THE DEVELOPMENT OF UNJUST ENRICHMENT IN THE CHANNEL ISLANDS

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In response to criticisms made by the Guernsey Court of Appeal in the Investec v Glenalla, *litigation, this article charts the progress of the law of unjust enrichment in Jersey and Guernsey, and attempts to identify its underlying principle. In Guernsey, the position since* Investec *is unclear, but Jersey has grounded cases of unjust enrichment very much in* équité, *and applied what it sees as a vibrant doctrine increasingly widely. Whilst that is to be welcomed, limits must still be observed to preserve commercial certainty and avoid unjust enrichment becoming no more than a discretion of the court.*

A. Overview of paper

1 In Jersey, in *Flynn v Reid*,[1] Sir William Bailhache, then Deputy Bailiff, upheld Mrs Flynn's claim to a share in a house owned jointly with her unmarried partner, on grounds of unjust enrichment. He also thought the result in *Maçon v Quérée*,[2] a proprietary estoppel case, could have been achieved on similar grounds,[3] describing the doctrine of unjust enrichment as a "vibrant one . . . [whose] principles can be applied across a wider basis than merely a cohabitation case".[4] That view has eventuated, as recent Jersey cases have deployed the doctrine in circumstances ranging from fraud to contribution between joint tortfeasors. That said, detailed consideration of the doctrine's juridical basis is limited, and in Guernsey, in *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd*,[5] the Court of Appeal expected—

> "147 . . . In any future *cause* where a claim is advanced in this jurisdiction based on principles of restitution, unjustified enrichment, quasi-contract or *quantum meruit*, this court expects that the parties will address the Royal Court fully on the ambit of the remedy available to litigants in this jurisdiction by reference to the local jurisprudence, customary law and such judicial or

[1] 2012 (1) JLR 370.
[2] 2001 JLR 80.
[3] 2012 (1) JLR 370, at 390.
[4] *Ibid*, at 406.
[5] 2015 GLR 300.

> academic writings from other jurisdictions as appear not inconsistent with the law of Guernsey. See, for example, the discussions in *Benedetti* v. *Sawiris* . . . and the symposium on unjustified enrichment, unjust factors and failure of purpose reasons (18 *Edinburgh Law Review*, at 414–451).
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> 148 We note that in Jersey the Royal Court has been equally cautious in dealing with applications based on unjust enrichment: see *In re Esteem Settlement* . . . (2002 JLR 53, at paras. 156–157, *per* Birt, Deputy Bailiff) and *Flynn* v. *Reid* . . . (2012 (1) JLR 370, at paras. 93–108, *per* William Bailhache, Deputy Bailiff)."

2 The appeal court's expectations were not met in the Privy Council, as the parties agreed English law would govern the unjust enrichment claim.[6] In response, this paper reviews the development of unjust enrichment in the Islands in terms of its underlying basis and its unifying principle. That both are established is essential for the doctrine's principled development. And that the doctrine develops is essential for the law to grant remedies where one is clearly needed, but where ordinary rules of property, contract or tort will not apply. Say I inadvertently pay my electricity bill twice. In that situation, most of us, I think, would expect I can recover the second mistaken payment; the electricity company has surely benefited at my expense without reason. And yet my terms with the electricity company say nothing to that effect, and only the first payment was legally owed, so no contract applies to the second. Nor in the circumstances, will I have retained any proprietary interest in the second payment, nor has the electricity company obtained it by committing a wrong against me. I therefore must look to unjust enrichment for recovery, and not by seeking compensation but by having the value of the electricity company's benefit restored to me.

3 The UK Supreme Court recently said unjust enrichment is about reversing normatively defective transfers of property, and operates as "a tool of corrective justice".[7] Hence, "When a transfer of value

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[6] *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [2018] UKPC 7; 2018 GLR 97, at para 144.

[7] See Lord Clarke in *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 15, at para 23, approved by Lord Reed in *Commissioners for HMRC v Investment Trust Companies* [2017] UKSC 29, at para 42, and Lord Sumption in *Lowick Rose LLP v Swynson Ltd* [2017] UKSC 32, at para 30. See also *Prudential Assurance Co Ltd v Commissioners for HMRC* [2018] UKSC 39, at para 68. Corrective justice is traceable to Aristotle, *Nichomachean Ethics*, Book V, IV, at paras 3ff, at 1132, as a means of restoring a pre-existing balance or equilibrium disturbed by an injustice:

between two parties is normatively defective, restitution functions to correct that transfer by restoring parties to their pre-transfer positions".[8] But when (and why) the transfer should be reversed, must be evaluated on principle and with due regard for policy, as otherwise unjust enrichment risks subverting the law (or sanctity) of contract[9] or the certainty of payments. And absent clear rules, it risks becoming "a discretionary power [of the court] to order payment whenever it seems in the circumstances of the particular case just and equitable to do so",[10] giving "judges carte blanche to adjudicate disputes in accordance with their own conception of justice",[11] creating palm tree justice of the worst kind.[12]

4 The clear rules underlying when and why to reverse a defective transfer differ significantly between common law and civilian jurisdictions. The Guernsey Court of Appeal in *Investec* wanted comparative analysis. Jersey and Guernsey are mixed jurisdictions, that is, "legal systems in which the Romano-Germanic tradition has become suffused to some degree by Anglo-American law".[13] That means some of their laws have a common law and others a civil law

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"Ό δε δικαστης έπανισοί, καί ώσπερ γράμμής είς άνισα τετμημένης, ώ τό μείζον τμημα της ημισείας ύπερέχει, τουτ' άφείλε καί τώ έλάττονι τμήμαιτι προσέθήκν . . . ώστε κέρδους τινός καί ςήμίας μέσον τό δίκαιόν έστι τών παρά τό έκούσιον, τό ίσον έχειν καί πρότερον καί ϋστερον"

["The judge undertakes a balancing exercise: supposing there was a line which had been broken into unequal parts, he takes away the extent by which the greater part exceeds the half, and adds it to the lesser part . . . The result is that justice is the space between a certain gain and loss, and to have equality both before and after".]

[8] Bastarache, J in *King Street Inv Ltd v New Brunswick (Dept of Finance*), (2007) 276 DLR (4th) 342, at para 32 and see also McLachlin, J in *Peel (Regional Municipality) v Canada* [1992] 3 SCR 762, at 804, both cited with approval, by the Guernsey Court of Appeal in *Investec*, at para 170.

[9] See *eg* Virgo, *The Principles of the Law of Restitution* (OUP, 2006, 2nd edn), at 40–42; see also *Taylor v Motability Fin Ltd* [2004] EWHC 2619.

[10] Evans, LJ in *Kleinwort Benson Ltd v Birmingham CC* [1996] 4 All ER 733, at 737 (CA).

[11] Parker, J in *Firth v Mallender* (unreported, 11 October 1999) (CA).

[12] Laws, LJ in *Gibb v Maidstone & Tonbridge Wells NHS Trust* [2010] EWCA Civ 678, at paras 26ff.

[13] FP Walton, "*The Scope and Interpretation of the Civil Code* (Wilson & Lafleur Ltée, Montreal, 1907), reprinted by Butterworths, Toronto (1980).

derivation.[14] Some mixed jurisdictions follow the civil law approach to unjust enrichment. In Scotland, the cases of *Morgan Guaranty Trust Co of New York v Lothian Regional Council*,[15] *Shilliday v Smith*[16] and *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd*[17] identify with the civilian tradition of unjustified enrichment, or enrichment without cause. And in South Africa, attempts to shrink Wouter de Vos's general principle of enrichment *sine causa*[18] were halted by the Supreme Court of Appeal in 2001 in *McCarthy Retail Ltd v Shortdistance Carriers CC*,[19] and the trend since, inspired by the works of Visser[20] and Du Plessis,[21] has been towards a German model.[22] Others such as India, favour a broader approach grounded in equity and unconscionability.[23] By contrast, few have adopted the common law approach. And some jurisdictions (mixed or otherwise) such as Canada, have moved from a common law to civilian based system, sometimes with serious consequences.

5 In Jersey, early indications, notably in *Esteem*, were that the English model would be followed. However, in *Flynn v Reid*, Bailhache, Deputy Bailiff, called Pothier's *Traité des Obligations* (9th edn, Tome 1, Chapter 1), the "jurisprudential basis for claims in unjust enrichment",[24] adding that—

> "The relevant principle is that a person who, without any cause, obtains a benefit at the expense of another is bound to restore it. As with the principles underlying the French claim of *abus de droit*, neither principle is found in the Code Civil or in any other law. The approach is seemingly based upon the natural law and on general principles of *équité* of the kind described above. That is entirely consistent with the practice of the Royal Court over

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[14] See *eg* in Guernsey, *Flightlease Holdings (Guernsey) Ltd v Flightlease (Ireland) Ltd* 2009–2010 GLR 38, at paras 88–89.
[15] 1995 SC 151.
[16] 1998 SC 725.
[17] 1998 SC (HL) 90.
[18] De Vos, *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* (Cape Town, Juta, 1958).
[19] [2001] ZASCA 14.
[20] Visser, *Unjustified Enrichment* (Cape Town, Juta, 2008).
[21] Du Plessis, *The South African Law of Unjustified Enrichment* (Cape Town, Juta, 2012).
[22] Helen Scott, *Unjust Enrichment in South African Law* (Hart Publishing, 2013), at 5.
[23] *Sahakari Khand Udyog Mandal Ltd v CCE* 2005 (3) SCC 738.
[24] 2012 (1) JLR 370, at para 101.

> many years in allowing, as examples of unjust enrichment, claims for money paid by mistake of fact, or claims for damages on a *quantum meruit*."[25]

6 Some evidence suggests the common law too was based on natural justice. In *Moses v Macfarlane*,[26] Lord Mansfield said the recipient of money was bound to repay it *ex aequo et bono* where it was contrary to the ties of natural justice and equity for him to retain it.[27] But his approach was not followed, and eventually, in *Lipkin Gorman v Karpnale*,[28] the Lords recognised a right to restitution under English law if the defendant was unjustly enriched at the claimant's expense and had no defence. That remains the position today.[29]

7 Their references to *Benedetti v Sawiris* (a UK Supreme Court decision) and the symposium in Scotland (discussing a civilian, or mixed approach) suggest the Court of Appeal in *Investec* wanted comparative argument on whether Guernsey should adopt the common law or civilian system, or perhaps elements of both. And their references to "restitution, unjustified enrichment, quasi-contract or quantum meruit" suggest they wanted clarification of the remedies available, and the relationship between unjust enrichment and other areas of the law. This paper aims to provide insight on these difficult issues.

B. Common law and civilian law approaches

8 Initially, the Romans thought obligations derived from contract or wrongs, but in about 160 AD, Gaius recognised that legal duties, such as to repay money paid by mistake, could arise absent a contract or a wrong.[30] Those duties were later[31] grouped under *quasi-delict* and *quasi-contract*, the latter comprising various remedies *ex quasi contractu* concerning debt actions where there was no contract. The two most important were the *actio negotiorum gestorum contraria*, available where a claimant consciously involved himself in another person's affairs solely for that person's benefit, and the generic *condictio*.[32] Amongst its forms was the *condictio indebiti* (or action in

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[25] *Ibid*, at para 105.
[26] (1760) 2 Burr 1005.
[27] *Ibid*, at 1008, 1012.
[28] [1991] 2 AC 548.
[29] *Lowick Rose LLP v Swynson Ltd* [2017] UKSC 32, at para 56 and *Investec* in the Privy Council, note 6 above.
[30] Gaius, *Institutes*, 3.91.
[31] Justinian, *Institutes*, 3.13.2.
[32] The *condictio*—

respect of something not owed) appropriate where, for instance, someone paid money or transferred something, being mistaken that a debt was due or the transfer was required. Alternatively, there was the *condictio sine causa*, a remedy to reverse an enrichment where other forms of the *condictio* could not do so.

