Cambridge Law Journal, **63(2)**, July 2004, pp. 435–455
Printed in Great Britain

IMPLIED CONTRACT AND RESTITUTION

STEVE HEDLEY*

THE idea that much of the law of restitution is based on "implied contract" has deep roots in legal thinking. It is a natural, almost unavoidable analogy for many important forms of liability; it has proved valuable to many lawyers across the centuries. Yet therein lies the dilemma. *Because* it is so clearly part of the legal tradition, *because* it is not obviously a new or fashionable concept, it is open to attack as being out of date, part of an outmoded way of thinking. And so it has ended up being opposed to "unjust enrichment". The modern theory of unjust enrichment is conceived of as providing all the answers, to any question that might conceivably be asked about restitution. What use, then, can the older idea of implied contract be?

Yet "implied contract" and "unjust enrichment" were more often seen together than apart in earlier phases of the law. There is nothing intrinsic in either to call the other into question. The problem has only arisen because inflated claims have been made for the coherence and rigour of unjust enrichment. If unjust enrichment can be stated with such a high degree of clarity as its proponents have argued, then there is indeed no room for other organising concepts, of any kind. Of course, the degree of coherence claimed cannot be sustained for long. Restitution cases involve, almost by definition, those who have managed to lose their wealth in unforeseen and ever more various circumstances. Inventive counsel are forever straining at whatever limits have been laid down; and where judges have favoured unjust enrichment, it has usually been because they are impressed by the merits of a claim lying just outside the existing law. So while the settled rigour that the proponents of unjust enrichment seek is perhaps attainable in some area of the law, it will not be in the turbulent waters of restitution. Any clear statement of principle now must be paid for by an embarrassing retraction of that statement somewhere down the line, perhaps not very far in the future.

* Professor of Law, University College Cork. I gave an earlier version of this paper at the SLS Conference, Oxford, on 19 September 2003. Many thanks to Frank Rose, who organised the papers, to Eoin O'Dell, who chaired my session, and to the audience for their reactions. I would be delighted to receive comment on, or criticism of, anything in this paper: e-mail me at s.hedley@ucc.ie.

https://doi.org/10.1017/S0008197304006646 Published online by Cambridge University Press

My aim is not, therefore, to state the law of implied contract at the same level of logical rigour as has been claimed for unjust enrichment. Neither is it to reiterate criticisms of unjust enrichment made elsewhere. My task here is more basic: to rescue implied contract from the condescension of those who have made no attempt to understand it, and who (out of an exaggerated sense of what their preferred theory can do) think that they do not need it. The analogy between contractual liability and certain types of restitutionary liabilities is, I contend, not merely obvious and useful, but vital; for the truth is that "contract" is itself a flexible and permeable notion, with the metaphorical "implied contract" being one tool for dealing with its outer edges.

Opposition to "Implied Contract"

Most modern treatments of restitution make it clear that the analogy with contract can easily be drawn, indeed repeatedly *has* been drawn throughout legal history. Nonetheless, they usually go on to reject it. Yet their reasons for so doing are extraordinarily weak. Any stick is good enough to beat the "implied contract" theory with, and those doing the beating have plainly not asked themselves whether their own theories would fare any better under such an assault.

Some argue that implied contract is old-fashioned or anachronistic. Yet it is no older than unjust enrichment; both are hardy perennials of private law.[1] Both ideas are always around, and they rise or fall with the uses that lawyers and (more recently) economists find to make of them. Calling implied contract "old-fashioned" is simply a double standard: the theory we prefer has a long and distinguished history, whereas the theory you prefer is antiquated and superannuated. If that is all there is to the objection, then it is hardly worth making.

As a variant on this argument, some say that a modern theory of law will draw a sharp distinction between contractual liabilities and non-contractual liabilities; that "implied contract" blurs that line; and to that extent, it is a theory which is out-of-date. The difficulty with this argument is that (to put it kindly) it is itself at least a century behind the times. The urge to draw sharp lines between contractual and other forms of liability seems to have peaked somewhere around 1870; since that time, the "will" theory has had to share the law of contract with a variety of others.

[1] On Pomponius's vague maxim (*iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiorem*, Digest 50.17.206; see also D.12.6.14), which must be the historical root of unjust enrichment if anything is, see J. Dawson, *Unjust enrichment—A comparative analysis* (Boston, Mass. 1951), especially introduction and ch. 1.

https://doi.org/10.1017/S0008197304006646 Published online by Cambridge University Press

Liabilities of all sorts have expanded since then; notions of contract have altered, and "contractual" boundaries have blurred. At the boundaries of contract we are forever bumping into liabilities not clearly divided from it: tort, property, various forms of estoppel, equitable and statutory liabilities.[2] It is certainly possible to argue that the distinctiveness of "contract" should be re-asserted—and it is no particular surprise to find enthusiasts for unjust enrichment doing so[3]—but, right or wrong, this is not an argument for modernity. It is an argument for a return to what was so a century ago, a polemical re-assertion of Victorian values. In practice, of course, the line is impossible to hold—in descriptions of the actual law, talk of "consideration" or "bargained-for enrichments" is unavoidable.[4] We have not really gone very far from contract at all. The supposedly radical difference from contract is often hard to discern.

One repeated argument is that that "implied contract" involves a fiction—it makes us pretend that there is a contract when there is not. This objection is the one that is urged the loudest and in the most colourful language; one writer has even called the idea of quasi-contract "heresy", and its elaboration a "web of falsehood".[5] "'Quasi-contract' says only that the matter is not contract".[6] This is not true. It also says that the matter *deserves to be treated* as contract, an argument which is not obviously absurd, and must be considered on its merits. As Holdsworth pointed out, the similarity between contract and quasi-contract is much too close to be simply ridiculed and dismissed.[7] Indeed, it is those who down-play the similarity who need to explain themselves.

The "fiction" objection badly needs to be unpacked. It is really several objections rolled into one, some of the objections being more serious than others.

