000
851	Renishaw *(Engineering - Instrument)*	55,855	62,662	13,535	796	184,628
852	Glenmorangie *(Brewers & Distillers)*	55,815	35,367	5,708	220	108,929
853	Brent International *(Chemicals)*	55,671	142,522	3,530	1,288	59,361
854	Le Riches Stores Ltd *(Stores)*	55,594	119,382	1,851	1,269	†
855	Baring Emerging Europe Trust *(Investment Trusts)*	55,474	1,013	L335	n/a	52,395
856	Bailey (N.G.) Organisation Ltd *(Engineering - General)*	55,316	207,111	5,600	3,212	†
857	Finsbury Smaller Companies Trust *(Investment Trusts)*	55,308	1,814	1,104	n/a	54,957
858	Thorntons *(Food Manufacturing)*	55,147	95,648	10,482	2,830	102,683
859	Bristol Evening Post *(Media)*	55,093	59,976	7,581	1,016	60,477
860	FirstBus *(Transport Services)*	55,010	0	L0	n/a	369,000
861	Southern Newspapers *(Media)*	54,849	84,831	11,572	1,617	106,891
862	Russell (Alexander) *(Building Materials & Services)*	54,422	38,117	3,110	346	31,638
863	Ferguson International Holdings *(Miscellaneous)*	54,348	174,551	12,796	2,329	83,704
864	Haden MacLellan Holdings *(Engineering - General)*	54,300	438,000	11,100	4,898	91,268
865	Brockhampton Holdings *(Water)*	54,260	27,367	6,690	304	66,029
866	East Surrey Holdings *(Water)*	54,206	27,155	8,148	244	58,646
867	Fleming European Fledgeling Investment Trust *(Investment Trusts)*	53,963	1,347	319	n/a	65,445
868	Mountview Estates *(Property)*	53,842	17,249	9,317	21	44,724
869	Whatman *(Engineering - General)*	53,582	81,261	8,855	958	98,182
870	Vardy (Reg) *(Transport - Manufacture & Distribution)*	53,442	377,436	11,017	1,528	100,121
871	Undervalued Assets Trust *(Investment Trusts)*	53,429	1,986	1,330	n/a	93,598
872	Chloride Group *(Electricals)*	53,339	110,605	L318	2,069	75,182
873	Refuge Group *(Insurance (Life / Non life))*	53,240	226,005	42,125	3,279	718,522
874	Regalian Properties *(Property)*	53,235	18,444	1,375	28	26,349
875	Austin Reed Group *(Textiles)*	52,834	72,747	3,383	1,420	55,488
876	600 Group *(Engineering - General)*	52,694	116,632	5,738	1,414	105,227
877	Dorling Kindersley Holdings *(Media)*	52,579	138,834	12,710	880	260,591
878	Chrysalis Group *(Hotels & Leisure)*	52,560	74,306	1,015	403	78,316
879	Time Products *(Stores)*	52,559	79,974	12,490	743	140,880
880	Fleming Indian Investment Trust *(Investment Trusts)*	52,214	1,308	L194	n/a	57,687
881	Throgmorton 1000 Smallest Companies Trust *(Investment Trusts)*	52,202	1,797	1,127	n/a	46,897
882	British Sky Broadcasting Group *(Media)*	52,184	777,866	155,303	3,054	4,707,824
883	Birse Group *(Contracting, Construction)*	51,968	304,965	L6,984	1,542	34,421
884	Brazilian Smaller Companies Investment Trust *(Investment Trusts)*	51,916	1,222	L26	n/a	46,062
885	London American Growth Trust *(Investment Trusts)*	51,900	246	L438	n/a	44,011
886	Fairbairn European Smaller Companies Index Trust *(Investment Trusts)*	51,638	1,397	781	n/a	42,920
887	Mithras Investment Trust *(Investment Trusts)*	51,548	5,140	1,064	n/a	22,000
888	Chamberlain Phipps Group *(Textiles)*	51,540	139,403	12,390	2,644	77,630
889	Lookers *(Transport - Manufacture & Distribution)*	51,440	398,861	6,386	2,070	49,327
890	Mabey Holdings Ltd *(Contracting, Construction)*	51,321	77,952	6,697	1,016	†
891	Wates Building Group Ltd *(Contracting, Construction)*	51,180	204,004	1,073	980	†
892	Ryan Group Ltd *(Mines)*	51,174	106,075	L39,430	994	†
893	Morgan Grenfell Latin American Companies Trust *(Investment Trusts)*	51,123	1,252	422	n/a	46,844
894	INVESCO Korea Trust *(Investment Trusts)*	51,107	567	L9	n/a	41,953
895	Keller Group *(Contracting, Construction)*	50,801	218,875	11,154	2,040	80,080
896	Celltech Group *(Health & Household)*	50,800	17,100	L5,400	470	309,956
897	Fidelity Special Values *(Other Financial)*	50,710	1,348	652	n/a	39,266
898	CALA *(Contracting, Construction)*	50,664	87,431	6,888	278	49,532
899	Portsmouth and Sunderland Newspapers, *(Media)*	50,625	119,677	8,263	2,151	73,848
900	Melton Medes Ltd *(Other Industrial Materials & Products)*	50,614	128,593	1,003	2,758	†