9 In the second century AD, Pomponius recognized that these remedies derived from natural justice. The principle was that *iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiorem*, meaning "by natural law it is equitable that no one should be enriched by the loss or injury of another person".[33] Later civil lawyers, like Grotius,[34] used this principle as the basis for a general enrichment action, and it still underlies many modern codifications, such as the German,[35] as well as forming part of French law, without appearing in the *Code Civile* itself.[36] Interestingly, however, equity and unconscionability also ground the Australian model.[37] And as we have heard, *Flynn v Reid* places fairness at the heart of Jersey law.

10 In England, Henry of Bracton's treatise, *De Legibus et Consuetudinibus Angliae*, in the early 13th century, adopted the Romans' fourfold classification. However, in the 16th century, the extension of the historic contract writ, assumpsit, to encompass the remedies of *quantum meruit*, *quantum valebat* and *indebitatus assumpsit*, led to a new doctrine of quasi-contract.[38] That was because

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> "was only a single form of action, but it was grouped or classified in various ways according to the kind of property or according to the causa which gave occasion for recourse to [it] . . . The underlying principle of the Condictio was that a person had received from another some property and that, by reason of circumstances existing at the time or arising afterwards, it was or became contrary to honesty or fair dealing for the recipient to retain it"—

per Earl of Birkenhead in *Cantiere San Rocco SA v Clyde Shipbuilding & Engineering Co* [1923] UKHL1.

[33] Justinian, *Digest* 50.17.206.

[34] Inleiding, III, XXX, 4ff.

[35] German Civil Code §, 812ff.

[36] See Patureau, *Miran c Boudier*, Cour de Cassation, 15.6.1892, discussed in *Flynn v Reid*, at para 104.

[37] *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269, at para 89.

[38] Jackson, *The History of Quasi-Contract in English Law* (Cambridge, CUP, 1936), and JH Baker: *The History of Quasi-Contract in English Law*, in Cornish et al (eds) *Restitution, Past, Present & Future, Essays in Honour of Gareth Jones* (Hart Publishing, 2000), 37–57.

in each case the sum earned, deserved, or promised, derived from a non-existent agreement supplied by the court,[39] which—

> "look[ed] at the true facts and ascertain[ed] from them whether or not a promise to pay should be implied, irrespective of the actual views or intentions of the parties at the time the work was done or the services rendered."[40]

11 In *Moses v Macferlan*, Lord Mansfield explained these cases as instances of an obligation arising from the ties of natural justice, "as it were upon a contract ('*quasi ex contractu*' as the Roman law expresses it)".[41] But his analysis was later criticized as too general,[42] and defendants lost certainty amidst vague notions of justice and equity, as the shortcomings of the doctrine soon became apparent. Similar complaints are made today that the Australian model founded on equity and unconscionability is too open-ended.[43] Quasi-contract achieved its judicial high water mark in England in the House of Lords in *Sinclair v Brougham.*[44] But by the 1940s, its anachronistic nature was widely criticised,[45] and in *Westdeutsche v Islington LBC*, the House of Lords abandoned it for good.[46]

12 Having rejected quasi-contract and following the US Restatement of the Law of Restitution,[47] published in 1937 by the American Law Institute, common law jurisdictions now prefer a unifying principle of reversing unjust enrichment. Since *Lipkin Gorman v Karpnale*,[48] the position under English law has been that to succeed in a claim for unjust enrichment, A must show B has been enriched at A's expense,[49]

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[39] *Woolwich Equitable Bldg Soc v IRC* para 124.
[40] Barry J in *William Lacey (Hounslow) Ltd v Davis* [1957] 1 WLR 932, at 936.
[41] (1760) 2 Burr 1005, at 1008.
[42] *Baylis v Bishop of London* [1913] 1 Ch 127, at 140; *Holt v Markham* [1923] 1 KB 504, at 513.
[43] See eg Edelman & Bant *Unjust Enrichment*, 2nd edn, Hart Publishing, 2016, at 27.
[44] [1914] AC 398, at 415.
[45] *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1, at 28.
[46] [1996] AC 669, at 710.
[47] On which, see Seavey & Scott *Restitution* (1939) 54 LQR 29.
[48] [1991] 2 AC 548.
[49] On which see especially *Commissioners for HMRC v Investment Trust Companies* [2017] UKSC 29, clarifying *Bank of Cyprus UK Ltd v Menelaou* [2016] AC 176, so that enrichment must be direct, except in a limited number of cases, such as where a transaction is a sham, the corporate veil may be pierced or where agency is involved.

unjustly, and where B has no defence.[50] A number of recognised,[51] but not closed[52] reasons (or "unjust factors") explain when B's enrichment is unjust. The most important are, generically, mistake (of fact or law), compulsion, necessity and failure of consideration, and the most controversial is ignorance (or, as it is now variously called, lack of intention to benefit, want of authority, lack of consent,[53] and/or powerlessness). Liability is strict, but subject to defences, the most important being that B has changed his position in good faith in reliance on receipt of the enrichment.[54] By contrast, as we have heard, jurisdictions such as Scotland,[55] and civil law jurisdictions, base their older-established model on the *condictio indebiti*,[56] or enrichment *sine causa* (without legal justification).[57]

13 The difference between the two approaches is apparent in the paradigm example of a mistaken payment. Common law regards the mistake as a factor vitiating the payer's intention to benefit the payee (which, subject to defences, makes it unjust for the payee to retain the payment). Civil law says there was no legal basis for the payment, as it was neither voluntarily given nor due under any valid legal obligation, so that the payee may not retain it. So, whilst common law asks whether the claimant genuinely intended to benefit the defendant, civil law asks whether the payment is legally justified, and whether the defendant is legally allowed to retain it.

14 The merits of each approach fell into sharp focus, following Birks' admission,[58] shortly before his death, that he had been wrong all along,[59] and that not only should English law adopt the civilian method, but that it had already committed to do so on the basis of *dicta*

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[50] *Banque Financière de la Cité SA v Parc (Battersea) Ltd* [1999] AC 221, at 227, approved by Henderson J, in *Investment Trust Companies*, at para 38.
[51] *Uren v First National House Fin Ltd* [2005] EWHC 2529, at para 16ff.
[52] *CTN Cash & Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714, at 720.
[53] *AAHG, LLC v Hong Hin Kay Albert* [2017] 3 SLR 636.
[54] *Lipkin Gorman v Karpnale*, at 578.
[55] See *eg Cantiere San Rocco SA v Clyde Shipbuilding Engr Co* [1923] UKHL 1; *Morgan Guaranty Trust Co of New York v Lothian Regional Council* [1995] SC 151; *Shilliday v Smith* [1998] Scot CS, CSIH 121; *Mactaggart & Mickel Ltd v Hunter* [2010] Scot CS CSOH 130.
[56] The translation adopted by Birks, in Birks and Rose (eds) *Lessons of the Swaps Litigation*" (London, Mansfield LLP, 2000), at 14.
[57] Birks, *Unjust Enrichment* (2nd edn, Oxford Clarendon Law Series), at 102–103.
[58] See *eg* Baloch, *Unjust Enrichment and Contract* (Hart, 2009), Chapter 3.
[59] Birks, *Unjust Enrichment*, Chapter 5, at 101–128.

in cases involving the recovery by local authorities of payments made under invalid swaps transactions.[60] Drawing on his core case of *Kelly v Solari*[61] where the recipient of a death benefit paid under a lapsed insurance policy "was not entitled to [the benefit], nor intended to have it",[62] Birks contrasted the common and civil law approaches. Under the former, "unjustness" was determined by impairment of intent; the insurer's mistake about the policy's validity meant it did not intend Mrs Solari to receive the benefit. Under the civil, the policy's invalidity meant there was no benefit to which Mrs Solari was legally entitled, or rather, no debt of insurance which the insurer was obliged to discharge.[63] *Kelly v Solari* was therefore as explicable on civilian grounds that no debt was due, as it was on common law grounds that the insurer was mistaken about the policy's validity.

15 The House of Lords in *Hazell v Hammersmith & Fulham BC*[64] first confirmed that swaps contracts entered into by local authorities were invalid, being *ultra vires* the authorities' powers. In a later similar case, *Guinness Mahon & Co Ltd v Kensington & Chelsea Royal LBC*,[65] the contracts' invalidity or "absence of consideration" was decisive. That equated, in Birks' view, to absence of basis, which was the only rational explanation. The same had occurred at first instance[66] in *Westdeutsche Landesbank Girozentrale v Islington LBC*, and in the House of Lords,[67] where "failure of consideration" meant only that the authorities had paid money to discharge a non-existent obligation.[68] For Birks, absence of basis was not a new unjust factor but an alternative to those factors, so it was impossible to explain the swaps cases on any other ground. As a result, he proposed a new model, not

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[60] See S Meier "Judicial Development of the Law, Error Iuris and the Law of Unjustified Enrichment" (1999) 115 LQR 556 (Meier and R Zimmermann); "Restitution after Executed Void Contracts" in Birks and Rose (eds) *Lessons of the Swaps Litigation*", at 168; "Unjust Factors and Legal Grounds" in Johnston and Zimmermann (eds) *Unjustified Enrichment: Key Issues in Comparative Perspective*" (CUP, 2002), at 37; "No Basis: A Comparative View" in Burrows and Lord Rodger (eds) *Mapping the Law—Essays in Memory of Peter Birks* (Oxford, OUP, 2006), 343–361.
[61] (1841) 152 ER 24.
[62] *Ibid*, 27.
[63] Birks, *op cit*, at 102–103.
[64] [1992] 2 AC 1.
[65] [1999] QB 215.
[66] [1994] 4 All ER 890.
[67] [1996] AC 669.
[68] Birks, *op cit* at 113.

strictly civilian but closer to civil than common law, under which a *prima facie* entitlement to restitution arose if a payment was made without basis,[69] that is, without legal justification.

16 Some thought Birks' change of approach placed English law "at something of a crossroads",[70] the choice being whether to retain the common law or adopt the civilian approach, or the Birksian version of it. In the event, English law has retained the common law, with the commentators unconvinced by Birks' new model.[71]And the view remains that Birks was wrong that English law had committed to civil law, as his interpretation of the swaps cases ignored an alternative analysis based on mistake of fact,[72] and because the authority[73] was cautious, if not lukewarm, to reappraising English law in the civilian way.[74]

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[69] Birks, *op cit* at 262.

[70] Lord Walker in *Deutsche Morgan Grenfell Group plc v IRC* [2007] 1 AC 558, at para 154 and *Guinness Mahon & Co Ltd v Kensington and Chelsea LBC* [1999] QB 215, at 233, and see Krebs, *Restitution at the Crossroads: A Comparative Study* (London, Cavendish, 2001).

[71] See *eg*, Virgo, *op cit*, at 127ff. See also Goff & Jones, *op cit*, at 11ff, and especially Burrows "Absence of Basis: The New Birksian Scheme" in Burrows and Rodger (eds), *op cit*, at 33ff and *op cit* (n57 above) at 95–116. For a more favourable reception, see T Baloch "The Unjust Enrichment Pyramid" (2007) LQR 636, and *Unjust Enrichment and Contract* (Hart Publishing, 2009), especially Chapter 3.

[72] See in particular, Goff & Jones (eds), Mitchell, Mitchell & Watterson, *The Law of Unjust Enrichment* (Sweet & Maxwell, 8th edn, 2011), at 11–12; Burrows, *The Law of Restitution* (3rd edn, OUP, 2011), at 97–98.