At the more superficial end, you have those critics who pretend, unconvincingly, that they are unfamiliar with similes, metaphors and other basic tools of rhetoric. To say that A is *like* B does not involve any assertion that A *is* B. So to point out that the liabilities I am considering are *like* contractual liabilities involves no assertion that they *are* contractual. If someone says that I am like my brother, this involves no assertion that I am my brother, still less

[2] On this see S. Hedley, "Restitution: Contract's twin?" in F. Rose (ed.), *Failure of contracts—Contractual, restitutionary and proprietary consequences* (Oxford 1997), at p. 247.
[3] See especially A. Burrows, *Understanding the law of obligations: Essays on Contract, Tort and Restitution* (Oxford 1998), ch. 1.
[4] For an excellent example see the discussion of "bargained-for enrichment" in A. Burrows, *The law of restitution* (2nd ed., London 2002), pp. 23–24.
[5] P. Birks, *Unjust enrichment* (Oxford 2003), p. 234.
[6] Birks, *Unjust enrichment*, p. 233.
[7] W. Holdsworth, "Unjustifiable enrichment" (1939) 55 L.Q.R. 37, 42.

https://doi.org/10.1017/S0008197304006646 Published online by Cambridge University Press

does it import a fiction that I am my brother. Or again, if I say that my love is like a red, red rose, I do not mean that she attracts aphids, or that she needs to be watered regularly. So it makes perfect sense to point out that the remedy in many restitution cases is very similar to a contractual remedy: a debt arising in restitution has many of the characteristics of a contract debt, it often arises in similar or related circumstances, and so on. At this very basic level, then, there is not much in the objection. Indeed, to make it at all is to refuse to treat like cases alike, to insist that we should ignore similarities because they are not identities.[8]

As will become apparent, I think that in many cases the "fiction" charge has it backwards: we are dealing with cases which fairly deserve to be treated as contracts, and it is assertions that there is *no* contract that involve a fiction. But this will emerge below.

For those prepared to admit the obvious, that the analogy with contract clearly can be drawn, the argument becomes one over whether it should be drawn. I will be considering that objection throughout the rest of the paper, in the various different contexts in which it arises. I certainly do not argue that every case which a classical Roman lawyer or an 18th century common lawyer would have called quasi-contractual can usefully be treated that way today.[9] But many can, and I ask for honest enquiry as to which these are.

What is really in issue is, of course, not the shadow but the substance—not quasi-contract, but contract itself. Much of the protest against "fiction" is an attempt to maintain the traditional boundaries of contract law, to insist that the boundaries set by offer and acceptance, consideration, form and legality should set the absolute limits for what is contractual. Contract as conceived of by the Victorians is "genuine" contract, all else is "fiction". Yet if there are those who wish to take this Canute-like stance, to say that nothing of any structural importance has occurred in the law of contract in the past (say) 130 years, then their argument has to consist of a great deal more than a simple defence of "unjust enrichment". The law of contract was not written in stone in 1875. The economy is a vast, subtle and ever-changing social process. It would be remarkable if the law necessary to govern it were to stay still, if what fitted a century ago still fits now. And indeed modern contract scholars are not finding any such thing.[10] Contract law *is*

[8] Cf. Burrows, *The law of restitution*, p. 14.
[9] Cf. P. Birks and G. McLeod, "The implied contract theory of quasi-contract: Civilian opinion current in the century before Blackstone" (1986) 6 O.J.L.S. 46.
[10] See especially H. Collins, *Regulating contracts* (Oxford 1999).

https://doi.org/10.1017/S0008197304006646 Published online by Cambridge University Press

the law of which benefits are to be paid for by the recipient (though it is other things as well); and repeated assertions that there is another, different, "non-contractual" law on the subject are unconvincing. Attempts to define "benefit" will always lead back to the market one way or another—"benefit" always turns out to mean what the holder paid or might have paid, or the price it has been or might be sold for. "Benefit" is not intelligible without reference to the market; and the law of the market is called "contract".[11]

Therefore, I see no reason in principle why the law cannot be expounded within a quasi-contractual framework. The real question is what form this could take, and whether the result is a convincing theory of law—and better than the alternatives on offer. That is the issue the remainder of this paper addresses.

The Modern Law of Implied Contracts

I propose four ways in which the concept of "implied contract" is under-used in restitution, particularly if the alternative organising concept is taken to be "unjust enrichment". Taken together, the four mark out a considerable area of law, comprising a number of cases where one side has conferred a valuable benefit on the other and seeks to be treated as if there were a contract to pay for it. I do not suggest that the four together cover the whole of restitution, though it seems to me that the whole of "direct restitution"—transfers of wealth from claimant to defendant without intervening parties—is caught.[12]

In establishing the four specific propositions as I have said, I contrast each with the "unjust enrichment" explanation of the same liabilities, and argue that my proposition is superior. I appreciate that despite occasional shows of unity, "unjust enrichment" is not one theory but many, but I hope to make criticisms which are of general relevance, rather than simply biting on particular versions of the theory. As to what makes one theory better than another, I mean things like: how well it fits the results of, and reasoning in, decided cases; whether the rule is a reasonable one; and whether it fits tolerably well into the legal system generally. Contrary to what is sometimes said,[13] I cannot see that there is any fundamental *jurisprudential* difference between my approach and that of the "unjust enrichment" school. Sometimes they have seemed to place more emphasis on elegance and system, and this usually ends up in

[11] S. Hedley, *Restitution: Its division and ordering* (London 2001), ch. 3.
[12] On conceptual divisions within restitution see Hedley, *Restitution: Its division and ordering*, pp. 224–228.
[13] *E.g.* Burrows, *The law of restitution*, pp. 14–15.

https://doi.org/10.1017/S0008197304006646 Published online by Cambridge University Press

self-defeating declarations that the whole of the law is hopelessly unsystematic and none of their colleagues are really lawyers at all. This (I can only assume) is hyperbole.[14] It seems to me that with only minor differences of emphasis, we expect very similar things of the law—we simply disagree over whether the theory of unjust enrichment does them.

1. Almost-but-not-quite Contract

A teenager goes into a supermarket, selects certain food and household items, takes them to the till, pays for them, and carries them away. How do we, as lawyers, look at this transaction? It certainly looks like a contractual situation. Yet some teenagers have reached their 18th birthday, and some have not. If this particular one has not, then there is a problem—s/he is not regarded by the law as having full capacity to make contracts. An analysis based purely on contract law, narrowly understood, will not work.

