Cambridge Law Journal, **76(1)**, March 2017, pp. 168–195
doi:10.1017/S0008197316000842

THE DOUBLE CEILING ON UNJUST ENRICHMENT: OLD SOLUTIONS FOR OLD PROBLEMS

ANDREW TROTTER*

ABSTRACT. *Unjust enrichment is not calculated to strip defendants of gain at all costs, but rather to restore to the claimant the value or rights he has unjustly lost. It can therefore only justify restitution to the extent of the claimant's ultimate expense, or the defendant's ultimate enrichment, whichever is lesser. Although that "double ceiling" has not found favour (at least in England), this article defends it against perceived inconsistencies with principle and precedent, and proposes it as a solution to three unresolved doctrinal problems in the law of unjust enrichment: claims for improvements to property, subjective overvaluation and incidental benefits.*

KEYWORDS: *unjust enrichment, passing on, quantum meruit, subjective overvaluation, incidental benefit.*

I. INTRODUCTION

Nearly two decades ago, Professor McInnes published in this Journal an enlightened article on the purpose and scope of unjust enrichment.[1] His core tenet was that unjust enrichment provides a basis for a claimant to retrieve an enrichment only to the extent of his loss. It is a doctrine based on corrective justice between two innocents, so, unlike a claim founded in a wrong, it does not call for disgorgement: its normative justification expires once the claimant has been restored to the status quo ante. It follows that restitution for unjust enrichment should be limited by a "double ceiling"[2]: the lesser of the defendant's ultimate enrichment and the claimant's ultimate impoverishment. Although this view is supported by the position in some common law jurisdictions, including South Africa[3] and Canada,[4] McInnes knew at the time he wrote his article that his

* Pupil Barrister, London. Address for Correspondence: 35/24 Wapping Wall, London E1W 3SE. Email: andrew.trotter@icloud.com.

[1] M. McInnes, "'At the Plaintiff's Expense': Restitutionary Relief" [1998] C.L.J. 472. Following his example, this article uses male pronouns for claimants and female pronouns for defendants when speaking in the abstract.

[2] See the reference to *double plafond* in French law: S. Linssen, "Remedies for Wrongdoing: The Measure of Recovery" (2006) 14 E.R.P.L. 351, 357.

[3] *Nortje v Pool N.O.* 1966 3 S.A. 96 (A), 104.

[4] *Pettkus v Becker* [1980] 2 S.C.R. 217, 227; *Cie Immobilière Viger Ltée v Laurgat Giguère Inc.* [1977] 2 S.C.R. 67, 77.

https://doi.org/10.1017/S0008197316000842 Published online by Cambridge University Press

theory was in a minority in England[5] and it has fallen further into disfavour since.

Meanwhile, elsewhere in the world of unjust enrichment, three seemingly unrelated debates raged on. Each involves overreaching claimants: who seek restitution in the full amount by which their services increase the value of another's property; or to inflate their claim based on "subjective overvaluation"; or to claim for "incidental benefits". It is a matter of broad academic and judicial consensus that none of these claims should be allowed. However, the questions have not been the subject of extensive judicial examination and the doctrinal reasons for refusing such relief remain uncertain and imprecise. That uncertainty has recently been highlighted with the Court of Appeal denying the existence of any general doctrine prohibiting recovery for "incidental benefits",[6] and the Supreme Court offering conflicting bases on which to deny "subjective overvaluation".[7]

This article proposes that the double ceiling can aid in solving each of these problems. Section II will start by defending the theory against the attacks from principle and precedent. The requirement that an enrichment be "at the claimant's expense", properly understood, requires that an enrichment both result from a transfer of value from, and correlate to a loss in, the claimant (Section II(A)). A number of developments in the law that are said to foreclose this approach are not, on closer analysis, inconsistent with the double ceiling. In particular, brief examination is warranted of cases rejecting the defence of passing on, and others that would appear to permit disgorgement for unjust enrichment (Section II(B)).

Section III will then suggest that the double ceiling can go some way towards resolving three areas of the law that remain inadequately explained. The measure of quantum meruit is limited to the fair value of the services because that is usually the best measure of what the claimant has lost by performing them (Section III(A)). Subjective overvaluation should be denied because it would give the claimant a windfall beyond the expense he has incurred (Section III(B)). The absence of correlative loss also accounts for some incidental benefit cases: in others, there is no transfer of value, no unjust factor or a combination of the three (Section III(C)). In this way, the double ceiling obviates the need for additional rules and permits each of these old problems to be dealt with by the established principle that the enrichment must be "at the claimant's expense".

[5] McInnes, "'At the Plaintiff's Expense'", p. 473, referring to the "growing body of opinion" to the contrary including P. Birks, "Definition and Division: A Mediation on *Institutes* 3.13" in P. Birks (ed.) *The Classification of Obligations* (Oxford 1997) 1, 26.

[6] *TFL Management Ltd. v Lloyds TSB Bank plc* [2013] EWCA Civ 1415; [2014] 1 W.L.R. 2006, at [86].

[7] *Benedetti v Sawiris* [2013] UKSC 50; [2014] A.C. 938, at [21]; cf. at [100]–[109], [119].

https://doi.org/10.1017/S0008197316000842 Published online by Cambridge University Press

II. A Defence of the Double Ceiling

A. A Defence in Principle

An action in unjust enrichment lies wherever a defendant has been unjustly enriched "at the claimant's expense".[8] The nature of the claimant's "expense" has been the focus of some academic debate. Principally, these debates have centred on how the *source* of the benefit is to be identified: in what circumstances may a claim in unjust enrichment be brought by a claimant who indirectly confers a benefit through a third party[9]; or who confers a benefit under a contract with a third party[10]; or who would have received a benefit from a third party but for its interception by the defendant?[11] In each case, the question is directed to whether the particular claimant has standing to sue: whether the defendant's enrichment is in truth at his or another's expense.

Under the double-ceiling approach, the requirement that the enrichment be "at the claimant's expense" is directed also to a second question. It concerns not only title to sue, but also the measure of restitution available. This second limb would limit the rights of the claimant identified by the first limb to recover to the extent of his expense, rather than merely permitting him to retrieve all of the benefit because he has suffered some of the loss. This becomes relevant in cases in which the defendant's gain exceeds the claimant's expense. There are at least three categories of such cases.

The first is where the enrichment in the hands of the defendant is worth more than it was in the hands of the claimant. This is so, for example, where a claimant (*C*) contracts at the cost of £250 with a third party (*X*) for repairs to a car belonging to a defendant (*D*), and those repairs would be available at market for £1,000.[12] Likewise, if *C* mistakenly transfers money to *D* (both of whom are in debt) and, because of her poor credit rating, *D*'s interest rates are higher than *C*'s, then *D* will have saved more from the use of the money than the claimant paid in interest during that time.[13] The use value of the money is greater in *D*'s hands.[14]

Second, the enrichment in the hands of the defendant may come to be worth more than it was in the hands of the claimant because of events

[8] *Banque Financière de la Cité v Parc (Battersea) Ltd.* [1999] 1 A.C. 221, 227, 234.

[9] *Filby v Mortgage Express (No. 2) Ltd.* [2004] EWCA Civ 759; [2004] N.P.C. 98; *Relfo Ltd. (In Liquidation) v Varsani* [2014] EWCA Civ 360; [2015] 1 B.C.L.C. 14; *Menelaou v Bank of Cyprus plc* [2015] UKSC 66; [2016] A.C. 176.

[10] See e.g. *MacDonald Dickens & Macklin v Costello* [2011] EWCA Civ 930; [2012] Q.B. 244.

[11] P. Birks, *An Introduction to the Law of Restitution* (Oxford 1985), 133–34; *Arris v Stukely* (1677) 2 Mod. 660; 86 E.R. 1060; *King v Alson* (1848) 12 Q.B. 971; 116 E.R. 1134.

[12] This is the example used in McInnes, "'At the Plaintiff's Expense'", 472. See also *Greenwood v Bennett* [1973] Q.B. 195, where the claimant was awarded only the £226 the repairs "cost him [in] labour and material": at 200.

[13] This is the inverse of the situation in *Sempra Metals v IRC* [2007] UKHL 34; [2008] 1 A.C. 561.

[14] This assumes that *Sempra Metals* [2007] UKHL 34; [2008] 1 A.C. 561 is correctly decided and puts to one side the question whether the "use value" of the money is something that was transferred from the claimant.

https://doi.org/10.1017/S0008197316000842 Published online by Cambridge University Press

occurring after the transfer. This may be because of the defendant's actions or those of a third party. For example, where *C* sells a lottery ticket to *D* for £10 under a void contract and the ticket wins, entitling *D* to receive £1 million from the lottery board, the ticket *D* possesses is far more valuable than the ticket *C* sold.[15] Likewise, where *C* transfers money by mistake to *D*, who doubles it by speculating in potato futures, *D* has gained more from the exercise than *C* can be said to have lost.[16]

Third, the enrichment may not change in value, but may cause the defendant to derive a separate benefit from a third party, either in the form of a positive enrichment or saved expense. This is so, for example, where *C* mistakenly pays charity *D* £100, as a result of which *D* also receives a government donation of £100. Another illustration is where *C* mistakenly pays *D*'s parking fine, and *D* would otherwise have incurred a 10% penalty for late payment.

There is good reason in principle why, in each of these categories, the claimant's right to recover should be limited to the amount of his loss.[17] The common law is not in the business of interfering needlessly in private property. It requires a normative justification to force a defendant to compensate a claimant's loss beyond the extent of her profit, or to permit a claimant to disgorge a defendant's profit beyond the extent of his loss. In most cases, that justification lies in the contractual, tortious or equitable wrong committed by the defendant. The breach of that primary obligation by the defendant creates the secondary obligation to pay compensatory or disgorgement damages. In such claims, there is a positive reason to strip gains from the defendant, without regard to whether the claimant has suffered any loss or recouped his loss from a third party.[18] If an instrumental justification is necessary, the potential windfall to the claimant incentivises him to bring an action through which the wrong can be addressed.[19]

However, claims in unjust enrichment do not depend on, and so are not supported by, any such breach of duty.[20] The corrective justice in unjust enrichment[21] is concerned with the reversal of a transfer between two

[15] This is a variation (to exclude proprietary remedies) of the example used by R. Grantham and C. Rickett, "Disgorgement for Unjust Enrichment?" [2003] C.L.J. 159, 165.

