
THE OVERLAPPING OF LEGAL CONCEPTS

A LEGAL REALIST APPROACH TO THE
CLASSIFICATION OF PRIVATE LAW

by

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ABSTRACT

The main aim of this research is two-fold; firstly, these chapters will seek to demonstrate the unreliability of theoretical or abstract approaches to legal reasoning in describing the law. Secondly, rather than merely providing a deconstruction of previous attempts to classify private law, the chapters attempt to construct an overlapping approach to classification. This represents a new way of classifying private law, which builds on the foundations of the lessons of legal realism and explains how classification can accommodate overlaps to assist in identifying the core elements of private law reasoning. Following the realist tradition, the thesis argues for narrower formulations of the concepts of property, contract and tort. It is then argued that within these narrower concepts, the law is made more predictable and clearer. Importantly, adopting the overlapping analysis, we can explain the areas that we have removed from property, contract and tort as overlaps with these core concepts. The purpose is to recognise that legal concepts can be best understood as links between facts and judicial decision making, and the best way to achieve this is to reject discrete categorisation and, instead, to recognise the overlapping of legal concepts.

Dedication

In loving memory of my Nan, Lilly Durack and my brother, Laith Salmons.

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CHAPTER 1: CLASSIFYING PRIVATE LAW

Regula est, quae rem quae est breviter enarrat. Non ut ex regula jus sumatur, sed ex jure quod est regula fiat. That is a rule which concisely states the actual doctrine of the case.

The law is not taken from the rule, but the rule is made by the law.¹

1. Introduction

The main aim of this research is two-fold; firstly, these chapters will seek to demonstrate the unreliability of theoretical or abstract approaches to legal reasoning in describing the law. Secondly, rather than merely providing a deconstruction of previous attempts to classify private law, the chapters attempt to construct an overlapping approach to classification. In doing so, it incorporates and explains the overlapping of legal concepts. This represents a new way of classifying private law, which builds on the foundations of the lessons of legal realism and explains how classification can accommodate overlaps to assist in identifying the core elements of private law reasoning. To begin with, it is important to state why this thesis, and the overlapping analysis that it introduces, is desperately needed.

¹ Paulus D 50. 17. 1, as reproduced and translated in JG Phillimore, *Principles and Maxims of Jurisprudence* (John W Parker 1856) at 92.

2. The Role of Classification

There have been many previous attempts to comprehensively codify or arrange English private law, all of which have been met with limited success.² In recent times, the quest to classify English private law has taken on a renewed focus.³ One of the significant factors in this resurgence of interest in classifying the law has undoubtedly been the recognition of the law of unjust enrichment in England. Those writing on the subject have sought to find a place on the map for this developing area of private law.⁴ However, the debate has gone much further than this. Attempts to classify private law have also raised important questions about the way in which English lawyers apply logic and deductive reasoning, and the systematic arrangement of private law actions.⁵ In particular, many of those seeking to classify English Law have sought to use an approach to classification which would represent a fundamental shift in the way that we approach legal reasoning.

² S Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (CUP 2003) at ch 1; H Hollond, 'English Legal Authors before 1700' (1947) 9 CLJ 292 at 296; R Brown, 'The Law of England During the Period of the Commonwealth' (1931) 6 Indiana LJ 359 at 367-370.

³ P Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989); P Birks, 'Misnomer' in WR Cornish et al (eds), *Restitution Past, Present and Future: Essays in Honour of Gareth Jones* (1998); G Samuel, *Can the Common Law be Mapped?* (2005) 55 Univ of Toronto LJ 271; G Virgo, 'What is the Law of Restitution About?' in WR Cornish et al (eds), *Restitution Past, Present and Future: Essays in Honour of Gareth Jones* (Hart 1998); A Beever and C Rickett, 'Interpretative Legal Theory and the Academic Lawyer' (2005) 68 MLR 320; A Burrows, 'Contract, Tort and Restitution – A Satisfactory Division or Not?' (1983) 99 LQR 217; P Birks (ed), *The Classification of Obligations* (OUP 1997); C Rickett and R Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart 2008); P Jaffey, *Private Law and Property Claims* (Hart 2007).

⁴ See in general P Birks, 'Misnomer' in WR Cornish et al (eds) *Restitution, Past, Present and Future* (Hart 1998), M McInnes, 'Restitution, Unjust Enrichment and the Perfect Quadrature Thesis' [1999] RLR 118; A Burrows, 'Quadrating Restitution and Unjust Enrichment: A Matter of Principle' [2000] RLR 257.

⁵ P Birks, 'Definition and Division' in P Birks (ed), *The Classification of Obligations* (OUP 1997).

The arguments made by the unjust enrichment lawyers, whatever our opinion on the substantive proposals, cannot be ignored. In the past, it may have been the case that judges could dismiss the work of academics for being too theoretical,⁶ or maybe to maintain their role as the exclusive voice of the law.⁷ That is no longer the case. Indeed, as Hedley has explained, the organisation and arrangement of private law has largely been left to the field of academia.⁸ In the courtroom, judges focus on solving the case before them, and attempts to restructure the law are always on shaky ground.⁹ So the restructuring is left to the academics. It would, therefore, be wrong to assume that the classification debate has simply been the preserve of the academic; a number of authoritative judgments over recent years have been heavily influenced by these issues.¹⁰ Judges are now writing in academic journals themselves, and show an awareness of academic writings which indicates the influence that academics have. Similarly, many of our top academics are at the same time practising barristers. We cannot think that the law is immune to any of the arguments made by the theoreticians.

What this means is that, for those practising or teaching in private law areas, the need to understand the issues that have been raised by the classification debate is, therefore, very important. One way in which this can be important is in drawing our attention to

⁶ J McLaren, 'Codification of the Laws of the United Kingdom' (1897) 9 Juridical Rev 1 at 1.

⁷ S Hedley, 'How Has the Common Law Survived the 20th Century' (1999) 50 NILQ 285 at 287-288.

⁸ S Hedley, 'How Has the Common Law Survived the 20th Century' (1999) 50 NILQ 285 at 287-288.

⁹ See, for example, the recent attempt by Lord Hoffmann in *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1 where his Lordship restructured the economic torts and defined the term 'unlawful means'.

This was soon followed by *Total Network SL v Revenue and Customs Commissioners* [2008] UKHL 19, [2008] 1 AC 1174, where a differently constituted court took a very different view of the phrase 'unlawful means'. H Carty 'The Economic Torts in the 21st Century' (2008) 124 LQR 64.

¹⁰ *Attorney General v Blake* [2001] 1 AC 268 (HL); *Foskett v McKeown* [2001] 1 AC 102 (HL); *Henderson v Merrett Syndicates* [1995] 2 AC 145 (HL).

cases which in the past have been sidelined or misinterpreted. This process allows us to replace the language of old, making the law more accessible to those who are new to certain areas of the law. Probably the most important way in which these writings can be important is in predicting the future. Academics can draw up patterns which the courts may not have seen, and they can explore cases which have not, as of yet, even reached the courts. To have these guides is invaluable to anybody seeking to understand the legal system. Writing more recently, Hedley has acknowledged that most writers accept that there is need for some structure.¹¹ There is simply disagreement about *how* to achieve that structure and its role.