So when we consider the rights and obligations arising from an under-age supermarket sale, we must start by admitting that this is not "contract" in the strict sense. Yet the law applicable to the transaction is not entirely "non-contractual", either. The supermarket are liable under the arrangement precisely as they are to an adult—if the goods turn out to be defective they can be sued. The teenager has a right to escape the contract when an adult would not, but it is a very limited right—a court would have to be convinced either that the goods were not necessaries or that the price was unreasonable, and even so the right is obscure and hedged around with exceptions. So while the legal regime applying to the transaction is not exactly what ordinary contract law would suggest, it is certainly very similar, and in most situations indeed there is no difference worth mentioning.

So what we have in this situation is very like a contract. According to taste we can call it a quasi-contract, a virtual contract, or an almost-contract. The rights to which it gives rise are very similar to those under a contract: in fact, bar an obscure and awkward right to avoid the arrangement (which in most practical situations is not available anyway), they are identical. So if we really believe in treating like cases alike, we need to recognise that this is like contract, and is treated like contract. Anyone who talks of "fictions" of contract has missed the point.

So that is one example. More formally, then, my first proposition is this:

[14] I explore this further in "The taxonomic approach to restitution", in A. Hudson (ed.), *New perspectives on property law, obligations and restitution* (London 2004), p. 151.

https://doi.org/10.1017/S0008197304006646 Published online by Cambridge University Press

If :

(i) there is an arrangement between two or more parties which would be a contract except for the application of one specific rule of law, and
(ii) the arrangement has been at least partly acted on,[15] and
(iii) one party now seeks a remedy which would have arisen if the arrangement were contractual,

then that remedy will be granted so long as

(iv) it can be granted without subverting the specific rule of law.

So in the teenager example, the arrangement would certainly be contractual but for the rule that those under 18 have no contractual capacity. If it has been acted on, it is nonetheless treated as a contract, unless the rule protecting teenagers would thereby be subverted. So if the teenager is, on mature reflection, happy to stick with the arrangement, it is a contract; and if the goods were necessaries at a fair price, then the arrangement binds as a contract regardless of the teenager's wishes. Only if the goods were not necessaries or were unfairly priced does the law grant an escape.

It will be observed that this approach involves asking why the law refuses to treat the arrangement as a contract, and balancing this against the objectives of the legal system generally. Contract is not an unthinking colossus, its rules are there for a reason. The legal system strives to protect teenagers from exploitation, but it also strives to do many other things. When the law singles out a contract-like arrangement and says that this is not to be regarded as a valid contract, usually it is for a very specific reason, and the objection often is not to *all* the legal consequences of a contract but only to *some*. It is no surprise, then, that the other remedies remain available; but to see which these are, it may be necessary to ask the point of the ban.

So in the case of the under-age supermarket sale, the quasi-contractual analysis is perfectly natural. The arrangement is very close to what the law would regard as a contract, and where a remedy is given at all it is a contractual one. Contract law is applied in such cases to the extent that it is fair to do so, but no further. The similarity with contract is not accidental or irrelevant; on the contrary.

What of the proposed alternative explanation, that the teenager's liability to pay for the goods arises to correct the unjust

[15] It will be seen that the implied contract is more unilateral than bilateral, though the case law on the point is sparse.

https://doi.org/10.1017/S0008197304006646 Published online by Cambridge University Press

enrichment which would occur if s/he were allowed to keep them for nothing? This adds little to the explanation given, and is mostly a *suggestio falsi*. The case law makes no attempt to measure whether the teenager is better off, or has benefited or been enriched. This can only be squared with unjust enrichment theory by adopting some very strange definitions of "benefit", to smuggle in the quasi-contract through the back door. And what is the "unjust factor"? Most writers simply give "infancy" as the factor; but why is lack of age here a reason for imposing liability, when it is usually something that *relieves* people of liabilities?[16] Finally and emphatically, *even if* the unjust enrichment explanation were accepted, it would only solve half the problem. It would explain why the teenage consumer sometimes has to pay, but would not explain why the supermarket are liable if the goods are defective. The bilateral character of the arrangement is simply ignored.

It therefore makes much more sense to say that the arrangement is treated as a contract, to the extent that it can do so consistently with protecting teenagers from exploitation; and this solution seems superior to saying that "contract" is irrelevant.

This is, in microcosm, an example of why the argument from "fiction" usually has it backwards. There is no fiction involved in saying that a 17-year-old may contract with a supermarket—it is, after all, an everyday occurrence. The fiction comes from those who draw unfeasibly sharp distinctions between contract and non-contract, refusing to admit that there are cases in between. Yet a contract with a 17-year-old has *most but not quite all* of the consequences of a contract with an 18-year-old. Where it is necessary to distinguish the cases, the law does so; but where there is no necessity to do so, we should not.

So to complete this section of the paper, I consider the situations which I think should be explained in this way. In all of them, the arrangement between the parties falls short of a contract, but does so for a very specific reason. If one party to such an arrangement claims a contractual remedy, and it can be given consistently with that specific reason, then the law will do so.

I group the cases into three rough categories.

Failure of Capacity

Lack of capacity I have now considered in some detail, in relation to lack of age; similar issues arise when there is a generalised lack of cognitive capacity, whether through senility or more temporary

[16] For example, Burrows (*The law of restitution*) sometimes treats lack of age as a defence (pp. 559–564) and sometimes as a ground of liability (pp. 412–416), without any discussion of the rationale.

https://doi.org/10.1017/S0008197304006646 Published online by Cambridge University Press

factors, such as drink or an unduly-influential relative or friend. The balance the law strikes here can be elaborate, as we have seen. A further dimension is provided by the variety of parties who may be involved in commercial transactions—in undue influence cases, we might treat an arrangement as a binding contract at the behest of a good faith third party, but not at the behest of the influencer. But it is important, I think, to start with reality not fiction: the arrangement is one which it is perfectly fair to treat as a contract for some purposes, and the issue is whether the instant case is one of them. The starting point is contractual; and if there is a liability, it is a contractual liability.