[16] These are the facts of *Trustee of Jones v Jones* [1997] Ch. 159, except that, in that case, the money came to the hands of the defendant by transfer in breach of trust, leading the court and most commentators to characterise the case as one involving the "vindication of property rights": see e.g. Grantham and Rickett, "Disgorgement for Unjust Enrichment?", 171. Let us assume for these purposes that a proprietary remedy does not (necessarily) follow upon a mistaken payment: e.g. D. Salmons, "The Availability of Proprietary Restitution in Cases of Mistaken Payments" (2015) 74 C.L.J. 534; cf. *Chase Manhattan Bank N.A. v Israel-British Bank (London) Ltd.* [1981] Ch. 105.

[17] J. Greiss, "Causes of Action Supporting a Constructive Trust" (2011) 38 Advocacy Quarterly 249, 254–55.

[18] That is, in circumstances not constituting mitigation: e.g. *Gardner v Marsh & Parsons* [1997] 1 W.L.R. 489; *Needler Financial Services v Taber* [2002] Lloyd's Rep. 32.

[19] A. Duggan, "Constructive Trusts from a Law and Economics Perspective" (2005) 55 U.T.L.J. 217, 227.

[20] *Kelly v Solari* (1841) 9 M. & W. 54, 58–59.

[21] See e.g. *Kleinwort Benson Ltd. v Lincoln City Council* [1999] A.C. 349, 406, per Lord Hope; *Peel (Regional Municipality) v Ontario* [1992] 3 S.C.R. 762, 788, per McLachlin J.; E. Weinrib, "The

https://doi.org/10.1017/S0008197316000842 Published online by Cambridge University Press

innocent parties (or, at least, two parties whose fault is not relevant to the claim). The mere presence of wrongdoing on the facts is immaterial: there may be forensic reasons why a claim is framed in a particular way: for example, to escape a bad bargain[22] or to avoid limitation periods.[23] Nor can such a claim properly be characterised as a wrong based on "unconscionable retention"[24] without introducing some form of notice requirement, or engineering a duty on an innocent defendant not to be enriched, or allowing the doctrine to collapse into a "general abstract principle, extending to many contexts to justify relief for a "deserving" plaintiff".[25]

Rather, unjust enrichment creates a primary obligation to restore the benefit from whence it came without any question of a breach of a separate obligation.[26] The function of that primary obligation is to restore the equilibrium between the parties. It does not "seek to institute a new state of affairs between the parties or to facilitate a transformation of their rights",[27] nor is it "intended to provide windfalls to [claimants] who have suffered no loss".[28] It is concerned with restoring displaced wealth where it can be found, rather than stripping wealth at all costs.

This suggests a double ceiling[29] on the quantum of unjust enrichment: it cannot compromise more than the lesser of the defendant's gain and the claimant's loss. The best explanation for this is that the defendant's enrichment can only meaningfully be said to be at the claimant's expense, and therefore to be "returned" to him, if he has suffered a corresponding loss. That element of unjust enrichment is both a question of title to sue and a measure of the extent of the claimant's right to recovery.

This might be put in a different way: that the defendant's enrichment is not *unjust* to the extent it exceeds the claimant's loss. On this view, the

Normative Structure of Unjust Enrichment" in C. Rickett and R. Grantham (eds.), *Structure and Justification in Private Law: Essays for Peter Birks* (Oxford 2008), 21.

[22] E.g. *Lodder v Slowey* [1904] A.C. 442; *Boomer v Muir* 24 P. 2d 570, 574 (Cal. App. 1933); D. Friedmann, "Does the Dead Contract Rule Restitution from Its Grave?" (2012) 92 B.U.L.Rev. 811; cf. *Taylor v Motability Finance Ltd.* [2004] EWHC 2619 (Comm).

[23] See *Test Claimants in the FII Group Litigation v HMRC* [2008] EWHC 2893 (Ch); [2009] S.T.C. 254, at [342].

[24] *Roxborough v Rothmans of Pall Mall Australia Ltd.* [2001] HCA 68; (2001) 208 C.L.R. 516; *Pitt v Holt* [2013] UKSC 26; [2013] 2 A.C. 108, at [124]–[125].

[25] R. Grantham, "Restitutionary Recovery Ex Aequo et Bono" [2002] Sing. J.L.S. 388, 402; see also p. 397, lamenting the "general attachment in Australian law to the notion of unconscionability as a solvent of legal problems".

[26] Grantham and Rickett, "Disgorgement for Unjust Enrichment?", 162–63; S. Smith, "Justifying the Law of Unjust Enrichment" (2001) 79 Tex.L.Rev. 2177.

[27] Grantham and Rickett, "Disgorgement for Unjust Enrichment?", 159.

[28] *Air Canada v British Columbia* [1989] 1 S.C.R. 1161, 1202. See also *Roxborough* [2001] HCA 68; (2001) 208 C.L.R. 516, at [119]–[120], [125]–[144], per Kirby J. (dissenting); *Banque Financire de la Cité* [1999] 1 A.C. 221, 237, per Lord Clyde; *Citadel General Assurance Co. v Lloyds Bank Canada* [1997] 3 S.C.R. 805, 824, per La Forest J.

[29] The term "correspondence" (A. Burrows, *The Law of Restitution* (Oxford, 2011), 64; Grantham and Rickett, "Disgorgement for Unjust Enrichment?", 166) is deliberately avoided so as not to imply that the claimant's loss and defendant's gain need be identical: e.g. in *Sempra Metals* [2007] UKHL 34; [2008] 1 A.C. 561, it could be no objection that the defendant's gain was (presumably) *less than* the claimant's loss.

https://doi.org/10.1017/S0008197316000842 Published online by Cambridge University Press

point is that, once the claimant has had his loss restored to him, any surplus enrichment can no longer be regarded as unjust.[30] The distinction is of only of academic value, since an action in unjust enrichment is defeated equally by a finding that the enrichment is not at the claimant's expense as it is by one that the enrichment is not unjust. If it is right to say that unjust enrichment should not act on a benefit except to the extent of the claimant's loss, then it matters only for the sake of analytical clarity whether that is attributed to a limit on injustice or a limit on expense. Arguably neither conception occasions more violence than the other to the conventional conception of unjust enrichment, since both elements are traditionally understood as binary: a claimant either has standing to sue or he does not and the circumstances of the enrichment are either attended by an unjust factor or they are not.

If it matters, I would prefer to say that the claimant's loss is relevant because it defines the extent of his expense, not the extent of the injustice. It sits more comfortably to characterise expense as both a criterion and a measure of degree than it does to qualify the scheme of unjust factors by introducing a rule that enrichments are unjust only to the extent that they reflect the claimant's loss (although the latter is perhaps no more inelegant than saying that enrichments are unjust only to the extent that the defendant is not "legally entitled" to the benefit).[31] Moreover, one might say in some broader sense that there is no injustice in every case where there is no expense. Wherever an enrichment is not at the claimant's expense, the circumstances vitiating the claimant's consent will not, for the same reasons, render the defendant's enrichment unjust. For example, where *C* goes unpaid under his contract with *X* for his work done for *D*, his claim fails because the work is at *X*'s expense, not his own.[32] It might equally be said that there is no failure of consideration as between *C* and *D*: but that is only to extrapolate a lack of injustice from a lack of expense to *C*. Likewise, where *C* mistakenly procures services from *X* at an undervalue for *D*'s benefit,[33] it is more apt to say that he is limited to recovering that undervalue because it represents the extent to which *D*'s enrichment is at his expense: although of course it follows that there is no injustice requiring restitution of any greater amount. If the normative basis for restricting restitution of unjust enrichment to the lesser of the claimant's loss and the defendant's gain is accepted (or rather, if no normative basis to permit disgorgement for unjust enrichment can be found), it is most

[30] This view finds some support in the reasons of Lord Neuberger in *Benedetti* [2013] UKSC 50; [2014] A.C. 938, at [197].
[31] Burrows, *Law of Restitution*, 110.
[32] E.g. *MacDonald Dickens & Macklin* [2011] EWCA Civ 930; [2012] Q.B. 244; *Uren v First National Home Finance Ltd.* [2005] EWHC 2529 (Ch); [2005] All E.R. (D) 146; *Brown and Davis v Galbraith* [1972] 1 W.L.R. 997.
[33] See note 12 above and accompanying text.

https://doi.org/10.1017/S0008197316000842 Published online by Cambridge University Press

suitably accommodated by conceptualising the requirement that enrichment be at the claimant's expense as both a criterion designating his title to sue and a measure of the degree of his entitlement to recover.

B. A Defence in Precedent

It has been argued that the double-ceiling approach proposed above and accepted in other jurisdictions is foreclosed in England by precedent. Of particular note in this regard are cases rejecting the defence of passing on, and those in which there is an apparent disparity between benefit disgorged and loss suffered, such as proprietary claims and services cases. If the double ceiling is to aid in the solution of other problems, it must first be reconciled with these cases.

