

## THE EMPIRE STRIKES BACK? A RESTATEMENT OF THE LAW OF UNJUST ENRICHMENT

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*Unjust Enrichment* by Peter Birks (Oxford: Oxford University Press, 2003) pages i–xxx, 1–274. Price A\$82.95 (softcover). ISBN 0 19 926968 8.

[The supposed unity of unjust enrichment has come under many attacks from writers who suggest that it is illusory. It is also rife with internal controversy amongst those who agree that it displays uniformity but cannot agree on how that uniformity should be characterised. *Unjust Enrichment*, Birks' new restatement of the theory, stakes out a distinctive position in these debates, with his own defence of its coherence. It contains much that is familiar, but also some striking innovations. Chief amongst these is Birks' repudiation of the 'unjust factors', and his restriction of his theory to the English legal system. This review essay sketches the current state of the theory, locates Birks' arguments within the debates surrounding it, and considers their merits. It concludes that while Birks has done an excellent job in stating a broad unitary theory, the irreducible complexity of the result calls the merits of the entire enterprise into doubt.]

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### I INTRODUCTION

Peter Birks' *An Introduction to the Law of Restitution*<sup>1</sup> is probably the single most influential book on the law of restitution or unjust enrichment. It took the subject to unprecedented heights of rigour. Like it or loathe it, *Introduction* was

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<sup>1</sup> Peter Birks, *An Introduction to the Law of Restitution* (1985) ('*Introduction*').

impossible to ignore. Yet today, less than two decades later, much of it reads as only a superficial treatment of the area. The scholarship has gone so much further: the wish either to emulate *Introduction*, to improve upon it, or to push it aside, has certainly superseded it. Even Birks himself has been at the forefront of those who seek to replace it with something better. Now he says that he has done so: *Unjust Enrichment*<sup>2</sup> is his new restatement. Very soon after it appeared, we heard the sad news of its author's death. While *Unjust Enrichment* is not quite the final word — a revised textbook from this most prolific of theorists is apparently now in press — it nonetheless appears to be the last detailed statement of the direction that he wished for the theory to take.

It is by no means a clean break from *Introduction*. Whatever the new book's title may suggest, it covers much the same ground. Many individual paragraphs from *Unjust Enrichment* could easily have come from *Introduction*; every major topic tackled in *Unjust Enrichment* was foreshadowed in *Introduction*. However the changes in structure, emphasis and detail are significant indeed, and even those of us who are opposed to his entire project can see the merits of a concise and theoretically profound account of the current law.

The new *Unjust Enrichment* comes at a time of particular turmoil in the theory of the subject. To understand what is new about the book, we must appreciate the recent developments in the law of restitution.

## II THE STARTING POINT

The starting point for most restitution lawyers is where the plaintiff seeks to recover a direct money payment back from the defendant through personal action. Birks starts here too, or at least with a subset of this case.<sup>3</sup> How should we sum up its gist? 'Money had and received'? 'Implied contract'? 'Unjust enrichment'? Each has its supporters and good points can be made for each. But if this is *all* the dispute is about, it is, while fascinating in its detail, not awfully significant. It is really just an argument about the best way of setting out mostly uncontroversial law and this is as much a matter of style or rhetoric as of any underlying theory.

The real dispute begins when we look outside the core case. Once we have established a basic pattern of liability, the question is whether we can apply it to other sets of circumstances that are slightly different but not totally dissimilar. What if the transaction did not involve money? Or if the money was not transferred directly from plaintiff to defendant? Or the remedy claimed is not a simple personal liability? Here the differences between the theories cease to be merely rhetorical, and begin to produce substantive results. 'Money had and received' discourages analogies with other cases. There was never an action for 'goods had and received', and this approach suggests we should not expect very close parallels. 'Implied contract' certainly looks broader, suggesting that transactions with a broadly contractual flavour can be brought in, though plainly it cannot be

<sup>2</sup> Peter Birks, *Unjust Enrichment* (2003).

<sup>3</sup> *Ibid* ch 1. The limits of Birks' 'core case' are not entirely clear in this initial chapter: see, eg, at 1, 6–7, 15. However, I do not think this affects his argument at the generalised stage.

pushed very far. It is the term ‘unjust enrichment’ that seems to give the greatest scope for analogies. The number of variants on the basic core theme is fairly substantial. In the ‘core case’, the benefit consists of money. However, money is a mere example of an enrichment. Rather than going straight from the plaintiff’s pocket to the defendant’s, an enrichment may be at the plaintiff’s expense in other senses. Indeed, remedies other than a personal remedy may be sought. If ‘unjust enrichment’ can be generalised in this way, the resulting area of law is obviously quite substantial.<sup>4</sup>

Clearly, then, ‘unjust enrichment’ can take the ‘core case’ and expand it to cover huge areas of liability — so long as sufficiently robust definitions of key expressions are in place. Most of the theoretical argument over unjust enrichment in the past 50 years has focused on whether sufficiently robust terminology can be found, and if so, how it is to be defined.

*Unjust Enrichment* is Birks’ latest contribution to this argument. But to where had the argument progressed? Against what background is Birks speaking?

### III RECENT HISTORY OF UNJUST ENRICHMENT: RISE AND FALL

When we look at unjust enrichment’s academic status or its standing in the opinions of the higher courts, it has plainly gained an importance it could not have claimed until recently. But when we ask about its *territory*, a different picture emerges. Which liabilities are thought to be explained by unjust enrichment? Which heads of the law are based on unjust enrichment, whether explicitly or in disguise? In this respect, the history of the last third of a century has been one of steady decline.

The broadest scope claimed for unjust enrichment was perhaps in Lord Robert Goff and Gareth Jones’ *The Law of Restitution*.<sup>5</sup> This pioneering work discarded a complex theoretical vision and thus had no qualms about casting its net wide. To compensate rescuers for their time and trouble; to prevent a murderer from inheriting their victim’s fortune; to unscramble a transaction that was illegal or became frustrated: these and many more were included on the grounds of having at least *something* to do with unjust enrichment. Indeed, it was the broad reach of *Goff and Jones* that was one of its leading features. Practitioners who thought nothing of ‘unjust enrichment’ theory nonetheless valued *Goff and Jones* as a treasure chest of obscure doctrines. ‘Unjust enrichment’ was used indiscriminately, and (according to taste) was either praised for its exuberant breadth or condemned for its conceptual promiscuity.

It took a decade or two for this euphoria to die down, as the subject settled into the more modest niche in which it now resides. Birks’ *Introduction* set the tone for a new settlement. He described the core case using the ‘unjust factors’ — so that plaintiffs must establish a ‘factor’ such as mistake or duress in order to recover the money. On that apparently secure foundation, he then extended the core analysis to catch further liabilities: other forms of ‘enrichment’, other routes

<sup>4</sup> Ibid 9–10. Here, as elsewhere, Birks seems unable to describe this process without equating it to the biological classification of animals. Cf Stephen Waddams, *Dimensions of Private Law — Categories and Concepts in Anglo-American Legal Reasoning* (2003) 110.

<sup>5</sup> Lord Robert Goff and Gareth Jones, *The Law of Restitution* (1<sup>st</sup> ed, 1966) (‘*Goff and Jones*’).

to the defendant's pocket and other remedies. Yet with greater clarity came the realisation that *Goff and Jones* had gone too far. Much that was in *Goff and Jones* was declared as not truly 'unjust enrichment' at all.<sup>6</sup> And the more detailed texts to come out of that phase of the scholarship have largely accepted the Birksian limits. For example, Justice Keith Mason and John Carter's *Restitution Law in Australia*<sup>7</sup> covers fewer topics than *Goff and Jones*, and is a better book as a result.

Yet the retreat was by no means over. Unjust enrichment, as it was now conceived, was held together by its organising concepts, particularly the scope of 'unjust' and 'enrichment' themselves. As more attention was paid to defining those vital expressions, the unity of the subject wilted. Scholarly disputes over the definition of 'enrichment' failed to produce consensus. Numerous unsuccessful attempts to define 'unjust' led to the admission, by Birks at least, that 'restitution' was no longer defensible as a coherent category. Restitution was not 'mono-causal' (that is, all based on one principle) but 'multi-causal' (that is, based on all sorts of things, of which unjust enrichment is only one). Ground had to be conceded to other doctrines. Recovery of profits gained from torts was part of tort law, not unjust enrichment. Furthermore, rescission of contracts, earlier claimed wholly for unjust enrichment, now had to be shared: whilst setting aside contracts was a matter for contract law, sweeping up the resulting mess was a matter for unjust enrichment. The drive towards purer concepts implied an even smaller area in which unjust enrichment could operate. 'Unjust enrichment' was in danger of becoming a core area of direct payments, surrounded by an increasingly sorry-looking periphery of misfit liabilities.