Corporate lack of capacity is a different kind of issue. Benefits are supplied for a company which has not technically been formed, or which cannot validly contract, or which is now defunct or nearly so. The courts are well aware of the dangers of fraud in such cases,[17] but if that objection can fairly be met then there is no difficulty in treating the matter as if the benefit had been contracted for. Here, there is no denying that the "contracts" are fictions, for the obvious reason that any contract with a company is a fiction; the question is as to the appropriate limits to the fiction. And when statute intervenes, it does so by straightforwardly quasi-contractual means: an arrangement which would be a contract, except that one party to it has yet to be incorporated, takes effect as if it were a contract by the promoters.[18] Indeed, the notion that a company is a real person who is responsible for their actions (the *Salomon* fiction) is one of the more prevalent and useful fictions in the modern legal system, without which the economy would have to be structured in a very different way. While admitting that these contracts are fictitious, then, it is hard to see this as a serious objection to them.

Failure of Formality

The second category is that of a failure of formality, where the claim is for a remedy as on a contract, but the formal proof of agreement is absent. Sometimes the lack is of some statutory formality such as writing, or sometimes it is the absence of the common law's formal requirement, *viz.* an offer followed by an acceptance. In many cases, of course, the failure of formality is the end of the matter—formal requirements are there for good reasons, and a failure to comply with them should and does deprive parties

[17] See especially D. Srivastava, "Alarming Levels of Provisional Liquidators' Remuneration and Costs" (1998) 9 Australian Journal of Corporate Law 263.

[18] Companies Act 1985, s. 36C, on which see generally J. Savirimuthu, "Pre-incorporation contracts and the problem of corporate fundamentalism" (2003) 24 Company Lawyer 196.

https://doi.org/10.1017/S0008197304006646 Published online by Cambridge University Press

to the agreement of a remedy. But there are a few well-recognised exceptions, where countervailing considerations persuade the courts to recognise a contract.

One clear case is salvage, where emergency help is rendered at sea. In those circumstances, it is clear law that the salvagor is entitled to be remunerated by the salvagee. The help may technically be "contractual" or it may not be—there may or may not have been an opportunity to agree a formal contract—but the courts are careful not to let actual contracts and quasi-contracts diverge too much. The quasi-contracts are carefully modelled on standard industry terms; and the actual contracts are scrutinised carefully for unfairness. Again, the strength of a quasi-contractual analysis is obvious—great care is taken to make sure that the quasi-contracts and the actual contracts are on very similar terms, and so this can hardly be dismissed as an accident.

Again, if it is said that the salvage quasi-contract is a "fiction", this stands the truth on its head. Every reasonable sea-travelling individual will have heard of salvage, and it seems to me that this can be fitted into the concept of actual intent. Whether it can be shown that they communicated, to remind each other of what they both knew already, is an empty formality. But regardless of whether this is so, undoubtedly there is an argument for *making* people contract in this situation, whether the argument is put in moral language ("rescuers deserve generous treatment") or economic language ("rescue at sea is more efficient than letting property sink and people drown"). Clearly, an element of social engineering enters: it is desirable to apply the economic incentive of contract to would-be salvagors, in addition to the less tangible moral incentives.[19] No doubt argument will continue over whether this approach should be extended to other arenas, such as emergency medical help on land.[20] But however that argument may go, it is clear what we are arguing *about*: namely, whether such individuals should be remunerated as if they were contractors. The argument is explicitly over whether the parties should be treated as if they had made a contract.

A second case of informality is that of so-called "incomplete" contracts. I say "so-called" because the very label embodies the fallacy I am attacking. In the typical "incomplete contracts" case, one party has done work for the other, which was always intended to be remunerated at market rates. If the court then takes this

[19] *E.g.* R. Long, "A theory of hypothetical contract" (1984) 94 Yale Law Journal 415.
[20] H. Dagan, "In defense of the good Samaritan" (1999) 97 Michigan Law Review 1152; Cf. K. Williams, "Doctors as Good Samaritans: Some empirical evidence concerning emergency medical treatment in Britain" (2003) 30 Journal of Legal Studies 258, 279–280.

https://doi.org/10.1017/S0008197304006646 Published online by Cambridge University Press

arrangement at face value and awards market remuneration, then this seems to me a *complete* contract, without a shadow of a fiction. The joker in the pack is that while the parties' acts proclaim a contract, their words may have suggested that they were still negotiating—usually because the work was part of a wider project, the full details of which had not been worked out. I have myself never understood why the fact that the parties wanted to negotiate some great and all-encompassing contract should prevent us from recognising the more modest contract which they ended up making. And talk of "fictions" of contract here prove much too much. *Of course* it is a fiction to say that the parties meant to end up in court, or "intended" any particular remedy—but no more of a fiction than saying that in ordinary contract cases. *No-one* intends to end up in court. In restitution cases, it is no fiction to say that the court gives effect to the parties' intentions where it can; and it is quite wrong to say that ordinary contract law does anything more than that.

In arguing that an "implied contract" framework is best for discussing these issues of partial or "incomplete" contracts, I mean to keep my claims modest. "Implied contract" is here the what, not the why—if a legal remedy is given, it consists in treating the parties as if they had contracted. When and whether to do so is a complicated question, to which I have no easy answer, and neither does anyone else; there is an inescapable and complex moral dimension to what we are prepared to regard as a contract.[21] In the real world, where the line is often not clearly drawn, a relatively fluid approach may be necessary.

A final case is that of statutory formalities. Very often, the legislature demands that certain transactions be reduced to writing, or otherwise made formal. Yet while the court may applaud the impulse behind this legislation, it is quite another question whether every party to an informal arrangement should always be denied any remedy on it. And indeed there is a long history of judicial avoidance of the effect of formalities in contract law and property law. The question is whether, ultimately, a particular contractual remedy claimed will be granted, or whether the statutory ban will be held to defeat it. To those who are thinking clearly, there is no third option, of granting the contractual remedy yet waving a magic wand to prevent its being "contractual".