1. Passing on

The double-ceiling analysis logically requires acceptance of a defence of passing on in some form.[34] If restitution for unjust enrichment is to be limited by the claimant's loss, it would be arbitrary to assess that loss without regard to subsequent events. For example, where an underwriter *C* mistakenly overpays on a claim by *D*, and passes on that overpayment under a back-to-back policy with a third-party reinsurer, *C* has passed his loss onto the reinsurer and cannot fairly have been said to have suffered it himself.[35]

While complete academic consensus on the passing-on defence is yet to be reached[36] and the defence has been accepted in a number of other jurisdictions,[37] it must be acknowledged that, as a matter of positive law, the defence has been rejected in England.[38] (It has also been rejected in Australia,[39] but the precedential and logically persuasive force of that line of authority need not be conceded in light of its abandonment of the conventional formulation of unjust enrichment in favour of an indeterminate equitable principle of "unconscionable retention",[40] thereby "tak[ing] Australia out of the fold".[41])

[34] Grantham and Rickett, "Disgorgement for Unjust Enrichment?", 166–67.
[35] This is a variation of *Roxborough* [2001] HCA 68; (2001) 208 C.L.R. 516 and *Kleinwort Benson Ltd. v Birmingham City Council* [1997] Q.B. 380. See further below, Section II(B)(1).
[36] W. Woodward, "Passing On the Right to Restitution" (1985) 39 U.Miami L.Rev. 873; G. Jones, *Restitution in Public and Private Law* (London 1991), 28–37, 46–47.
[37] Particularly in civil law systems: see B. Rudden and W. Bishop, "*Gritz* and *Quellmehl*: Pass it On" (1981) 6 E.L.Rev. 243.
[38] *Kleinwort Benson Ltd.* [1997] Q.B. 380, 744; *Kleinwort Benson Ltd. v South Tyneside Metropolitan Borough Council* [1994] 4 All E.R. 972.
[39] *Roxborough* [2001] HCA 68; (2001) 208 C.L.R. 516.
[40] Ibid., at pp. 354–55.
[41] Grantham, "Restitutionary Recovery", 389; A. Burrows, "The Australian Law of Restitution: Has the High Court Lost Its Way?" in E. Bant and M. Harding (eds), *Exploring Private Law* (Cambridge 2010), 67–85.

https://doi.org/10.1017/S0008197316000842 Published online by Cambridge University Press

However, the cases in which the defence has been rejected have been poor vehicles for its consideration and can be rationalised on other grounds. The first cases rejecting the passing-on defence were decided in the particular context of ultra vires taxation,[42] where constitutional considerations militate against permitting a public body that has exacted payments by acting beyond its power to avoid repayment by reference to the extent of the claimant's loss.[43] This also appears to have been the basis for clumsy and temporary denial of the need for corresponding impoverishment otherwise recognised by Canadian law.[44] Indeed, it has been forcefully argued that *Woolwich* claims, now happily severed from the constraints of duress *colore officii*, are better seen as an incidence of public law than as private law claims[45]; or at least as a hybrid of the two.[46] In that regard, it is significant that the defence of change of position is also unavailable because it would "undermine an overriding policy of the law"[47] in view of the particular position of public authorities as defendants to *Woolwich* claims.[48]

In the other cases, the best reason for not upholding the passing-on defence was factual or evidentiary rather than legal. The advantage of passing on may be reduced or eliminated by the loss of sales caused by higher prices.[49] Similarly, if the subsequent transaction said to have passed on the loss arises from an independent and free-standing obligation, the defence would not succeed in any event.[50]

Hence, the defence of passing on might have been rejected in each of these cases on other grounds. Yet, the reasoning employed in each of these cases reflects the popular view that restitution is concerned only with depriving the defendant of benefits, and changes in the claimant's circumstances "are of no consequence".[51] This view is expressly concerned with stripping, rather than restoring, wealth. It has been described as

[42] *Commissioner of State Revenue (Victoria) v Royal Insurance Australia Ltd.* [1994] HCA 61; (1994) 182 C.L.R. 51, 90.

[43] *Woolwich Equitable Building Society v IRC (No. 2)* [1993] A.C. 70, 177–178; *Roxborough* [2001] HCA 68; (2001) 208 C.L.R. 516, at [119]–[120], [125]–[144].

[44] *Kingstreet Investments Ltd. v New Brunswick (Department of Finance)* 2007 SCC 1; [2007] 1 S.C.R. 3; cf. *Air Canada* [1989] 1 SCR 1161, 1202; *Kerr v Baranow* 2011 SCC 10, (2011) 328 D.L.R. (4th) 577, at [39].

[45] J. Alder, "Restitution in Public Law: Bearing the Cost of Unlawful State Action" (2002) L.S. 165.

[46] R. Williams, *Unjust Enrichment and Public Law: A Comparative Study of England, France and the EU* (London 2010), 31–40.

[47] E. Bant, "Restitution from the Revenue and Change of Position" [2009] L.M.C.L.Q. 166, 172, cited with approval in *Test Claimants in the FII Group Litigation v HMRC (No. 2)* [2014] EWHC 4302 (Ch); [2015] S.T.C. 1471, at [310].

[48] The view of such defendants as "wrongdoers" was disavowed in *Test Claimants in the FII Group Litigation* [2014] EWHC 4302 (Ch); [2015] S.T.C. 1471, at [309]–[315].

[49] M. McInnes, "A Return to First Principles in Unjust Enrichment: *Kerr v Baranow*" (2011) 51 Canada Business Law Journal 275, 282. In competition law, lost sales may themselves be claimed as recoverable loss, but are not inconsistent with an adjusted passing-on defence except in a monopoly or wholly cartelised market: F. Verboven and T. van Dijk, "Cartel Damages Claims and the Passing-On Defence" (2009) 57 Journal of Industrial Economics 457, 465–66. See further below, text accompanying notes 59–67.

[50] *Kleinwort Benson Ltd.* [1994] 4 All E.R. 972.

[51] G. Virgo, *The Principles of the Law of Restitution* (Oxford 1999), 739.

https://doi.org/10.1017/S0008197316000842 Published online by Cambridge University Press

"misguided and confused"[52] and the difficulties it presents have been discussed above. At the very least, it is conclusory and does not propose a rationale for choosing between two "equally (un)deserving parties".[53] In those circumstances, the defence ought not to be summarily rejected without considering its rationale.

The rationale for passing on reflects that of change of position. Change of position ensures that unjust enrichment does not strip gains from the innocent[54] defendant that she does not ultimately have; passing on ensures it does not restore to the claimant wealth that he has not ultimately lost.[55] In both cases, the motivation for the law to intervene to shift wealth is reduced pro tanto.[56] This is not the place to examine the scope of the defence of change of position in any detail, but it is relevant to note a few matters of symmetry. For example, change of position relieves a defendant from full restitution provided the diminution in her wealth is causally linked, even if it is not of the particular benefit gained; likewise, a claimant should be denied full restitution even though his gain is not the recoupment of the particular benefit with which he parted. If, as a result of her enrichment, a defendant purchases property that depreciates, her change of position is the amount of the depreciation[57]; if a claimant receives property as a result of his impoverishment, his claim should be reduced by the value of the property at the date of judgment. Just as change of position applies to a case in which a defendant foregoes a gain, a claimant's entitlement to recover should be reduced to the extent he evades an expense. And just as a defendant cannot resist repayment based on expenditure that might later be recovered,[58] a claimant should not be denied a remedy based on a benefit that he would become liable to return.

Finally, it is significant that the role of the passing-on defence has now been confirmed in competition law. Claims in competition law *do* concern a wrong – the defendant has abused a dominant position in the market or engaged in agreements or concerted practices to avoid competition. That is both a public wrong punishable by pecuniary penalties[59] and a private

[52] Grantham and Rickett, "Disgorgement for Unjust Enrichment?", 169.
[53] M. McInnes, "The Canadian Principle of Unjust Enrichment: Comparative Insights into the Law of Restitution" (1999) 27 Alta.L.Rev. 1, 23.
[54] That is, to the extent that she is not disqualified from the defence by bad faith or wrongdoing: e.g. *Lipkin Gorman (a firm) v Karpnale Ltd.* [1990] 1 A.C. 548, 580.
[55] This notion of imbalance is evident in the cases establishing the change of position defence: ibid., at p. 579; see also *David Securities Pty. Ltd. v Commonwealth Bank of Australia* [1992] HCA 48; (1992) 175 C.L.R. 353, 385.
[56] Some authors suggest that the change of position defence is itself broad enough to cover both disenrichment of the defendant and reduction in the claimant's loss: see Grantham and Rickett, "Disgorgement for Unjust Enrichment?", 177. It is not necessary to go that far, as the defence of passing on is analytically distinct in that it negatives a different element of the action and requires proof of different matters.
[57] *Lipkin Gorman (a firm)* [1991] 2 A.C. 548, 560, per Lord Templeman.
[58] *Scottish Equitable plc v Derby* [2000] 3 All E.R. 793, at [44]; cf. *Australia and New Zealand Banking Group Ltd. v Westpac Banking Corporation* [1988] HCA 17; (1988) 164 C.L.R. 662, 677–78.
[59] Competition Act 1998, s. 36.

https://doi.org/10.1017/S0008197316000842 Published online by Cambridge University Press

wrong for which purchasers who incur increased prices may claim damages. Unlike in unjust enrichment, that wrongdoing provides an impetus for the law to disgorge any profits and to disregard whether the purchaser has passed on his loss.[60] For these reasons, the passing-on defence is not recognised in the US, where treble-damages are available and emphasis is placed on the deterrent function of antitrust litigation. This is in part based on an aversion to the prospect that "those who violate the antitrust laws by price-fixing or monopolizing would retain the fruits of their illegality".[61] The same does not apply to the defendant in unjust enrichment, who has the benefit innocently thrust upon her.

For better or for worse, European[62] and English law have taken a different route. Although the existence of the passing-on defence had been contemplated by a number of decisions,[63] it was expressly recognised for the first time in *Sainsbury's Supermarkets v Mastercard Inc*.[64] The Competition Appeal Tribunal held that the defence "is in reality not a defence at all" but was necessary to consider "to ensure that a claimant is … not overcompensated".[65] Whether a true "defence" or an aspect of principles of causation and mitigation,[66] the acceptance of the principle of passing on in the competition law context suggests that the motivation provided by the wrongdoing in this context is not sufficient to justify shifting the gain to a claimant who has not suffered all of the loss. It would be surprising if an innocent defendant to a claim in unjust enrichment were in a worse situation; or if a claimant could pass on his losses and plead in unjust enrichment to avoid the defence.[67]

2. Disgorgement for unjust enrichment?

There are a number of other cases in which restitution has been granted despite an apparent lack of equivalence between the defendant's gain and the claimant's loss. However, on closer examination, such cases are also explicable by reference to separate principles. Three most common categories of such case merit brief attention.