What should have been even more worrying was the increasingly complex language apparently required by the theory of unjust enrichment, not to mention the rate at which it changed. The constant redefinitions of the main expressions made it harder and harder to actually say anything, without making an error which someone else would consider as elementary. Indeed, it now only takes a few short years from the time a new leading case appears until the time when it must be 'explained' in language that its judicial authors would have found strange. The theoretical twists and turns now evade all but the deepest of specialists. The increasing complexity and diversity of viewpoint are most marked.<sup>8</sup>

That the subject is in turmoil is apparent. However, there are two competing interpretations of this commotion. Many see no escape for unjust enrichment theory if it continues to be propelled down these narrow alleyways. Correcting its own internal definitions, and getting its own story straight, has become an end in itself. The number of critics is larger than ever, as is the number of mutually irreconcilable positions within the unjust enrichment camp. Many of those who support unjust enrichment only do so with the (profoundly un-Birksian) qualifi-

<sup>6</sup> Waddams, above n 4, 162–4.

<sup>7</sup> Justice Keith Mason and John Carter, *Restitution Law in Australia* (1995) ('*Mason and Carter*').

<sup>8</sup> See generally Steve Hedley, 'Unjust Enrichment: A Middle Course?' (2002) 2 *Oxford University Commonwealth Law Journal* 181.

cation that unjust enrichment contains distinct ‘varieties’, or discrete notions.<sup>9</sup> If the object of the exercise is to achieve a straightforward account of the state of the law, Birks is heading in the wrong direction, at some speed.

However, Birks firmly opposed this, and *Unjust Enrichment* is his latest reassertion of his view. The current phase of ‘wondering whether unjust enrichment exists and, if it does, what form it might take’<sup>10</sup> is merely a preliminary stage, before unjust enrichment takes its proper place in the common law. Birks argues that there are better things to discuss, but that these issues cannot be tackled until this phase is disposed of.<sup>11</sup> *Unjust Enrichment* is his most recent attempt to achieve that end and take unjust enrichment beyond its preliminary stage — to state unjust enrichment in such clear terms that its merits will no longer be in dispute and its status undoubted.

#### IV STEMMING THE TIDE: THE NEW RESTATEMENT

*Unjust Enrichment* is a detailed restatement of the unjust enrichment theory. Its chapter titles systematically follow what Birks considers are the requirements of unjust enrichment. He starts with the ‘core case’, defining this against the backdrop of obligations generally.<sup>12</sup> Successive chapters then define ‘Enrichment’,<sup>13</sup> ‘At the Expense of the Claimant’,<sup>14</sup> and ‘Unjust’.<sup>15</sup> After tackling the distinction between personal rights and proprietary rights,<sup>16</sup> he then discusses defences,<sup>17</sup> each of which he relates to an earlier part of the exposition (some defences are ‘enrichment’-related,<sup>18</sup> others ‘unjust’-related).<sup>19</sup> Finally, he considers ‘Competing Generics’<sup>20</sup> (that is, opposing theories) and ‘Persistent Fragments’<sup>21</sup> (which are matters rooted in the history of the subject, but inconvenient for his theory).

It is not a book for beginners. Indeed, it is not an easy read even for specialists. Birks is attempting to give his solution to every problem worth tackling in the area, and even those familiar with these problems may find the going tough. Difficulties are dealt with as they arise, even if that means that hard points are encountered well before easy ones. Some aspects of Birks’ theory — such as his notion that all liabilities arise from (mutually distinct) ‘causal events’ — are assumed from the start, with the explanation only coming later.<sup>22</sup> Nor does Birks

<sup>9</sup> See, eg, Justice Keith Mason, ‘Where Has Australian Restitution Law Got to and Where Is It Going?’ (2003) 77 *Australian Law Journal* 358, 367, drawing on Ian Jackman, *The Varieties of Restitution* (1998).

<sup>10</sup> Birks, *Unjust Enrichment*, above n 2, xiii.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid* chs 1–2.

<sup>13</sup> *Ibid* ch 3.

<sup>14</sup> *Ibid* ch 4.

<sup>15</sup> *Ibid* chs 5–6.

<sup>16</sup> *Ibid* chs 7–8.

<sup>17</sup> *Ibid* ch 9.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid* ch 10.

<sup>20</sup> *Ibid* ch 11.

<sup>21</sup> *Ibid* ch 12.

<sup>22</sup> See, eg, *ibid* 9. See at 19–26 for an explanation of ‘causal events’.

pause to explain when he is merely repeating uncontroversial conclusions, or when he is flying a kite of his own recent devising. Readers either bring that knowledge to the text themselves, or struggle on without it.

What is novel in this work? To show the respects in which *Unjust Enrichment* is new, let us take three different aspects: the retractions, the restatement of the law, and the attempts to expand unjust enrichment. For, underneath the technicality, there is no doubt as to the ultimate aim: to stop the retreat of the subject, and to reclaim at least some instances of liability which have been abandoned in the earlier headlong rush towards theoretical purity.

The retractions are perhaps the most headline-grabbing, not least because they are simplest to understand.<sup>23</sup> Firstly, Birks reiterates that restitution does not inevitably derive from unjust enrichment. Restitution may be triggered by any number of events, of which unjust enrichment is only one; Birks does not believe that there is a coherent or 'mono-causal' law of restitution to be discovered. Secondly, Birks admits that in the past he has been too reluctant to allow alternative legal analyses of the same cause of action. In particular, he was wrongly held back by the view, which he also now retracts, that a loss to the plaintiff must be proved if unjust enrichment is invoked. Thirdly, Birks retracts the concept of 'unjust factors', which featured so prominently in his earlier work. In his new view, *all* enrichments are unjust unless they can in some way be justified. Hence, the law does not start by assuming that enrichments are irrecoverable, and then look for an 'unjust factor' to justify recovery. Rather, the starting point is that enrichments *are* recoverable, and we need to look for something to justify their retention (such as an unimpeachable contract or gift). Fourthly, and most unexpectedly, Birks retracts his claim to be describing any law but English law.<sup>24</sup> How seriously this last retraction can be taken is, in crucial respects, a matter for conjecture, which I consider below.

The need for a restatement of Birks' position flows directly from the various retractions, which, taken together, spell major changes for expositions of unjust enrichment. As Birks concedes, '[a]lmost everything of mine now needs calling back for burning'.<sup>25</sup> Whether other writers will be happy to stoke this blaze must be questioned. Many will prefer 20<sup>th</sup> century Birks to his more recent counterpart;<sup>26</sup> those who have accepted the 'unjust factors' may be unhappy to be told, even by their creator, that they were in error all along. Indeed, the four retractions may seem a step backwards, for it is not always entirely clear what is replacing them. To win over these potential critics, Birks goes as far as he can in restating his updated theory, for which he makes great claims. Indeed, his

<sup>23</sup> See *ibid* xiv–xv, where Birks summarises three of these four retractions.

<sup>24</sup> This, as will be explained, is a consequence of his third retraction, which is based on English cases which other jurisdictions are free to ignore.

<sup>25</sup> Birks, *Unjust Enrichment*, above n 2, xiv.

<sup>26</sup> Justice Mason (co-author of *Restitution Law in Australia*, above n 7) intends to follow the earlier 'Birks Mk I' in his next edition, rather than the revised Peter Birks, 'Misnomer' in William Cornish et al (eds), *Restitution: Past, Present and Future* (1998) 1: Mason, 'Where Has Australian Restitution Law Got to and Where Is It Going?', above n 9, 367.

previous statements of the law were said to be merely a cocoon, whereas in his latest version the butterfly itself emerges.<sup>27</sup>

Less openly trumpeted is the cautious expansionism of the new approach. Amongst all the careful reworking of definitions, the general outward drift is discernible. Birks is quietly moving the game ahead, before most show any sign of understanding his intentions.<sup>28</sup> His insistence that the same rules must apply to all enrichments is used repeatedly to extend liability.<sup>29</sup> A quiet redefinition of ‘enrichment at the plaintiff’s expense’ catches more and more cases, and the abolition of the ‘unjust factors’ effectively moves the onus in the plaintiff’s favour: where it would have been for the plaintiff to find an ‘unjust factor’ to establish a ground for recovery, now the defendant must find a ‘justification’ to deny it. The new welcome for alternative analysis allows Birks to reclaim various liabilities that were thought to be lost. In particular, many liabilities based on wrongs can now be re-analysed to permit recovery for unjust enrichment.

Rather apologetically, Birks now asserts the ‘Englishness’ of his new theory.<sup>30</sup> He does brief penance for the sin of nationalism, but says that adherence to precedent leaves him with no alternative. Does this mean that he is abandoning Australia? Or perhaps he is worried that Australia is abandoning him? Matters seem to be on a knife edge at times. His explanations of classic Australian cases often seem remote from the actual opinions.<sup>31</sup> Yet, Australia often seems to be on his mind. He frets when the Australians show even less enthusiasm for his views on proprietary restitution than the English.<sup>32</sup> He is relieved that he can find a proper ‘Birksian’ explanation for the ‘apparently unorthodox’ case of *Roxborough v Rothmans of Pall Mall Australia Ltd*<sup>33</sup> (even though it bears no resemblance to the High Court opinions). And he bares his fangs at Ben Kremer’s suggestion that the Australian doctrine of unconscionability might all but engulf unjust enrichment.<sup>34</sup> This is not a pattern of neglect or disdain. On the contrary, it seems that Birks cares very much as to whether he carries Australia with him. Nor does he ignore Australian criticisms as such.<sup>35</sup> Rather he tends to ignore those critics, of any nation, who have proposed more simple alternative theories,

<sup>27</sup> Birks, *Unjust Enrichment*, above n 2, xiii, xiv.