[73] *Woolwich Equitable Bldg Soc v IRC* [1993] AC 70, at 172; *Deutsche Morgan Grenfell v IRC* [2006] UKHL 49, at para 155, although note paras 157–158 where Lord Walker saw some grounds for a reappraisal of the position generally, in light of Birks' views.

[74] For a tentative view that English law might want to consider a move to the civilian approach, see Collins, J in *Primlake Ltd v Matthews Assocs* [2006] EWHC 1227, at para 335, where the claimant might have had a claim based on "absence of consideration in the sense of no legal basis for the payments"; see also Mummery LJ in *NEC Semi-Conductors Ltd v IRC* [2006] EWCA Civ 25, at para 161. For the contrary view, see Lord Hoffmann in *Deutsche Morgan Grenfell*, at para 21, followed in *Marine Trade SA v Pioneer Freight Futures Co Ltd BVI* [2009] EWHC 2656, at para 63, and in *Test Claimants in the FII Group Litigation v IRC* [2010] EWCA Civ 103, at para 156, on appeal [2012] UKSC 19; see also *Investment Trust Companies v Revenue and Customs Commrs* [2012] EWHC 488, at para 74.

17 Against this background, I now consider the Jersey cases.

C. Quasi-contract in Jersey

18 Jersey has long recognised customary rights *ex quasi contractu*.[75] However, these rights differ significantly from those rejected in England. Their nature can be derived from cases involving disputes between adjoining owners of land,[76] where they were said by Sir Philip Bailhache, Bailiff, in *Gale v Rockhampton*, to be best analysed—

> "as obligations, arising in quasi-contract, to be a good neighbour and not to use one's land in such a manner as to injure that of the adjoining owner—obligations arising from the law of *voisinage*."[77]

19 Although resembling nuisance, the basis for *voisinage* was quasi-contract within the customs of Orléans and Paris,[78] and the term was known also to Normandy.[79] The issue in *Gale* was the correct prescription period, which, at first instance and on appeal,[80] was ten (not three) years, because *voisinage* was an action in quasi-contract, not nuisance or breach of fiduciary duty.[81] Importantly, however, unlike an action in unjust enrichment, a breach of duty arising from *voisinage* generates a claim for compensation for loss, not restoration

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[75] *Golder v Société des Magasins* 1967 JJ 721.
[76] Especially *Searly v Dawson* 1971 JJ 1687.
[77] 2007 JLR 27, at para 23.
[78] *Ibid*, at paras 15–16.
[79] Houard, *Dictionaire de Droit Normand* (1st edn, 1782) Vol 4, at 3—,
"*On donne le nom [quasi-contrat] a une obligation qui nait de I'équité, sans que la convention des parties y intervienne. Ainsi il se forme un quasi-contrat entre l'absent et celui, durant son absence, fait pour lui quelquechose d'utile; car l'absent, par seule équité est tenu de la restitution des dépenses necessaires et utiles faites pour lui*",
[2007 JLR 27, at para 16: "The name [quasi-contract] is given to the obligation which arises from equity, without the need for any agreement between the parties. Thus, for instance, a quasi-contract is formed between an absent person and one who, during his absence, does some necessary thing for him; for the absent person, by reason only of equity, will be bound to reimburse any necessary and appropriate expenditure made on his behalf".]
[80] 2007 JLR 332.
[81] *Ibid*, at paras 176–179.

of gain,[82] creating one immediate distinction between the English and civilian understanding of quasi-contract.

20 Further differences emerge from Pothier, who used the term quasi-contract to describe the "act of a person permitted by the law which obliges him in favour of another, without any agreement intervening between them".[83] In *Gale*, in the Court of Appeal, McNeill, JA quoted Evans' footnote to his translation of Pothier, which said—

> "We have no term in the English law strictly corresponding with that of quasi-contract in the civil law; many of the cases falling within the definition of that term, may be ranked under the denomination of implied contracts, but that denomination is applicable rather to the evidence than to the nature or quality of the obligation, as in judgment of law an actual promise is deemed to have taken place, and the consequences are the same as if such promise had been declared by the most expressed and positive language",[84]

and concluded that Pothier sought "to identify . . . that the nature of the relationship is one which produces actual obligations just as if there had been a contract".[85]

21 On occasions,[86] Jersey has been encouraged to discard quasi-contract, and relocate the decided cases within tort or fiduciary duty. But it has not done so,[87] and the doctrine remains part of Jersey law. It therefore becomes important to identify when a claim lies in quasi-

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[82] The same applies to *negotiorum gestio*—Burrows, *Law of Restitution*, 3rd edn, Oxford, 2011, at 470.

[83] *Traité des Obligations* vol 1, section 2 para 113; and see also para 114 (translated from the French)—

> "A Quasi contract is the act of a person permitted by the law which obliges him in favour of another, without any agreement intervening between them. In contracts, it is the consent of the contracting parties which produces the obligation. In quasi contracts there is not any consent. The law alone, or natural equity, produces the obligation, by rendering obligatory the fact from which it results. Therefore, these facts are called quasi contracts; because without being contracts, and being in their nature still further from injuries, they produce obligations in the same manner as actual contracts."

[84] 2007 JLR 332, at para 168.

[85] *Ibid*, at para 169.

[86] In *Gale* and in R MacLeod, "*Voisinage* and Nuisance", (2009) 13 *Jersey & Guernsey Law Review* 274 at para 75.

[87] *O'Keefe v Canor* [2017] EWHC 1105, at para 108

contract, and how it differs from a claim for unjust enrichment, which is similar. It is suggested that distinction has not yet been clearly articulated. In *Neal v Kelleher*, counsel for the defendant argued quasi-contract claims were restitutionary,[88] which was surely wrong given the inclusion of *voisinage* within them. In *Neal*, the point went undecided, but quite rightly, decided authority suggests the two are distinct and co-exist. For instance, in *CMC Holdings Ltd v Forster*, Master Thompson recognised quasi-contract and unjust enrichment had many similarities, and overlapped, being both "based on the same juridical foundation of *équité*".[89] And in *Classic Herd Ltd v Jersey Milk Marketing Bd*,[90] William Bailhache, then Deputy Bailiff, said claims in quasi-contract—

> "like claims in unjust enrichment, are permitted because *équité* allows the Court to remedy what would otherwise be injustice arising out of the lack of contractual obligation."[91]

22 That helps a little, but does not explain where lie the boundaries between the two. Under Roman law, as well as the *condictio indebitati* and *condictio sine causa* (closest to cases of unjustified enrichment), *obligations ex quasi contractu* arose in a variety of cases sharing little in common, such as the unauthorised management of another's affairs (*negotiorum gestio*), guardianship (*tutela*), co-ownership (*communio*) and instructions within a will (*legatum per damnationem*).[92] Under Jersey law too, quasi-contracts are not confined to neighbours' disputes over land. Instead, for example, and in line with the Roman model, prior to statutory intervention they governed the relationship between a curator and its ward,[93] and created an obligation on an absentee to reimburse someone who had incurred costs in doing something necessary for the absentee,[94] the latter a clear example of *negotium gestio*.[95] It seems also that cases of *quantum meruit* are dealt with as quasi-contracts.[96] And recently, in *O' Keefe v Caner*, in the English High Court, after reviewing extensive evidence of Jersey law, H.H. Judge Keyser QC concluded that a director's duty of care and skill under Article 74(1) (b) of the Companies (Jersey) Law, 1991 was

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[88] [2014] JRC 233, at para 56, noted at 2015 (1) JLR *N* [3].
[89] [2017] JRC 190, at para 22.
[90] 2014 (2) JLR 487.
[91] *Ibid*, at para 21.
[92] Justinian, *Inst*. 3, 27 and see Zimmerman, *Law of Obligations*, at 15–16.
[93] *Neal v Kelleher* [2014] JRC 233, at para 55.
[94] Houard, note 79 above.
[95] *Gale* 2007 JLR 332, at para 40.
[96] *Ingram v Gottrel* [2018] JRC 062, at para 14.

most naturally quasi-contractual in origin.[97] However, in *Fogarty v St Martin's Cottage Ltd*,[98] the Jersey Court of Appeal questioned the value in calling the customary law remedy of relief (part of *voisinage*) quasi-contract, especially as under French law it included concepts Jersey would describe as torts.

23 To summarise, English law rejected the procedural fiction of treating cases of unjust enrichment as quasi-contractual, whereas Jersey retains a substantive law of quasi-contract. That law is separate from unjust enrichment (although likewise arises from *equité*) and applies where the parties' relationship is non-contractual[99] but requires a legal basis for the imposition of an actionable duty. That basis is a finding of an implied agreement deriving from the parties' circumstances, be it they are neighbours or whatever. But the question in *Fogarty* remains; does the designation quasi-contract serve any purpose? Or to put it another way, what do the quasi-contract cases share in common?

24 This is essentially an exercise in taxonomy. If an obligation logically already falls within an established branch of the law, including customary law, it seems unnecessary to further characterise it as quasi-contract. Co-ownership is part of property law, and the rights and obligations of co-owners can be determined without need for recourse to the Roman *actio communi dividundo*, to decide on their shares.[100] Similarly, the duties of a *tuteur* can be traced to the customary law *bon père de famille*,[101] or common law fiduciary principles, without additional enquiry whether the parties enjoy a quasi-contractual relationship. *Voisinage* itself adequately explains the relationship between neighbours without need for an implied contract. In cases of that kind, it is suggested the reference to quasi-contract adds little. Similarly, the cases are not obviously instances of unjust or unjustified enrichment. More interesting are cases involving payments by mistake, and instances of *quantum meruit* and *negotiorum gestio*, all of which Roman law placed within the *condictio indebitati*, or *condictio sine causa*, as there, the analogy with unjust enrichment is much closer. How the Jersey cases have addressed these issues, and unjust enrichment generally, is considered in the following sections.

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[97] [2017] EWHC 1105, at para 113.
[98] 2016 (2) JLR 246, at para 80.
[99] Involving "an element of reciprocity", *per* Keyser QC in *O' Keefe v Caner supra*, at para 110.
[100] See in Guernsey, *McCormack v Waterman* 2000–02 GLR 283.
[101] *Payne v Pirunico Trustees (Jersey) Ltd* 2001/14, at para 15.

D. Early cases in Jersey

25 The early Jersey cases show little consistency, and offer no coherent doctrinal explanation for the Jersey law of unjust enrichment, placing reliance instead on disparate and at times controversial authorities.

26 In *La Motte Garages Ltd v Morgan*,[102] the defendant bought a car from the claimant company for £4,995, offering her car worth £2,000 in part exchange. The defendant had acquired her car on hire purchase, and a company employee said the company would discharge the £2,270 outstanding to the HP company. When making out the invoice, however, he mistakenly omitted to include the £2,270. The defendant paid only the £2,995 balance, and when she refused to pay the additional £2270, the company issued proceedings claiming their salesman had intended the company only to discharge the HP obligation on receipt of funds to do so. There was no intention voluntarily to discharge the debt. The defendant argued, unsuccessfully, that the salesman's offer meant the company had to pay outright, and that was the contract she accepted. The court found the salesman's mistake annulled his agreement,[103] so that (applying a Canadian source, Klippert[104]) the claimant was entitled to

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[102] 1989 JLR 312.