[21] The better modern writing stresses the wide variety of possible conceptual bases for recovery: see especially J. Dietrich, "Classifying precontractual liability: a comparative analysis" (2001) 21 Legal Studies 154; K. Barker, "Coping with failure—reappraising pre-contractual remuneration" (2003) 19 Journal of Contract Law 105.

https://doi.org/10.1017/S0008197304006646 Published online by Cambridge University Press

Of course, it is easy to understand how judges who understand this point well might nonetheless take the illicit third option. Suppose the owner of a cottage arranges for builders to do work on it; the work is done well but the owner, for some reason, declines to pay; when the builder takes her to court, she points out that their arrangement was not in writing as statute required. Now, if we are approaching the case in the spirit that like cases will be treated alike, then it is the statute that will decide the issue. Perhaps the statutory ban does not extend so far, in which case she loses—after all, perhaps the statute did not say anything expressly about particular types of contractual claim. Or again, if the court really feels that the statutory language leaves no alternative, her argument succeeds. It seems very hard, however, to defend what the High Court of Australia did on those facts, which is to say that the statutory ban catches all *contractual* claims, but that this claim was not contractual but rather *restitutionary*.[22] Really? The claim was one for agreed work at an agreed price, the agreement being between competent adults. It is no fiction to say that there was a promise to pay—on the contrary. What magic can make this "non-contractual"? This seems to me to be precisely the sort of fiction-mongering we should be opposing.[23]

It is clear that "unjust enrichment" is no panacea for the problems of this area; here as elsewhere, supporters of "unjust enrichment" cannot even agree on how their theory is to apply at all, with quite different accounts of what the "enrichment" and the "unjust factor" are supposed to consist of. The theoretical disputes over what "enrichment" means have simply run into the ground, unresolved and apparently unresolvable within the current scheme of concepts.[24] There are many theories that can be brought to bear on facts of this nature, with "unjust enrichment" certainly not standing out as particularly useful or even coherent. Its value has not been demonstrated.

[22] *Pavey and Matthews Pty. Ltd.* v. *Paul* (1987) 69 A.L.R. 577. See D. Ibbetson "Implied contracts and restitution: History in the High Court of Australia" (1988) 8 O.J.L.S. 312. In that respect if in no other, *Sinclair* v. *Brougham* [1914] A.C. 398 represents a more satisfactory approach. On the financial collapse of a building society, it emerged that the extensive banking business it had conducted was *ultra vires*. Could the depositors nonetheless make a personal claim that would treat them in exactly the same way as if it had been *intra vires*? The Lords cannot be faulted for asking themselves the right question—whether such a personal quasi-contractual claim can be squared with the policy of the legislation establishing the limits of the society's powers—though of course from a 21st-century perspective we can regret their negative answer.

[23] See more generally I. Jackman, "Promissory obligations in the law of restitution" (1995) 69 Australian Law Journal 614; A. Vrisakis and J. Carter, "Restitution of payments made under contracts prohibited by statute" (2000) 15 Journal of Contract Law 228.

[24] See especially the long-running disagreement over whether "free acceptance" is a fit concept to be accepted into unjust enrichment theory at all: issues summarised by Burrows, *The law of restitution*, pp. 402–407.

https://doi.org/10.1017/S0008197304006646 Published online by Cambridge University Press

Failure of Legality

The third category is failure of legality: arrangements which plainly fall to be treated as contracts, except that there is a breach of the law in their making or performance.

Enormous harm has been done here by mindless insistence that an illegal contract is no contract at all, that an illegal contract has none of the effects of a valid contract. This false absolutism is not called for today. In the eighteenth century caselaw, an absolutist line is taken—unsurprisingly, since the illegality was usually fairly serious. But the rise of modern regulation calls this into question. Statute today is a much more pervasive and subtle instrument for the regulation of the economy: bluntly, most examples of "illegality" are not anything to lose much sleep over.[25] Illegality therefore works at the level of the individual remedy. It is now generally accepted, for example, that someone claiming property that was involved in an illegal transaction cannot be met with a simple plea that the contract was illegal—an illegal contract may nonetheless be fully effective when it comes to creating or modifying property rights. This is equally true, I contend, when it comes to more "contractual" remedies, such as claiming for the value of work done. The contract may have been illegal, and to give it all of the usual consequences of the contract may therefore offend public policy, but if *the claim actually made* does not so offend then it should be allowed. So a contractual claim for work done under an illegal arrangement may succeed if the work concerned was incidental to any illegality; or if the person who did it was assured by the (apparently more knowledge) other party that it was legal; or if the person who did the work was the very sort of the person the legislation was meant to protect.[26]

Again, it is easy to see the temptation to dress up these claims as non-contractual, to pretend that the illegal contract has nothing to do with the matter. This avoids awkward questions about whether the court may, by allowing the claim, be condoning an illegality proscribed by statute. But to those of us who believe in treating like cases alike, or avoiding unacknowledged fictions, this plainly will not do. Where the court gives a remedy that is much like a contractual remedy, and for much the same reasons as in contract cases, then it is no fiction to suggest that we are still dealing with contract.

[25] J. McCamus, "Restitutionary recovery of benefits conferred under contracts in conflict with statutory policy—the new golden rule" (1987) 25 Osgoode Hall Law Journal 787, 788–780.

[26] For a similar approach see J. McCamus, "Restitutionary recovery of benefits conferred under contracts in conflict with statutory policy—the new golden rule" (1987) 25 Osgoode Hall Law Journal 787.

https://doi.org/10.1017/S0008197304006646 Published online by Cambridge University Press

2. Failure of Classification—Contracts by Other Names

In this second category of case, an essentially contractual arrangement is nonetheless not so treated, usually for reasons rooted in the history of the area, and in the major examples quite impossible to weed out.

Unlike the previous category of case, where I strongly argue that the contractual model is the right one, I am here more cautious. The analogy with contract is always there, and on some issues should be pushed hard; but only in relatively rare circumstances does it demand to be accepted. In relation to great social institutions such as employment and marriage, for example, the contractual element is obviously present yet also controversial; to ask whether either is "really" contractual is to revive issues that have plagued both areas for several centuries now. Insisting on the contractual approach is tendentious at best.

At a more modest but still quite abstract level, there are the estoppels and various related "reliance" doctrines. Here too the contractual angle is obvious enough—the claim is typically to enforce or at least recognise some promise as binding—and historically it seems clear that these too are almost-but-not-quite contracts.[27] In other words, they deserve to be treated as contractual, but traditional contract theory will not have them, and it not clear how it could easily be modified to receive them.[28] This of course is yet one more cause for dissatisfaction with the traditional model of contract, leading some to propose "reliance" models to supplement or perhaps even supplant the traditional model.[29]

It is only at the most modest level that the contractual analysis needs to be insisted on for its analytical benefits, and that is what I propose here. There is a very basic legal transaction that has all the obvious features of a contract—it is plainly two-sided, it can only happen if both sides go along with it, and is manifestly intended to affect their mutual legal rights. And yet, anomalously, it is rarely treated as contractual. That is the simple and every-day transaction of paying off a debt, or (at a higher level of generality) conferring a valuable benefit in response to a legal claim to that benefit. This can plainly be analysed as a simple exchange: the payor gives up

[27] A good example is the "mutual will". See discussion by J. Cassidy, "*Osborne* v. *Estate Of Osborne*" (2003) 27 Melbourne University Law Review 217.