First, where "proprietary restitution" is at issue, the market value of the remedy may significantly exceed the value of the expense incurred by the

[60] See above, text accompanying notes 17–28.
[61] See *Hanover Shoe Inc. v United Shoe Machinery Corporation*, 392 US 481, 491–94 (1968).
[62] See Case C-453/99, *Courage Ltd. v Crehan* [2002] Q.B. 507; Case 68/79, *Hans Just I/S v Danish Ministry for Fiscal Affairs* [1981] 2 C.M.L.R. 714, at [20]; see also Parliament and Council Directive (EU) No 2014/104 (OJ L 349, p. 1) (Damages Directive), Article 14.
[63] *Devenish Nutrition Ltd. v Sanofi-Aventis S.A.* [2008] EWCA Civ 1086; [2009] Ch. 390, at [147], [151]; *Emerald Supplies Ltd. v British Airways plc* [2009] EWHC 741(Ch); [2010] Ch. 48, at [37]; *WH Newson Holding Ltd. v IMI plc* [2013] EWCA Civ 1377; [2014] 1 All E.R. 1132, at [40].
[64] *Sainsbury's Supermarkets v Mastercard Inc*. [2016] CAT 11.
[65] Ibid., at para. [484].
[66] See *Fulton Shipping Inc. v Globalia Business Travel S.A.U.* [2014] EWHC 1547 (Comm), at [17]; T. Jones, "The English Law of Causation and the Passing-On Defence", Blackstone Chambers Competition Law Bulletin (online), 30 June 2014.
[67] See the submissions of Thomas de la Mare Q.C. in *Devenish Nutrition Ltd.* [2008] EWCA Civ 1086; [2009] Ch. 390, 433–34, 443 [31].

https://doi.org/10.1017/S0008197316000842 Published online by Cambridge University Press

claimant.[68] As a matter of positive law, such cases are not inconsistent with the double-ceiling approach because they do not engage unjust enrichment at all, but rather involve the vindication of property rights.[69] An alternative analysis, traversed by Professor Chambers in detail elsewhere, is that, in such cases, "the defendant has received an assignable right at the claimant's expense and is required to give up that right, regardless of its value".[70] The fact that the right may have increased in value between the receipt of the enrichment and the award of restitution does not therefore mean that what the defendant is required to return exceeds what the claimant lost in any relevant sense. Although "there are two kinds of enrichment (value and rights) … there is really only one kind of restitutionary response, which is to give up the enrichment itself".[71] Either Virgo's or Chamber's analysis eliminates any perceived inconsistency with the double-ceiling approach.

Second, many cases that might appear to permit disgorgement for unjust enrichment are on closer examination better characterised as a claim for a wrong.[72] For example, the award of restitution to a claimant who apparently suffered no loss in *Edwards v Lees Administrators*[73] is sometimes presented as inconsistent with a double ceiling,[74] but that case is readily characterised as one of trespass to land.[75] The same can be said of the reasonable hire charge awarded in respect of the electrical equipment in *Strand Electric* without regard to whether it would otherwise have been hired.[76] Likewise, although the Earl of Halsbury's chair[77] and Lord Shaw's horse[78] were invoked as supporting the unjust enrichment claim for the use value of money in *Sempra Metals*,[79] those hypotheticals each involve the "abstraction or invasion of property"[80] and are more commonly and appropriately cited in cases involving a breach of obligation.[81] Where a

[68] E.g. *Foskett v McKeown* [2001] 1 A.C. 102; *Re Diplock* [1951] A.C. 251.
[69] *Foskett* [2001] 1 A.C. 102, 115; see Virgo, *The Principles*, 559.
[70] R. Chambers, "Two Kinds of Enrichment", in R. Chambers, C. Mitchell and J. Penner (eds.), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford 2009), 258.
[71] Ibid., at p. 267.
[72] Consider e.g. *Ministry of Defence v Ashman* (1993) 25 H.L.R. 513; *Shi v Jiangsu Native Produce Import & Export Corp* [2009] EWCA Civ 1582, at [18]–[28]; *Strand Electric and Engineering Co. Ltd. v Brisford Entertainments Ltd.* [1952] 2 Q.B. 246.
[73] *Edwards v Lees Administrators* 96 S.W. 2d 1028 (Ky. 1936).
[74] P. Birks, "'At the Expense of the Claimant': Direct and Indirect Enrichment in English Law" in D. Johnson and R. Zimmermann (eds.), *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge 2002), 510. Birks also characterises it as one of interceptive subtraction.
[75] I. Jackman, "Restitution for Wrongs" [1989] C.L.J. 302, 308. Note that others consider that a remedy should flow automatically from interference with property rights: see Grantham and Rickett, "Disgorgement for Unjust Enrichment?", 174.
[76] *Strand Electric and Engineering Co. Ltd.* [1952] 2 Q.B. 246.
[77] *The Mediana* [1900] A.C. 113, 117.
[78] *Watson Laidlaw & Co. Ltd. v Pott Cassels & Williamson* (1914) 31 R.P.C. 104, 119.
[79] *Sempra Metals* [2007] UKHL 34; [2008] 1 A.C. 561, at [116].
[80] *Watson Laidlaw & Co. Ltd.* (1914) 31 R.P.C. 104, 118–19.
[81] See e.g. *Attorney General v Blake* [2001] 1 A.C. 268, 278–79; *Devenish Nutrition Ltd.* [2008] EWCA Civ 1086; [2009] Ch. 390, 449 [51].

https://doi.org/10.1017/S0008197316000842 Published online by Cambridge University Press

defendant misappropriates a chair or horse or money, she cannot later return it and resist paying gain-based damages by asserting that the claimant would otherwise have kept it in a disused room or stable or under the bed. The same disfavour awaits a defendant who asserts that her breach of a negative covenant occasioned no damage,[82] or the fiduciary who asserts the benefit she obtained in breach of duty would never have been available to the claimant.[83] That is because the breach of tortious, contractual or equitable duty provides a reason to strip the defendant's gain without regard to the claimant's loss. However, the position is different in unjust enrichment, where the defendant's fault is no part of the claim: in such cases, there is no reason the law should provide a windfall to the claimant – who is entitled to relief "however careless … in omitting to use due diligence".[84] If the Earl loaned his chair, or Lord Shaw his horse, to an innocent defendant under some misapprehension that the defendant neither knew nor encouraged, it would seem excessive to allow their Lordships later to claim by good fortune a rental fee for property they would never have used.[85]

Finally, in cases involving quantum meruit for services, it makes no difference that the claimant would not otherwise have been gainfully employed, and the cost of performing the services does not limit the measure of restitution[86]; therefore, it is said, no proof of loss is required.[87] There are at least two responses to this analysis. First, it takes an unduly narrow approach to the meaning of loss. Edelman and Bant consider that an enrichment is "at the claimant's expense" if it "come[s] directly from the plaintiff's assets or labour".[88] In services cases, the claimant has incurred an expense through his labour: the fact that he may not have been otherwise engaged in that labour for financial gain does not deprive his labour of a market value. His expense is of his energies and time, which are usually best quantified by what a willing but not anxious buyer would have paid for them. The second response is an evidentiary one: just as the evidentiary burden on an innocent defendant asserting change of position is regarded as easily discharged,[89] it should not be readily accepted that the claimant would have been idle had he not been engaged in the services. Where an innocent defendant has generally inflated the cost of her lifestyle due to receipt of an enrichment, she should not be required to undergo the

[82] *Wrotham Park Estate Co. Ltd. v Parkside Homes Ltd.* [1974] 1 W.L.R. 798.
[83] *Regal (Hastings) Ltd. v Gulliver* [1967] 2 A.C. 134.
[84] *Kelly* (1841) 9 M. & W. 54, 59.
[85] Although in *Dimond v Lovell* [2002] 1 A.C. 384 there was no inquiry into whether the car would otherwise have been hired, the claimant company was in the business of doing so and it could not have been easily assumed that it suffered no loss. The question was not raised for consideration and the observations on enrichment were brief and obiter: at 397–98.
[86] *Brenner v First Artists' Management Pty. Ltd.* [1993] 2 V.R. 221, 262.
[87] Burrows, *Law of Restitution*, 64.
[88] J. Edelman and E. Bant, *Unjust Enrichment in Australia* (2006), 123.
[89] *Philip Collins Ltd. v Davis* [2000] 3 All E.R. 808; *Scottish Equitable plc* [2000] 3 All E.R. 793.

https://doi.org/10.1017/S0008197316000842 Published online by Cambridge University Press

hardship, or the indignity,[90] of producing exact and comprehensive proof. Likewise, it should not be easily assumed that the claimant suffered no loss: for example, he should not be called upon to demonstrate to any high degree of particularity that he would have been otherwise gainfully engaged had he not been mistakenly rendering services to the defendant.

III. Old Solutions for Old Problems

It is not enough to say that the double-ceiling approach is consistent with principle or remains open as a matter of precedent. A more effective defence would invoke cases whose outcomes do not merely permit but require the double ceiling. In this regard, the approach aids in developing a coherent answer to three key problems: restitution in respect of improvements to property, subjective overvaluation and incidental benefit.

A. The Quantum of Quantum Meruit

The double ceiling has been defended above from the suggestion that services cases contradict it.[91] To the contrary, the cases involving restitution of benefits in kind can be seen as supporting the double-ceiling approach. This is because it provides the best justification for restricting the measure of restitution to the market price of the services where that is lower than the increase in value of the defendant's property.

Most academics agree[92] and the law is tolerably clear[93] that the measure of restitution in such cases is so limited. One exception is in the context of frustrated contracts,[94] where the "valuable benefit" of the subject of restitution has been described as the "end product of the plaintiff's services, not the services themselves".[95] This view has been heavily criticised,[96] but it is revealing: where a claimant builds on a defendant's land, the objective benefit accruing to the defendant – that is, the difference in her position before and after the services – is the increase in value of her land. It is, after all, a fiction to say[97] that the defendant would have incurred and therefore has been saved only the expense of obtaining the services at market if for example she was absent, incapacitated, too busy or unaware of the need to procure them. If *C* mistakenly builds a retaining wall on *D*'s property while *D* is on sabbatical to save it from destruction in a rare flood, *D* cannot

[90] Consider e.g. the witness statement the innocent defendant was forced to give in *Scottish Equitable plc* [2000] 3 All E.R. 793, at [16]. While proof of a large mistaken payment may be very easily achieved, the same cannot be said of particularisation of a change of position.
[91] See above, text accompanying notes 86–90.
[92] See Burrows, *Law of Restitution*, 47.
[93] *Cobbe v Yeoman's Row Management* [2008] UKHL 55; [2008] 1 W.L.R. 1752.
[94] Law Reform (Frustrated Contracts) Act 1943, s. 1(3).
[95] *BP Exploration Co. (Libya) Ltd. v Hunt (No. 2)* [1979] 1 W.L.R. 783, 801, per Goff J.
[96] Virgo, *The Principles*, 365.
[97] See e.g. Burrows, *Law of Restitution*, 67.

https://doi.org/10.1017/S0008197316000842 Published online by Cambridge University Press

sensibly claim she has only been saved the expense of obtaining help. She has a retaining wall she would never have built and a house she would otherwise have lost. The same is true if the defendant was willing to take the risk of not doing so, not willing to incur the expenditure or lacked the ability to carry out the work herself or the liquidity to procure it. Where *C* mistakenly drills a well on *D*'s property at the cost of £1 million, yielding oil proceeds of £5 million, then, unless *D* at least knew the oil was there and had the means to extract it, she has gained more than the cost of accessing it.