Another factor which we must take into account is that more complex and novel disputes have emerged over the last decade, and the boundaries between different areas of private law have been tested and often blurred.¹² The blurring of these divides has led many to question whether the tools which we use to identify and distinguish private law claims are of any use anymore. Some have told us that property is disintegrating,¹³ that contract has risen and fallen¹⁴ and that tort law lacks coherence.¹⁵ The need to find some clarity in the law is important for everyone. The above criticisms have, to an extent, been valid. We have stretched most of our core concepts to the point where we can no longer recognise them. This is, however, the product of

¹¹ S Hedley, 'Looking Outward or Inward: Obligations Scholarship in the Early 21st Century' in Robertson A and HW Tang (eds), *The Goals of Private Law* (Hart 2009).

¹² As for example the P Cane, 'Contract, Tort and The Lloyd's Debacle' in F Rose (ed), *Consensus ad idem: Essays for Guenter Treitel* (Sweet and Maxwell 1996) at 96.

¹³ TC Grey, 'The Disintegration of Property' in JR Pennock and JW Chapman (eds), *Property: Nomos XII* (New York UP 1980).

¹⁴ P Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press 1979); G Gilmore, *The Death of Contract*, (Ohio State Uni Press 1974); FH Buckley, *The Fall and Rise of Freedom of Contract*, (Duke University Press 1999).

¹⁵ P Cane, *The Anatomy of Tort Law* (Hart 1997) at 202.

classification as much as it is a problem in need of classification. In other words, the answer to this problem is to avoid the mistakes which got us to this position in the first place. We must learn the lessons of the past.

3. The Nature of the Project: To Reject the Exclusivity of Categories

This may all sound like hyperbole; even academics who subscribe to discrete categories seem to acknowledge the importance of facts in decision making.¹⁶ But some go much further, and the effort has become one for elegance, simplicity and symmetry in private law.¹⁷ The following comment explains why the overlapping approach is an original approach;

‘In order to ensure that the categories of causative events do not overlap with each other, we have to insist on the basic principle of classification, namely the principle of exclusivity.’¹⁸

For this writer, the dangers of classification can be demonstrated by the decision in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour*.¹⁹ Birks praised the decision for ridding us of the fiction that claims of restitution for money under failed

¹⁶ E McKendrick, ‘Taxonomy: Does It Matter?’ in D Johnston and R Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (CUP 2002) at 631.

¹⁷ This principle of symmetry is identifiable in the following works; A Burrows, E McKendrick and J Edelman, *Cases and Materials on the Law of Restitution* (OUP 2007) at 250 and 394 P Birks, *Restitution: The Future* (Federation Press 1992) at 86-87, J Edelman, ‘The Meaning of Loss and Enrichment’ in Chambers et al (eds), *Philosophical Foundations of Unjust Enrichment* (OUP 2009), R Nolan, ‘Change of Position’ in P Birks, *Laundering and Tracing* (Clarendon 1995) at 174.

¹⁸ P Birks, ‘The Law of Unjust Enrichment: A Millennial Resolution’ (1999) *Singapore Journal of Legal Studies* 318 at 328.

¹⁹ Lord Wright in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour* [1943] AC 32 (HL) at 61; A Burrows, ‘Contract, Tort and Restitution – A Satisfactory Division or Not?’ (1983) 99 LQR 217 at 217.

contracts arose because of some ‘implied contract’.²⁰ This had the benefit of allowing recovery in cases where the contract was initially valid. In other words, it recognised that the claim was distinct from contract, and avoided the need to justify restitution on the basis of an ‘implied contract.’ But this cannot be given as an example *for* classification.

Fictions such as the category of implied contract were not produced because of an absence of legal classification. They were developed simply because the claim had to be pigeon-holed into contract or tort.²¹ We simply repeat this error when we think that we can solve this issue by adopting a third category or a fourth of a fifth category. Neither is the problem solved by having a separate catch-all miscellaneous category. The problem highlighted by the implied contract is the very fact that we are using *categories* in the first place. Such an approach is inevitable if we place the law within categories, as the courts can never develop new concepts outside of the strictures of the code.²²

For the purposes of this thesis, it demonstrates the problem with classification through exhaustive and exclusive categories. To quote Stevens and Neyers; ‘[t]he common law has a weak and deficient theory of sources of obligation since no court has ever been, nor ever will be, seized of the question.’²³ The tendency for lawyers is to argue

²⁰ P Birks, ‘The Law of Restitution at the End of an Epoch’ (1999) 28 UWAL Rev 13 at 36-37.

²¹ S Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (CUP 2003) at 9-11.

²² Even one of the supporters of discrete categories has recognised the dangers; A Burrows ‘Legislative Reform of Remedies for Breach of Contract: The English Perspective’ (1997) Edinburgh L Rev 155 at 156, he warns that ‘[b]inding codes are dangerous’ as they can ‘freeze’ the development of the law which he argues should be shaped by the courts and academics.

²³ D Stevens and J Neyers in ‘What’s Wrong with Restitution’ (1999) 37 Alberta L Rev 221.

for the extension of one or other of those concepts. For example, in Chapter 3, we look at the classification of claims for ‘pure economic losses’ in the English tort of negligence or the law of contract. For many modern lawyers, the basis of liability must be described as either contractual or tortious. As a result, what happens is that a wide definition of tort or contract is adopted to accommodate these claims. This is the solution in civilian legal systems. French law, for example, places such cases within the law of tort; 1382 Code civil covers harms which are physical and purely economic.²⁴ In contrast, German law would permit claimants to bring an action for negligent misstatements as a contractual claim.²⁵

The same approach even happens in England. We can see this in the House of Lords decision in *White v Jones*, which involved a claim by the intended beneficiaries of a will against the defendant solicitors.²⁶ Lord Goff noted the problems created by the narrow definition of contract in England, going on to state; ‘I have already referred to problems created in the English law of contract by the doctrines of consideration and of privity of contract. These, of course, encourage us to seek a solution to problems of this kind within our law of tortious negligence.’²⁷ This reluctance to recognise the unique nature and scope of the overlapping area undermines the search for an accurate description of the existing legal system.

²⁴ M Bussani & V Palmer, ‘The Liability Regimes of Europe- Their Facades and Interiors’, in M Bussani & V Palmer, *Pure Economic Loss in Europe* (Cambridge UP 2003) at 127.

²⁵ M Bussani & V Palmer, ‘The Liability Regimes of Europe- Their Facades and Interiors’, in M Bussani & V Palmer, *Pure Economic Loss in Europe* (Cambridge UP 2003) at 148-149.