[28] See particularly on the problems of formality avoidance in land law: C. Davis, "Informal acquisition and loss of rights in land: What justifies the doctrines?" (2000) 20 Legal Studies 198; A. Robertson, "The statute of frauds, equitable estoppel and the need for 'something more'" (2003) 19 Journal of Contract Law 173.

[29] See especially M. Spence, *Protecting reliance: The emergent doctrine of equitable estoppel* (Oxford 1999); P. Jaffey, *The nature and scope of restitution* (Oxford 2000).

https://doi.org/10.1017/S0008197304006646 Published online by Cambridge University Press

whatever is claimed, the payee gives up their claim. There is no difficulty in this, and no fiction either: it simply spells out the reasonable expectations that each has of the transaction.[30]

This matters most in the case of overpayment—an amount is paid which is more than is due, or indeed a payment is made where none at all is due. The contractual analysis is simple enough: to the extent that the money was paid to discharge an obligation that did not exist, it was paid on a failure of consideration, and so is recoverable. The money was paid for nothing, and so should be repaid.[31]

This theory may be contrasted with the "unjust enrichment" alternative, that the money in such a case is recoverable on the ground of "mistake".[32] "Mistake" as a legal ground seems to be on the skids these days,[33] and I have given elsewhere my account of its weaknesses in relation to the overpayment problem.[34] "Mistake" seems a difficult notion to elaborate, with technicality and fiction rapidly springing up whenever it is discussed. The notion seems to suggest that essentially the same principles apply to mistaken gifts and mistaken commercial payments, whereas notoriously the former is much harder to set aside than the latter; and the notion is plainly under-inclusive, as over-payments are often recoverable even where the payor knew the truth all along.[35] My suggestion is therefore that an attempt to pay a debt is in essence a contractual arrangement—the payment is to secure the other's abandonment of their claim.

3. Wrongful Failure to Contract—Treat it as Contract

My third category is of facts which ought to have ended up as contracts—where the claimant put up goods or other assets as being for sale, and the defendant in effect steals them. In these circumstances, the outraged claimant might seek many remedies; but the most minimal, yet also often the most satisfactory, is to

[30] The difficulty is at least partly historical: at common law, a unilateral attempt at payment ("tender") seems to have had some substantive effect, even sometimes to the extent of providing a defence to later attempts to recover the money. However, the modern position (which so far as I can ascertain has been in place for over a century) is that a unilateral attempt to make a payment has no effect at all, except under the provisions for payment into court. See C.P.R. 16.5.6 and part 37.

[31] For an analogous argument see P. Jaffey, "Restitutionary claims arising on contractual termination", in E. Schrage (ed.), *Unjust enrichment and the law of contract* (Amsterdam 2001) 243, at pp. 253–255.

[32] For the main counter-view on these issues, see P. Birks, "A bank's mistaken payments: Two recent cases and their implications" (2000) 14 Trust Law International 217.

[33] See especially *Great Peace Shipping Ltd.* v. *Tsavliris Salvage (International) Ltd.* [2002] EWCA Civ 1407, [2003] Q.B. 679.

[34] Hedley, *Restitution: Its division and ordering*, ch. 1.

[35] For discussion of the interrelationship of "failure of consideration" and "mistake" in this situation see E. O'Dell, "Bricks and stones and the structure of the law of restitution" (1998) 20 Dublin University Law Journal 101, 128–141; Burrows, *The law of restitution*, pp. 142–147.

https://doi.org/10.1017/S0008197304006646 Published online by Cambridge University Press

insist that the defendant should be treated as buying the assets taken. If the defendant wants them so badly, then the law will itself supply the contract the defendant ought to have made. So if the defendant tricks the claimant into rendering valuable services, then it is reasonable to subject the defendant to the same legal responsibilities as if he had openly requested them.[36] Where the law allows only two honest courses—either to leave well alone or to ask "How much, please?", then one way of dealing with the dishonest is to treat them as if they had asked the right question.

Is it a fiction in these cases to say that there is a contract? Certainly it is, but it is a useful fiction, even one required by morality. The defendant's plea that he had no intention of paying is certainly not a ground for lessening his legal responsibilities; and a claimant who seeks a contractual remedy should be applauded for his restraint, not condemned as a fiction-monger. Both the justification for the liability and the link to contract are obvious enough.

The argument seems to be ubiquitous. It appears and re-appears because of structural considerations: the complexity of the economy throws up many valuable assets, which the traditional law of obligations can only protect very awkwardly, perhaps because they seem like mere fragments of other rights. So while obligations is usually able to deal with outright theft of physical property, it encounters problems with lesser "thefts" such as unauthorised borrowing of the property,[37] or infringing covenants in respect of its use,[38] or "theft" of non-physical property (such as intellectual property).[39] While at one level obligations is in a mess—it has not really got over the mediaeval obsession with the freehold in land as the only important asset—nonetheless there is a distinct trend in the results. Where the economy generally treats a right as valuable, then obligations will protect it, typically by putting those who take on a par with those who agree to buy.