Let us accept for a moment that the defendant's gain can in all cases be equated to the market value of the services. It may be, for instance, that the remainder of the gain in the value of the defendant's property should be attributed to the property's own "potential for improvement".[98] This "potential" can only be quantified as the difference between the market value of the services and the increase in value of the property and provides no independent reason to restrict recovery to the former rather than some intermediate value. In any event, this need not be the only reason for denying restitution of the higher amount. If it were, it would leave us with an alarming problem: where the cost of the services exceeds the benefit derived therefrom, the defendant would be liable to the larger amount, or left to rely on subjective devaluation. For example, suppose *C* mistakenly expends £5 million prospecting for oil on public land, forgetting that his licence had expired, and finds oil, to the benefit of new licensee *D*, but only in the net value of (and increasing the value of the land by) £1 million. Perhaps subjective devaluation is an adequate recourse for *D* in such a case. However, if *D* had requested the drilling under a contract that is void, unenforceable or repudiated by *C*, it would leave her in a difficult position.

The double-ceiling approach provides a firm basis on which to restrict restitution to the lesser of the two amounts.[99] In South Africa, where that view prevails, the restitution granted in respect of building work done on another's land is restricted to the market value of the services because this represents the claimant's loss.[100] Conversely, the defendant will not be liable to the full market price of works that increase the value of a vehicle[101] or a property[102] only by a lesser amount. Hence, the double ceiling permits an award of quantum meruit in respect of improvements to property to be quantified without resorting to legal fiction.

[98] R. Stevens, "Three Enrichment Issues" in A. Burrows and A. Rodger (eds.), *Mapping the Law: Essays in Memory of Peter Birks* (Oxford 2006), 54.
[99] See *Rhoode v De Kock* [2012] ZASCA 179; 2013 (3) S.A. 123, at [15].
[100] *Nortje N.O.* 1966 3 S.A. 96 (A), 108.
[101] *ABSA Bank Ltd. t/a Bankfin v Stander t/a CAW Paneelkloppers* 1998 1 S.A. 939 (C), 957.
[102] *Fletcher & Fletcher v Bulawayo Waterworks Co. Ltd.* 1915 A.D. 636, 641.

https://doi.org/10.1017/S0008197316000842 Published online by Cambridge University Press

B. Subjective Valuation

Another problem to which the double ceiling offers a solution is the role of subjectivity in valuation of benefits. Until recently, subjective de- and overvaluation had been discussed academically but had not been seriously considered by any court. This has been recognised as an area of law that "is at an early stage in its development, and [where] it remains to be seen whether we have yet found the most suitable analytical scheme".[103] In particular, no sound explanation has yet been provided for why the acceptance of subjective devaluation does not logically extend to allow subjective overvaluation.

It is now settled that the starting point for quantifying benefit is an objective assessment.[104] It is also generally agreed that the measure of benefit may be reduced to the subjective value of the enrichment to the defendant at the particular time because "a benefit is not always worth its market value to a particular defendant",[105] although there is some disagreement about the mechanism for doing so. Broadly, one camp would assess the objective market value and allow a reduction for the defendant's subjective circumstances[106]; the other would permit the defendant's particular (but not idiosyncratic)[107] circumstances to be taken into account in assessing the objective price in a more narrowly defined market.[108] The difference between the two is slight[109] and turns on whether having regard to factors particular to the defendant is to engage in subjectivity or to inform an objective assessment more precisely.

Whatever the correct position in that regard, it is now a matter of unanimous Supreme Court authority that the same principle does not extend to inflating the valuation of benefit to match the defendant's subjective view where it exceeds the objective value of the enrichment.[110] If *C* and *D* each possess rare stamps worth £1,000 at market, the marriage value of which is £2,500, *D* subjectively values *C*'s stamp at £1,500 (or perhaps £1,250).[111] Likewise, *C* may repair *D*'s ship in particular circumstances in which *D* is in desperate need and would have happily paid double the market price.[112] Yet, subjective overvaluation being prohibited, in the

[103] *Benedetti* [2013] UKSC 50; [2014] A.C. 938, at [119].
[104] Ibid., at paras. [16]–[17], per Lord Clarke; *Benedetti v Sawiris* [2010] EWCA Civ 1427, at [140], per Etherton L.J.
[105] *Sempra Metals* [2007] UKHL 34; [2008] 1 A.C. 561, per Lord Nicholls; Burrows, *Law of Restitution*, 44; Virgo, *The Principles*, 67–68. Cf. the somewhat confused implication that subjective devaluation is available only to an "involuntary recipient" in *Littlewoods Retail Ltd. v Revenue and Customs Commissioners* [2015] EWCA Civ 515; [2015] 3 W.L.R. 1748, at [195].
[106] *Benedetti* [2013] UKSC 50; [2014] A.C. 938, at [21].
[107] Ibid., at paras. [122]–[123]; *Harrison v Madejski* [2014] EWCA Civ 361; [2016] Ch. 373, at [57].
[108] *Benedetti* [2013] UKSC 50; [2014] A.C. 938, at [100]–[109], [119].
[109] Ibid., at para. [22].
[110] Ibid., at para. [29] per Lord Clarke; paras. [120]–[121] per Lord Reed; para. [195] per Lord Neuberger; see also R. Goff and G. Jones, *The Law of Unjust Enrichment*, 8th ed. (London, 2011), [4–11]; Virgo, *The Principles*, 88–89.
[111] I am indebted to Professor Robert Stevens for this example and the variations on it below.
[112] See generally A. Burrows, *Restatement of the English Law of Unjust Enrichment* (2012), 158.

https://doi.org/10.1017/S0008197316000842 Published online by Cambridge University Press

absence of a contract, *C* could not recover the greater sum in either case.[113]

This creates an incongruity. Let us assume that *C* mistakenly renders identical services to *D1* and *D2* with, in each case, an objective market value of £7,000. *D1* may subjectively devalue those works because, for example, her brother would otherwise have performed them for £5,000. *D2* is thrilled with the works for which, on account of her desperation, she would have paid £9,000. *C*'s claim against *D1* is reduced to £5,000, but his claim against *D2* cannot be increased beyond £7,000. While *D1*'s liability is reduced on account of her subjective circumstances, *D2*'s liability is not increased on account of hers. If the valuation of enrichment is to be "seen from the perspective of the recipient"[114] in some circumstances but not in others, we must explain why that is so.

A further complication arises from cases where the good or services constituting the "enrichment" are objectively worthless or detrimental: for example, where *D* has her house "decorated in execrable taste"[115] or demolished as a spectacle.[116] It appears that, despite the general prohibition on subjective overvaluation, the claimant rendering those services *would* be entitled to restitution.[117] One view is that there is no need to resort to subjective overvaluation for such cases, because services have an objective market value independent of their result.[118] However, this contemplates an assessment of the market value of services in a vacuum. Although the value of services and the value of the end product are conceptually distinct, the objective value of the former can only be assessed with the latter in mind: the reasonable person in the market would plainly pay more for 100 man-hours spent restoring a valuable painting than 100 man-hours spent defacing it with the same precision and skill. Such cases reveal that restitution must lie for more than the objective market value of goods or services in some cases but not in others.

Finally, it is not clear that the same result would obtain in circumstances where the relevant "enrichment" consists of objectively worthless goods to which the defendant attaches a subjective value. If, for example, *C* mistakenly transfers to *D* a childhood picture or a barrel of radioactive waste to which *D* attaches a subjective value but *C* regards as meaningless or a liability, then, barring proprietary remedies,[119] it would seem inequitable to permit *C* to extract a remedy from *D*.

[113] *Benedetti* [2013] UKSC 50; [2014] A.C. 938, at [31].
[114] *Brenner* [1993] 2 V.R. 221, 258.
[115] *Benedetti* [2013] UKSC 50; [2014] A.C. 938, at [120].
[116] M. McInnes, "Enrichments and Reasons for Restitution: Protecting Freedom of Choice" (2003) 48 McGill L.J. 419, 449–50.
[117] *Benedetti* [2013] UKSC 50; [2014] A.C. 938, at [120]–[121].
[118] Burrows, *Law of Restitution*, 60–61, cited with approval in *Benedetti* [2013] UKSC 50; [2014] A.C. 938, at [121].
[119] See above, text accompanying notes 68–71.

https://doi.org/10.1017/S0008197316000842 Published online by Cambridge University Press

Neither of the two approaches in *Benedetti* supplies an answer to these problems. Those who adopt the concept of subjective devaluation can only assert that subjective overvaluation "is not necessary in order to protect a defendant's freedom of choice".[120] However, if the purpose of unjust enrichment is to strip the gains unjustly conferred on defendants,[121] then, in this context, protection is not our concern. The defendant's "freedom of choice" provides no reason to relieve her from liability if she has received precisely what she desired or requested, even if no reasonable person would have requested the services or valued them in the way she did.

The difficulty is all the more serious if the concept of subjective devaluation is discarded in favour of a defining an "objective" market price particular to every situation. If the "objective" measure is the price that would have been available to a reasonable person with all of the defendant's characteristics and circumstances,[122] there remains no basis to admit to that calculus only those circumstances that decrease the market value so assessed and not those that inflate it.[123]

A third explanation that has been offered is that the defendant who subjectively overvalues goods or services has nothing (or nothing beyond the objective market value) to give back.[124] Perhaps this is what Degeling and San Roque had in mind when rejecting subjective overvaluation on the basis that the "court is reversing the unjust enrichment of the defendant, not protecting the plaintiff's expectation interest".[125] However, that reasoning assumes what it seeks to prove: that the assessment of benefit in the defendant's hands must be limited by an objective standard. It is also contradicted by the availability of restitution for pure services, which produce no end product,[126] and by the denial of subjective overvaluation in cases where the defendant *does* have something more to give back, but only by reason of her particular circumstances, such as the fortunate stamp recipient mentioned above. None of these theories explains why subjective overvaluation is generally unavailable, or why it is available in some cases but not in others.