<sup>28</sup> See, eg, Andrew Burrows et al, ‘The New Birksian Approach to Unjust Enrichment’ (2004) 12 *Restitution Law Review* 260.

<sup>29</sup> Birks, *Unjust Enrichment*, above n 2, 15.

<sup>30</sup> *Ibid* 113.

<sup>31</sup> See, eg, *ibid* 112, 219–20 for his various accounts of *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221.

<sup>32</sup> Birks, *Unjust Enrichment*, above n 2, 183.

<sup>33</sup> (2001) 208 CLR 516 (*Roxborough*). This is discussed in *ibid* 108–9. On the (not awfully well hidden) antipathy to Birks’ thought in *Roxborough*, see especially Katy Barnett, ‘The Uneasy Position of Unjust Enrichment after *Roxborough v Rothmans*’ (2002) 23 *Adelaide Law Review* 277, 300–3.

<sup>34</sup> *Ibid* 17–18, 160–1, 236–8. See especially Ben Kremer, ‘Restitution and Unconscientiousness: Another View’ (2003) 119 *Law Quarterly Review* 188; James McConvill and Mirko Bagaric, ‘The Yoking of Unconscionability and Unjust Enrichment in Australia’ (2002) 7 *Deakin Law Review* 225.

<sup>35</sup> Birks, *Unjust Enrichment*, above n 2, 233, 243–4. Here, Birks acknowledges the works of Samuel Stoljar, *The Law of Quasi-Contract* (2<sup>nd</sup> ed, 1989) and James Edelman, *Gain-Based Damages* (2002).

designed to secure the benefits of systematisation without over-egging the pudding.<sup>36</sup> All things considered, and given that his appeal to English precedent is rather an eccentric one (as will appear below), it seems that significant dialogue between Australia and Birks can continue for a while yet.

#### V THE 'CORE CASE' — DIRECT MONEY PAYMENTS

The easy case in restitution has always been the 'core case' — that of the direct payment of money by plaintiff to defendant (the old 'money had and received').<sup>37</sup> Just how we should treat this case is the most controversial issue in *Unjust Enrichment*. This is because all other instances of unjust enrichment are taken by Birks to be mere variants on the 'core case'. If we were interested in the 'core case' *alone*, the fuss would be inordinate. Yet for Birks, everything that can be said about this 'core case' must be able to be said more broadly. Thus considerable care is needed and with this case, then, we begin.

##### A *The 'Unjust Factors' — A Bridge from Common Law to Civil Law?*

Until now, prescribing a solution for the 'core case' has been seen by Birks as work for the 'unjust factors', which provide grounds for recovery. Mere payment to the defendant is not enough; it must be accompanied by another factor such as 'mistake' or 'duress' or some other factor. Beginners in unjust enrichment will soon find themselves with a substantial list of factors which seem to ground recovery. However, legal expositors are inevitably led to deeper questions. Is there an established list of factors? If not, can we ever be sure that a given list of factors is complete? Are the factors simply arbitrary, or is there some hidden unity — some meta-theory, so to speak — under which the individual factors can be logically deduced, or at least patterned in some fashion? That some greater unity could be expected is strongly suggested by the civil law approach to unjust enrichment, which for the most part does without 'unjust factors' at all. Rather, it holds that *any* enrichment is sufficiently 'unjust' unless there is a solid justification for considering it 'just'.<sup>38</sup> It will immediately be seen that this inversion — looking for 'justification' rather than 'injustice' — may not affect the results much, at least in the 'core case'.

We must ask what is happening. We frequently see the 'unjust factors' referred to as 'the common law approach',<sup>39</sup> to be contrasted with the civil law approach. But this is history rewritten. No common law lawyer had ever heard of the 'unjust factors' before Birks himself introduced them in 1985. The degree of

<sup>36</sup> Thus there is no mention of, for example, Joachim Dietrich, *Restitution — A New Perspective* (1998) (see esp at 50), but equally not of Peter Jaffey, *The Nature and Scope of Restitution* (2000), or Steve Hedley, *A Critical Introduction to Restitution* (2001). Ross Grantham and Charles Rickett are mentioned only as 'critics': Birks, *Unjust Enrichment*, above n 2, 235–6. There is no mention of their opposing theory in Ross Grantham and Charles Rickett, *Enrichment and Restitution in New Zealand* (2000). The section on competing modern conceptions of the subject is somewhat selective: Birks, *Unjust Enrichment*, above n 2, 235–44.

<sup>37</sup> See Birks, *Unjust Enrichment*, above n 2, for the (real, but irrelevant) ambiguities in Birks' own version of the core case.

<sup>38</sup> *Ibid* 88–91.

<sup>39</sup> *Ibid* 91.

order that they presupposed was then quite alien to the common law. ‘Unjust factors’ explicitly formed a *bridge* between common law and civil law, part of a road map towards civil law uniformity. The point was to assert that cases of ‘duress’ and ‘mistake’ are not entirely distinct heads of recovery. Rather, they are variants on a broader theme, both involving examples of recovery for unjust enrichment, differing only in that a slightly different form of injustice (‘factor’) is in play. If that intellectual move is accepted, then so is a large measure of uniformity within unjust enrichment. The great achievement of Birks’ *Introduction* was to persuade many lawyers of precisely that uniformity.

But now, it seems that this is not enough. The ‘unjust factors’ themselves look untidy from a civil law perspective,<sup>40</sup> and the only way to neaten them up is to treat them as part of a more highly ordered model. Much influenced by civil law criticism, particularly that of Sonja Meier, Birks seeks to put the damage right.<sup>41</sup>

Why did he not do so earlier? In fact, a high degree of internal order was already implicit in the factors as Birks expounded them in 1985. Most of the factors, as he then explained, were variants of *I (the plaintiff) did not really mean you (the defendant) to have the money*.<sup>42</sup> The plaintiff might deny this intent on the ground of ‘mistake’, ‘pressure’, or ‘failure of consideration’, but all of these could plausibly be regarded as variants on the same basic pattern. So further generalisation was clearly possible, and much of what Birks is now saying could in principle have been said at an earlier stage. However, the argument could not be pushed very far in 1985. Simply persuading lawyers to accept his overall theory was a big enough move. To assert that the factors themselves were part of something bigger would probably have been too broad a claim. Besides, in 1985 there were still too many loose ends and exceptions. Other factors or quasi-factors had to be postulated, such as ‘Free Acceptance’<sup>43</sup> and ‘Public Policy’,<sup>44</sup> which did not fit so neatly into a unified pattern. Furthermore, Birks was not then sure whether unjust enrichment included restitution for wrongs, which was hard to square with the factors, unified or not.<sup>45</sup> The idea of unification was always around, but Birks quite deliberately chose not to take this road in 1985.

Since the *Introduction*, what have other writers made of this? To Birks’ invitation to leave common law territory and visit the civil law lawyers, a variety of responses have emerged. Some refuse to step on the bridge at all: the rhetoric of ‘unjust factors’ presupposes a unity which the common law simply does not have. The common law’s rules on mistaken money payments are quite different from its rules on mistaken land improvements or services rendered by mistake.

<sup>40</sup> For a review of civil law criticisms, see Thomas Krebs, *Restitution at the Crossroads: A Comparative Study* (2001) esp 243–54.

<sup>41</sup> Birks, *Unjust Enrichment*, above n 2, 39, 98, 119. See especially Sonja Meier, ‘Restitution after Executed Void Contracts’ in Peter Birks and Francis Rose (eds), *Lessons of the Swaps Litigation* (2000) 168 and Sonja Meier, ‘Unjust Factors and Legal Grounds’ in David Johnston and Reinhard Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (2002) 37.

<sup>42</sup> See Birks, *Introduction*, above n 1, 140.

<sup>43</sup> *Ibid* pt VIII.

<sup>44</sup> *Ibid* pt IX.

<sup>45</sup> Birks, *Unjust Enrichment*, above n 2, 36–8.

Unity in the common law must be sought by other means.<sup>46</sup> Others go some way with the factors, but are really not prepared to give up their common law freedom. Birks does not feel free to modify the definition of ‘enrichment’ for each of the different factors, but others do. For example, Mindy Chen-Wishart believes that ‘[i]n working out the precise details of the restitutionary response, the nature of the unjust factors, embodying the reasons for restitution, come[s] to the fore’.<sup>47</sup> So a nod may be made to theoretical unity, while in fact retaining the common law’s diversity. Also of this frame of mind have been those judges who have developed unjust factors of their own, such as ‘absence of consideration’.<sup>48</sup> Nobody told their Lordships that there was any limit to the factors that may be postulated. In the middle of the bridge stand perhaps the bulk of the theorists, who are in rough agreement with the *Introduction*’s approach, but always argue furiously over the details — and are clearly *not* in agreement on a single list of factors. But would anyone go further in the civil law direction? Logically, there is a further step which *could* be taken in the civil law direction without fully accepting civil law ways of thought. That is, to domesticate the factors, by fitting them into a logical ‘pyramid’, thus eliminating all the factors which do not quite fit such a tidy pattern.<sup>49</sup> But there is little point in doing this unless we mean to go the whole way: to eliminate the factors entirely, and to base liability on an absence of justification.