n/a – not available. †Market Capitalisation not available. Figure not disclosed or company unquoted, government controlled, a nationalised industry, a subsidiary or quoted.

THE UK'S TOP 1000 — 901-950

RANK	COMPANY NAME [Sector]	CAPITAL EMPLOYED £000	TURNOVER £000	PRE-TAX PROFIT £000	NUMBER OF EMPLOYEES	EQUITY MKT CAPITAL £000
901	Speciality Shops *(Property)*	50,382	8,288	907	72	21,876
902	Ashtead Group *(Contracting, Construction)*	50,368	67,344	13,609	1,046	131,797
903	English & Overseas Properties *(Property)*	50,363	6,951	L631	14	16,181
904	Pye *(Electronics)*	50,347	143,786	15,982	1,622	119,246
905	Northern Leisure *(Hotels & Leisure)*	50,305	23,238	3,771	889	40,364
906	Shetley *(Miscellaneous)*	50,263	139,704	6,366	4,609	82,853
907	Black [Peter] Holdings *(Health & Household)*	50,214	124,984	9,395	1,970	150,802
908	Hall & Woodhouse Ltd *(Brewers & Distillers)*	50,210	63,884	4,698	1,484	†
909	East German Investment Trust *(Investment Trusts)*	50,071	100	L2,386	n/a	37,067
910	Royal Mint Trading Fund *(Metal & Metal Forming)*	50,006	106,477	15,005	997	†
911	Perpetual *(Other Financial)*	49,944	1,168,837	37,207	350	466,803
912	Brintons Ltd *(Textiles)*	49,837	73,401	1,655	1,933	†
913	Paribas French Investment Trust *(Investment Trusts)*	49,807	1,088	486	n/a	41,415
914	Walker Greenbank *(Health & Household)*	49,583	95,856	9,575	1,093	99,079
915	Trinity Holdings *(Transport - Manufacture & Distribution)*	49,384	208,114	16,004	1,498	196
916	MacDonald Hotels *(Hotels & Leisure)*	49,159	35,865	5,235	1,921	†
917	Mercury Grosvenor Trust *(Investment Trusts)*	49,006	2,884	1,739	n/a	36,30
918	First Philippine Investment Trust *(Investment Trusts)*	48,856	463	L62	n/a	38,03
919	European Smaller Companies *(Investment Trusts)*	48,815	1,410	407	n/a	40,347
920	Dana Holdings Ltd *(Transport - Manufacture & Distribution)*	48,794	224,527	6,543	2,717	†
921	Dunedin Enterprise Investment Trust *(Investment Trusts)*	48,763	2,098	1,500	n/a	42,544
922	Claremont Garments (Holdings) *(Textiles)*	48,718	172,907	12,918	5,840	151,989
923	Marshall Food Group Ltd *(Agriculture)*	48,700	208,740	L896	4,631	†
924	Union *(Other Financial)*	48,394	15,841	1,366	195	22,754
925	International Biotechnology Trust *(Investment Trusts)*	48,080	1,401	461	n/a	36,218
926	Thompson Clive Investments *(Investment Trusts)*	48,061	762	415	n/a	35,934
927	Sanderson Bramall Motor Group *(Transport - Manufacture & Distribution)*	48,002	516,811	9,292	1,993	66,282
928	Wardle Storeys *(Other Industrial Materials & Products)*	47,987	94,915	7,161	1,675	98,083
929	Throgmorton Preferred Income Trust *(Investment Trusts)*	47,925	4,714	3,951	n/a	47,400
930	Baillie Gifford Shin Nippon *(Investment Trusts)*	47,676	380	L163	n/a	39,648
931	Maritime Transport Services Ltd *(Transport Services)*	47,648	23,231	L44,831	302	†
932	Foster Yeoman Ltd *(Mines)*	47,601	111,787	613	517	†
933	Halstead [James] Group *(Building Materials & Services)*	47,542	72,671	10,321	819	104,339
934	Moorgate Investment Trust *(Investment Trusts)*	47,533	2,088	1,762	n/a	44,367
935	International Energy Group Ltd *(Oil, Gas & Nuclear Fuels)*	47,470	82,985	4,410	500	(
936	Really Useful Holdings Ltd *(Media)*	47,401	110,079	46,163	148	†
937	Palmer & Harvey McLane (Holdings) Ltd *(Food Wholesaling & Retailing)*	47,353	1,965,791	15,084	2,942	†
938	Martin-Baker (Engineering) Ltd *(Aerospace)*	47,219	65,897	10,916	777	†
939	Gartmore British Income & Growth Trust *(Investment Trusts)*	47,174	2,357	2,129	n/a	45,817
940	Yates Brothers Wine Lodges *(Hotels & Leisure)*	47,061	53,824	5,107	1,131	80,766
941	Mott MacDonald Group Ltd *(Engineering - General)*	46,796	189,498	5,741	3,495	†
942	Baggeridge Brick *(Building Materials & Services)*	46,772	36,061	4,712	512	45,492
943	More O'Ferrall *(Media)*	46,669	87,302	15,045	637	150,664
944	Transtec *(Engineering - General)*	46,625	210,959	6,723	2,104	91,423
945	GEI International *(Engineering - General)*	46,588	82,335	4,312	1,608	48,378
946	P & P *(Electronics)*	46,577	341,990	12,574	1,243	124,927
947	Century Inns *(Hotels & Leisure)*	46,531	21,574	4,889	74	†
948	Ropner *(Conglomerates)*	46,499	27,090	4,618	433	44,640
949	Jeyes Group *(Health & Household)*	46,391	116,565	1,287	1,187	30,339
950	Horace Small Apparel *(Textiles)*	46,278	80,160	3,185	1,401	31,025