²⁶ [1995] 2 AC 207 [HL].

²⁷ [1995] 2 AC 207 [HL] at 263.

Not only are we failing to properly describe the operation of the claim for pure economic loss, but we are also adding confusion to the tort of negligence. This concern is noted by Waddams; ‘material that is inherently complex is not better understood by concealing its complexity.’²⁸ Grouping areas of private law together under broad and abstract categories does little to help us traverse the terrain covered by private law and it is easy to get lost on the map.

Stifling Flexibility

The other significant problem that classification must deal with is growth and flexibility. In Europe, the development of Civil Codes has arguably inhibited the flexibility of the law and its ability to adapt to new situations.²⁹ In a recent article, Omar notes that, ‘one of the criticisms levelled against the French Civil Code in the late 1990s was that it was “greatly out of date”.’³⁰ With a rigid system of classification there are two ways to incorporate new developments.³¹ The first is to extend the boundaries of the existing categories which, as we have seen above, can lead to the categories losing their integrity and becoming heterogeneous. The second option is to create new categories, which has the danger of creating a new type of claim which may be uncertain in its application and scope. In France, the difficulties of creating new laws have sometimes been a hindrance. It was only recently that

²⁸ S Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (CUP 2003) at 2.

²⁹ E Metzger, ‘Roman Judges, Case Law and Principles of Procedure’ (2004) 22 *Law and History Rev* 243 at 243-244.

³⁰ P Omar, ‘Lessons from the French Experience: The Possibility of Codification of Commercial Law in the United Kingdom’ (2007) 7 *ICCLR* 235.

³¹ H Collins, ‘Classifications from Knowledge Systems’, in P Birks (ed), *The Classification of Obligations* (Clarendon Press 1997) at 63-64.

France managed to introduce the mechanism of '*la fiducie*' in Article 2011 of the Civil Code.³²

Legal Tradition

Atiyah explains that most unjust enrichment scholars have been heavily influenced by Roman law.³³ This system of classification has already provided the impetus for the development of contract and tort in English Law.³⁴ However, this has been achieved by integrating the labels of the Roman categories with the current system, rather than replacing it outright.³⁵ Attempts to carry forward this integration of Roman and English private law have come at the expense of Equity. This criticism is nothing new; as Atiyah noted, '[n]obody ever paid much attention to the place of the law of trusts in this scheme of things.'³⁶ Yet, it is easier to find a Roman law of equity and trusts than it is to find a Roman law of unjust enrichment.³⁷ Furthermore, if Roman law achieved greatness and simplicity, it was seemingly achieved through an evolution of law and not a revolution of law. This was described by Llewellyn as the Grand Style; the application of precedent and 'unceasing judicial review of prior

³² PJ Douvier and C Potter, 'Trusts Face Testing Time in France' (1997) 8 Intl Tax Rev 43; MJ de Waal, 'In Search of a Model for the Introduction of the Trust into a Civilian Context' (2001) 12 Stellenbosch L Rev 63at 74-75.

³³ P Atiyah, 'Contracts, Promises, and the Law of Obligations' in P Atiyah, *Essays on Contract* (OUP 1990) at 10.

³⁴ B Simpson, 'Innovation in 19th Century Contract Law' (1975) 19 LQR 247.

³⁵ Birks for example did not see the need for the separation of the law of property and the law of obligations that is present in the Civilian model; P Birks, 'Property and Unjust Enrichment: Categorical Truths' [1997] New Zealand L Rev 623.

³⁶ P Atiyah, 'Contracts, Promises, and the Law of Obligations' in P Atiyah, *Essays on Contract* (OUP 1990) at 10.

³⁷ D Johnston, *The Roman Law of Trusts* (OUP 1989), P. Stein, *Roman Law in European History* (Cambridge UP 1999), at 20.

judicial decisions on the side of rule, tool and technique'³⁸ Llewellyn favoured what he referred to as the 'grand style' of legal reasoning. As noted in *The Common Law Tradition*, Llewellyn only witnessed this grand style in two other legal systems: 'in Cheyenne Indian law and in the classical Roman period.'³⁹

For this writer, we would lose a valuable part of our legal heritage if we were to ignore this style of law. This is not just a case of clinging on to a tradition without any consideration of its virtues. Indeed, we must recognise that those outside the common law systems have expressed admiration for our legal system. The comparison between Roman law and English law was also made by Pringsheim, a German scholar. He argued that English law was more open, accessible and fair than its civilian counterparts. He similarly praised the English law for demonstrating 'a sense of reality and the significant.'⁴⁰ English private law also found a supporter in the renowned economist, Hayek. For Hayek, the great *benefit* of English law was its lack of any rigid or predisposed structure.⁴¹ He praised English law for its spontaneity, for having the flexibility to adapt to each particular case.⁴² General rules and principles, he argued, were a source of inefficiency. The important point that Hayek made was that the complexity of the private law limits the extent to which we can fully understand the particulars of the legal order. Indeed one relatively recent article gives full support to Hayek's thesis. Mahoney has argued that all of the evidence we have

³⁸ K Llewellyn, *The Common Law Tradition* (Boston 1960) at 402.

³⁹ K Llewellyn, *The Common Law Tradition* (Boston 1960) at fn.40.

⁴⁰ F Pringshiem, 'The inner relationship between English and Roman Law' (1935) 5 CLJ 347 at 359.

⁴¹ FA Hayek, *Law, Legislation and Liberty* (Routledge & Kegan Paul 1973).

⁴² FA Hayek, *Law, Legislation and Liberty* (Routledge & Kegan Paul 1973) at 85-88.

suggests that the market benefits from the development of specialist rules.⁴³ This is not an argument that economic growth is necessarily a measure of the merits of a legal system. But those seeking to place private law into discrete categories have certainly made this argument in support of their methods. We are often told that the commercial world requires certainty and it is the job of the courts to provide it.⁴⁴ Mahoney's article suggests that economically the answer is that there are no benefits to be provided by discrete categories.

The other argument for discrete categorisation is that it achieves consistency. This seems mistaken for two reasons. Firstly, every case is distinct and despite our best wishes we cannot treat every claim in the same way. We might find it unfair, for example, that a mistaken provision of services is treated differently from a mistaken transfer of money, but it would arguably be just as unfair to treat them in the same way.⁴⁵ Secondly, by setting out broad and ambiguous categories, we get no closer to consistency. Because the categories are so broad, the facts of the cases can be classified so as to achieve a desired result.⁴⁶ The arguments seem ill-founded.

4. The Foundations

⁴³ P Mahoney, 'The Common Law and Economic Growth: Hayek Might Be Right' (2001) 30 *The Journal of Legal Studies* 503.

⁴⁴ P Birks, 'Equity in the Modern Law: An Exercise in Modern Taxonomy' (1996) 26 *U West Austl L Rev* 1 at 9, 97; E McKendrick, 'Taxonomy: Does It Matter?' in D Johnston and R Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (CUP 2002).