#### B *Getting By without the Factors*

That further step described above is the one that Birks has now taken. For him, the unjust factors are no more. Birks has succumbed to the siren song of § 812.I.1 of the German *Bürgerliches Gesetzbuch* (‘*German Civil Code*’) and now suggests that all enrichments are *prima facie* unjust. It is not for the plaintiff to point to an ‘unjust factor’ grounding recovery; rather, the defendant must point to an explanation or justification for the enrichment, such as that it was a gift or was conferred under contract.<sup>50</sup> We need to be clear that this is not a wholesale adoption of German concepts. While the new version of unjust enrichment bears a decidedly non-accidental resemblance to § 812.I.1 of the *German Civil Code*,

<sup>46</sup> See, eg, Steve Hedley, *Restitution: Its Division and Ordering* (2001).

<sup>47</sup> Mindy Chen-Wishart, ‘In Defence of Unjust Factors: A Study of Rescission for Duress, Fraud, and Exploitation’ [2000] *Oxford University Comparative Law Forum* 2, 191–3, available at <<http://oucl.iuscomp.org>> and reprinted in David Johnston and Reinhard Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (2002) 191. See also Mindy Chen-Wishart, ‘Unjust Factors and the Restitutionary Response’ (2000) 20 *Oxford Journal of Legal Studies* 557.

<sup>48</sup> See, eg, *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70, 197–9 (Lord Browne-Wilkinson) (‘*Woolwich*’).

<sup>49</sup> Birks, *Unjust Enrichment*, above n 2, 90–1, 101–2.

<sup>50</sup> Tony Weir translates the first paragraph of the *German Civil Code* § 812.I.1 as follows: ‘A person who without legal justification ... obtains anything from a person at his expense, whether by transfer or otherwise, is bound to give it up to him’: Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (Tony Weir trans, first published 1977, revised ed, 1998) 540 [trans of: *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts*].

nonetheless Birks' overall conception of the subject is still noticeably broader (and much more unified) than the German conception.<sup>51</sup>

Obviously enough, while this is a reversal on a fundamental matter, in the 'core case' at least it does not have many implications for liability. The change is one of terminology. Whereas 'mistake', 'undue influence' and 'failure of consideration' were previously distinct grounds in themselves, now they are merely different reasons why a particular transaction may be impugned, so that benefits conferred under it are 'unjustified'. This opens the way to the elimination of the unjust factors, which Birks treats with relish. 'Mistake' is no longer a ground of recovery, nor is 'duress': both are simply reasons why transactions may be impugned. Benefits under invalid or illegal transactions, hitherto regarded as difficult, now become easy cases: benefits conferred under such transactions are automatically 'unjust'. The question-begging 'ignorance' is gone. Also, all discussion of 'failure of consideration' or 'absence of consideration' may be subsumed into unjust enrichment without any risk of confusion with contract. It will be enough to say that the basis of the transaction has failed. Many of the problems which have beset the unjust enrichment theorists now simply vanish in a puff of logic. But this apparent simplification is not quite what it seems. Rather, as it will emerge below,<sup>52</sup> the problems have not disappeared; they have simply moved house. Nonetheless, it is certainly true that no more thought need be given to what is or is not an 'unjust factor'.

### C *Why Make the Change? The 'Swaps Cases' Reconsidered*

Birks says that this change of approach is not a matter of choice — rather, he is forced into it by recent English case developments.<sup>53</sup> This is why he now restricts his theory to England, no matter how similar other systems may be.

This, I suggest, should be taken with a grain of salt. Forced or not, Birks is plainly content to be going in this direction, and he does not deny that he might find it an attractive destination in any case.<sup>54</sup> Nonetheless, his argument from the 'Swaps Cases' must be looked at in some detail, not least because they would not necessarily be followed in Australia — if indeed their (somewhat unusual) facts were ever repeated.

The 'Swaps Cases' are set against the gloomy backdrop of the United Kingdom's constitutional politics in the 1980s. Central government was determined to restrict local government expenditure, but was only slowly developing the auditing regime necessary to assert such close control. Meanwhile, local authorities were reluctant to surrender control of their finances, though increasing financial sophistication was necessary to circumvent central government control. A number of local authorities sought a solution by entering into interest rate swaps which were not on the balance sheet. At the time, these were relatively novel transactions. This gave the authorities considerable flexibility in debt

<sup>51</sup> See, eg, Krebs, *Restitution at the Crossroads*, above n 40, 19–20, 27, 209–17.

<sup>52</sup> See below Part V(D).

<sup>53</sup> Birks, *Unjust Enrichment*, above n 2, 99.

<sup>54</sup> *Ibid* 100–1, 143, 182.

management which was not otherwise open to them. However, this particular house of cards was brought to the ground by a decision of the House of Lords that local authorities had no power to enter into such arrangements.<sup>55</sup> All of the swaps were held to be ultra vires and void.<sup>56</sup> But where did this leave the parties to the swaps? Under a typical swap, a succession of payments would have been made over time — some by banks to local authorities and some the other way, depending on how interest rates had varied and on the precise terms of the swap. Was it necessary to return all those payments? Did it matter whether a swap transaction had run its course before the illegality was revealed (and hence was a ‘closed’ swap, as opposed to an ‘open’ one which never ran its full course)? Did it matter how long ago this happened? And if so, how did the law of limitation apply?

The ensuing litigation was complex.<sup>57</sup> In a variety of rulings, it became clear that *all* payments made under swap arrangements were recoverable by the payer, and that this applied to ‘closed’ swaps just as it did to ‘open’ swaps. Various grounds for this recovery were suggested: ‘absence of consideration’, ‘failure of consideration’, and the policy behind the relevant statute.<sup>58</sup> The issue of ‘mistake’ then emerged, as the importance of the law of limitations became clearer. While the point was not directly in issue in the crucial case of *Kleinwort Benson v Lincoln City Council*,<sup>59</sup> their Lordships plainly thought that ‘mistake’ was also a possible ground of recovery.

This multiplicity of suggested bases for recovery is Birks’ starting point. His argument seems to be this: although various and quite distinct bases for recovery have been suggested, only one can be right. This is not because there cannot be more than one basis for recovery; Birks fully accepts the possibilities of alternative analysis. However, *these* reasons are mutually incompatible, he claims. A legal system which truly believes in ‘absence of consideration’ as a ground of recovery cannot also uphold ‘mistake’ as a ground of recovery, for each logically precludes the other.<sup>60</sup> Similarly, neither can stand with ‘public policy’, which again derives from a quite different mind-set. Birks draws on an analogy that ‘[f]rom the premiss that animals can be hairy, carnivorous, and black one cannot infer that in a census of the local canine population the labrador next door should count as three’.<sup>61</sup> Thus, only one of these approaches can truly represent the law; the only question is which one? Birks argues that, all things considered, ‘absence

<sup>55</sup> *Kleinwort Benson v Lincoln City Council* [1999] 2 AC 349 (‘*Kleinwort Benson*’).

<sup>56</sup> *Hazell v Hammersmith & Fulham London Borough Council* [1992] 2 AC 1.

<sup>57</sup> For a general review, see Peter Birks and Frank Rose (eds), *Lessons of the Swaps Litigation* (2000).

<sup>58</sup> Support for all three can be found at different points in *Guinness Mahon & Co Ltd v Kensington & Chelsea Royal London Borough Council* [1999] QB 215 (though ‘failure’ is specific to the ‘open’ swaps). See Birks, *Unjust Enrichment*, above n 2, 96, 100.

<sup>59</sup> [1999] 2 AC 349.

<sup>60</sup> Note that this assertion of incompatibility drives a wedge between Birks’ approach and the actual English cases, which not only recognise both, but have started to address the problems caused by the overlap. See especially *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2003] EWHC 1779, noted by Steve Hedley, ‘Restitution and Taxes Mistakenly Paid’ (2003) 5 *Web Journal of Current Legal Issues* <<http://webjcli.ncl.ac.uk/2003/issue5/hedley5.html>>.

<sup>61</sup> Birks, *Unjust Enrichment*, above n 2, 98.

of consideration' is closest to the truth, though he prefers to see through the awkward common law wrapping to the essence of the civil law, and call it 'absence of basis'.<sup>62</sup> So the 'Swaps Cases' propel Birks on the final leg of his journey to the ordinary approach: acceptance that all enrichments are unjust unless a valid legal explanation can be found.<sup>63</sup>

As legal proofs go, this one is on the impenetrable side. It is partly an appeal to logic and partly an appeal to precedent. Yet neither element seems compelling to this writer.