[103] *Ibid*, 315 (relying on Pothier, *Traité des Obligations*, at paras 17–18 (1821 edn)—

> "*L'erreur est le plus grand vice, des conventions; et il ne peut pas y avoir de constentement lorsque les parties ont erre sur l'objet de leur convention . . . L'erreur annulle la convention . . .*"

[104] Klippert, *Unjust Enrichment* (1983), at 117–118—

> "When a person discharges the liability of another, courts are, it seems, most anxious to ensure that he is not a volunteer before considering whether he may recover against the other. The simple payment of another's debt cannot of itself give rise to a claim. As pointed out by Lord Kenyon C.J. in *Exall v Partridge [(1799), 8 T.R. 308; 101 E.R. 1405]*, it has been said, that where one person is benefited by the payment of money by another, the law raises an assumption against the former; but that I deny: if that were so, and I owed a sum of money to a friend, and an enemy chose to pay that debt, the latter might convert himself into my debtor, nolens volens. It should be noted that this passage relates to the lack of choice by the defendant in the matter. But the interesting point is that this case, and others with similar issues, shows that if the 'enemy', or other payor of the debt, can show he was not a volunteer—by demonstrating compulsion through duress, or secondary liability, or fraud, mistake, or self-interest for example—then

reimbursement from the defendant, who should have understood the salesman's offer amounted to an equitable assignment of the HP obligation to the company, giving the company the right to reimbursement.[105]

27 *Morgan*'*s* importance is less to do with mistake, than with compulsion, a recognised unjust factor under English law. True, given Morgan's error, the company could by the rules of contract (not unjust enrichment) have denied it had voluntarily promised to pay the HP debt. But then, having established the company involuntarily discharged the HP debt, to have allowed the company no right of reimbursement from the defendant, would have been unjustly to enrich her at their expense. The proof is in the authority cited in the extract relied upon from Klippert, which was *Exall v Partridge*,[106] an old example of an action paid to the defendant's use,[107] where a landlord owed rent by the defendant lawfully seized the claimant's carriage from the defendant's premises, and would only return it on payment of the rent by the claimant. Having paid the rent and recovered the carriage, the claimant was treated as having involuntarily discharged the defendant's liability, which entitled it to restitution on grounds of legal compulsion. One might argue *Morgan* is an example of *negotiorum gestio*; the claimant necessarily intervened in the defendant's affairs, and was entitled to reimbursement of the sums paid. However, the analogy is not sound. For there to be an *actio negotiorum gestorum contraria*, the gestor must not have acted solely for his own benefit,

28 Next, in *Louis v Le Liard*[108] the claimant obtained *quantum meruit* for the construction of a shed on the defendant's land.[109] He relied on the English case of *Way v Latilla*,[110] where the claimant received remuneration, again by *quantum meruit*, for services involving the identification of mining opportunities in Ghana, provided to the defendant in anticipation of receiving a substantial interest in the

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he will be able to convert himself into the 'debtor, nolens volens'. As a result, he will defeat the 'acceptance ' principle provided that the debt is discharged by the payment".

[105] 1989 JLR 312, at 316.

[106] (1799) 8 Term Rep. 308, on which see Virgo, *Principles of the Law of Restitution* (Oxford 2nd edn), at 227–228.

[107] See Baker, *op cit* n 29, at 46-47; Goff & Jones *op cit*, at 9.

[108] 1990 JLR *N*–13.

[109] See also *Broadland Estates Ltd v Consolidated Hotels (CI) Ltd* 1990 JLR *N*–1.

[110] [1937] 3 All ER 759.

defendant's gold mining business. Although there was no agreement on the amount of the claimant's interest, the House of Lords found evidence to imply a distinct contract for services, under which the claimant would receive remuneration amounting to a proportion of the value of any opportunities secured by the defendant's business.[111] But *Way v Latilla* is a controversial decision, which has long divided the commentators. Burrows sees it as an example of restitution arising from total failure of consideration.[112] By contrast, Birks, in his first book, thought it was based on the controversial unjust factor of free acceptance,[113] where the defendant declines to reject services it knows the claimant is providing non-gratuitously. More recently, in *Benedetti v Sawiris*, in the Court of Appeal, Arden LJ saw it as an example of restitution,[114] whilst Etherton LJ called it "a classic case of a contractual term to pay reasonable remuneration",[115] and hence part of contract law.[116]

29 In *Selby v Romeril*,[117] the claimant tenant obtained compensation[118] for the value of improvements it made to the defendant's property, after their contract was avoided *ab initio* for want of *objet* and *cause*. As a general principle, where as in *Selby*, a contract is void *ab initio*, the common law of England entitles both parties to restitution of any benefits conferred, on the ground (unjust factor) of "total failure of consideration".[119] Whilst on the civilian basis, restitution of the benefits would be justified because the contract's invalidity meant they were not conferred pursuant to any enforceable legal obligation. But, surprisingly, the basis for recovery in *Selby* was neither unjust nor unjustified enrichment, but rather Nicholas, writing on the French law of contract, whose conclusion was that where a contract was *null*, each party to the contract had to make restitution of what it had received.[120] The result on the facts was that—

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[111] *Ibid*, at 766.
[112] Burrows *op cit*, at 373.
[113] Birks *An Introduction to the Law of Restitution* (revised edn, 1989), at 271–272.
[114] [2010] EWCA Civ 1427, at para 56.
[115] *Ibid*, at para 148.
[116] Virgo, *Quantum meruit: right or remedy*?, at 6.
[117] 1996 JLR 210.
[118] *Ibid*, at 218.
[119] *Guinness Mahon & Co Ltd v Kensington and Chelsea Royal London Borough Council* [1999] QB 215.
[120] 1996 JLR 210, at 220.

> "the right to restitution is not unqualified but in the circumstances of this case, we consider it is just that the defendant should return to the plaintiff the benefit which he has received by way of improvement to the property."[121]

30 In *Planning and Environment Committee v Lesquende*[122] the claimant successfully sought summary judgment on a claim for the return of monies paid to the defendant under an *ultra vires* compulsory purchase order. The claimant argued that as the order was invalid, the defendant would be unjustly enriched at its expense, if it retained the payment. The defendant questioned the availability of a right in unjust enrichment under Jersey law and on the facts. Giving judgment, Le Marquand, Greffier Substitute said—

> "The plaintiff based its claim in this case upon the equitable jurisdiction of the Royal Court under the category of case which in England would be called 'unjust enrichment'. In England, the law in this area has become very complicated but the general principle is defined in the following quotation Goff & Jones, *The Law of Restitution*, 4th ed., at 39 (1993), which reads as follows:
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> > 'It is not in every case where a defendant has gained a benefit at the plaintiff's expense that restitution will be granted. It is only when a court concludes it would be unjust for him to retain the benefit that he must make a restitution to the plaintiff.'"[123]

31 The claimant had argued that since the order was quashed, the defendant was "holding the said sum without any right as the basis upon which it was paid has ceased to exist".[124] Le Marquand agreed, saying—

> "any court of equity would be bound to come to the conclusion that it is unjust for the defendant to be able to retain the sum and that the defendant must make restitution to the plaintiff. In my view, the point of law is very clear in this case and sufficiently clear for me to grant summary judgment for the capital sum being sought."[125]

32 This is muddled. On one view, the claimant's focus on a lack of lawful basis for the defendant to retain the payment, indicated a

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[121] *Ibid*, at 220.
[122] 1998 JLR 396.
[123] *Ibid*, at 406.
[124] *Ibid*, at 406.
[125] *Ibid*, at 408.

civilian approach. However, the judge decided the case on English law grounds, but without (as was recognised in *Flynn v Reid*[126]) identifying an unjust factor,[127] and relying instead on general notions of injustice. That approach was surely wrong, because as we have heard, English law requires that claims in unjust enrichment be pleaded so as to bring them "within or close to some established category or factual recovery situation".[128] And when *Lesquende* was decided, it was settled that general injustice would not do.[129] Ultimately of course, injustice was to become the basis for unjust enrichment in Jersey; but at the time of *Lesquende*, that was still some way off.

E. *Esteem*, ignorance, and knowing receipt

33 A more serious attempt to locate Jersey law within an established context came in *Esteem.*[130] However, it is hard to agree with the Court of Appeal's suggestion in *Investec*, that in dealing with the claim in unjust enrichment, the Jersey court displayed caution. Instead, it dealt with surprising confidence (albeit *obiter*) with what was then one of the most difficult and controversial aspects of the law of restitution, namely, whether the victims of fraud have a personal claim in unjust enrichment against innocent recipients of their property, and if so, why. The point is this. If you steal my property, and give it to your friend who is unaware of your crime, can I seek personal restitution from you or your friend if, for instance, I have no proprietary claim?[131] A line of old cases suggests I can. In *Holiday v Sigil*[132] the claimant lost a £500 note which the defendant found and paid into his bank account. The claimant successfully sought *indebitatus assumpsit* for money had and received. The same applies if you pass my property to your friend. Hence, if B accepts monies stolen from C by A,[133] or

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[126] Note 152 below.

[127] In 1998 JLR 396, at 406 the judge rejected the claimant's argument that the payment was recoverable because it was made pursuant to a mistake of law (that the award was *intra vires*), and at 405, there is reference to *Woolwich Equitable Building Society v IRC* [1993] AC 70.

[128] *Uren v First National Home Finance Ltd* [2005] EWHC 2529, at para 16ff.

[129] *Woolwich Equitable BS v IRC*, at 196; *Kleinwort Benson Ltd v Birmingham CC* [1996] 4 All ER 733, at 737.

[130] 2002 JLR 53.

[131] Jersey and Guernsey law both accept that a thief holds stolen property on constructive trust for its victim.

[132] (1826) 2 Car & P 176.

[133] *Clarke v Shee & Johnson* (1744) I Loup 197.

receives the sale proceeds of C's shares which A, one of C's partners, has sold *via* a fraudulent power of attorney,[134] B is similarly liable.

34 When *Esteem* was heard, the ground for recovery in these cases was debated. Burrows thought it was unjust enrichment, with ignorance the unjust factor,[135] whilst Swadling argued the cases were delictual[136] and within the law of wrongs. Virgo[137] on the other hand, saw them as personal claims for money had and received based on the defendant's receipt of property in which the claimant retained a proprietary interest, and where the claimant did not intend the defendant to take title (so that title did not pass). Hence, they amounted to a vindication of the claimant's property interest by a personal rather than a proprietary remedy. The balance of the English[138] authority (then and now)[139] favours Virgo's approach, and Birks' view that—

> "Restitution for mistake does not involve the proof of any wrong; and total ignorance is a fortiori from the most fundamental mistake. Hence a system which believes in restitution for mistake cannot but believe in restitution for ignorance, quite independently of any wrong committed"[140]

—has not been accepted.

35 Cases like *Holiday v Sigil* deal with personal remedies available to legal owners of misapplied property. For equitable owners, the position is different. Unless they can show the defendant is at fault, they have no personal remedy, whether based upon ignorance or

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[134] *Marsh v Keating* (1834) I Bin NC 19.

[135] Burrows, *The Law of Restitution*, 3rd edn, 2011, Oxford, at 409n. *Op cit* 4089

[136] Swadling, *Ignorance and Unjust Enrichment: The Problem of Title*, (2008) 28 OJLS 627.

[137] Virgo, *The Principles of the Law of Restitution* (2nd edn), at 570, 584–585.

[138] But see in Singapore, *AAHG, LlC v Hong Hin Kay Albert* [2017] 3 SLR 636, at para 74 where (*obiter*) "lack of consent" was recognised as an unjust factor, although see contra, *Ong Teck Soon v Ong Teck Seng* [2017] 4 SLR 819.

[139] *Foskett v McKeown* [2001] 1 AC 102, at 127; *OEM plc v Schneider* [2005] EWHC 1072, at para 40; *Farah Constructions Pty Ltd v Say Dee Pty Ltd* [2007] HCA 22, at para 150, overturning [2005] NSWCA 309, at paras 216–233.