The problem is easily solved if the claimant's recovery is limited by his expense. Subjective overvaluation is objectionable not because it is unduly harsh on defendants, but because it is unduly generous to claimants. The double ceiling reduces the recoverable benefit if subjectively devalued by

[120] *Benedetti* [2013] UKSC 50; [2014] A.C. 938, at [29]; see also Burrows, *Restatement*, 158; but cf. Burrows, *Law of Restitution*, 60.
[121] See above, text accompanying notes 51–53.
[122] *Benedetti* [2013] UKSC 50; [2014] A.C. 938, at [100]–[101].
[123] The problem is not dealt with at paras. [120]–[121], where Lord Reed comments only on the tangential debate of whether subjective overvaluation plays a role in assessing services that objectively add no value to land.
[124] McInnes, "Enrichments and Reasons", 449.
[125] S. Degeling and M. San Roque, "Unjust Enrichment: A Feminist Critique of Enrichment" (2014) 36 Syd.L.R. 69, 96.
[126] E.g. *Pettkus v Becker* [1980] 2 S.C.R. 834; *Deglman v Guaranty Trust Co.* [1954] S.C.R. 725.

https://doi.org/10.1017/S0008197316000842 Published online by Cambridge University Press

the defendant, and also prevents it from rising above the objective market value – ordinarily the best estimation of what the claimant has lost by parting with his goods or rendering his services. There is support for this view in Lord Neuberger's speech in *Benedetti v Sawiris*. His Lordship disallowed subjective devaluation on the basis that "it would … be hard to describe the defendant's consequent enrichment as 'unjust' if he pays the claimant the market value of the benefit", and it would "be surprising if a claimant could obtain more by pursuing an unjust enrichment claim" than he would be able to obtain through a contract struck at market prices.[127] This reasoning is expressly focused on the claimant's loss – not in assessing *whether* the enrichment was at his expense (it was common ground that it was), but in determining the *extent* to which restitution should go. That is to say, the justification for restitution of unjust enrichment, in these circumstances as in others, expires once the claimant has recovered his expense.

What if the "benefit" is objectively worthless? The double ceiling also accommodates such cases. Although the reasonable person would pay nothing for worthless services, the claimant has suffered a loss by expending time, energy and resources in performing them[128] and the defendant has obtained a benefit, subjectively assessed. (The same cannot be said of the claimant who has merely parted with a barrel of useless waste.) Although the best measure of the claimant's expense is ordinarily the objective market value of his services, this is premised on an assumption – that there is a wider market of consumers willing to pay for his efforts against which they can be assessed, because people do not generally perform deliberately worthless or detrimental services – that does not hold in such cases. The same may be true of extremely specialised services. Lord Clarke left open the possibility that subjective overvaluation may be permitted in exceptional circumstances[129]: it is possible to conceive of circumstances such as these in which the value of the services to the reasonable person in the particular position of both the claimant and the defendant is higher than that to the market at large.[130]

C. Incidental Benefits

A general view has emerged that, although restitution might otherwise be available, it should not be granted where the benefit to the defendant is merely incidental to the claimant's pursuit of self-interest.[131] The problem

[127] *Benedetti* [2013] UKSC 50; [2014] A.C. 938, at [197]–[198].
[128] See above, text accompanying notes 86–90.
[129] *Benedetti* [2013] UKSC 50; [2014] A.C. 938, at [34].
[130] Although a similar proposition was rejected by Stephen Morris Q.C. in *Diamandis v Wills* [2015] EWHC 312 (Ch), at [94]–[95], his comments were made in obiter in the context of a strike-out application and without the benefit of full argument.
[131] This is related to, but conceptually distinct from, the prohibition on recovery for "risk-takers", or volunteers, who confer a benefit directly on another in the hope of reward, as in the case of the officious cobbler hypothetical in *Taylor v Laird* (1856) 25 L.J. Ex. 329, 332, per Pollock C.B.

https://doi.org/10.1017/S0008197316000842 Published online by Cambridge University Press

is most commonly enshrined in one of two examples of so-called "incidental benefit": where a claimant unwittingly heats his neighbour's apartment as an incident of heating his own,[132] or enhances her view by cutting down his trees.[133]

1. An independent rule?

In *TFL Management Ltd. v Lloyds TSB Bank Plc*,[134] the Court of Appeal declined to recognise a general defence of "incidental benefit",[135] although it was common ground between the parties that one existed.[136] Although the court was divided, no judge was prepared to endorse an independent rule barring recovery for incidental benefits. Floyd L.J. (with whom Beatson L.J. agreed) considered it "abundantly clear that although 'incidental benefit' may be a convenient chapter heading or umbrella term, it includes within its scope a whole variety of cases which may perhaps be better explained by reference to one or more of" the established elements of unjust enrichment.[137]

Over the years, various rules have been formulated to exclude recovery of "incidental benefits". On one view, such enrichments are not to be regarded as at the claimant's expense insofar as they are "merely incidental to the furtherance by the Claimant of an objective unconnected with the Defendant's enrichment".[138] Another approach is that there is a general exception to recovery for benefits "incidentally conferred on a defendant by a claimant in the course of acting in his own interest".[139] The Court of Session's formulation in the early leading case *Burns v McLellan's Creditors* is in the inverse: "No law subjects a man to recompense or remuneration who reaps an occasional or consequential benefit from the deed of another done with no view to his interest."[140]

However, none of these rules cleanly encapsulates the reason for denying restitution of incidental benefits. By introducing a free-standing exception, they clutter the symmetrical landscape of unjust enrichment and initiate a further inquiry into the scope and meaning of such terms as "incidental", "unconnected objective" and "self-interest". By reason of their imprecision,

[132] P. Birks, *Unjust Enrichment*, 2nd ed. (Oxford 2005), 158–60.
[133] *Ruabon Steamship Company Ltd. v The London Assurance* [1900] A.C. 6, 12; Burrows, *Restatement*, 54.
[134] *TFL Management Ltd.* [2013] EWCA Civ 1415; [2014] 1 W.L.R. 2006.
[135] Ibid., at para. [86].
[136] Ibid., at para. [19].
[137] Ibid., at para. [37].
[138] Burrows, *Restatement*, 54 (Rule 8(4)). See also the materially similar formulation advanced by the Bank in *TFL Management Ltd.* [2013] EWCA Civ 1415; [2014] 1 W.L.R. 2006, at [22].
[139] Goff and Jones, *Law of Unjust Enrichment*, para. [4–52]; see also the position in Scots law: *Jones v Muir* 2015 G.W.D. 11–183, at [7]; *Shilliday v Smith* 1998 S.C. 725, 730 (no recovery for claimant acting "in their own interest but which incidentally benefits someone else").
[140] *Burns v McLellan's Creditors* (1735) Mor. 13402, 6240.

https://doi.org/10.1017/S0008197316000842 Published online by Cambridge University Press

they require further exceptions and carve-outs in order to serve their purpose.

The concepts of acting in "self-interest" or in pursuit of an "unconnected objective" are at once too broad and too narrow. On the one hand, it is commonplace for claimants acting primarily in self-interest to be awarded a restitutionary remedy.[141] Where a claimant repairs a car he believes to be his,[142] or pays money in the mistaken belief that it is owed,[143] he acts in his perceived self-interest and with an objective other than enriching the defendant. It might be that the reason such cases do not qualify for the "incidental benefit" defence is that the nature of the claimant's mistake means that he is not acting in his own interest at all, or that his "objective" is an illusion. However, it would be difficult to engage in an objective assessment of self-interest, and such an exercise is not in any event supported by the cases in which the principle has been applied. For instance, the adoption of the "incidental benefit" terminology in *Shilliday* was focused on "the *intention* of the person who was the source of the benefit … to gain some personal material advantage", irrespective of whether his actions are capable of bringing about the benefit sought.[144] Further, an objective approach would not cure all cases: for example, restitution is available to a claimant who pays money under threat of violence,[145] although the avoidance of physical harm is the claimant's objective and is in his own interest.

On the other hand, a disqualification for "self-interest" or "unconnected objective" may not capture all cases it targets. For example, suppose *C* accidentally destroys his rare stamp, causing *D*'s rare stamp to increase in value.[146] He cannot be said to have acted in self-interest, or in pursuit of any particular objective, but should surely be denied restitution. Quite apart from these considerations, it is difficult to see what bearing the claimant's objective, interest or intention can have on whether the enrichment is at his "expense".

This leaves only the criterion that the benefit is "incidental" in nature. This concept has been described as "rather confused".[147] It cannot denote that the benefit is unintended, since that is the case for some unjust enrichment claims (such as in the case of mistake or undue influence), but not others (such as failure of consideration cases). The ordinary meaning of incidental might suggest that the benefit must arise unexpectedly and "by

[141] For a detailed discussion, see J. McCamus, "The Self-Serving Intermeddler and the Law of Restitution" (1978) 16 Osgoode Hall L.J. 515.
[142] *Greenwood* [1973] Q.B. 195.
[143] See *TFL Management Ltd.* [2013] EWCA Civ 1415; [2014] 1 W.L.R. 2006, at [85].
[144] *Shilliday* 1998 S.C. 725, 743, emphasis added; see also below, text accompanying notes 188–189.
[145] *Barton v Armstrong* [1976] A.C. 104.
[146] For this example I am indebted to Professor Robert Stevens.
[147] W. D. H. Sellar, "*Shilliday v Smith*: Unjust Enrichment through the Looking Glass?" (2001) 5 Edin.L.R. 80, 84.

https://doi.org/10.1017/S0008197316000842 Published online by Cambridge University Press

chance", or that it should be a "minor accompaniment to something else".[148] However, an "incidental benefit" may be neither: the value of a neighbour's property may increase dramatically by revealing ocean views as the altogether likely and foreseeable result of removing rather inconsequential vegetation. In a related context, it has been defined as referring to benefits "not flowing from the essential purpose or foundation" of the claimant's act.[149] But to classify as "incidental" all benefits arising as a collateral or secondary consequence of the claimant's actions would be to throw the net too wide. Under such a definition, the use value of money paid in error could be fairly characterised as incidental, contrary to House of Lords authority granting restitution for that form of enrichment.[150] Likewise, one might regard as "secondary" and therefore "incidental" the benefit that accrues to a defendant whose liability to pay compensation is discharged when the victim of her tort is paid by a concurrent tortfeasor. However, it is clear that the law regards the tortfeasor who thus escapes liability as unjustly enriched and will hold her to account. This category of case has therefore been characterised as a sole "exception" to the exception for incidental benefits.[151] It is a dissatisfying resolution.