As an appeal to logic, it is a strange one. Legal systems recognise multiple bases of recovery all the time. From a Herculean standpoint, by rationalising the entire system with a single logical entity, the different bases will, no doubt, be mutually incompatible. But that is precisely why most people doubt the Herculean standpoint as a description of real legal systems.<sup>64</sup> If it is illogical to mix conceptual bases in this way, then *every* legal system *everywhere* is illogical. This includes Germany<sup>65</sup> amongst the rest.<sup>66</sup> Arguments that civil law jurisprudence has, in general, usefully combined 'justification' with 'unjust factors' are not noticeably lacking in logic.<sup>67</sup> In reality, no existing legal system can meet Birks' high standard. Therefore, nobody should be too worried that their own system does not meet this standard. Birks' version of 'logic' seems too fine-spun for everyday use. It is also entirely circular: nothing in the cases demands such a high level of logical consistency. This axiom comes from Birks alone.

As an appeal to precedent, Birks' argument is even more baffling. The 'Swaps Cases' assert and base themselves on a number of different unjust factors. Now someone who dislikes this position — one who either dislikes these particular factors, or dislikes the very idea of factors — may do much to reduce the authority of these cases. They may live in a jurisdiction where those cases are merely persuasive, or they may downplay the judicial accounts of the various factors.<sup>68</sup> These and other points may reduce the authority of the 'Swaps Cases' considerably. But what surely cannot be done, on any conventional theory of precedent, is to treat the 'Swaps Cases' as *counting for the other side*, so that judicial assertions that such-and-such is an unjust factor somehow become authority for there being no such things as unjust factors. Weaken the authority

<sup>62</sup> Ibid chs 7–12.

<sup>63</sup> Ibid 96–102. It is hard to do complete justice to the highly compressed argument in those pages, and it is a pity that this part of Birks' thesis was not spelled out at greater length.

<sup>64</sup> Unless, of course, it is conceded that Hercules is as confused as any real person.

<sup>65</sup> See Krebs, *Restitution at the Crossroads*, above n 40, 28–9, 139–58, 218 for the dispute over whether the *German Civil Code* § 812.1.2 is a distinct 'unjust factor', or a mere example to illustrate § 812.1.1. See also Thomas Krebs, 'Unrequested Benefits in German Law' in Jason Neyers, Mitchell McInnes and Stephen Pitel (eds), *Understanding Unjust Enrichment* (2004) 247, arguing that German law's apparent neglect of substantive reasons for restitution is, to a great extent, illusory.

<sup>66</sup> See, eg, Lionel Smith, 'The Mystery of "Juristic Reason"' (2000) 12 *Supreme Court Law Review* 211 (Canada); M W Scheltema, 'Restitution and Mistaken Payment' in Eltjo Schrage (ed), *Unjust Enrichment and the Law of Contract* (2001) 85 (Holland).

<sup>67</sup> Francesco Giglio, 'A Systematic Approach to "Unjust" and "Unjustified" Enrichment' (2003) 23 *Oxford Journal of Legal Studies* 455.

<sup>68</sup> Certainly, the judges were far more interested in whether the payments were recoverable at all than in which of the possible arguments to justify recovery was the preferable one.

of a case as you may, a case can never become an authority for *precisely the opposite conclusion to the one the court reached*. Yet this seems to be what Birks claims.<sup>69</sup> This is not an appeal to precedent, or at least not to precedent as we know it.

What precisely was held in the ‘Swaps Cases’, and especially in *Kleinwort Benson*, is actually a question of great subtlety — a subtlety which is only beginning to be deployed in academia. Considered as a precedent, *Kleinwort Benson* is a disaster, despite appearing straightforward at the time. All then accepted that there was liability if an operative mistake could be shown, within limits. The question for the Lords was therefore the extent of those limits; in particular, whether mistakes of law were subject to a different rule (their Lordships said, definitively, ‘no’), and whether there was a special limitation period for actions ‘for relief from the consequences of a mistake’ (their Lordships said, definitively, ‘yes’).<sup>70</sup> In hindsight, it is clear that the Lords were asked the wrong questions; indeed, they were asked incoherent and meaningless questions. Why was it assumed that the payments in the case were ‘mistaken’ at all? It was certainly very convenient for the parties if it was assumed that they had participated in an illegal transaction only ‘by mistake’. However, on the facts, it seems a little optimistic; certainly no lower court held that there was a mistake, and the Lords did not claim to find new facts. Furthermore, why was it assumed that ‘mistake’ in the *Limitation Act 1980* (UK) c 58 had the same meaning as mistake in the context of liability? This is certainly a possible view, but a rather insecure one. Were the Lords discussing ‘mistake’ as a ground of liability, or ‘mistake’ in the context of the *Limitation Act* — or are they to be taken as asserting that the two are the same (an issue they certainly never addressed directly)?<sup>71</sup> *Kleinwort Benson* is, in short, built on sand, and a variety of forces are rapidly dissolving its foundation. How much of the case will survive is a matter for speculation.

#### D *Are We Better Off without the ‘Factors’?*

Birks’ claim that he is compelled to abandon the ‘unjust factors’ does not, therefore, hold much water. However, might his new idea nonetheless be a good one? After all, it enables us to forget the unjust factors. Could it not be said that this intellectual move makes the law simpler and clearer?

This is not a line which Birks pursues, and it seems doubtful whether he could make good this claim. For while the new approach does indeed avoid the need to

<sup>69</sup> The peculiarities intensify because Birks admits that *Kleinwort Benson* [1999] 2 AC 349 assumed that there *are* such things as unjust factors: Birks, *Unjust Enrichment*, above n 2, 120. Cf Andrew Burrows, *The Law of Restitution* (2<sup>nd</sup> ed, 2002) 48–51. Burrows uses *Kleinwort Benson* as part of his claim that the factors *are* a useful part of the law of unjust enrichment.

<sup>70</sup> The relevant legislation is *Limitation Act 1980* (UK) c 58 s 32(1)(c) (*‘Limitation Act’*). Very similar in effect though differently drafted (both reflect the same traditional equity rule) is *Limitation Act 1969* (NSW) s 56(1).

<sup>71</sup> See especially Birks, *Unjust Enrichment*, above n 2, 119–21, 214. Both NSW and English authority (not discussed in *Kleinwort Benson*) hold that the two issues *are* linked — an action ‘for relief from the consequences of a mistake’ is not merely one that happens to set a mistake right — mistake must be ‘the gist of the action’: see, eg, *Hillebrand v Penrith Council* (Unreported, Supreme Court of New South Wales in Equity, Austin J, 14 November 2000). However this is a vague criterion.

define the ‘unjust factors’, this simply renames the difficulties and moves them to other areas. The Titanic was not saved by rearranging the deckchairs around the quarterdeck, and unjust enrichment is no better a candidate for such treatment. Certainly, the plaintiffs in the ‘Swaps Cases’ would no longer need to debate whether they were relying on ‘absence of consideration’ — the mere invalidity of the swap transactions would be enough. However they would have to contest a new defence of ‘stultification’: that granting them a remedy would defeat the objects of the very provision which rendered the transaction invalid.<sup>72</sup> The new approach avoids the need for the use of ‘unjust factors’ to list all the reasons why a transaction may be invalid, but it does not avoid the need for such a list to exist *somewhere* in the law. So many of the difficulties expelled from the concept of ‘unjust’ under the new analysis reappear as ‘unjust-related defences’ a few chapters later.<sup>73</sup> Certainly they *all* have to reappear *somewhere* in the law (though not necessarily in the restitution books). Furthermore, the list of ‘justifications’ is neither static nor closed, any more than the list of ‘unjust factors’ was. Birks has not simplified. He has merely rearranged.

As Birks candidly admits, his new approach leaves many problems unresolved. Indeed, they are simply the old problems in ‘new clothes’. Now that the spotlight is turned on to ‘failure of basis’ rather than ‘mistake’, the essential arbitrariness of the former formulation is becoming apparent. Birks is already required to insist that either a particular basis fails or it does not, even though the resulting line is necessarily rather stark, not to mention artificial.<sup>74</sup> Furthermore, the new approach may not, after all, avoid the issues of ‘mistake’. German law does not avoid such issues, for it provides a defence where the plaintiff knew the crucial facts,<sup>75</sup> thus achieving much the same result, with its attendant problems. Birks tentatively suggests that the same result now follows in England,<sup>76</sup> though he gives little coverage to the various leading English cases which stand as obstructions.<sup>77</sup>

### E Conclusion

In summary, Birks’ new approach is not a simplification of the law, and he does not claim that it is. Its appeal to logic will only satisfy those who have

<sup>72</sup> See Birks, *Unjust Enrichment*, above n 2, 217–18, where Birks assumes, unconvincingly, that ‘stultification’ could not be established in the ‘Swaps Cases’. Proper consideration of the point might involve distinguishing between local authority plaintiffs and bank plaintiffs.

<sup>73</sup> *Ibid* ch 10.