[140] Birks, *An Introduction to the Law of Restitution* (Oxford, Clarendon Press, 1985), at 140.

otherwise. In *Esteem*, had its proprietary claim failed, the claimant wanted as an alternative, to pursue *in personam*, the indirect recipient of its funds, which was the trustee of a trust established by the Sheikh out of the proceeds of his fraud. It therefore claimed a right in restitution against the trustee. The difficulty was that it was a beneficiary of the constructive trust imposed on the Sheikh following his fraud, so (if English law applied) could not rely on cases like *Holiday v Sigil*. Instead, to succeed it had to show the trustee was at fault (had knowledge of the breach of trust), in which case it would be liable for knowing receipt. The rules of equity were clear. Absent fault, the trustee could not be personally liable, as the exception in *Ministry of Health v Simpson*[141] did not apply.

36 Even before *Esteem*, Lord Nicholls, writing extra-judicially,[142] and academics like Birks[143] had encouraged removing the disparity between strict liability at law, and the requirement for fault in equity. Lord Nicholls argued for two forms of equitable liability, one based upon the defendant's fault so that no change of position defence would be available, and the other, the equitable counterpart to the common law action for money had and received, subject to defences of bona fide change of position or purchase for value. In support, equity already imposed strict liability on the innocent recipients of wrongly distributed assets within a deceased's estate,[144] so why not also trust assets? And where an innocent party used the proceeds of misapplied trust monies to discharge a secured debt, the beneficiaries could enforce the secured creditor's rights by subrogation to recover the monies' value on grounds of unjust enrichment,[145] so why not where there was no debt? Influenced by Birks, Michael Birt, then Deputy Bailiff, decided that Jersey was neither bound by decisions requiring fault, nor obliged to await the likely recognition by the English courts (post-*Lipkin Gorman*) of a personal remedy against innocent recipients of misapplied trust property, holding—

> ". . . under the law of Jersey, where property in respect of which a person (a beneficiary) has an equitable proprietary interest (because the property has been taken from the beneficiary by a

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[141] [1951] AC 251.

[142] "Knowing Receipt: the Need for a New Landmark", in Cornish *et al* (eds) *Restitution: Past, Present and Future* (1998), at 231; see also *Criterion Properties plc v Stratford UK Properties LLC* [2004] UKHL 28, at para 4.

[143] See *eg* "Receipt", in Birks and Pretto (eds) *Breach of Trust* (2002), and Virgo *The Principles of the Law of Restitution*, at 65lff;

[144] Note 141 above.

[145] *Primlake Ltd v Matthews Associates* [2006] EWHC 1227.

> person who is in a fiduciary position towards that beneficiary) is received by an innocent volunteer, the beneficiary has a personal claim in restitution against the recipient even where the recipient has not been guilty of any 'fault' in receiving the property. In other words, the state of mind required for a 'knowing receipt' claim under English law is not required in Jersey. It is a strict restitutionary liability. However, the claim is based upon unjust enrichment and, accordingly, the beneficiary can only succeed to the extent that the recipient remains unjustly enriched. A defence of change of position is therefore available. We emphasize that the liability is a personal one; the recipient is not a constructive trustee for the beneficiary."[146]

37 This conclusion, albeit *obiter* and suitably caveated, ignored the views of those, in England and elsewhere, who disagreed with Birks. In *Republic of Brazil v Durant*,[147] Page, Commr applauded it, saying—

> "Jersey law can and should, we suggest, not hesitate to take advantage of the fact that it is not burdened with the same historical limitations, adopting those features of English law that have proved their worth but not those that have proved intractably problematic, and continuing to develop its own law of recovery and restitution of misapplied property and related liabilities in ways that accord, wherever possible, with good sense and notions of justice: as, for example, in the court's ground-breaking recognition in *Esteem* . . . of a personal claim in restitution against a fault-free but unjustly enriched recipient and its formulation of a victim's proprietary right of recovery where fraud has occurred . . ."[148]

but the contrary view must be that justice and good sense are precisely what the Lords had warned against in *Foskett v Mckeown*.

F. *Flynn v Reid*

38 In the ten years or so after *Esteem* no decided cases in Jersey dealt with unjust enrichment. So, during that period, it was a reasonable inference that the Jersey law of unjust enrichment was most likely based on the English model. *Flynn v Reid* changed all that.

39 Mrs Flynn and Mr Reid were co-habitees, who shared a relationship from 1995 until 2005, when they separated. Neither wanted to marry. In 2001, they bought a property for £199,000 with a

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[146] 2002 JLR 53, at para 157.
[147] 2012 (2) JLR 356.
[148] *Ibid*, at para 194.

deposit for £54,000 from Mr Reid and a secured joint bank loan for the balance. The property was taken in Mr Reid's name as Mrs Flynn did not have housing rights in Jersey enabling her to hold property in her own name. Mr Reid remained in the property after the separation, and met the loan repayments until the property was sold in 2011 for £420,000. In August 2010, Mrs Flynn sought orders under the Matrimonial Causes (Jersey) Law, 1949, to the effect that she was entitled to 50% of the equity in the property, or such other sum as was just, or, alternatively, damages. Her claims were for proprietary estoppel, but also breach of contract, constructive trust and unjust enrichment. Whilst acknowledging the court's wide jurisdiction under the 1949 Law, Sir William Bailhache, then Deputy Bailiff recognised the difficulties in reaching a fair result for non-married couples. The case was therefore significant, and although the court was invited to make new law, it could only look at (and perhaps extend) the existing grounds for a claim. To introduce a new quasi-matrimonial causes regime for unmarried couples was a matter for the legislature, after full consultation.[149] The court said that whilst not so pleaded, the claim's thrust was that the parties acted, and should be treated as if married. The intention was that Mrs Flynn's non-financial contribution, for instance to childcare, should be recognised, and that her contribution to the loan meant there was an equity in ensuring she had her fair share of the property. In the event, only the unjust enrichment claim succeeded. Mrs Flynn's advocate suggested her claim was one in restitution, "an equitable remedy which needed to be widely interpreted".[150] But very surprisingly, neither party produced Jersey or English authority, and the matter was decided principally by reference to a Scottish case, *MacKenzie v Nutter*,[151] with the court being left to do much of the work.

40 The court found three references to unjust enrichment in the Jersey law reports general index. The first was to the cases concerning *quantum meruit*, suggesting that remedy was part of Jersey law.[152] Then came *Lesquende*, where whilst noting the complexity of the English law of unjust enrichment, the Greffier seemed to have decided the case purely on a view of what was just.[153] Lastly, *Esteem* showed the Jersey court would recognise unjust enrichment in principle, but only in terms no wider than were necessary for the particular case.[154]

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[149] 2012 (1) JLR 370, at para 5.
[150] *Ibid*, at para 94.
[151] 2007 SLT (Sh Ct) 17; 2007 SCLR 115
[152] *Ibid*, at para 95.
[153] *Ibid*, at para 97.
[154] *Ibid*, at para 99.

Unjust enrichment was a "vibrant doctrine" and the court would be failing the community if it did not at least consider its application in the current context.

41 The court next considered the jurisprudential basis for claims in unjust enrichment. It started with Pothier, who identified, in addition to contracts, quasi-contract, delicts and quasi-delicts, another category of obligations derived from Pomponius's Roman law maxim *Neminem aequum est cum alterius damno locupletari*, and which *produisent une action que l'on appelle condictio ex lege*. It then referred to Domat's *Loix Civiles*, which contained—

> "rules of equity which take the place of a Law—all men are impressed with the requirement that they should not do wrong to others; that they should render to another that which belongs to him; that they must be sincere in their engagements, faithful in executing their promises and complying with other similar rules of justice and equity",

and finally to *Boudier*, to conclude—

> "The relevant principle [was] that a person, without any cause, obtains a benefit at the expense of another is bound to restore it. As with the principles underlying the French claim of abus de droit . . . The approach is seemingly based on the natural law and on general principles of equite . . . That is entirely consistent with the practice of the Royal Court over many years in allowing, as examples of unjust enrichment, claims for money paid by mistake of fact, or claims for damages on a quantum meruit."[155]

42 Attention now moved to Scottish law, where, as Lord Hope of Craighead observed in *Stack v Dowden*,[156] two cases had applied the law of unjust enrichment in response to the social problems faced by cohabiting couples, which were the same as in England. Scottish law did not distinguish between legal and beneficial ownership, so unless there was a trust, where title to a property was taken in a sole name, the presumption was of sole, and where in joint names, of joint equal ownership. However, in *MacKenzie v Nutter*[157] and *Satchewell v Macintosh*,[158] dealing respectively with sale of co- and solely owned properties, the claimant's contribution to the purchase and improvement costs was recognised to allow (*Mackenzie*) recovery of the defendant's share in the sale proceeds, and (*Satchewell*) a return of

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[155] *Ibid*, at para 105.
[156] [2007] UKHL 17, at paras 8–10, quoted at in *Flynn v Reid* at para 106.
[157] [2006] ScotSC 84.
[158] [2006] SLT (Sh Ct) 117.

the sums contributed, because in either case, the defendant would otherwise have been "unjustly enriched because the condition on which the enrichment was given . . . did not materialise".[159]

43 In *Mackenzie*, the parties were in a relationship which ended in 2001. A year or so earlier, they made an offer to purchase a property in which they would live as a couple. Both agreed to place their own properties on the market, but only the respondent did so. His property soon sold, but the proceeds were insufficient to meet the purchase price. The parties therefore took a loan secured by a mortgage to pay the balance, which would be discharged when the appellant sold her house, and they agreed to purchase the new property in joint names. In the event, the appellant never moved in, and the respondent paid all bills and taxers, met the mortgage payments and covered all maintenance costs. Nor did she ever place her own property on the market, and instead continued to live in it. When on sale of the new property, the Sheriff refused her application for her share of the sale proceeds, she appealed. Finding against her, Principal Sheriff Lockhart said the case was one of *condictio causa data causa non secuta* or "a claim for something given on a basis which has failed".[160]

44 The Principal Sheriff provided some detail on the *condictio*. In *Grieve v Morrison*, he noted[161] Lord Morrison said—

> "The nature of the condictio is set out in the speeches reported in the leading case of Cantiere San Rocco v Clyde Shipbuilding and Engineering Company. It rests generally on the liability to make restitution of a thing which has been transferred on a consideration which has failed. A well recognised example of the application of the doctrine is a gift made, for example to a bridegroom, in consideration of marriage. If the marriage does not take place, the gift must be returned . . . in the present case the defender made no gift of heritable property to the pursuer."[162]

45 And later,[163] he said this—

> "Unjust enrichment and remedies therefore should be determined on broad equitable principles. I was referred to Dollar Land Limited v CIN Properties Limited in the House of Lords Report 1998 SLT (HL) 90 at 98E to F where Lord Hope of Craighead,

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[159] [2007] UKHL 17, at para 9.
[160] [2006] ScotSC 84, at para 32.
[161] *Ibid*, at para 10.
[162] [1993] SLT 852, at 855.
[163] [2006] ScotSC 84, at paras 26–27.

referring to his decision in Morgan Guaranty Trust Co of New York v Lothian Regional Council 1995 SC 151 said:

> 'I sought to make my position clear when I said in the Morgan Guaranty case at p 155E that the important point was that these actions were all means to the same end, which is to redress an unjustified enrichment upon the broad equitable principle *nemo debet locupletari aliena jactura.'*

Here what was challenged by way of enrichment was the taking of title by the appellant. It had arisen in contemplation of a certain state of affairs, namely payment by the appellant of the mortgage of £29,000 from the sale proceeds of her house. That did not materialise. I was referred to the Court of Session report of Dollar Land Limited v CIN Properties Limited 1996 SC 331 where Lord Cullen said at pp 348–349:

> 'A person may be said to be unjustly enriched at another's expense when he has obtained a benefit from the other's actings or expenditure, without there being a legal ground which would justify him in retaining that benefit. The significance of one person being unjustly enriched at the expense of another is that in general terms it constitutes an event which triggers a right in that other person to have the enrichment reversed.'