⁴⁵ Eg *Chief Constable of Greater Manchester v Wigan Athletic AFC Ltd.* [2008] EWCA Civ 1449, [2009] 1 WLR 1580.

⁴⁶ JM Balkin, 'Taking Ideology Seriously: Ronald Dworkin and the CLS Critique', (1987) 55 *UMKC L Rev* 392 at 422.

If the law is broadly defined, it loses its descriptive value and it will be necessary to look at case-law in more detail. Our objective is to classify, without providing a straitjacket for the law. The balance is achieved through the acceptance of overlaps. Instances of concurrent liability can be avoided by the adoption of narrower and more specific concepts. An overlap leaves the core areas of law untouched; the borders of contract, tort or property are left intact under an overlapping approach. The overlap represents a unique concept, within which new rules and defences can be tailored.

The inspiration for the thesis comes from three main sources; Llewellyn, Waddams and Dietrich. Firstly, it is inspired by Llewellyn and the tradition of the rule-sceptic form of legal realism. In the early stages of the project, it was recognised that the approach taken here would require the boundaries of private law concepts to be redrawn. Otherwise, there would be no overlaps at all; the large areas of property, contract, tort and unjust enrichment have taken up most of the terrain. A sound methodology was required. Llewellyn indeed fitted perfectly with this aim. He argued against fictions in the law; he argued for narrower concepts; and, importantly, he argued against abstract theories of the law.⁴⁷ At the same time, it was quite clear that many realists were opposed to any attempts to classify the law.⁴⁸ Separating the rule-sceptics from the fact-sceptics became a necessary part of the groundwork for this project. The rule-sceptics were those who favoured concepts and classification, if they were used sensibly, for the purposes of predicting the law. Obviously, most realists also called for further changes in the substance of the law; but nearly all recognised

⁴⁷ K Llewellyn, *The Common Law Tradition* (Boston 1960).

⁴⁸ B Leiter, 'Legal Realism and Legal Positivism Reconsidered' (2001) 111 *Ethics* 278.

that the classification itself cannot be the basis for any such restructuring. It is merely a road to a better understanding of the law.

The thesis also draws on the work of Waddams, who explored the interrelation of legal concepts in *Dimensions of Private Law*.⁴⁹ In *Dimensions*, Waddams refutes the exclusivity of private law categories. Developments in private law seem to respond to facts more than anything else, and the categories can be combined and used to justify and explain these decisions.⁵⁰ Waddams' primary focus is on the historical foundations of developments in private law, but Waddams also shows that many legal developments are attributable to conceptual overlaps.⁵¹ He rejected the arguments of unjust enrichment scholars that the law is incoherent or chaotic and argued that any alternative would prejudice the more important values of our legal system.⁵² Additionally, this thesis develops a concept taken from Dietrich's discussion of the classification of estoppel and its 'hybrid' nature as an overlap of contract and tort.⁵³ Dietrich also supports the abandonment of discrete categories of private law.⁵⁴

What this thesis intends to do is to fully explain how and why legal concepts overlap in the first place. In doing so it responds to one particular criticism made by Beever and Rickett against Waddams' work; 'if it is true that a list of these concerns can, in

⁴⁹ S Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (CUP 2003).

⁵⁰ S Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (CUP 2003) at 142.

⁵¹ J Weibrib, 'What Can Kant Teach Us' (2010) 23 Can J L & Jurisprudence (2010) 203 at 204.

⁵² S Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (CUP 2003) at 222-233.

⁵³ J Dietrich, 'The 'Other' Category in the Classification of Obligations' in A Robertson (ed), *The Law of Obligations: Connections and Boundaries* (Cavendish 2004).

⁵⁴ J Dietrich, 'What is "Lawyering"? The Challenge of Taxonomy' (2006) 65 CLJ 549 at 575.

any case, be added together to generate liability, then one must show how the aggregation generates the conclusion reached.’⁵⁵ This is the very crux of the thesis; explaining how the overlap works and how the overlapping analysis assists in predicting private law. The overlapping concept analysis which we develop in this thesis provides a detailed explanation of how overlaps occur and also why in fact this assists in predicting the law.

5. Scope of the work

The relevance of unjust enrichment, and the methods used by the unjust enrichment lawyers, is of central importance to the thesis. It will become apparent that much of the overlapping territory which is explored within this thesis has at one time or another been claimed by unjust enrichment theorists. Those who have argued for unjust enrichment have attempted to stake claim to large portions of private law, but in doing so they have sought to make substantial changes to our legal culture. This thesis is an attempt to reclaim much of that territory, but it goes much further than that; it is also a defence of the reasoning we apply in approaching legal issues.

The first explanation that needs to be made is the focus of the study; private law. No apologies are made for this focus; it is in this area where unjust enrichment lawyers have made their arguments. It is not presumed that private law itself is a *category* which can be separated from public or criminal law. In fact, in Chapter 5 an argument

⁵⁵ A Beever and C Rickett, ‘Interpretative Legal Theory and the Academic Lawyer’ (2005) MLR 320 at 333.

is presented that there is a clear overlap between private law and criminal law in regards to the type of remedy available for money transfers.⁵⁶

Secondly, the thesis avoids arguing for substantive changes in the law. That statement must be taken in light of our definition of law. For this thesis, the law is the decisions reached by the courts⁵⁷. What this means is that judicial reasoning does not necessarily count for what we would regard as ‘law.’ This means that our proposals are restricted to looking at how we analyse the decisions of the courts. Decisions are *not* criticised for being wrongly decided on the basis of justice, fairness, consistency or outcome. This has been necessary so that the thesis can stay true to its methodology. The arrangement of the law is not an opportunity to change the substance of the law. If at times the analysis is descriptive, for the most part that is a deliberate aim. In achieving narrower categories the purpose is to find a clearer and easier way of understanding private law claims. The thesis looks for patterns; but the conceptual tools are not tools for any grander task. Ultimately they are used to establish these patterns. For cases that do not fit into the patterns, attempts have been made to find alternative explanations. The narrowing and redefining of legal concepts does not mean that we sideline and ignore those areas of law which do not fit into our schema. This should be always kept in mind. In Chapter 6, for example, it is argued that ‘proprietary estoppel’ cases which are based on acquiescence have very little modern support as the higher courts are finding more and more reasons for not recognising claims in these cases. It is not argued that the acquiescence cases are wrong, but that they are finding a smaller role in border disputes between landowners.

⁵⁶ See text at n 92 in Chapter 5.

⁵⁷ See text at n 7 in Chapter 3.

This is not a normative argument, it is one based on the facts and the patterns. The only normative element which is present in this thesis is the aim of presenting a clearer picture of judicial decision making. It is hoped that, throughout, the thesis has stayed true to this proposition.