<sup>74</sup> *Ibid* 106–10.

<sup>75</sup> *German Civil Code* § 814. The Australian position is therefore not dissimilar to the German position, though it is an open question whether the English rule would be followed if novel facts forced the courts to choose between the German and the English rules: see, eg, *Hollis v Atherton Shire Council* [2003] QSC 147 (Unreported, Jones J, 18 March 2003) [45]–[46].

<sup>76</sup> Birks, *Unjust Enrichment*, above n 2, 116.

<sup>77</sup> See especially *Woolwich* [1993] AC 70. See also Hedley, *Restitution: Its Division and Ordering*, above n 46, 4–9. Birks’ thoughts on the ‘ordinary’ nature of the *Woolwich* decision seem overly optimistic: Birks, *Unjust Enrichment*, above n 2, 118. The difficulty in these English cases is that the plaintiff was not mistaken, but found immediate litigation unpalatable and so paid anyway. Whether it is legitimate to postpone litigation in this way will need direct addressing, perhaps under the law of procedure rather than restitution.

accepted its conclusions for other reasons. The logic is circular, and under its demanding standards there are no truly logical legal systems in the world (except, possibly, English law as conceived by Birks). Furthermore, its appeal to precedent is a strange example of the species, for the proposition it extracts from the cases is directly contradicted in every one of them. The unspoken argument in favour of the new approach (as is so often the case with Birks' writing) is perhaps aesthetic. The limpid beauty of the *German Civil Code* § 812.I.1 has got under his skin, and encouraged him to copy it, or even improve upon it, on English soil. But selective transplants of foreign law are always problematic. The *German Civil Code* § 812.I.1 has caused enough difficulties within Germany; and as Thomas Krebs notes, general provisions in civil codes are only ever of limited importance in resolving any particular dispute (a point which the German judiciary appreciates well, but their English colleagues, through lack of experience of codes, may not).<sup>78</sup>

Hence, many difficulties await the new theory. The first hurdle will no doubt be whether the English legal system can accept Birks' theory of unconscious law-making. Birks insists that '[t]he swaps cases did not know that they were making a momentous choice, but they were, and in fact they chose the better method'.<sup>79</sup> It will be interesting to observe their Lordships' expressions as counsel explains to them that their seminal ruling in *Kleinwort Benson*, apparently holding that mistake of law was to be recognised as an 'unjust factor', in fact held the converse — that there are no such things as 'unjust factors' at all. Their Lordships' response to that will perhaps set the tone for the next phase of scholarship.

## VI EXTENDING THE BASIC MODEL

Precisely where writers in this area stand in relation to 'unjust enrichment' depends largely on their interpretation of the attempts to apply the analysis more broadly. That is, how well does it explain the wider picture? Naturally, *Unjust Enrichment* does not consider this separately, for its entire thesis is that the same rules apply generally. It is an integrated treatment of everything which Birks takes to be within unjust enrichment. Nonetheless, its success or failure turns on its treatment of the outlying areas, which shall now be considered.

### A *Not Just Money in the Defendant's Hands?*

*Unjust Enrichment* takes, as an example of the 'core case', the accidental overpayment of money<sup>80</sup> — for example, if you buy goods in a store and tender \$20, but by accident you receive change as if you had tendered \$50. Immediate recovery of the overpayment is obviously just (though there are more possible explanations of this injustice than Birks allows). For Birks, what is important is that you received an unjustified *enrichment* which you should return. The simple case of extra cash received is seen as a mere example of a broader principle,

<sup>78</sup> See especially Krebs, *Restitution at the Crossroads*, above n 40, 17–21.

<sup>79</sup> Birks, *Unjust Enrichment*, above n 2, xv.

<sup>80</sup> *Ibid* 3.

which should apply whenever the defendant is enriched, whatever form this enrichment takes. Birks maintains that '[w]hat works for money must work for value received in other forms'.<sup>81</sup>

This is all elementary. However, the trouble is that this elementary theory is wrong. In the overpayment example, putting the matter right is simple and relatively painless, if done quickly: you hand over the stray \$30. But the slightest change to the example alters both the equities of the case and the complexity of the remedy. You may, for example, accidentally have been the recipient of services objectively worth \$1000, but of course you cannot simply 'return' them. You might justly resent being ordered to pay \$1000 for them (especially as you may not *have* \$1000 spare). Or, for example, the value of your house might have been accidentally increased by \$5000; a court order to raise that sum and transfer it to your 'benefactor' is a harsh thing, certainly if you do not happen to have that much free capital, and quite possibly even if you do. The truth is that the case of the accidental overpayment is not typical at all. Money is just not the same as other types of assets. It is fungible and easily transferred, which means that mistakes are more common but also easier to correct. Furthermore, money has no 'use value' at all, its value being only in where and when it is spent. The reasons why it is so obviously just to return the money simply do not apply to other, even slightly different, cases, and to take it as the core case is a misuse of examples.<sup>82</sup>

Large expanses of unjust enrichment theory, by Birks and others, are attempts to get around this difficulty, and to say on what terms other enrichments are to count *as if* they were money. Readers of *Unjust Enrichment* who hope for some new solution to this conundrum will be disappointed, for it adds little to existing treatments. Birks merely offers a review of the various conceptual tools for converting a received benefit into a sum of money.<sup>83</sup> For example, a benefit may be assessed at its market price ('objective valuation'), or by asking whether it saved the defendant money, or whether it has been or could be realised in cash. The problem here is a familiar one: there are too many theories, each of which is plausible enough when *viewed as a mere concept*, but none of which bears much resemblance to the actual case law on the topic. The real problem is not addressed. The difficulty is *not* in putting a monetary value on, say, an unwanted improvement to property — anyone can do this. Rather, the difficulty is that if the value of \$X is placed on the property, unjust enrichment theory then requires that liability is imposed *as if the owner had received \$X in cash*. Yet that will often be unjust, sometimes monstrously so. As a civil law commentator notes, unless a very tight hold is kept on this sort of liability, the simplest way to ruin a person would be to enrich them.<sup>84</sup> To value improvements to my house at \$X is

<sup>81</sup> Ibid 43.

<sup>82</sup> Intriguingly, Birks can understand this as a *historical* point. English law refused to go from 'money had and received' to 'enrichment had and received' *precisely because* other forms of enrichment could not be sensibly treated as if they were money. However Birks puts this down to 'tunnel vision' rather than common sense: *ibid* 251.

<sup>83</sup> Ibid 47–53.

<sup>84</sup> See Martin Schermaier, 'Current Questions in the German Law of Enrichment' in Eltjo Schrage (ed), *Unjust Enrichment and the Law of Contract* (2001) 115, 119.

not at all the same thing as saying that I have received \$X. Receipt of money is quite different from other sorts of enrichment. The common law recognises this by making remedies available for ‘money had and received’ which are simply not available for other types of enrichment, and rightly so. Although Birks denies this fundamental difference, he says nothing new to surmount the basic difficulty.

Similarly difficult to fit into the core pattern is the area of recoupment, contribution and subrogation. These cases are squeezed in (barely) by saying that to pay off a debt which the defendant ought to have paid ‘enriches’ that defendant. So if I owe \$100 to X, then for you to pay off that debt is equivalent to giving me \$100 directly. This is obviously possible as a matter of logic, though it also increases the complexity markedly. But what is the point? Most writers who claim those areas for unjust enrichment then go on to ignore the full unjust enrichment analysis. So Mason and Carter, like Goff and Jones before them, simply say that unjust enrichment is at the root of liability, but then make little or no use of ‘unjust enrichment’ in expounding it. It is merely a label, telling us little about when the liability applies.<sup>85</sup> The only writer to delve deeper and apply Birks’ theory to concrete instances of liability is Charles Mitchell, who has sought to deal with the ramifications of ‘enrichment’, and to tie down the ‘unjust factors’.<sup>86</sup> But where does that work lie now, with the ‘unjust factors’ disowned by their creator? Those who think it useful to define the liabilities in those terms must either begin again, or develop their own apology for the use of factors. Birks’ scattered observations on the topic throughout *Unjust Enrichment* are of only limited value,<sup>87</sup> and it must seriously be questioned whether there is any point in imposing such a high level theory on an area that seems to proceed happily enough without it. Perhaps Birks can be persuaded to follow the civil law lead here, and omit it from the scope of unjust enrichment.

### B *Is Loss Irrelevant?*

In most examples of the ‘core case’, there is both a gain to the defendant and a loss to the plaintiff. This is not an accidental feature of the transaction. Indeed, the ‘gain’ and the ‘loss’ are simply the same thing described from different directions. Is this equally true when the ‘core case’ is generalised to other situations? Birks concedes that in principle it might be, noting that some civil law systems do indeed define the action for unjust enrichment in terms of loss as well as gain.<sup>88</sup> Nonetheless, Birks uses both English and Australian authority to illustrate two classes of cases that show that this is not the common law way.<sup>89</sup>

<sup>85</sup> Mason and Carter, above n 7, ch 6. This is not a criticism of Mason and Carter; they expound the law perfectly well while making only nominal reference to unjust enrichment, which *should* make them question the point of the nominal reference.