I was also referred to the case of Shilliday v Smith supra where Lord Caplan said at page 734:

> 'The governing equitable principle is that a party ought not to be permitted to remain enriched in respect of a benefit in property or money which he has no legal rights to retain against the party from whom it derived. There are many situations where the law has confirmed that unjust enrichment can arise and there has been a tendency to categorise them. However, this process should not deflect from the underlying equitable foundation of claims based on such categories. What makes it fair and reasonable that recompense, restitution or repetition should be made to the party who originated the enriching benefit is that it would be unjust that a party should be enriched at the expense of another when in the circumstances no such enrichment was intended . . . The simple equitable formulation of the rules arising from unjust enrichment would perhaps be "is it right that the person should be entitled to retain a valuable benefit in circumstances when the person who conferred it had no intention that he should keep it."'''

46 Drawing these *dicta* together, the Principal Sheriff said—

> "The trio of recent cases (Morgan Guaranty, Dollar Land and Shilliday) made it clear that Scots law would provide a remedy on the general ground of unjust enrichment and was more concerned with the reversal of the enrichment than with the imposition of a rigorous and inflexible taxonomy of remedies."[164]

In unjust enrichment cases, the approach was to ask (1) had the defendant been enriched at the expense of the claimant, and how, (2) if so, was the enrichment unjust, (3) what remedy was available in the particular circumstances, and (4) was that remedy equitable?[165] In *Flynn v Reid*, the Deputy Bailiff found that approach—

> "not inconsistent with such slender authority as can be ascertained in Jersey law from the cases and is consistent with principle. It also provides a modern statement of an approach currently adopted by French courts to questions of *enrichissement sans cause.* The starting point is the legal interest. The court then looks at whether there has been enrichment which benefits the legal owner or owners or perhaps some of them at the expense of the claimant in a way that is unjustifiable. We also think that approaching the problem in this way will enable the court to consider enrichment problems holistically, rather than in separate compartments."[166]

47 In *McKenzie v Nutter*, the appellant failed to overturn the decision at first instance because (1) she was enriched by receiving a half share in the property when it was taken in joint names, (2) unjustly, because she never intended to sell her property, so that (3) the remedy was for the respondent to receive the entire proceeds of sale, which was (4) equitable given the appellant had contributed nothing and acted in bad faith. Mr Reid too was enriched by receiving the entire proceeds of sale, notwithstanding the parties' estimated joint earnings led to the grant of the bank loan, and Mrs Flynn had contributed financially by loan repayments and voluntarily by providing domestic services and looking after their children. Following Canadian authority,[167] the voluntary services were contributions no less than financial ones. Mr Reid benefitted from them because he could work longer and remain in the property for longer after Mrs Flynn left, than if she had not made them. His enrichment was unjust because the parties regarded themselves as a couple, and because Mrs Flynn had made a substantial contribution, in money and in kind, which it would be unfair to ignore.

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[164] *Ibid*, at para 31.
[165] *Ibid*, at para 33.
[166] 2012 (1) JLR 370, at para 108.
[167] *Kerr v Baranow; Vanasse v Segun* [2011] 14 ITELR 171.

The appropriate time of enrichment was the date of sale, *ie* April 2011, Reid having been enriched progressively because all the time the value went up, the bank loan went down.

48 *Flynn v Reid* is a striking decision. Clearly, the Deputy Bailiff derived little guidance on the juridical basis for cases of unjust enrichment from what he called Jersey's "slender" previous authorities. And in fairness, he received no assistance from the parties' advocates either. But surely some explanation was needed as to why the civil law *enrichissement sans cause* was preferred to the common law approach in *Esteem*. Although *Esteem* refrained from setting limits on when an unjust enrichment claim would lie, it did say how the claim would play out. Unsurprisingly, *équité* played no part in that, because the claim in *Esteem* was one under the common law. What is also interesting is that the relevant extract from Pothier cited in *Flynn v Reid* was (with emphasis added) "*Il y a des obligations qui ont pour seule et unique cause immediate la loi. Par example,* ***ce n'est en vertu d'aucun contrat ni quasi- contrat*** *que les enfants . . . c'est le loi naturelle seule qui produit en eux cette obligation*".[168] The highlighted text suggests that under Jersey law, cases of unjust enrichment now sit outside of the fourfold classification of obligations owed to Gaius, something we shall was later confirmed in *CMC Holdings Ltd v Forster*.[169] Those obligations created an action called *condictio ex lege*. Significantly, *Gale v Rockhampton* was not mentioned in *Flynn v Reid* and nor was quasi-contract.

(G) More recent Jersey cases

49 Recent Jersey authorities have applied the test in *Flynn v Reid* in a variety of circumstances. In *Campbell v Campbell*,[170] two brothers disputed their shares in a jewellery business. Le Cocq, Deputy Bailiff, followed *Flynn*[171] but found the defendant had not been enriched at the claimant's expense as it had been agreed he would hold the benefit of some disputed loans as constructive trustee for them both.[172] In

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[168] *Traité des Obligations* (9th edn), Tome 1, Chapter 1, para 123, at 109. ["there are obligations which arise solely from the general law and have no other immediate cause. For example, it is not due to any contract or quasi contract that children . . . it is the natural law alone which creates the obligation"]

[169] See Section (H) below.

[170] 2017 JRC 108.

[171] *Ibid*, at para 60.

[172] *Ibid*, at para 120.

Campbell, the test was expressed to be as set out in para 107 of *Flynn* as follows—

> "So there we have a reference from Lord Hope to two Scottish cases where the law of unjust enrichment has been applied. In *Mckenzie* v. *Nutter* . . . Sheriff Principal Lockhart, having summarized the relevant law, described his approach as follows (2007 S.L.T. (Sh. Ct.) 17, at para. 33):
>
> > 'On the basis of the law which I have set out it is clear that the court may allow an equitable remedy in circumstances where one party has been unjustly enriched at the expense of another party. I propose to deal with this matter under four headings:
> >
> > a. Has the appellant been enriched at the expense of the respondent and what is the nature of that enrichment?
> >
> > b. If so, was that enrichment unjust?
> >
> > c. If so, what remedy, in the particular circumstances of this case, is open to the respondent?
> >
> > d. Is that remedy equitable?'"

50 The same test was applied in *A v B (Matrimonial)*[173] to strike out a "hopeless" claim that a third party had been enriched by the increase in value of a property, due to time and money spent on works and improvements to the property. In *Al Tamimi v Al Charmaa*,[174] where a divorced spouse held shares in two Jersey companies as nominee for her former husband, Sir William Bailhache, Bailiff, distinguished *Flynn* on the facts. In *Holmes v Lingard*,[175] Master Thompson refused to strike out a claim for payment for services by which the claimant improved the defendant's property, as following *Benedetti v Sawiris*,[176] absent a contract, the claimant was *prima facie* entitled to the objectively assessed value of the services,[177] albeit not to the increase in the property's purchase price.[178] The decision was upheld on appeal.[179] That *Benedetti* anticipated alternative claims in *quantum*

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[173] [2018] JRC 042.
[174] 2017 (2) JLR 92.
[175] [2017] JRC 113.
[176] *Ibid*, at para 212.
[177] [2017] JRC 113, at para 212.
[178] *Ibid*, at paras 216–218 following *Cobb v Yeoman's Rowe Management Ltd* [2008] 1 WLR 1752.
[179] [2018] JRC 071B.

meruit and in contract, was also recognised in *Doran v Dataquill Ltd*.[180]

51 These cases show the widening circumstances in which unjust enrichment claims might arise, but still contain little analysis of the doctrine's limits.

H. *CMC v Forster*, contribution and subrogation

52 Of much more interest is *CMC Holdings Ltd v Forster*,[181] where two Kenyan companies who had monies wrongly diverted by certain of their directors, issued against one such director, Forster, for breach of duty, and two Jersey corporate service providers for dishonest assistance. In January 2017, Master Thompson allowed[182] the service providers to join as third parties (to seek contribution and/or indemnity from) Forster and two other directors, K and N, on grounds including that if dishonest assistance was established, it would be unjust if the providers bore the whole loss, given their liability depended on the directors having acted in breach of duty. The parties' arguments, and the Master's findings, repay close analysis.

53 The service providers relied upon a Canadian authority, *Peterson Pontiac Buick GMC Ltd v Campbell and Isfeld*,[183] and Goff & Jones,[184] arguing a claimant was entitled to contribution in equity and/or under the court's inherent jurisdiction, if (1) it and the defendant both were liable to a third party, (2) which could not recover fully from both, but (3) could elect to recover in full from either of them, and (4) the defendant should bear some or all of the burden to pay. It did not matter if the claimant and the defendant were liable to the third party under different causes of action. The third parties argued the inherent jurisdiction could not generate new substantive rights and remedies on the basis of what was considered fair and just in the circumstances, and that care was needed to avoid the law of unjust enrichment "degenerating into an exercise of 'idiosyncratic discretion'".[185]

54 The Master saw *Esteem* as a first step in Jersey recognising a claim in unjust enrichment "but clearly leaving it for another day as to the

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[180] [2018] JRC 148, at para 52.
[181] [2016] JRC 149; 2016 (2) JLR *N* [5].
[182] [2017] JRC 014A.
[183] [2013] ABCA 251.
[184] 8th edn, 2011, at para 20–1.
[185] [2017] JRC 014A, at para 61.

extent of the doctrine";[186] and the result in *Flynn v Reid* was "entirely understandable because without use of the doctrine of unjust enrichment, the plaintiff would have been left without a remedy".[187] That said, the facts in *CMC v Forster* were very different and Jersey's contribution legislation was not as extensive as the UK Civil Liability (Contribution) Act 1978. However, in *Barnes v EastEnders Cash & Carry plc*[188] the following words from Goff & Jones were approved—

> "It has been alleged that unjust enrichment is a vague principle of justice of no practical value. However, the search for principle should not be confused with the definition of concepts. Unjust enrichment is not a high-level notion lacking in substantive content, 'an indefinable idea in the same way that justice is an indefinable idea'. Rather, as Deane J held in the High Court of Australia, unjust enrichment is a—
>
> > '. . . unifying legal concept, which explains why the law recognises, in a variety of distinct categories of case, an obligation on the part of the defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff and which assists in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognise such an obligation in a new or developing category of case.'
>
> Whatever may be the underlying moral justifications for the award of restitution in these cases the 'unjust' element in 'unjust enrichment' is simply a 'generalisation of all the factors which the law recognises as calling for restitution'. In other words, unjust enrichment is not an abstract moral principle to which the courts refer when deciding cases; it is an organising concept that groups decided cases on the basis that they share a set of common features, namely that in all of them the defendant has been enriched by the receipt of a benefit gained at the claimant's expense in circumstances that the law deems to be unjust. The reasons why the courts have held a defendant's enrichment to be unjust vary from one set of cases to another, and for this reason the law of unjust enrichment more closely resembles the law of torts (recognising a variety of reasons why a defendant must compensate a claimant for harm) than it does the law of contract 'embodying a single principle that expectations engendered by

[186] *Ibid*, at para 69.
[187] *Ibid*, at para 72.
[188] [2014] UKSC 26, at para 102.