S: n/a – not available. †Market Capitalisation not available. Figure not disclosed or company unquoted, government controlled, a nationalised industry, a subsidiary or quoted.

Rank	Company Name (Sector)	Profit before tax £'000	Turnover £'000	Net worth £'000	Number of employees	Equity market capitalisation £'000
951	Tor Investment Trust. *(Investment Trusts)*	46,191	2,049	1,814	n/a	44,127
952	Plantation & General Investments *(Investment Trusts)*	46,180	47,744	3,912	14,276	19,586
953	Govett American Smaller Companies Trust *(Investment Trusts)*	46,172	353	64	n/a	39,148
954	Rowe Cath Investments *(Investment Trusts)*	46,147	6,647	5,916	1,118	51,195
955	Pittencrieff Resources *(Oil, Gas & Nuclear Fuels)*	45,782	12,088	L20,255	35	28,201
956	Fleming Natural Resources Investment Trust *(Investment Trusts)*	45,707	1,944	1,464	n/a	39,026
957	BBW Partnership Ltd *(Transport Services)*	45,586	518,817	1,562	4,966	†
958	Rowlinson Securities *(Property)*	45,563	12,855	2,788	91	12,490
959	German Smaller Companies Investment Trust *(Investment Trusts)*	45,552	986	473	n/a	41,104
960	Murray Emerging Economies Trust *(Investment Trusts)*	45,530	1,524	983	n/a	42,412
961	Harrison [T.C.] Group Ltd *(Transport - Manufacture & Distribution)*	45,342	183,914	3,631	894	†
962	Court Cavendish Group *(Health & Household)*	45,278	23,272	5,077	1,026	†
963	Mid-States *(Transport - Manufacture & Distribution)*	44,919	80,462	689	1,141	24
964	Henderson Administration Group *(Other Financial)*	44,721	324,491	18,136	527	238,368
965	Johnston Group *(Building Materials & Services)*	44,564	137,889	6,622	1,387	36,993
966	Hopkinsons Group *(Engineering - General)*	44,542	114,194	13,039	1,974	28,885
967	Zortech International Ltd *(Building Materials & Services)*	44,398	98,957	13,722	1,707	†
968	Cook [William] *(Metal & Metal Goods)*	44,389	104,522	7,700	1,901	†
969	Bespak *(Other Industrial Materials & Products)*	44,360	66,771	L14,023	971	64,398
970	Lloyd Thompson Group *(Insurance (Brokers))*	44,324	45,016	20,408	351	119,762
971	Boxmore International *(Packaging, Paper & Printing)*	44,047	71,871	11,103	811	147,614
972	Helene *(Textiles)*	44,046	128,203	6,130	328	20,913
973	Rix [J.R.] & Sons Ltd *(Oil, Gas & Nuclear Fuels)*	44,039	185,237	4,968	592	†
974	Rotork *(Engineering - Instrument)*	43,988	79,998	15,336	835	149,697
975	Beattie [James] *(Stores)*	43,958	84,981	6,271	1,094	58,655
976	Napier Brown Holdings Ltd *(Food Manufacturing)*	43,872	414,346	13,619	1,535	†
977	David Brown Group *(Engineering - General)*	43,845	125,723	12,509	2,086	125,120
978	HTR Income & Growth Split Trust *(Investment Trusts)*	43,784	1,780	1,690	n/a	42,005
979	German Investment Trust *(Investment Trusts)*	43,710	843	294	n/a	40,617
980	Hillcsden Investments Ltd *(Miscellaneous)*	43,566	131,310	3,434	1,263	†
981	Church & Co *(Miscellaneous)*	43,505	78,403	4,551	1,746	39,674
982	Rugby Estates *(Property)*	43,481	7,897	1,052	10	16,059