<sup>86</sup> Charles Mitchell, *The Law of Subrogation* (1994). See also Charles Mitchell, *The Law of Contribution and Reimbursement* (2003) 43. On Mitchell’s use of the ‘unjust factors’, see Hedley, *Restitution: Its Division and Ordering*, above n 46, 135–40.

<sup>87</sup> Birks, *Unjust Enrichment*, above n 2, 141–2, 153–5, 181–2, 256–9.

<sup>88</sup> *Ibid* 69–70.

<sup>89</sup> *Ibid* 64–6, 196–8. Much of this is in response to Ross Grantham and Charles Rickett, ‘Disgorgement for Unjust Enrichment?’ (2003) 62 *Cambridge Law Journal* 159, 166–71.

Firstly, there are cases where, right from the start, there is a gain to the defendant without any corresponding loss to the plaintiff. For example, where the defendant trespasses on the plaintiff's property for a period, the defendant has gained something of value, even though the plaintiff may not be a penny the worse off.<sup>90</sup> However this is hard to accept. If we are prepared to say that the defendant has 'gained' the use of the land, it is hard to see what stops us saying that the plaintiff has 'lost' it. Birks can hardly deny tort lawyers the same intellectual moves that he allows himself. In fact, tort lawyers have for some centuries described that situation as one where the plaintiff has 'lost' the use of the land, which is then valued at the market rate ('mesne profits'). It is hard to see what Birks can say against this that cannot also be said against his 'gain' theory.

Secondly, while Birks concedes that nearly all cases involve an *initial* loss to the plaintiff, he argues that nonetheless loss often shifts to others.<sup>91</sup> A typical example is the sales tax that is wrongly charged, where the plaintiff dealer pays the tax to the defendant taxing authority, and then recoups it by increasing their prices. If the dealer then reclaims the tax from the authority, it is no answer to point out that the plaintiff has 'passed on' the loss to his or her customers. Thus, Birks argues, the crucial point is not that the plaintiff lost (since overall, they lost nothing) but that the defendant gained. This is a more substantial point, but in fact it proves too much. If right, it also catches any *tort* case where the plaintiff has received other benefits in respect of the loss, as in the standard road traffic case where the injured plaintiff receives insurance benefits but then allows the insurer to sue the defendant on their behalf. For while the precise scope of the rule in tort is unclear, 'in practice, very few monetary benefits received by a plaintiff from other sources will be taken into account in reduction of damages'.<sup>92</sup> If the plaintiff's loss has been made good, then on Birks' argument the action must be for an enrichment unjustly gained. Is most of tort, then, based on unjust enrichment? The point is that in all these cases — both restitution and tort — the loss has not *really* been made to vanish, but has simply been shifted around to a slightly different party. Whether it has gone so far from the original plaintiff as to extinguish the plaintiff's right of action can be a difficult question. However, to say simply that 'there is no longer a loss' does not begin to address that complexity. The loss in these cases is as real as the gain.

### C Not Just Direct Enrichment?

Yet Birks simultaneously seeks to expand unjust enrichment into a quite different dimension. The core case of a direct payment from plaintiff to defendant is again the starting point. Here, the payment received is said to be 'at the expense of the plaintiff' in a simple sense (the money came from the plaintiff's pocket, till or bank account). However, Birks insists that the law should be no different if

<sup>90</sup> Birks, *Unjust Enrichment*, above n 2, 64.

<sup>91</sup> *Ibid* 64–6. This aspect of Birks' thesis is much more orthodox in Australia than it is in England: see especially *Roxborough* (2001) 208 CLR 516.

<sup>92</sup> Rosalie Balkin and Jim Davis, *Law of Torts* (2<sup>nd</sup> ed, 1996) 370.

the money was ‘at the plaintiff’s expense’ in quite a different sense. This includes cases where the money went from plaintiff to defendant by a more circuitous route. There is no requirement that it should ever have visited the plaintiff at all, so long as it can in some other sense be said to be ‘at the plaintiff’s expense’.

This proposition broadens the liability considerably. The main ways in which liability is now extended beyond the core case are individually complex and are interrelated throughout the book. These are as follows:

- *Receipt of property*. Where I find your property in my hands, this is in itself a gain at your expense. Again, if I use that property to make some other acquisition, then that acquisition too is a gain at your expense.<sup>93</sup>
- *Leap-frogging*. You overpay me. Discovering that I am richer than I had expected, I give an expensive present to my good friend X. Can you sue X? Birks now thinks that the general answer must be ‘yes’, though X would have the usual restitutionary defences.<sup>94</sup>
- *Interceptive subtraction*. Benefits are sufficiently at the plaintiff’s expense so long as they were ‘on their way, in fact or law, to the claimant [plaintiff] when the defendant intercepted them’.<sup>95</sup> This notion of benefits ‘caught in transit’ is not entirely new, but it is now considerably expanded.<sup>96</sup>
- *Tracing*. You overpay me and the enrichment is converted into another form, when, for instance, I pay it into a bank or buy some fresh asset with it. Birks says that your claim stretches to the new form of the enrichment, and that the rules defining how we recognise the enrichment in its new guise are also part of the law of enrichment.<sup>97</sup>
- *Proprietary effects of transfers*. You overpay me. If it matters, can you claim that the very coins and notes constituting the overpayment are yours? In principle you can, says Birks. Unjust enrichment gives rise not only to personal claims but to proprietary claims.<sup>98</sup>

These concepts weave in and out of *Unjust Enrichment*, and it is hard to tell where they will end up. The main idea that lies behind most of them is one Birks has expounded before: that property law is not in itself an independent source of liability, but merely a mask for such sources. When we see the economy at work, we should look through the transfers of property and see enrichment in motion. Property is not an ‘event’ but a ‘response’.<sup>99</sup> Many of the consequences of this are unclear. Indeed, the lack of an overall definition should make even the most

<sup>93</sup> Birks, *Unjust Enrichment*, above n 2, 53–8.

<sup>94</sup> Ibid 75–84, deriving some support from the *German Civil Code* § 822. For the contrary view (leap-frogging generally prohibited), see Burrows, above n 69, 31–41.

<sup>95</sup> Birks, *Unjust Enrichment*, above n 2, 66.

<sup>96</sup> Ibid 66–72. For comment, see Mitchell McInnes, ‘Interceptive Subtraction, Unjust Enrichment and Wrongs — A Reply to Professor Birks’ (2003) 62 *Cambridge Law Journal* 697.

<sup>97</sup> See especially Birks, *Unjust Enrichment*, above n 2, 68–71.

<sup>98</sup> Ibid ch 8.

<sup>99</sup> See especially ibid 29–34, 58–60. Birks has been developing these interrelated ideas at least since Peter Birks, ‘Property and Unjust Enrichment: Categorical Truths’ [1997] *New Zealand Law Review* 623. For criticism, see especially Ross Grantham and Charles Rickett, ‘Property Rights as a Legally Significant Event’ (2003) 62 *Cambridge Law Journal* 717.

pro-Birks scholars hesitate before signing up for such a jurisprudential mystery tour.

Several points *are* clear, however. Firstly, the new theories, taken together, amount to a noticeable expansion of the law of unjust enrichment, at the expense of both property law and of wrongs. Birks denies that any remedy can derive from property law. He is also beginning to extend alternative analysis to take back many cases earlier surrendered to other disciplines. Therefore, a profit made by trespassing on the plaintiff's land may be brought within the law of unjust enrichment, not as unjust enrichment through a wrong (which he still regards as unacceptable), but as unjust enrichment at the expense of the land's owner.<sup>100</sup> Indeed, as Mitchell McInnes points out, this re-analysis seems to have no logical end short of reabsorbing nearly all of 'restitution for wrongs' into proper unjust enrichment.<sup>101</sup> The logic Birks uses to recapture a few cases could be used on nearly all of them. In an early chapter, Birks remarks that a liability to pay a gain-based tax — such as income tax — cannot be an example of unjust enrichment, as the enrichment (the income received) is not at the revenue's expense.<sup>102</sup> Yet on the expanded version of the theory, which Birks now pursues, that is not obvious at all.

Secondly, this expansion is urged purely on the grounds of 'logic' — that is, on the consistent application of Birks' own concepts. He makes no concessions to those who prefer other concepts, nor is there any justification given for his choice of premise. His treatment of the House of Lords cases standing in his way is startling, even savage. In *Westdeutsche Landebank Girozentrale v Islington London Borough Council*,<sup>103</sup> the House of Lords directly contradicts Birks' view on proprietary restitution. Birks replies that the matter is much more complicated than a mere *court* can possibly imagine, and that it would take the verdict of Parliament backed by a royal commission against him before he would acquiesce.<sup>104</sup> The decision in *Foskett v McKeown* directly rejects Birks' views on property, asserting that the law of tracing is part of property law, not unjust enrichment.<sup>105</sup> Birks replies that this embodies 'a disabling heresy',<sup>106</sup> is 'unfortunate',<sup>107</sup> and involves a 'fiction' which operates to 'conceal' the true position. Quite simply, '[t]heir Lordships must have intended to say' something entirely different from what they did in fact say!<sup>108</sup> Yet these aspects of Birks'

<sup>100</sup> Birks, *Unjust Enrichment*, above n 2, 70, explaining *Edwards v Lee's Administrator*, 96 SW 2d 1028 (1936).