6. The Structure

Since the focus of the thesis is in the area which has been claimed by unjust enrichment, the following chapter looks at the work of the leading figure in unjust enrichment. Chapter 2 provides an analysis of the methodology and the philosophy behind Birks' classification, but the specific details of his classification will be explored throughout the thesis. In short, his theory was that private law could be classified as four 'causes of action'; consent, wrongs, unjust enrichment and miscellaneous others. There were three assumptions which lay at the heart of this classification. First, that private law claims arise because of 'causative events', which meant each area could be encapsulated by a single principle such as 'consent'. Secondly, these areas were categories in the strict sense of the word, i.e. they were discrete areas of law, and importantly they did not overlap. Finally, case law was used to support the presence of the categories in English private law. Chapter 2 concludes by arguing that the methods applied by Birks illustrate the necessity of separating description from prescription.

The next chapter sets out the methodology that will be adopted in the thesis. The aim is to provide the appropriate balance of description and prescription. This is a realist classification, one that adopts a conceptual approach inspired by Llewellyn. The

chapter also introduces the idea of overlapping concepts, the idea that law can be arranged into expositive concepts. The chapter introduces the process of ‘pruning’ legal concepts to establish narrow concepts to form the basis of this framework. The chapter applies the realist method of testing the utility of concepts by reference to the extent to which they can identify facts and outcomes.

Chapter 4 sets up the framework for the overlapping approach. It provides what can reasonably be regarded as the three core concepts of private law; property, contract and tort. Using the methodology which was set out in Chapter 3, these three concepts are given the realist treatment. Narrower versions of these concepts are set out in this chapter. Within these concepts, we identify the legally significant facts which make up the factual elements of each concept. For the most part, they are distinct insofar as property can exist without contract, contract can exist without tort and so on. Nonetheless, they are in no way exclusive. The next few chapters set out how they overlap with other legally significant facts.

Chapter 5 considers the concept of money transfers, an area which at present forms the bedrock of the modern theory of unjust enrichment. The argument is that money is a weaker variant of property, requiring a specialised approach. The rules governing money transfers are not, therefore, of wider application. We also delve into the question of ‘specific restitution’ (a phrase developed here to avoid confusion with the trust, although it would more commonly be referred to as a ‘constructive trust’.) Our conclusion is that this mechanism shares an overlap with tort, looking into the standards of conduct of the defendant. Finally we argue that claims for money transfers under an initial agreement provide a clear overlap with contract, with the

content of the agreement providing the main guidelines for restitution in these circumstances.

Chapter 6 looks at reliance-based claims. The reliance-based claim does not operate in isolation, it requires additional facts. Three main overlaps are looked at, the first with property (proprietary estoppel), the second with contract (non-contractual services) and the third with tort (claims for pure economic losses.) Finally, Chapter 7 considers the trust mechanism, arguing that the express trusts, resulting trusts and bargain-based trusts represent different combinations of facts from contract and property. All three, therefore, are overlaps between these two main concepts of contract and property. The chapter ends with a discussion of co-habiting couples, usually referred to as the ‘common intention constructive trust’. It is argued that there is very little overlap with the concepts of private law which we have looked at in this thesis. Therefore, the argument is that we should be more open about the special nature of these situations. The concepts we look at here are in no way exclusive, and they repeatedly overlap. The analysis reveals the patterns of these concepts, and in turn the legally significant facts of our private law.

7. Conclusion

The classification of the common law is an important task. It is possible to identify a number of core legal concepts in English private law, but only by adopting a conceptual approach which accommodates overlaps instead of excluding them. The methods applied by civilian lawyers to categorise the private law are specific to those

legal cultures, and English private law has developed in a much more *ad hoc* and disorganised manner. Moreover, concepts that would be treated as distinct within civilian legal systems can overlap within the English legal system. For example, in equity we have concepts such as estoppel and the trust, which do not seem to fit into any of the basic categories of contract, tort or property. This poses two important questions which will be addressed in the following chapter; (i) can English private law be described in a systematic and logical manner, and (ii) if not, should we be changing the substantive content of the law to achieve a more coherent and straightforward system of private law? It will be argued that classification must reflect the substantive content of the legal system, and only when the classification provides an accurate picture of what the law is, can there be any sensible discussion of what the law should be doing. Although the concepts we use in our private law are not arranged in a logical and coherent manner, they can provide accurate descriptions of the substantive content of the private law. The purpose of classification is simply to identify the relevant factors which reveal the various functions of private law actions. As Waddams declares; '[c]onvenience and elegance of concepts are not the primary ends to be attained by the legal system.'⁵⁸

⁵⁸ S Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (CUP 2003) at 68.

CHAPTER 2: METHODOLOGICAL AND PHILOSOPHICAL FOUNDATIONS OF PRIVATE LAW CLASSIFICATIONS

1. Introduction

This chapter approaches the classification of private law by looking at two interrelated issues; first, the methodological approaches which have been used to classify private law and, second, the overall aims of those seeking to reclassify the law. One of the most important themes that will be explored in this chapter is whether the attempt to reclassify the law is an effort to *describe* the legal system or an effort to *prescribe* changes in the law. This dichotomy has been explored by Waddams in *Dimensions of Private Law*.¹ As the first chapter of *Dimensions* demonstrates, it is almost inevitable that efforts to classify the law will involve elements of both; by incorporating existing rules and principles the author can allay fears of revolution or being merely aspirational, while at the same time the project is also used for arguing for substantive changes in the law. The purpose of this chapter is to demonstrate the dangers of failing properly to distinguish the roles of descriptive and prescriptive commentaries. This sets the scene for the next chapter, where an alternative ‘legal realist’ approach to classification is developed.

¹ S Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (CUP 2003).

2. Legal Interpretivism in General

Writing recently, Webb has set out two functions of classification.² The first is that classification is a tool for arranging and discovering patterns within private law.³ This is the position which is adopted in this thesis. As Pound once explained, this method treats classification as ‘simply a means of organizing knowledge and thus of making it more effective for some purpose.’⁴ According to this method it is argued that classification can have a useful *function* in understanding the law, but it is not an attempt to argue that the law should be changed. Classification, therefore, serves the higher purpose of improving predictability in private law and identifying the relevant factors in judicial decision making. The second function of classification which is identified by Webb goes much further than this. This second function is the use of classification to determine the content and development of private law claims. By this, it is meant that the writer is trying to identify a single norm that underpins private law claims. In this context, classification is a method of supporting a general proposition about what private law *is*, while also determining the way in which decisions should be made. Although this method is not our main focus, we return to this type of approach later on in this chapter by looking at the approach taken by Weinrib.

The main focus of this chapter, however, is to explore a possible third function. Under this third approach, the author attempts to construct a classification of private law

² C Webb, ‘Treating like cases alike: principle and classification in private law’ in A Robertson and HW Tang (eds), *The Goals of Private Law* (Hart 2009) at 216.