The maelstrom of theories to explain this—unjust enrichment, implied contract, market failure, damages under various heads—is notorious, and has been the subject of many papers, to which I do not seek to add here. Nor is it really necessary for me to attack the "unjust enrichment" solution here, which has been done very adequately by others already: plainly "enrichment" is not being used in the standard sense here, but in some different and non-

[36] *E.g. Rumsey* v. *The North Eastern Railway* (1863) 14 C.B.N.S. 641, 143 E.R. 596.
[37] *E.g. Inverugie Investments Ltd.* v. *Hackett* [1995] 3 All E.R. 841.
[38] *E.g. Wrotham Park Estate Co. Ltd.* v. *Parkside Homes Ltd.* [1974] 1 W.L.R. 798.
[39] *E.g. Experience Hendrix L.L.C.* v. *P.P.X. Enterprises Inc.* [2003] EWCA Civ 323, [2003] 1 All E.R. (Comm.) 830.

https://doi.org/10.1017/S0008197304006646 Published online by Cambridge University Press

standard sense.[40] Indeed, I think that the best of the scholarship now concedes that none of the doctrinal theories quite fits, in the sense of explaining everything;[41] and when I push the "implied contract" solution it is not because I think it explains everything, but because it is an important facet of the problem, which is in danger of being ignored. Most of these cases concern marketable assets of the claimant which the defendant has, on any fair reading, simply stolen. However, the traditional structure of obligations prevents our simply giving effect to this. While I understand the urge to deal with these cases by seeing them as remedies for wrongs against the claimant, it seems to me much simpler, and much more in line with a commercial understanding of the issues, to treat them as the law's recognition of new types of assets, which the economy got around to recognising before the legal system did. The link to the market is vital, and the "implied contract" theory is as good a way of asserting it as any.

4. Contractual Remedies—What Results from Contract is Contractual

My fourth and final category has been implicit, at various points, in much of what I have already said. If the arrangement between the parties is properly regarded as contractual, then remedies arising out of or in consequence of that arrangement are also properly regarded as contractual. So if two parties contract, the legal issues arising out of that arrangement do not cease to be contractual simply because one side breaches, or discovers that they have been misled by the other, or because subsequent events frustrate or invalidate the contract. Whatever the problems, and however the law deals with them, we are still talking about the law of contract.[42]

This may be contrasted with the view that if a contract is set aside or vitiated, then the law of contract becomes irrelevant, and some other head of the law, such as unjust enrichment, must regulate it. On that view, the consequences of frustration, or breach followed by termination, or rescission of contract, are not really

[40] J. Edelman, *Gain-based damages—Contract, tort, equity and intellectual property* (Oxford 2002), especially ch. 3; S. Waddams, "The relation of unjust enrichment to other concepts", in E. Schrage (ed.), *Unjust enrichment and the law of contract* (Amsterdam 2001), 411, at pp. 418–421 ("diluted" unjust enrichment). There has recently been a suggestion that all the results may be reconciled as examples of a "sliding scale" of enrichment: see "Summary of discussion" in A. Burrows and E. Peel (eds.), *Commercial remedies—Current issues and problems* (Oxford 2003), p. 129 (Lord Nicholls); RDG discussion 24–26 March 2003 (RDG is archived at http://www.ucc.ie/law/restitution/rdg_admin/front.htm). There are however many difficulties with this, not least that it seems to embrace a vague and discretionary approach hitherto regarded as unacceptable by all sides of the discussion.

[41] See especially the views expressed on the RDG 25–27 March 2003.

[42] For an analogous argument see P. Jaffey, "Failure of consideration: *Roxborough* v. *Rothmans*" (2003) 66 M.L.R. 284.

https://doi.org/10.1017/S0008197304006646 Published online by Cambridge University Press

ones of contract at all. The contract has ceased to be, and so other heads of the law must settle the problems it leaves behind. Yet the situation in these cases only arises because the parties had a contract; and any solution must reflect that contract to the extent that justice requires. To deny that we are in the realm of contract law will certainly seem to the parties to have elements of fiction to it—indeed, it may not have been apparent to them for some time that the contract had vanished.

This artificial doctrinal split, between termination/rescission and its consequences, has little to commend it. It has never been justified by any logical argument, beyond the false logic that because the distinction can be made, it therefore *should* be. The argument usually is that, the contract having disappeared, the remedy cannot be contractual; that if the parties had effectively contracted for a solution the court could base itself on their intention, but as it is it must fall back on other, non-intended solutions.[43] But this is simply the fallacy criticised elsewhere, that contracts are 100% based on the intentions of the parties, whereas other heads of the law are 0% so based.[44] That approach, so manifestly based on fictions of its own, proves too much: very few of the rules governing the effect of breach of contract are in any realistic sense based on the intentions of the parties. (How many parties *intend* the rules on substantial performance, innominate terms or the assessment of damages?[45]) While the parties are still trying to extricate themselves from the mess their contract has led to, it is perverse to insist that the legal regime they are subject to is "non-contractual"; indeed, it borders on the fictitious.[46] What is also true is that this fiction is built into the current "unjust enrichment" approach: so much so indeed that (as Birks says) repeated reference to "consideration" in restitutionary context "puts in question" the very notion of an independent unjust enrichment.[47]

[43] See *e.g.* M. Kelly, "It's not my job!" (2003) 36 Loyola of Los Angeles Law Review 887, 890–893.

[44] Hedley, *Restitution: Its division and ordering*, ch. 3 especially pp. 56–63.

[45] The High Court of Australia fell into this trap in *Roxborough* v. *Rothmans of Pall Mall Australia Ltd.* [2001] H.C.A. 68, saying that money paid to satisfy a licence requirement which turned out to be constitutionally improper could not be recovered back under an implied contract, because to say that repayment had been agreed by the parties was "artificial and unconvincing" (para. 20, Gleeson C.J., Gaudron and Hayne JJ.). But in all but a miniscule number of cases, this could be said of any remedy under a contract. The plea that "I want my money back, because I didn't get what I paid for" is surely at the core of the law of contract. The idea that providing a remedy for failure of consideration is alien to it, or can only be explained by invoking extra-contractual notions, is quite bizarre.

[46] For an approach which escapes this formalism see M. Gergen, "Restitution as a bridge over troubled contractual waters" (2002) 71 Fordham Law Review 709.

[47] P. Birks, "No consideration: Restitution after void contracts" (1993) 23 Western Australia Law Review 195, 207.

https://doi.org/10.1017/S0008197304006646 Published online by Cambridge University Press

Clearly, therefore, the current "unjust enrichment" approach poses a false dilemma. Someone who said that a contract was still in force, even though it has been terminated or rescinded, is making some sort of error. But equally someone who said that, the contract being gone, it can be ignored and completely non-contractual principles applied, would be making an even greater error. The solutions imposed have everything to do with the defunct contract, which was, after all, the basis on which the parties were working. Why there is such resistance to calling the relevant principles "quasi-contractual" I do not know—the label sums up rather neatly the in-between nature of the liability, its status as not-quite-contractual but not-quite-non-contractual either.