983	Whitecroft *(Electricals)*	43,432	131,239	12,744	1,753	102,889
984	Motherwell Bridge Holdings Ltd *(Engineering - General)*	43,425	184,430	3,990	3,269	†
985	Oakstead Holdings Ltd *(Transport Services)*	43,407	140,813	2,127	61	†
986	Pilot Investment Trust *(Investment Trusts)*	43,302	1,614	986	n/a	41,941
987	Berry Bros. & Rudd Ltd *(Food Wholesaling & Retailing)*	43,053	97,133	8,751	241	†
988	Perpetual UK Smaller Companies Investment Trust *(Investment Trusts)*	43,032	904	439	n/a	40,261
989	Johnson Fry Second Utilities Trust *(Investment Trusts)*	42,989	3,063	2,812	n/a	42,328
990	Moss Bros Group *(Stores)*	42,840	87,500	11,305	894	108,171
991	Equitable Life Assurance Society *(Insurance (Life / Non life))*	42,700	2,381,300	0	1,974	†
992	Dowding & Mills *(Electricals)*	42,663	102,223	9,359	2,013	101,116
993	Alpha Airports Group *(Transport Services)*	42,600	552,900	20,600	8,608	177,621
994	Legal & General Recovery Investment Trust *(Investment Trusts)*	42,560	1,525	7,841	n/a	36,458
995	Quality Care Homes *(Health & Household)*	42,510	16,954	4,806	1,691	38,036
996	Siam Selective Growth Trust *(Investment Trusts)*	42,442	1,101	143	n/a	40,500
997	Solaglas Ltd *(Other Industrial Materials & Products)*	42,395	152,153	L8,494	2,287	†
998	Boosey & Hawkes *(Miscellaneous)*	42,182	87,098	6,169	1,088	93,786
999	Greggs *(Food Manufacturing)*	42,119	219,514	13,056	12,207	131,756
1000	Gent [S.R.] *(Textiles)*	41,975	154,098	6,309	3,214	36,438

n/a – not available. †Market Capitalisation not available. Figure not disclosed or company unquoted, government controlled, a nationalised industry, a subsidiary or ed.

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"I've studied now Philosophy
And Jurisprudence, Medicine—
And even, alas! Theology—
From end to end with labour keen;
And here, poor fool! with all my lore
I stand, no wiser than before."
(Goethe, *Faust*, pt. 1,
"Night" (tr. by Bayard Taylor)).

"In expanding the field of knowledge, we but increase the horizon of ignorance." Henry Miller (1891–1980), *The Wisdom of the Heart*, (1947).

"If I could have made this enough of a book it would have had everything in it...What else should it contain about a country that you love very much. Rafael says that things are very changed now and he won't go to Pamplona anymore...I know things change now and I do not care. It's all been changed for me. Let it all change...The great thing is to last and get your work done and see and hear and understand; and write when there is something that you know; and not before; and not too dammed much after. Let those who want to save the world if you can get to see it clear and as a whole. Then any part you make will represent the whole if it's made truly. The thing to do is to work and learn to make it. No, it's not enough of a book, but still there were a few things to be said. A few practical things to be said." (Ernest Hemingway (1899-1961), *Death in the Afternoon*, Epilogue).