³ See also K Low, ‘The Use and Abuse of Taxonomy’ (2009) 29 *Legal Studies* 355 at 356-357.

⁴ R Pound, ‘Classification of Law’ (1924) 37 *Harvard L Rev* 933 at 937.

which is both descriptive and the prescriptive. Beever and Rickett have labelled this method as ‘interpretive legal theory’⁵ (hereafter referred to as ‘interpretivism’).⁶ ‘Interpretivism’ is the process of ‘reflective equilibrium’⁷ whereby the lawyer is led by moral intuitions and constructs a normative moral theory.⁸ Essentially, this is a form of theorising about areas of private law, with the aim of achieving coherence and justification. This chapter is a focused critique of Birks, who was the leading figure in this interpretivist school.⁹ Beever and Rickett deny that interpretive theories are *primarily* prescriptive in nature.¹⁰ This position is also adopted by Smith, who explains that ‘[i]nterpretive theories aim to enhance understanding of law by highlighting its significance or meaning.’¹¹ As Beever and Rickett conclude ‘[a] similar analysis is undertaken by those who taxonomise the law in terms of categories such as consents, wrongs, unjust enrichments, and other events, and by those who argue that the private law is a system of corrective justice or of economic efficiency.’¹² It is argued that interpretivist methods do not separate the prescriptive from the descriptive, and that one can only classify the law by adopting a descriptive methodology. This is a necessary step *before* one can develop a prescriptive analysis.

⁵ A Beever and C Rickett, ‘Interpretative Legal Theory and Academic Lawyer’ (2005) 68 MLR 320 at 324.

⁶ S Hedley, ‘The Shock of the Old: Interpretivism in Obligations’ in C Rickett and R Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart 2008) at 205.

⁷ For this term, the authors cite J Rawls, *A Theory of Justice* (rev edn, Belknap Press 1999) at 18-19 and 42-45.

⁸ A Beever and C Rickett, ‘Interpretative Legal Theory and Academic Lawyer’ (2005) 68 MLR 320 at 324-325.

⁹ R Grantham and C Rickett have stated that ‘Professor Birks is undoubtedly the leading modern theorist on the taxonomy of the private law.’ ‘Property Rights as a Legally Significant Event’ (2003) 62 CLJ 717 at 718.

¹⁰ A Beever and C Rickett, ‘Interpretative Legal Theory and Academic Lawyer’ (2005) 68 MLR 320 at 321-322: ‘these legal theorists are (usually) not doing prescriptive theory, nor are they using prescriptive theory to interpret the past.’

¹¹ S Smith, *Contract Theory* (Clarendon Press 2004) at 5.

¹² A Beever and C Rickett, ‘Interpretative Legal Theory and Academic Lawyer’ (2005) 68 MLR 320 at 324.

3. Birks and the classification of the private law

Birks' Critique of the private law

The most recent resurgence of interest in legal classification has been instigated by the writings of Birks. Dietrich has noted that those who have followed Birks have not always completely agreed with the way in which he sought to classify the law,¹³ but most have more or less agreed with the methodology and aims of his classification.¹⁴ Our focus is on the latter; the methodology of the Birksian approach. For present purposes we are not concerned with some of the finer details concerning the structure of these classifications, although these are addressed where it is relevant. Instead, we are concerned with the techniques and reasoning that characterises Birks' classification.

Birks argued that the common law lacked cohesion and consistency due to the failure to develop a logical and reasoned approach to the classification of English private law.¹⁵ He proposed the adoption of Justinian's *Institutes* of private law, which contained the basic framework for the Roman legal system.¹⁶ This map has also

¹³ J Dietrich, 'What is "Lawyering"? The Challenge of Taxonomy' (2006) 65 CLJ 549 at 551-553.

¹⁴ A Smith, 'A Map of the Common Law' (2004) 40 Can Bus LJ 364 at 365; A Beever and C Rickett, 'Interpretative Legal Theory and Academic Lawyer' (2005) 68 MLR 320; A Burrows, *Understanding the Law of Obligations: Essays on Contract, Tort and Restitution* (Hart 1998); E McKendrick, 'Taxonomy: Does It Matter?' in D Johnston and R Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (CUP 2002).

¹⁵ P Birks, 'Introduction' in P Birks (ed), *English Private Law* (2 vols, OUP 2000) at li.

¹⁶ P Birks, 'Definition and Division: A Meditation on *Institutes* 3.13' in P Birks (ed), *The Classification of Obligations* (Clarendon Press 1997).

provided the basis for the civilian legal systems.¹⁷ Justinian's *Institutes* divided the private law into the law of property and the law of obligations, with the latter further being divided into contract, quasi-contract, delict and quasi-delict. The notable feature of Birks' adoption of the Roman map is that he did not propose to perfectly replicate the Roman classification. For example, Birks rejected elements of the Roman system for containing flaws such as the 'hopeless' categories of quasi-contract and quasi-delict.¹⁸

Therefore, a perfect replication of the Roman scheme was never the actual purpose of Birks' taxonomy. Rather, it was the approach to legal reasoning and the development of an institutional scheme that Birks borrowed from the Roman system.¹⁹ The form of legal reasoning and logic used in Roman law also differs quite significantly from that used in English private law. Samuel presents a useful comparison of these forms of legal reasoning by contrasting 'inductive' and 'deductive' forms of reasoning.²⁰ Inductive reasoning refers to a bottom-up approach that develops legal rules and principles from the litigation facts. It is generally accepted that the English system of precedent and fact-based law is one such example of 'inductive' reasoning.²¹ This is distinct from the process of deductive reasoning, where a codified set of legal rules

¹⁷ P Birks, 'Definition and Division: A Meditation on *Institutes* 3.13' in P Birks (ed), *The Classification of Obligations* (Clarendon Press 1997) at 1-2; J Apple and R Deyling, *A Primer on the Civil Law System* (Federal Judicial Center 1994-1995) at 39. Available online at <[www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/\\$file/CivilLaw.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/$file/CivilLaw.pdf)> accessed 18 January 2011.

¹⁸ P Birks, 'Definition and Division: A Meditation on *Institutes* 3.13' in P Birks (ed), *The Classification of Obligations* (Clarendon Press 1997) at 18-19.

¹⁹ This is demonstrated by Birks' statement that 'Nobody should think that the structural scheme of these volumes is, or is thought, to be, perfect. It is merely the best that can for the moment be found' from P Birks, 'Introduction' in P Birks (ed), *English Private Law* (2 vols, OUP 2000) at 1.

²⁰ G Samuel, 'Can the Common Law be Mapped?' (2005) 55 *Univ of Toronto LJ* 271 at 271.