<sup>101</sup> McInnes, above n 96, 709–15.

<sup>102</sup> Birks, *Unjust Enrichment*, above n 2, 24.

<sup>103</sup> [1996] AC 669 ('*Westdeutsche*').

<sup>104</sup> Birks, *Unjust Enrichment*, above n 2, 163. Birks' more detailed discussion suggests that *Westdeutsche* is called into question by *Kleinwort Benson* — or rather by the new view on 'unjust' which he says that *Kleinwort Benson* requires: at 170–4.

<sup>105</sup> [2001] 1 AC 102. For commentary, see Craig Rotherham, 'Property and Unjust Enrichment: A Misunderstood Relationship' in Alastair Hudson (ed), *New Perspectives on Property Law, Obligations and Restitution* (2004) 187; Graham Virgo, 'Vindicating Vindication: *Foskett v McKeown* Reviewed' in Alastair Hudson (ed), *New Perspectives on Property Law, Obligations and Restitution* (2004) 203.

<sup>106</sup> Birks, *Unjust Enrichment*, above n 2, 183.

<sup>107</sup> *Ibid* 31.

<sup>108</sup> *Ibid* 32, 71.

theory have been respectfully considered at the highest levels, and decisively rejected; indeed, it is hard to see how their Lordships could have put it more simply. This is why Birks cannot be taken seriously when, elsewhere in *Unjust Enrichment*, he claims to be bound by precedent. Evidently, precedent only binds him when he agrees with it. Or, in simpler words, it does not bind him at all.

Thirdly, most of Birks' 'logic' in unjust enrichment assumes that *other* areas of law have no logic of their own. He insists that all cases on transmission of value are about 'enrichment', and that 'enrichment' must have a consistent definition.<sup>109</sup> But in fact, most cases about transmission of enrichment are about the way in which that value is held — the form of the valuable property — and it would be surprising if different types of property had exactly the same rules. It may be unacceptable to Birks that leading cases on tracing might proceed differently depending simply on what type of property was involved,<sup>110</sup> but it is hard to see how things could be otherwise. A coin is different from a diamond, and neither is much like 'money in the bank'. The differences between the various types of property are not mere appearances that logic can strip away: they are real. Birks' attempt to expand 'unjust enrichment' into property and tort therefore has little to commend it. It can logically be done, but only at the cost of reopening questions which property law and tort law have hitherto closed.

Finally, Birks' new theorising threatens an expansion of the law in a quite different sense. His goal seems to be mostly classificatory. He does not want to catch more defendants, but simply wants to say that more of the cases where defendants are *already* caught are part of the law of unjust enrichment. However, the template he is forcing on the law also expands it, as analogies from plaintiff cases are forced on the wider law. Most startlingly, Birks reconsiders the classic Scottish case of *Edinburgh Tramway Co v Courtenay*<sup>111</sup> where liability was denied. That case involved the owner of an apartment who lit a fire in his grate and then claimed that his upstairs neighbour was 'unjustly enriched' if his apartment, too, was warmed.<sup>112</sup> Birks manages to bring himself to deny liability, on the wafer-thin ground that the fire's owner intends his neighbour to receive a free gift of heat (though how Birks can know the owner's intent is open to question).<sup>113</sup> Indeed, Birks appreciates that liability is now extremely wide, but he protests that this broad liability is matched by defences, now said to be 'infinitely more vigorous than they were even twenty years ago.'<sup>114</sup> Really? There is little evidence of vigour. Birks introduces no new defences in this book, except for a few which merely restate what were previously seen as rules of liability. In fact, he tries to explain most defences away as mere examples of unjust enrichment in action. Further, he labours to dismember the most important

<sup>109</sup> Ibid 58–61, 155–61.

<sup>110</sup> Ibid 71, commenting on *Trustee of Jones v Jones* [1997] Ch 159.

<sup>111</sup> (1909) SC 99.

<sup>112</sup> Ibid 140–1. The Court of Session considered that there was no liability.

<sup>113</sup> No doubt an ungenerous would-be plaintiff could clarify his intent in a note or text to his upstairs neighbour: 'I'll be lighting my fire tonight, and I expect you to pay your share'. The reply can be imagined, but on Birks' new view it is presumably irrelevant.

<sup>114</sup> Birks, *Unjust Enrichment*, above n 2, 101.

restitutionary defence, that of change of position.<sup>115</sup> More defendants are being pulled into the net, not because a reasoned argument has been made that they should be, but because to do so makes the theory of unjust enrichment neater and more ‘logical’. This invites the question: how high a price are we prepared to pay for this sort of ‘logic’?

#### VII CONCLUSION: ON DOGMATISM AND ITS LIMITS

*Unjust Enrichment* is a brilliantly executed restatement of the theory of unjust enrichment. It states a position on most of the issues of the day. Where the book is open to criticism, it is largely for problems inherent in the project itself. If the law of unjust enrichment can be reduced to a single dogmatic ideal, then Birks is best placed to do it. What you will not find anywhere in the book is an admission that dogmatism has its limits. Logic does not rule the law, but is on the contrary a tool to be used when appropriate and discarded where not. There is the occasional acknowledgement that the high order of logic to which Birks aspires is quite alien to other heads of the law — tort, in particular, is noted as quite unruly<sup>116</sup> — but Birks entertains no doubts that order is the principal goal, to which much else must be sacrificed.

There is a substantial downside to this approach.<sup>117</sup> Simply restating the theory has become a considerable undertaking: the theory of ‘unjust enrichment’ has become an end in itself. The high degree of precision that Birks demands ensures that there is a continual battle simply to keep academic theory and judicial pronouncement within hailing distance of one another. The language is becoming denser and more intense. Birks himself, normally a most lucid writer, acknowledges that his approach is making unjust enrichment abstract and technical. ‘No passenger on the Clapham omnibus ever demanded restitution for want of legally sufficient basis’.<sup>118</sup> An increasingly high proportion of the problems are self-created: they are attempts to reconcile the actual diversity of the case law with the theoretical uniformity it is supposed to display.

Much of this was foreseen, of course. In fact, few doubted that ‘unjust enrichment’ would become a more complex entity as a result of Birks’ theorising. The division was between those who thought it could only get worse, and those who, like Birks himself, thought that an initial increase in complexity would ultimately lead to simpler and more stable ideas. The desired simplification may yet happen, but there is no sign of it in *Unjust Enrichment*. The departure from language comprehensible even to other lawyers goes too far. Critics are now regularly dismissed, not for saying anything with which Birks can find fault, but simply because they use a different terminology. This is not the sort of inclusive theory that a successful law must encompass.

Moreover, Birks quite deliberately tries to cut the subject off from other sources of ideas. Anything that is not a logical refinement to his own basic

<sup>115</sup> See *ibid* 188–9 (disenriching change of position), 222–3 (non-disenriching change of position).

<sup>116</sup> *Ibid* 38–9, 94.

<sup>117</sup> See generally Waddams, *above n 4*, 161–71, 231–3.

<sup>118</sup> Birks, *Unjust Enrichment*, *above n 2*, 100. Very probably, that passenger would instinctively adopt a Stoljarian, proprietary view of restitution: ‘I want *my money* back!’

concepts is dismissed. In particular, the suggestion that unconscientious behaviour might play a part in the theory is rejected, as it confuses liability for unjust enrichment with liability for fault.<sup>119</sup> In addition, the rejection of opposing theories is barely reasoned at all. Birks seems unable to bring himself to name his major critics, or to explain why he thinks their ideas are wrong, preferring to grapple only with those who already accept most of his views. His approach to competing theories is usually to reiterate that they are wrong, and to leave it at that. So talk of 'quasi-contract' is a 'maddening heresy';<sup>120</sup> and 'implied contract' is wrong because it 'conceals and distracts, making it impossible to see and understand the independent normativity of unjust enrichment'.<sup>121</sup> In other words, it is wrong simply because it prevents people from seeing that Birks is right!

In summary, therefore, Birks has made another great stride towards the goal he has set himself: an entirely logical and internally consistent statement of the law of unjust enrichment. Yet he has done so at the expense of further increases in abstraction and complexity. Is the price worth paying? Is *Unjust Enrichment* truly another step forward? Or is it a case of one step forward, two steps back?

<sup>119</sup> Ibid 5–7, 37–8.

<sup>120</sup> Ibid 252.

<sup>121</sup> Ibid 244. On Birks' tendency to pronounce his opponents wrong *by definition*, begging the question of which definitions are appropriate, see Steve Hedley, 'The Taxonomic Approach to Restitution' in Alastair Hudson (ed), *New Perspectives on Property Law, Obligations and Restitution* (2004) 151.