Finally, if the collateral, secondary or incidental nature of the benefit negatives the "at the expense of" element[152] or provides for a general exception to recovery,[153] then it would not save the claimant that he conferred *both* the primary and secondary benefit on a basis that was mistaken or attracts the operation of another unjust factor. For example, in *Jones v Muir*,[154] the claimant parents built a bungalow on their daughter's land intending to occupy but not own it. When on their departure the daughter was enriched by the structure, restitution was denied (in an alternative line of argument) on the basis that her gain of the remainder interest in the bungalow was merely incidental to the parent's pursuit of building a temporary residence for themselves.[155] However, if the parents had been mistaken *both* as to their legal rights to occupy the bungalow *and* as to the ownership of the bungalow, one would expect that the characterisation of the latter as "incidental" should not disqualify them from a claim in unjust enrichment. The reliance on an independent rule against incidental benefit is prone to lead into error: although the undisturbed finding of fact in that case was that the parents had been advised that they would not own the bungalow,

[148] *Oxford Dictionary of English* (Oxford 2010), 884 ("incidental").
[149] *Van der Garde B.V. v Force India Formula One Team Ltd.* [2010] EWHC 2373 (QB), at [257].
[150] *Sempra Metals* [2007] UKHL 34; [2008] 1 A.C. 561.
[151] Burrows, *Restatement*, 55.
[152] Ibid., at p. 54 (Rule 8(4)); *TFL Management Ltd.* [2013] EWCA Civ 1415; [2014] 1 W.L.R. 2006, at [22].
[153] Goff and Jones, *Law of Unjust Enrichment*, para. [4–52]; see also the position in Scots law: *Jones* 2015 G.W.D. 11–183, at [7]; *Shilliday* 1998 S.C. 725, 730.
[154] *Jones* 2015 G.W.D. 11–183.
[155] Ibid., at para. [7(1)].

https://doi.org/10.1017/S0008197316000842 Published online by Cambridge University Press

the judgment would have denied restitution "whether they realised it or not".[156]

Perhaps it is possible to formulate a coherent and independent rule barring recovery of incidental benefits. However, the formulation of such a rule is a complicated exercise fraught with difficulty and risk, with little reward. So far, it has failed. Unless the cases of incidental benefit at which it is targeted are not dealt with by the existing framework of rules, there is no reason to complicate the challenge associated with the "worrisome … complex network of subsidiary or secondary rules" in unjust enrichment.[157]

2. Three kinds of incidental benefit

On closer examination, the cases of "incidental benefit" fall into one or more of three categories, in each of which recovery is barred by an existing rule of unjust enrichment: there is no transfer of value, no correlative loss or no unjust factor.

In the first category, the claimant has no standing to sue because the enrichment is not at his expense in the conventional sense that there is no transfer of value from the claimant to the defendant.[158] For example, where *C* destroys his stamp, or cuts down his trees, *D* may gain a benefit and *C* may suffer a loss but there is no transfer of value between them.[159]

This category accommodates the decision in *TFL Management Ltd. v Lloyds TSB Bank Plc*.[160] That case raised the question whether one company who benefits from another's efforts in litigation is unjustly enriched. Lloyd's Bank, acting pursuant to a charge, assigned the assets of The Trading Force Ltd. to Explora Group. These assets included rights under certain marketing and sales contracts between Trading Force and Hesco Bastion Ltd., under which there was a dispute about whether commission was due to Trading Force. As assignee, Explora issued proceedings against Hesco and established that the commission was due. However, Explora's entitlement to the commission was overturned on appeal, because the right to commissions was excluded from the terms of the assignment.[161] Riding on the coattails of that litigation, the receivers of Trading Force issued proceedings against Hesco. When those proceedings settled, Lloyd's Bank was the ultimate beneficiary of Explora's litigation, recovering the settlement sum and costs through its debenture. TFL, having been

[156] Ibid., at para. [6].
[157] M. McInnes, "The Reason to Reverse: Unjust Factors and Juristic Reasons" (2012) 92 B.U.L.Rev. 1049, 1064.
[158] See Burrows, *Law of Restitution*, 66; Menelaou [2015] UKSC 66; [2016] A.C. 176 at [38] per Floyd L.J.
[159] See D. Friedmann, "Unjust Enrichment, Pursuance of Self-Interest, and the Limits of Free Riding" (2003) 36 Loy.L.A.L.Rev. 831, 845; F. Wilmot-Smith, "Taxing Questions" (2015) 131 L.Q.R. 531, 534.
[160] *TFL Management Ltd.* [2013] EWCA Civ 1415; [2014] 1 W.L.R. 2006.
[161] *Explora Group Plc v Hesco Bastion Ltd.* [2005] EWCA Civ 646.

https://doi.org/10.1017/S0008197316000842 Published online by Cambridge University Press

(validly) assigned Explora's rights, commenced proceedings against the Bank alleging that it had been unjustly enriched by Explora's conduct of the proceedings. At first instance, the claim was summarily dismissed as being founded on a claim for the restitution of an incidental benefit, but the Court of Appeal held it should not be struck out.

The litigious efforts of Explora were in pursuit of their (illusory) self-interest and produced a benefit that could fairly be characterised as "incidental". However, Explora transferred value to the Bank by unwittingly conducting litigation from which only the Bank could benefit. It is the value of these services, rather than their end result (the commission) which might be recovered. Adapting Lord Scott's analogy in *Cobbe v Yeoman's Row Management Ltd.*,[162] the litigation efforts were the key to the Bank's cabinet, and Explora was the smith who mistakenly believed the cabinet to be his. The decision is also consistent with the position in some jurisdictions that a litigator who creates, increases or protects a fund in which third parties have an interest may be able to extract the costs of litigation from the fund itself, and therefore indirectly from those third parties.[163]

On the other hand, as Hume noted in his *Lectures*, a party to litigation that produces a precedent or settles a point of law has no claim for restitution from third parties who benefit from it[164] – just as it could not be suggested that a mistakenly published pattern for making keys could found an action against the owners of locked cabinets everywhere. Hume's helpful litigant is denied restitution not based on any free-standing rule against "incidental benefits", but because there is no transfer of value: any enrichment is not at his expense.

In a second category of "incidental" benefit, the claimant cannot recover in unjust enrichment because the enrichment is not at his expense in the additional sense proposed: that he has suffered no correlative loss. The academic commentary on the "incidental benefit" principle recognised by the law of Scotland frequently invokes the lack of correlative loss as the basis for denying recovery in such cases.[165] As Gloag and Henderson recognise, "[i]f somebody does something for his own benefit which also incidentally confers a benefit on another, the former probably suffer[s] no relevant loss; the latter's benefit does not cause him any extra expenditure".[166] Similarly, Professor Whitty notes that "[a]n important reason of principle underlying the 'incidental benefit' doctrine is that in providing such a benefit, the pursuer incurs no additional loss or expense",[167] and Sellar goes so far as to

[162] *Cobbe* [2008] UKHL 55; [2008] 1 W.L.R. 1752, at [41].
[163] See e.g. *Macdonald v McCall* (1887) 12 P.R. 9 (Ont); McCamus, "Self-Serving Intermeddler", 559–75.
[164] D. Hume, *Lectures 1786–1822*, vol. III (Edinburgh 1952), 166, n. 8.
[165] See *Shilliday* 1998 S.C. 725, 731.
[166] Gloag and Henderson, *Law of Scotland*, 12th ed. (Edinburgh, 2007), 523–24.
[167] N. Whitty, "*Transco plc v Glasgow City Council:* Developing Enrichment Law after *Shilliday*" (2006) 10 Edin.L.Rev. 112, 118.

https://doi.org/10.1017/S0008197316000842 Published online by Cambridge University Press

say that such cases are "covered by the well-accepted requirements of enrichment, impoverishment [and] a causal connection between" the two.[168]

The denial of restitution for incidental benefit is also explained with reference to the lack of correlative loss in the line of authority establishing this principle. Lord President Dunedin in *Edinburgh and District Tramways v Courtenay* first gave the example (later popularised by Birks) of the defendant who benefits from her neighbour's heating, and noted that it was the lack of any expense on the part of the claimant which indicated that recompense was not due.[169] In *Stewart v Steuart*, the owner and tenants of an estate that benefited from the supply of water to a neighbouring estate were under no obligation of recompense because of the absence of any "loss to one party resulting in a benefit to the other".[170] In *Exchange Telegraph Co. Ltd. v Giulianotti*, Lord Guest denied recovery for an incidental benefit because "the expense had been incurred by the pursuers in providing the racing news service to their subscribers [and t]he fact that the defender by obtaining the news service from other subscribers benefited incidentally did not involve the pursuers in any extra expenditure".[171] And, when the claimant tramway company in *Courtenay* produced new tramcars that saved advertisers the expense of producing tags to fix their advertisements to the sides of the cars, the Court of Session refused to order restitution of the benefit incidentally conferred because it could "not see that the Tramway Company ha[d] lost anything" by making improvements to its own property.[172] In each case, the claimant could not have heated his flat or obtained his water supply or transmitted its racing results or renovated its trams without the collateral benefit accruing to the defendant, and "must be taken to have accepted this as an inevitable consequence" of his actions[173]; he cannot therefore assert that he intended that collateral benefit for himself, or claim to have lost it.