²¹ C Valcke, 'Comparative History and the Internal View of French, German, and English Private Law' (2006) 19 *Can JL & Juris* 133.

and principles are developed and then applied to litigation facts.²² According to Legrand, this provides one of the distinguishing factors between English private law and the civilian legal systems.²³ This process of deductive reasoning characterised Birks' legal classification, as he tried to identify generic principles which can in turn be applied to factual situations.²⁴

Fourfold Classification

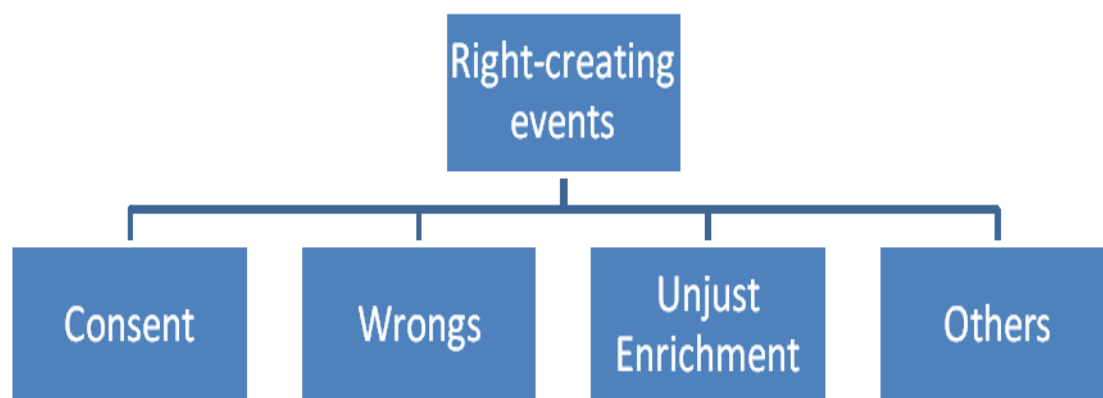


Figure 1.

Birks believed that English private law could be classified under four discrete categories of right-creating (or *causative*) events. These consist of 'events' which create private law rights. There were, accordingly, four general events which created

²² J Apple and R Deyling, *A Primer on the Civil Law System* (Federal Judicial Center 1994-1995) at 39. Available online at <[www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/\\$file/CivilLaw.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/$file/CivilLaw.pdf)> accessed 18 January 2011.

²³ P Legrand, 'Against a European Civil Code' (1997) 60 MLR 44 at 53-56.

²⁴ G Samuel, *Law of Obligations and Legal Remedies* (2nd edn, Cavendish 2001) at 13.

rights; consent, wrongs, unjust enrichment and others.²⁵ Although the *content* of these categories changed over time, the overall structure of this division was present throughout his writings.²⁶ In his classificatory model, both the law of contract and the creation of express trusts were subsumed into a category which Birks referred to as ‘consent’ based obligations.²⁷ The law of tort(s) and breaches of fiduciary duties became the category of ‘wrongs’, while the law of unjust enrichment incorporated what is now regarded as unjust enrichment at common law and also some resulting and constructive trusts.²⁸ Birks also rejected the threefold common law classification of contract, tort and restitution that had been recognised by Lord Wright in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour*.²⁹ This was on the basis that restitution only refers to a *response* and not to a right-creating event. Unjust enrichment was, therefore, to be preferred.³⁰

Discrete Categorisation

²⁵ P Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) at 32.

²⁶ P Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989); P Birks, ‘The Concept of a Civil Wrong’ in D Owen (ed), *Philosophical Foundations of Tort Law* (Clarendon Press 1996); P. Birks, ‘Misnomer’ in WR Cornish et al (eds), *Restitution Past, Present and Future: Essays in Honour of Gareth Jones* (Hart 1998); P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) at 308.

²⁷ P Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) at 44-45. P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) at 21.

²⁸ P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) at 21 and 301-307.

²⁹ Lord Wright in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour* [1943] AC 32 (HL) at 61; A Burrows, ‘Contract, Tort and Restitution – A Satisfactory Division or Not?’ (1983) 99 LQR 217 at 217.

³⁰ Although Birks did note that the term ‘unjust enrichment’ was simply shorthand for the actual causative event of ‘unjust enrichment at the expense of another’ in P Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) at 16. In the same work, he also indicated that ‘unjust’ was an unfortunate term and that a more neutral term (and less equitable-sounding one) would be *disapproved or reversible* enrichment (at 19).

According to Dietrich, these *categories* were, ‘for the most part’, presented as discrete branches of civil law.³¹ Birks did at least acknowledge the possibility of overlaps, but only so far as it may be possible for there to be concurrent claims in unjust enrichment and wrongs.³² As will be discussed below, the eventual recognition that restitution overlapped with unjust enrichment and wrongs led Birks to re-assess his classification altogether.³³ In Birks’ view, the overlap showed an error in his structure, one which he was keen to avoid.³⁴ Whereas he had previously maintained that unjust enrichment and restitution quadrated (meaning that unjust enrichment only ever resulted in restitution, and restitution only responded to unjust enrichments) he would later modify this so that restitution would also be available for wrongs. This meant that restitution had to be cut down into smaller categories of restitution for wrongs and restitution for unjust enrichment. It was also clear that unjust enrichment and consents were separate causes of action, and if there was a contract to pay money back, this would be justified under the contract alone.³⁵ In Birks’ words, ‘there can be no overlaps in the nature of dependent description.’³⁶ In a later piece, Birks was even more adamant in his rejection of overlaps; ‘[a] good classification must observe the principle of exclusivity. That principle requires that each category in a series be perfectly distinct from all the others. If one of the relevant entities can fall into more than one category, the classification is flawed, indeed falsified, and has to be

³¹ J Dietrich, ‘What is “Lawyering”? The Challenge of Taxonomy’ (2006) 65 CLJ 549 at 556. Webb also explains that this discrete categorisation did not permit the existence of overlaps: C Webb, ‘Treating like Cases Alike: Principle and Classification in Private Law’ in A Robertson and HW Tang (eds), *The Goals of Private Law* (Hart 2009) at 223.

³² P Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) 41-45.

³³ See text at n 56 in this Chapter.

³⁴ P Birks, ‘Law of Unjust Enrichment: A Millennial Resolution’ [1999] *Singapore Journal of Legal Studies* 318 at 327.

³⁵ P Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) at 45.

³⁶ P Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) at 45.

revised.³⁷ Each category was, therefore, analytically distinct; although as pointed out above, this did not preclude concurrent claims.³⁸

The last category was a miscellaneous ‘Others’, which (in Birks’ own words) was somewhat of ‘a cheat.’³⁹ This category represented actions that could not be placed within the other three categories of consent, wrongs and unjust enrichment. Unlike Justinian’s quasi-categories, this miscellaneous category was analytically distinct from the three main causative events of contract, tort and unjust enrichment.⁴⁰ According to Birks, such events included ‘salvage, judgments, taxable events, and becoming a parent but it would require very remarkable learning to compile an exhaustive list.’⁴¹ As Dietrich does,⁴² one could argue that it was simply those claims that undermined the discrete nature of the taxonomic project that were sidelined. Whether or not that was the case with Birks’ scheme, one of the dangers of having a catch-all ‘cheat’ category is that areas of the law that undermine the classificatory system are sidelined. As Waddams states this is problematic; while a certain decision may appear insignificant in the taxonomic scheme, these ‘insignificant cases’

³⁷ P Birks, *The Foundations of Unjust Enrichment: Six Centennial Lectures* (Victoria UP 2002) at 43.