> binding promises must be fulfilled'). In this respect, English law does not have a unified theory of restitution."[189]

55 The Master approved a concession that Goff & Jones[190] showed how, even before the 1978 Act, the English court had power in equity to apportion responsibility for loss, and noted that in *Dubai Aluminium Co Ltd v Salaam*,[191] dishonest assisters received an indemnity under the 1978 Act from principal wrongdoers who had not returned the full spoils of their fraud. And finally,[192] he saw an analogy with *Niru Battery Manufacturing Co v Milestone Trading Ltd (No. 2)*,[193] where D1 and D2 were jointly and severally liable to X, D1 in negligence and D2 in unjust enrichment. When D1 paid X in full, D1 was entitled by subrogation to enforce X's rights against D2, as otherwise D2 was unjustly enriched. Subsequently, the Master dismissed applications by N[194] to strike out, and K[195] to strike out or seek summary judgment on the third party proceedings.

56 The two grounds relied on by K, relevant for present purposes, were (1) that a dishonest assister could not look to equity to recover a contribution, and (2) only statute and not unjust enrichment, which imported general notions of fairness, could allocate responsibility between wrongdoers. Rejecting both arguments, the Master referred to Pothier, who had recognized—

> "five different bases or whether one party might be under some form of legal obligation to compensate another. As part 1, chapter 1 of [Pothier, 1821 edn] states, '*Les causes des obligations sont les contrats, les quasi-contrats, les delits, les quasi-delits; quelquefois la loi ou* ***l'equite seule***'." [Emphasis supplied.][196]

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[189] Paras 1–07 and 1–08 quoted at [2017] JRC 014A, at para 74.
[190] *Ibid*, at para 78.
[191] [2003] 2 AC 366.
[192] [2017] JRC 014A, at para 85.
[193] [2004] EWCA Civ 487.
[194] [2017] JRC 141.
[195] [2017] JRC 190.
[196] [2017] JRC 190, at para 15 ["Obligations derive from contracts, quasi-contracts, wrongs and quasi-wrongs, and sometimes simply under the general law or equity"]; and compare also Keyser QC in *O'Keefe v Caner supra*, at para 105; "Mr Kelleher's opinion, if I understood it, seemed to be that the duty must be regarded as tortious because all obligations must be brought within one of Pothier's four categories, namely contract, quasi-contract, delit and quasi-delit. I do not accept that. Pothier himself recognised residual categories of obligation arising from "the mere authority of the law, or the mere force of natural equity".

57 Pothier permitted a debtor, who had paid out a sum to discharge a debt owed by a number of debtors, to step into the creditor's shoes by way of subrogation and recover from them a part of the sum paid out.[197] He also permitted joint tortfeasors to recover a contribution form the other.[198] The rationale for both was not statute, but *équité*,[199] which also underlay *enrichissement sans cause*. Pothier and *Niru Battery (No. 2)* were consistent so that the doctrine of unjust enrichment could be used as the basis for ordering an allocation of responsibility between joint wrongdoers.[200] Both of the Master's decisions were unsuccessfully appealed.[201]

58 The express recognition of the five sources of obligation is arguably the most important statement in the development of the Jersey law of unjust enrichment, as it expressly distinguishes *enrichissement sans cause* from quasi-contract, and confirms that Jersey law is grounded very firmly within French *équité*.

(I) The Guernsey authorities

59 In Guernsey, the position is less developed than in Jersey. Indeed, *Investec* aside, only two cases of which the author is aware have directly addressed questions of unjust enrichment.[202] On analysis, neither is without difficulty, and offers little to explain the doctrinal basis for the Guernsey law of unjust enrichment.

60 In the first, *Norman Piette Ltd v Hochtief Construction (UK) Ltd*,[203] HCL was appointed by the Guernsey States to develop Guernsey airport. NPL supplied goods to X, HCL's sub-contractor, for which X did not pay in full, so NPL sought reparation. Some of the

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[197] *Ibid*, at para 17.
[198] *Ibid*, at para 19.
[199] *Ibid*, at para 19.
[200] *Ibid*, at paras 23–25.
[201] [2018] JRC 081.
[202] I am not including here *Dervan v Concept Fiduciaries* (unreported) Judgment 38/2012, which concerned the proper law to determine whether dispositions to an EBT should be avoided for mistake. Nor do I consider the case of *Toor v Butterfield Trust (Guernsey) Ltd, and Braude, Liebeck & Ruttenberg* (unreported) Judgment 7/2013 where the court dismissed an exception raising the potentially significant question whether undue influence was an actionable wrong entitling a claimant to damages or simply a ground for rescission. Interestingly, at para 12 of the judgment, McMahon Deputy Bailiff, relied upon "practical justice" and the court's conscience as grounds for allowing the matter to proceed to a full trial.
[203] 2005–2006 GLR 50.

goods could not be returned because they already formed part of the airport building, and HCL refused to return the rest. NPL argued HCL had been unjustly enriched to the extent of the outstanding balance, because it had received payment for the goods as part of the contract price paid to it by the States. The hearing concerned a request for specific discovery, so there was no full decision on the merits. Nonetheless, Hancox, LB thought it important, before deciding the discovery application, to identify "the legal bases for the alleged causes of action".[204] Referring first to *Chitty on Contracts* (28th edn, 1999, Chapter 30), and then to Lord Wright's *dictum* in *Fibrosa* quoted above and the cases of *Refuge Assurance Co v Kettlewell*[205] (an illegality case) and *Craven-Ellis v Canons Ltd*[206] (concerning the mistaken provision of services under a void contract), he decided that (1) there was no need for a contract (or prior contract) between claimant and defendant to ground an action in restitution,[207] because (echoing *Moses v MacFerlan*) the action depended "on the principle that one party is obliged, *ex aequo et bono*, to make restitution", and (2) there was an arguable case for unjust enrichment. But that was as far as it went.

61 As well as lacking in doctrinal analysis, the conclusion is doubtful on other grounds. The first is that it surely offends the rule against "leapfrogging",[208] which is that—

> "Suppose that D receives a benefit from, or because of, the performance of a contract between C and X, and that C, the party making the performance, has a valid contractual right to be paid for that performance by X. D is the immediate enrichee of X, and the remote enrichee of C. In this case C cannot leapfrog X, who procured the performance, and claim against D. One may never attack one's contractual counter-party's immediate enrichee because this would subvert the insolvency regime by allowing C to wriggle round the risk of X's insolvency inherent in the party's contract".

62 If we apply this to the facts, D (HCL) received a benefit from the performance of the contract between NPL (C) and X, because it received the goods due to their provision by NPL to X. Hence HCL was the remote enrichee of NPL, but NPL could not pursue HCL for

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[204] *Ibid*, at para 4.
[205] [1909] AC 243.
[206] [1936] 2 KB 403.
[207] 2005–2006 GLR 50, at para 8.
[208] Burrows (ed) *English Private Law* (2nd edn, Oxford, 2007), Chapter 18, para 18.32, at 1344.

the enrichment, because that would have allowed NPL to avoid the risk of X's insolvency inherent in its contract with NPL. So NPL should have sued X, which it chose not to do.[209]

63 Alternatively, there must be doubt whether HCL as NPL's remote enrichee, was enriched at NPL's expense, when receiving the payment from the Guernsey States.[210] That doubt ought to have been apparent in 2005, but is now *a fortiori* since the UK Supreme Court confirmed in *Commissioners for HM Revenue & Customs v Investment Trust Companies* that absent agency, piercing the veil or sham, a claim for unjust enrichment is only available where the defendant receives a benefit directly from the claimant.[211]

64 The second case, *Carton-Kelly v Butterfield Bank (Guernsey) Ltd*,[212] seems known only[213] from Chapter 4 of *International Asset Tracing in Insolvency*,[214] where para 4.191 says—

> "In [Carton-Kelly] . . . a claim for money had and received was successfully established by the liquidators/trustees in bankruptcy over monies deposited in the wrongdoer's bank account held at a bank. The monies had been initially deposited by third party investors in a Ponzi scheme operated by the now insolvent UK-based partnership and individuals and had been paid to an associated BVI company rather than to the UK entities. The Royal Court held that, as the wrongdoer had been unjustly enriched as a result of the payments to it, the monies should be repaid in full to the insolvent estate (and crucially, not to the third party investors who had made the payments in the first place) for the benefit of the respective insolvent estates and, ultimately, their creditors."

65 It is hard to make sense of this. However, connected Guernsey proceedings,[215] reveal the case was part of the attempts to recover the

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[209] 2005–2006 GLR 50, at 53.

[210] Compare Goff & Jones, *op cit*, at paras 6–40ff.

[211] [2017] UKSC 29, at 73, and preceding discussion, and clarifying the "too vague" approach in cases like *Menelaou v Bank of Cyprus UK Ltd* [2015] UKSC 66, at para 27 where the question was said to be "in each case is whether there is a sufficient causal connection, in the sense of a sufficient nexus or link, between the loss to the bank and the benefit received by the defendant".

[212] Royal Court, 6 November 2008.

[213] It was not mentioned in *Investec*.

[214] Taube (ed) (Oxford, OUP, 2009).

proceeds of the "Vavasseur fraud", a US Ponzi scheme masterminded by one Terry Dowdell, which raised US$70m from investors "through the sale of fictitious securities introducing a programme purportedly operated by the Bahamian company Vavasseur".[216] Carton-Kelly and Callaghan were appointed liquidators to Dobb White & Co (a UK accountancy practice), and trustees in bankruptcy to Gangar and White, both partners in DWC. Between March 2001 and April 2002, Gangar and White administered Vavasseur under Dowdell's control. After November 2001, investors' monies were paid to offshore accounts, including some in Guernsey. In 2003, Vavasseur was placed in receivership in the US, and ordered to pay US$121,235m plus interest to investors.[217] Vavasseur had two accounts with Butterfield, and its US receiver, Mr Terry Jr of DurretteBradshaw plc, was recognised by the Guernsey court,[218] which later turned its attention to the competing claims to the funds in the accounts. The same text as describes the case, also reveals that Vavasseur's corporate veil was pierced. This explains the later proceedings in which, presumably, having set Vavasseur aside as a façade for its owners CK and C, as the insolvency practitioners appointed to G and W, claimed directly for money had and received on the basis that G and W had been unjustly enriched by the investors' payments. Now, one can readily appreciate how, if Vavasseur was set aside, its enrichment became that of its wrongdoer owners, but beyond that the matter is not easily comprehensible. In particular, how exactly the Guernsey court was able to find that the estates of G and W had a receipt-based personal claim in unjust enrichment to the monies at the bank, which trumped that of the duped investors, is very unclear.

66 Finally, we come to *Investec* itself, where the liquidators of a BVI company sought restitution in respect of a debt they had discharged, owed by the former trustees of the trust which owned its shares. Under English law, which is what the parties relied upon, the discharge of another person's debt falls, like contribution, under the head of legal compulsion.[219] Alternatively, and more rarely, it may fall under necessity, if discharge was necessary in the circumstances.[220] Under either head, a key consideration is that the debt must have been discharged involuntarily; the law will not protect the officious

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[215] *Terry and DurretteBradshaw plc v Butterfield Bank (Guernsey) Ltd* 2005–2006 GLR 327.
[216] 2005–2006 GLR 327, at 329.
[217] *SEC v Terry L Dowdell*, Civil Action No 3:01Cv00116 (W.D.Va.).
[218] 2005–2006 GLR 327, at 334.
[219] *Moule v Garrett* (1872) LR Ex 101, and see Virgo, *op cit*, at 233ff.
[220] *Owen v Tate* [1976] QB 402.

intervener. At first instance, Chadwick, LB understood the case to rest on observations in *Falcke v Scottish Imperial Insurance*[221] and found the trustees liable to pay,[222] on the basis that if, at B's request or with B's consent, A pays a debt owed by B to C, A is entitled to recover from B the amount paid.[223] The Court of Appeal[224] reversed that decision because it found the trustees had neither requested nor consented that the company discharge the loan. Rather, its discharge formed part of a complex refinancing which obliged the company and not the trustees to discharge it.