Evidently therefore, the "unjust enrichment" approach jars substantially with the current law. The problems in these cases are very much tied to the contract, and the common law solutions to them are thoroughly redolent of contract law, with liberal references to the "consideration" on either side. How is this to be squared with an "unjust enrichment" theory that insists on the sharpness of the distinction between contract and unjust enrichment? Some writers suggest that there are different "contractual" and "restitutionary" senses of "consideration",[48] but this seems unconvincing, not least because both of the proposed senses are well known to contract lawyers already.[49] It is apparent that for those who think about these issues in broad terms, either the case law must go or the "unjust enrichment" theory must go, and the only question is which. So Skelton states that "unjust enrichment is distinct from, and need not bow down to, contract"[50]; whereas Kull, a strong supporter of unjust enrichment in other contexts, keeps it out of these contractual areas;[51] whereas Kremer uses the incompatibility of "consideration" with the "unjust factors" to argue against the latter.[52]

The theoretical difficulty, therefore, is evident. But I would myself prefer that the issue be resolved at a more down-to-earth level. Let us look at the actual law in these supposedly non-contractual cases, and see if unjust enrichment provides a useful and coherent model for the law. When we do so, it seems clear that

[48] *E.g.* G. Virgo, *The principles of the law of restitution* (Oxford 1999), pp. 325–327.

[49] See in particular the great "executory consideration" dispute (recounted in P. Atiyah, *The rise and fall of freedom of contract* (Oxford 1979), p. 688), which was concerned precisely with the interplay between the different meanings. See also B. Kremer, "Recovering money paid under void contracts: 'Absence of consideration' and failure of consideration" (2001) 17 Journal of Contract Law 37, 52–54.

[50] A. Skelton, *Restitution and contract* (Oxford 1998), p. 23.

[51] A. Kull, "Rationalising restitution" (1995) 83 California Law Review 1191, 1204ff.

[52] Kremer, "Recovering money paid under void contracts: 'Absence of consideration' and failure of consideration" (2001) 17 Journal of Contract Law 37.

https://doi.org/10.1017/S0008197304006646 Published online by Cambridge University Press

it has not, to date. Further, the miscellaneous (not to say bitty) nature of the actual caselaw suggests that no one rigid theory is likely to work. These cases are simply the casual flotsam and jetsam of the common law; the situation they involve is too rare for principled solutions to emerge.

> So far as *frustration* is concerned, the law's solution is statutory and discretionary. Pure money claims apart, the "valuable benefit" obtained is expressly designated as the *upper limit* of any possible award, which in itself drives a sharp wedge between it and unjust enrichment theory. (Either awards will usually be less than the "valuable benefit", or "valuable benefit" is being used in more than one sense, with no statutory guidance between the senses. Neither solution sits well with the concepts of benefit promoted elsewhere in restitution.) We are therefore not dealing with "unjust enrichment" as it is defined elsewhere.[53]
>
> So far as *termination for breach* is concerned, it is perfectly clear that the law does not conform to the "unjust enrichment" model; and attempts to fit the law into it tend to degenerate into prolonged critiques of the law for not following the unjust enrichment model. Indeed, some demand that this should be achieved by legislation if the courts will not do it.[54] For myself, I have never understood why a contractor who does half the job but them walks away with no excuse should, without more, be entitled to argue that the other party is "unjustly enriched". Whether that contractor deserves anything at all is a matter for the subtle tools of the law of contract, not the sledgehammer of "enrichment" theory.[55]
>
> So far as *rescission* is concerned, there is necessarily a process of unscrambling what the parties did, returning to each what they gave to the other. Whether that process is described as "restitution for unjust enrichment" really makes no difference—certainly that mere phrase does not add very much by way of understanding, and certainly the process cannot be carried out without scrupulous attention to the detail of the contract. Attempts to use an "unjust enrichment" analysis in more difficult cases rapidly reveal that the judges are doing no such thing. As several commentators have pointed out, the attempt to split rescission from the consequences of rescission (on the ground that the first is "contractual" but the second "restitutionary") get us started on the wrong foot—especially given that the court's decision whether to allow rescission may depend on what it imagines would be the consequences if it did. In that sense, rescission is a "monolithic process", and

[53] For discussion see S. Hedley, *A critical introduction to restitution* (London 2001), pp. 234–236.

[54] Burrows, *The law of restitution*, pp. 354–359. Skelton (*Restitution and contract*) is more measured, but equally does not seem to think that the courts can reach the unjust enrichment solution without legislative assistance.

[55] For a general review of the difficulties and problems see Hedley, *A critical introduction to restitution*, pp. 214–231; S. Smith, "Concurrent liability in contract and unjust enrichment: The fundamental breach requirement" (1999) 115 L.Q.R. 245.

https://doi.org/10.1017/S0008197304006646 Published online by Cambridge University Press

> denials of that point, and assertions that the process can logically be split into two, carry us no further without a demonstration of why it is useful to carry out such an abstract logical exercise.[56]

The case material is therefore unpromising from an "unjust enrichment" point of view—it is very miscellaneous, and it is not obvious that it can be made into a theory of any complexity. To someone who believes in the virtues of the common law case-by-case approach, the area is plainly one where the situations are so radically different from one another, and the opinions in the cases so radically different, that no very precise theory can be adopted.

Conclusion

In sum, therefore, I think that the idea of implied contract is still a useful one. The law does deal with a wide range of problems by fashioning a contract between the parties, and the current need is not for any blanket condemnation of this, but for a careful investigation of whether or when it should do so. The charge that implied contract is "fictitious" is readily bent back on itself, resting on little more than a child-like faith that the boundaries of "contract" have been put in precisely the right place. Yet standard contract law is itself shot through with blatant fictions, not least that everything it does can be justified by "the will of parties". The difficulties of contract are never-ending, and very often the quasi-contractual solution to these difficulties is the best.

[56] On difficulties with "unjust enrichment" here see P. Watts, "Rescission of guarantees for misrepresentation and actionable non-disclosure" (2002) 61 C.L.J. 301. To the contrary see E. O'Dell, RDG for 5 January 1998 and 10 June 1999; D. Meikle, "Partial rescission—removing the restitution from a contractual doctrine" (2003) 19 Journal of Contract Law 40, 54–58.

https://doi.org/10.1017/S0008197304006646 Published online by Cambridge University Press