The facts of several other "incidental benefit" cases also fall within this category. When the miner in *Ulmer v Farnsworth* drained his land with the consequence of improving the surrounding allotments,[174] he suffered no loss from doing so. The insurers in *Ruabon Steamship* were obliged to pay for the dry dock in any event and suffered no loss from, and were entitled to no claim in respect of, the incidental benefit to the shipowners who had the vessel inspected and reclassified while it was available to do

[168] Sellar, "*Shilliday v Smith*", 84.
[169] *Edinburgh and District Tramways v Courtenay* 1909 S.C. 99, 105, cited with approval in *Corrie v Craig* 2013 G.W.D. 1–55, at [31].
[170] *Stewart v Steuart* (1878) 6 R. 145, 149.
[171] *Exchange Telegraph Co. Ltd. v Giulianotti* 1959 S.C. 19, 26.
[172] *Edinburgh & District Tramways Co. Ltd.* 1909 S.C. 99.
[173] *TFL Management Ltd.* [2013] EWCA Civ 1415; [2014] 1 W.L.R. 2006, at [36].
[174] *Ulmer v Farnsworth* 15 A. 65 (1888).

https://doi.org/10.1017/S0008197316000842 Published online by Cambridge University Press

so.[175] Likewise, the best explanation for why no claim lay for the parents in *Jones v Muir*, who incidentally benefited their daughter by building a bungalow on her land with the intention of occupying but not owning it, is that they suffered no loss.[176] The same is true of the claimant who conducts and charges admission fees to a horse race at a location in view of a defendant's residence.[177]

If, on the other hand, the claimant's mistake did lead him to suffer a loss, there is no reason why the correlative benefit should be beyond the reach of restitution merely because it is characterised as "incidental". If, for example, the claimant mistakenly paid to heat a vacant flat instead of his own, and the neighbour to that flat incidentally benefited from the heating, then (subject to proof and subjective devaluation), recovery appears altogether less objectionable. Likewise, when a claimant transfers money or property, he also loses the (incidental) benefit of the use of that money or property as a consequence.[178] Finally, a claimant who is required by law to discharge a defendant's concurrent liability in tort to a third party may claim a contribution from the defendant and this contribution is best characterised as within the law of unjust enrichment.[179] This is readily explained by the fact that he has (incidentally) enriched the defendant by discharging her liability, and suffered a loss to the extent that he has been compelled by law to do so.[180] It is no answer to say that he was liable to pay the tort victim in full in any event. If the law that requires him to pay his concurrent tortfeasor's share can be viewed as creating the policy-motivated unjust factor, it can also be seen as causing him "expense" for the purposes of the doctrine of unjust enrichment. In each of these cases, restitution is available despite the apparently "incidental" nature of the benefit conferred.

A third category of "incidental benefit" encompasses those cases that merely represent the absence of an unjust factor. Restitution will not be granted to a claimant who embarks on an activity for his own profit, causing those around him (incidentally) to benefit.[181] This is adequately explained by the fact that his consent is not impaired in any way and there is no policy reason rendering the enrichment unjust: there is no need for an independent rule. For example, a claimant who benefits his neighbour's property by draining his mine,[182] or who secures his neighbour's property by

[175] *Ruabon Steamship Company Ltd.* [1900] A.C. 6. Similarly, see *Crouan v Stanier* [1904] 1 K.B. 87, 94; *The Acanthus* [1902] P. 17.
[176] The enrichment was also not unjust, because the occupier parents had walked away from their rights voluntarily: *Jones* 2015 G.W.D. 11–183, at [6].
[177] Burrows, *Restatement*, 55.
[178] Cf. *Sempra Metals* [2007] UKHL 34; [2008] 1 A.C. 561; see also above, text accompanying notes 14, 85, 148.
[179] See generally Burrows, *Law of Restitution*, ch. 17.
[180] Cf. above, text accompanying note 149.
[181] See generally Friedmann, "Unjust Enrichment", 845–51.
[182] *Ulmer* 15 A. 65 (Me. 1888); see also *Berry & Gould v Berry* 757 A.2d 108, 116 (Md. 2000).

https://doi.org/10.1017/S0008197316000842 Published online by Cambridge University Press

constructing[183] or reconstructing a dam,[184] after failing to reach a bargain to share the costs of doing so[185] cannot find a remedy in unjust enrichment. The same may be said of the claimant who heats his neighbour's flat, assuming he is not so hostile to his neighbour that he would not have turned on his heating had he realised the minor benefit it would afford. Likewise, in *Edinburgh Tramways*, it was not suggested that the claimant's improvements to its tramcars, alleged to have enriched the defendant advertiser, were done mistakenly, or that the tramcars would not have been improved had the tramway company realised the benefit it would yield to the advertisers.[186] The same is true when the incidental benefit is conferred in the course of fulfilling an obligation, as with the insurers in *Ruabon Steamship*.[187] The characterisation of the benefit as "incidental" has no bearing on that conclusion. Such a case is no different in principle to a claimant who voluntarily and *directly* confers a benefit on a defendant: "One cleans another's shoes; what can the other do but put them on?"[188]

In some such cases, the claimant engages in work or spends money not for direct profit, but in anticipation that a valuable joint venture will be concluded.[189] Although the benefit accruing to the prospective counterparty in such circumstances might be characterised as "incidental" to the claimant's pursuit of his own interests,[190] that is a tortured expression in circumstances where the self-interest pursued is only the prospect of a joint venture that was never likely to eventuate. The better reason for denying restitution in such circumstances is that, where one party is "acting off his own bat",[191] there is no failure of consideration.[192] In such circumstances, the work was not "done under a mutual belief and understanding"[193] or based on any other mutually understood condition.[194]

The same is true where, although there is a condition contemplated by the parties that fails, the work benefitting the defendant would have been done anyway, for the claimant's own private reasons. This argument failed on the facts in *Shilliday v Smith*[195] but, had the defendant demonstrated that his ex-fiancée would have invested in the improvements to the house for the purpose of improving her lifestyle and irrespective of their engagement, her

[183] *Orr v Graham* (1831) 10 S. 135.
[184] *Knaus v Dennler* 525 N.E. 2d. 207, 208–210 (Ill. App. Ct. 1988).
[185] So as to exclude, to the extent it exists, the application of the doctrine of necessity: see Burrows, *Law of Restitution*, ch. 18.
[186] *Edinburgh & District Tramways Co. Ltd.* 1909 S.C. 99, 106.
[187] *Ruabon Steamship Company Ltd.* [1900] A.C. 6.
[188] *Taylor* (1856) 25 L.J. Ex. 329, 332, per Pollock C.B.; cf. the discussion of "free acceptance" as an unjust factor in Birks, *An Introduction*, p. 104.
[189] *Becerra v Close Bros Corporate Finance Ltd.* (unreported 25 June 1999).
[190] *Chartered Brands Limited v Elmwood Design Limited* 2006 G.W.D. 27–599, at [76]; ibid.
[191] *Becerra* (unreported 25 June 1999).
[192] See *Regalian Properties Ltd. v London Docklands Development Corporation* [1995] 1 W.L.R. 212.
[193] Cf. *William Lacey (Hounslow) Ltd. v Davis* [1957] 1 W.L.R. 932, 939.
[194] *Roxborough* [2001] HCA 68; (2001) 208 C.L.R. 516, at [101]–[102].
[195] *Shilliday* 1998 S.C. 725, 730, 734, 735.

https://doi.org/10.1017/S0008197316000842 Published online by Cambridge University Press

claim would have been defeated. As much is clear from *Fernie v Robertson*, where Lord Neaves observed that a "man who at his own hand executes operations on a property, partly for himself and partly for another, has no claim against that other".[196] The best explanation for this is that the enrichment would not have been caused by the consideration and so no remedy would flow from its failure.

To say that a benefit is incidental and not subject to restitution is to say that there has been no transfer of value from the claimant, or that the claimant has suffered no loss, or that there is simply no unjust factor. If the broader conception of "expense" as both a criterion (transfer of value) and a measure of degree (of the co-extensiveness of the claimant's loss and defendant's gain) is accepted, then it accounts for a number of scenarios that might otherwise require the development of an independent class of "incidental benefits". Such benefits are not recoverable because they are not at the claimant's expense, so understood, or are not unjust, or both. This relieves us of the task of formulating an "umbrella"[197] rule with adequate precision to capture the disparate cases in which restitution ought to be denied, without resorting to flexible or indeterminate criteria or sweeping up deserving claimants along the way.

IV. Conclusion

There are good reasons why unjust enrichment should do no more than restore to the claimant what he has lost. The defendant has committed no wrong and is an innocent party upon which the law imposes a primary obligation to make restitution. That duty can extend only so far as is necessary to do justice to the claimant. Any enrichment in the defendant's hands that exceeds the claimant's loss is not unjust vis-à-vis the claimant, because it is not at his expense. This is the position that has been taken in several other common law and civil jurisdictions. Although it has not been adopted in Australia, that jurisdiction has been led into error by its characterisation of claims in unjust enrichment as based on an equitable duty found in "unconscionability". That leaves English law rather isolated with its fixation on stripping benefits from innocent defendants. One step towards limiting the intrusion of the law of unjust enrichment to the minimum necessary to do justice was the advent of change of position. That development has allowed the law of unjust enrichment to expand and flourish. Another should be to limit the claimant's restitution to the extent of his expense.

It is not too late to do so. Although the defence of passing on has been rejected, this is in the context of *Woolwich* claims where constitutional

[196] *Fernie v Robertson* (1871) 9 M. 437, 442.
[197] *TFL Management Ltd.* [2013] EWCA Civ 1415; [2014] 1 W.L.R. 2006, at [37].

https://doi.org/10.1017/S0008197316000842 Published online by Cambridge University Press

considerations provide an independent reason to retract the whole of the defendant's enrichment, or in circumstances where the defence should have failed on the facts in any event. Likewise, the award of restitution in respect of services is only inconsistent with the double-ceiling approach if we accept that the claimant's labour does not qualify as an expense. Cases involving proprietary remedies are also no obstacle, either because restitution in such cases acts to restore assignable rights without regard to their value, or because such cases do not involve unjust enrichment at all.

To the contrary, the double-ceiling approach assists with elegance and symmetry, and leads us to a clean solution of several disorderly areas of the law. Restitution in services cases is of the market value of the services rather than the increase in the defendant's property, because that is usually the best measure of what the claimant has lost. Subjective overvaluation is not permitted where it would allow the claimant to recover more than his loss on account of the defendant's particular circumstances. Finally, the umbrella rule against recovery for "incidental benefits" is in truth a compendious reference to cases in which there has been no transfer of value, no unjust factor or no correlative loss. The seeds of these solutions are sown in the jurisprudence and academic commentary on each of these problems. It is hoped in time that the adoption of the double ceiling will at once ensure the law of unjust enrichment retains its sound foundations and its elegant shape.

https://doi.org/10.1017/S0008197316000842 Published online by Cambridge University Press