67 The liquidators' reliance on *Falcke* was puzzling, as *Falcke* was not a debt case. Instead, the claimant paid the defendant's insurance premium to protect its own interest in the insured premises, but failed to obtain restitution on grounds of necessitous preservation of the defendant's property because he was a found to be a volunteer. Surely then, there were closer and better authorities. But the trustees' arguments on appeal in *Investec* went further, to the essence of English law. The Lieutenant Bailiff had failed to apply the four-stage test in *Banque Financiere*, and identified no unjust factor.[225] And because the company drew down the sums to pay the trustees' debt, it assumed an equivalent liability to the lender, thereby reducing its value to the trust, so the trustees were not enriched.[226] Finally, the trustees had a defence of change of position as they had divested themselves of assets and entered into transaction which could not be reversed,[227] and, relying on *Taylor v Motabilty Finance Ltd*,[228] to allow the claim in unjust enrichment would have undermined the contracts to which the company and the trustees both were parties.[229] Troubled by the lack of detailed analysis, McNeill JA expressed the court's decision on what he called "this complex area" in terms no wider than absolutely necessary.[230] As a result, the decision was based upon two important assumptions. First, that *Norman Piette* indicated the Guernsey courts may entertain a claim in *unjustified* enrichment where the parties had no pre-existing relationship; secondly, that the four-stage test in *Banque Financiere* was an acceptable approach to such a claim.

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[221] (1886) 34 Ch D 234.
[222] 6 December 2013.
[223] *Ibid*, at para 130.
[224] 2015 GLR 300 (McNeill, Martin and Logan Martin JJA).
[225] *Ibid*, at para 154.
[226] *Ibid*, at para 154.
[227] *Ibid*, at para 155.
[228] [2004] EWHC 2619.
[229] (unreported), 10 August 2015, Judgment 35/2015, at para 157f.
[230] *Ibid*, at para 166.

Falcke came within that four-stage test, and was still good authority under English law. However, it also showed that work done or money expended to preserve or benefit the property of another did not of itself justify restitution, as there was no presumption against donation. Hence the crucial issue with regard to what McNeill JA called the "equitable restitutionary remedy", was whether the trustees had requested or agreed to the repayment, which he found they had not.

68 In so deciding, the court made reference to the judgment of Bastarache J in *Kingstreet Investments Ltd v New Brunswick (Finance)* which we encountered early on this paper,[231] saying—

> "Lord Reed, at paragraph 97, referred to the judgment of the Supreme Court of Canada, given by Bastarache J in Kingstreet Investments Limited v New Brunswick (Finance) [2007] 1 SCR 3 where, at paragraph 32, the learned judge said:
>
> > 'Restitution is a tool of corrective justice. When a transfer or value between two parties is normatively defective, restitution functions to correct that transfer by restoring parties to their pre-transfer positions. In Peel (Regional Municipality) v Canada [1992] 3 SCR 762, McLachlin J (as she then was) neatly encapsulated this normative framework: "the concept of 'injustice' in the context of the law of restitution harkens back to the Aristotelian notion of correcting a balance or equilibrium that had been disrupted" (p 804).'"[232]

and stressing (with emphasis added)—

> "The law of restitution, as indicated in the passage from Kingstreet Investments Limited, referred to in paragraph 163 above, operates to provide an immediate correction. *There is no indication that it can be operated to create a new set of rights and obligations such as a long term loan.* Nor was any correction required. The fact that matters proceeded by way of discharge of the old liability and putting in place of a new arrangement with the new debtor did not disturb the fact that Oscatello, a new or dormant company, with no other assets or interests, was being placed into a corporate structure where part of its obligations would be accepting the liabilities and obligations of debtor to Kaupthing, in place of its ultimate beneficial owner the TDT".[233]

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[231] Paragraph 3 above.
[232] *Ibid* at para 170.
[233] *Ibid*, at para 179.

69 *Investec* leaves Guernsey law in an unsatisfactory state. With obvious reluctance, the Court of Appeal delivered a heavily caveated judgement, placing Guernsey within the common law tradition. At the same time, they hoped future cases would challenge that conclusion. So far as I am aware, no Guernsey case since *Investec* has done that.

J. Conclusions

70 The references in *Investec* to corrective justice, and to Bastarache J in *Kingstreet Investments* take us back full circle to Aristotle. And the Court of Appeal's reservations about lack of comparative analysis, show how uneasy it was about setting any sort of precedent. But it has of course done so, and based the Guernsey law of unjust enrichment on the English model. Arguably then, Guernsey now stands at the same crossroads some thought English law faced following Birks' suggestion it commit to a civilian model.[234] Things are different in Jersey, as over time, and notwithstanding suggestions to the contrary in *Esteem*, Jersey has settled on a model founded on natural justice and *équité.*

71 How Guernsey makes its choice will depend on many things, such as policy, custom and precedent, but it might also have an eye for the experience in Canada, where, following *Garland v Consumers' Gas Co*,[235] the courts changed their unjust enrichment model from a common law approach (requiring a positive reason for recovery)[236] to a civil one (whereby relief is available absent reason to deny it).[237] The resulting experience has not been altogether successful, and it is worth considering why.

72 *Garland* attempted to clean up a juristic mess created when, contrary to earlier decisions, the Supreme Court in *Rathwell v Rathwell* modified the unjust factor test by requiring, to avoid palm tree justice, "absence of any juristic reason for the enrichment" as a third decidedly civilian limb.[238] *Rathwell* was followed in *Pettkus v Becker*, where unjust enrichment required—

> "[a]n enrichment, a corresponding deprivation and absence of juristic reason for the enrichment . . . The common law has never been willing to compensate a plaintiff on the sole basis that his actions have benefited another . . . It must, in addition, be evident that the retention of the benefit would be 'unjust' in the circumstances."[239]

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[234] Note 70 above.
[235] [2004] 1 SCR 629.
[236] Found in eg, *Stoltze v Fuller* [1939] 1 DLR 1, and *Degelman v Guaranty Trust.*
[237] Mcinnes, "Unjust Enrichment, Juristic Reasons and Palm Tree Justice; *Garland v Consumers*' *Gas Co*" 41 Can. Bus LJ 103 (2004–2005).
[238] [1978] 2 SCR 436, at 455.
[239] [1980] 2 SCR 834, at 847–848.

73 This ostensibly hybrid approach confounded commentators and courts alike, so to resolve the confusion, the Supreme Court in *Garland* restated the test as follows—

> "First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. By closing the list of categories that the plaintiff must canvass in order to show an absence of juristic reason . . . [the] objection that it require[s] proof of a negative is answered. The established categories that can constitute juristic reasons include a contract . . . a disposition of law . . . a donative intent . . . and other valid common law, equitable or statutory obligations . . . If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case . . . The *prima facie* case is rebuttable, however, where the defendant can show there is another reason to deny recovery. [T]here is a *de facto* burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence . . . As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations. It may be that when these factors are considered, the court will find that a new category of juristic reason is established."[240]

74 This restatement has been widely criticised because, as Smith has pointed out, the list of juristic reasons is not closed, but instead, wide open, with the defendant even able to add reasons of its own.[241] When one adds to the mix, that courts should look to the parties' expectations and policy considerations as well, the risk is that structured analysis becomes impossible. Smith goes on to show how decided cases since *Garland* have not applied the *Garland* test consistently, but then arrives at a startling conclusion, which is that in future, jurisdictions might not adopt either the civilian or the common law approach; they can just as easily adopt elements of both. And rather than apply in each case, a uniform over-arching principle based on either unjust factors or absence of legal justification, the correct approach is to apply a test depending on the particular circumstances. This would be a radical approach, which might lead to multiple causes of action within the unjust enrichment rubric. But Smith argues it is an approach already taken by Goff & Jones, who now include "justifying grounds" as a separate part of their text, and as grounds for justifying enrichments. It

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[240] [2004] 1 SCR 629, at paras 44–46.

[241] L Smith "The State of the Law of Unjust Enrichment in Common Law Canada" (2015) 57 *Canadian Business Law Journal*, 39, at 2.

is also an approach which might be seen as consistent with that in Jersey, and which would enable cases like *Esteem* to survive the trend towards *équité*. In other words, whilst cohabitee and contribution cases can be dealt with by reference to Pothier and natural justice, trust beneficiaries have a remedy against fault free recipients of misapplied trust property, grounded on common law and policy considerations. And that becomes a cause of action in itself, not an example of a wider common law principle to which it is an exception.

75 That approach would also be consistent with the desire, which surfaces from time to time, to see the law of unjust enrichment as a means of providing a remedy where one would not otherwise lie. The decision in *Esteem*, for example, was clearly influenced by a policy consideration that, as an offshore finance centre, Jersey should, wherever possible, afford those who place business there a range of appropriate remedies in the face of fraud. And there are doubtless other similar situations where uncertainty in English law, or a Jersey statutory lacuna,[242] would encourage a similar result. But principle must still be observed. In *Lipkin Gorman v Karpnale*, Lord Goff made it clear that "The recovery of money in restitution is not, as a general rule, a matter of discretion for the court"[243] and in *Uren v First National Home Finance Ltd*, Mann J said the authorities had not established "that a claimant could get away with pleading facts which he says leads to an enrichment which he says is unjust".[244] And nor should the law of unjust enrichment become a point of last resort if no others will assist, or a convenient dumping ground for causes of action which cannot be located elsewhere.

76 The cases described in this article show how unjust enrichment is being widely applied by the Channel Islands' courts in a variety of contexts, which is to be welcomed. But they also show how on occasions, and especially in Guernsey, the courts have failed to engage in the level of comparative analysis that the Court of Appeal expected in *Investec*. The result is that no Guernsey cases have yet explained the juridical basis for the Guernsey law, and the assumption is that English law will apply. By contrast, in Jersey, the move in *Esteem* away from quasi-contract towards unjust factors, has been largely rejected since *Flynn v Reid* in favour of a more civilian approach, but with the focus on natural justice. That is very clear now since the recognition of the fifth source of obligations in *CMC Holdings Ltd v Forster*. Even in Jersey, however, there remain questions to be answered. Where, for

[242] *CMC v Forster* [2017] JRC190, at paras 25 – 26
[243] [1991] 2 AC 548, at 578.
[244] [2005] EWHC 2529, at para 16.

instance, is the precise dividing line drawn between genuine cases of quasi-contract and cases of unjust enrichment: or should quasi-contract be abandoned altogether, even in cases of *voisinage*, which are said to fall within it, because it is outmoded and adds nothing, even as a generic term? And given Jersey's customary law background, what role if any, do concepts such as the *negotiorum gestio* have to play, potentially extending the more restrictive common law approach to necessitous intervention? Is the *quantum meruit* in Jersey (and Guernsey) law a cause of action in its own right, or simply a remedy similar to the remedy abolished in England in 1852? And finally, how is Jersey to achieve certainty in its law, having in effect adopted the *ex aequo et bono* approach of Lord Mansfield in *Moses v Macferlan* which was so widely criticised in its time for its vagueness? To put it another way; can *équité* ever be sufficiently certain to establish when, to use Bastarache J's words, a transfer is "normatively defective", or does the vibrancy of the law risk upsetting commercial certainty?

77 These all are matters for future consideration, which anticipate much stimulating legal debate.

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