³⁸ ‘Any set of facts may be susceptible of two or more analyses...each analysis stands alone.’ P. Birks, ‘Misnomer’ in WR Cornish et al (eds), *Restitution Past, Present and Future: Essays in Honour of Gareth Jones* (Hart 1998) at 8- 9.

³⁹ P Birks, ‘Equity in the Modern Law: An Exercise in Taxonomy’ (1996) 26 U West Austl L Rev 1 at 9.

⁴⁰ P Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) at 48.

⁴¹ P Birks, ‘Definition and Division: A Meditation on *Institutes* 3.13’ in P Birks (ed), *The Classification of Obligations* (Clarendon Press 1997) at 19. No real attempt was made by Birks to explain why these ‘events’ could not be categorised independently from each other, or even why taxable events should form part of private law and not public law, given that Birks also distinguished between these two areas of law.

⁴² J Dietrich, ‘What is “Lawyering”? The Challenge of Taxonomy’ (2006) 65 CLJ 549 at 551-553 and 557-558.

certainly are not insignificant for the parties involved, and importantly the courts that have to deal with these disputes.⁴³

No Room for Property

Birks rejected the institutional separation of the law of obligations and the law of property that is found in the Roman and civil codes.⁴⁴ It was Birks' conclusion that property rights could never be conceived of as a causative event. Therefore, the separation of property and obligations at the institutional level became unnecessary.⁴⁵ In fact, in some of his later writings, Birks quite doggedly rejected the independence of property from the law of obligations.⁴⁶ However, several academics who agreed with the nature of Birks' project refuted the rejection of 'property' as a right-creating event.⁴⁷ That is not to say that Birks was arguing against the distinction between personal and property rights, as he made it quite clear that there is an analytical distinction between these rights.⁴⁸ However, both types of rights were said to be created by one of the four right creating events. This aspect of Birks' scheme was

⁴³ S Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Reasoning* (CUP 2003) at 223.

⁴⁴ P Birks, 'Definition and Division: A Meditation on *Institutes* 3.13' in P Birks (ed), *The Classification of Obligations* (Clarendon Press 1997) at 11.

⁴⁵ P Birks, 'Property, Unjust Enrichment, and Tracing' (2001) 54 *Current Legal Problems* 231 at 239.

⁴⁶ For example in P Birks, 'Property and Unjust Enrichment: Categorical Truths' [1997] NZLR 623 and P Birks, 'Property, Unjust Enrichment, and Tracing' (2001) 54 *Current Legal Problems* 231.

⁴⁷ G Virgo, 'What is the Law of Restitution About?' in WR Cornish et al (eds), *Restitution Past, Present and Future: Essays in Honour of Gareth Jones* (Hart 1998) at 312-316; R Grantham and C Rickett, 'Property and Unjust Enrichment: Categorical Truths or Unnecessary Complexity' [1997] *New Zealand L Rev* 668.

⁴⁸ P Birks, 'Definition and Division: A Meditation on *Institutes* 3.13' in P Birks (ed), *The Classification of Obligations* (Clarendon Press 1997) at 10.

inspired by the approach within English private law, where the distinction between property and obligations is blurred.⁴⁹

The theory behind Birks' taxonomy

An Exercise in Description

It is important to identify why Birks was seeking to reclassify private law and the general approach that he used in his writings. The general view is that Birks was essentially a legal positivist, which is why he presented even the most controversial aspects of his thesis as *descriptive* in nature.⁵⁰ The term 'positivism' has several connotations, but in its simplest form legal positivism is the study of the stated law, as opposed to aspirational or reason-based views of the law.⁵¹ In other words, stating what the law *is* and not what the law *ought* to be. According to positivism, there is no necessary connection between law and morality.⁵² This theme can certainly be witnessed in Birks' writings: as, for example, when he rejected the normative foundations of 'unjust enrichment' and any general duty to obey the law.⁵³ This has

⁴⁹ P Birks, 'Definition and Division: A Meditation on *Institutes* 3.13' in P Birks (ed), *The Classification of Obligations* (Clarendon Press 1997) at 10-11. The same position is adopted in S Green and J Randall, *The Tort of Conversion* (Hart 2009) at 58-59.

⁵⁰ H Dagan, 'Legal Realism and the Taxonomy of Private Law' in C Rickett and R Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart 2008); E Sherwin, 'Legal Positivism and the Taxonomy of Private Law' in C Rickett and R Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart 2008); G Samuel, 'Classification of Obligations and the Impact of Constructivist Epistemologies' (1997) 17 *Legal Studies* 448 at 451.

⁵¹ MH Kramer, *In Defense of Legal Positivism: Law Without Trimmings* (OUP 1999) at 1.

⁵² HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard L Rev* 593.

⁵³ P Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) at 19 and 23.

been noted by Hedley, who points out that Birks actually went out of his way to deny that restitution or unjust enrichment had any relevance as a moral principle.⁵⁴

The importance of the posited law in Birks' thesis is demonstrated by those occasions when he felt that his theories were no longer compatible with developments in the case law. One such example is the House of Lords' decision in *Attorney General v. Blake*.⁵⁵ Birks had maintained that unjust enrichment was the only causative event that could lead to a claim for restitution, which he referred to as the quadrature of unjust enrichment and restitution.⁵⁶ After the Court of Appeal indicated that gain-based damages would be available for breach of contract,⁵⁷ Birks incorporated this into his thesis.⁵⁸ In 'Misnomer' Birks rejected his own quadrature theory, and adopted a multicausal approach to restitution, which recognised that restitution could be available for wrongs as well as unjust enrichment. Although it would be inaccurate to state that the decision of the Court of Appeal was the only factor that was relevant in the revision of his theory (the seeds of this view were already present in 1986's *An Introduction to the Law of Restitution*⁵⁹) it does demonstrate that he was willing to incorporate the decisions made by the courts.

⁵⁴ S Hedley, 'Unjust Enrichment: The Same Old Mistake' in A Robertson (ed), *The Law of Obligations: Connections and Boundaries* (UCL 2004) at 83-84. Hedley, however, did not see Birks' methods as having any normative foundations.

⁵⁵ [2001] 1 AC 268 (HL).

⁵⁶ P Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) at 17-18.

⁵⁷ [1998] Ch 439 (CA).

⁵⁸ P Birks, 'Misnomer' in WR Cornish et al (eds), *Restitution Past, Present and Future: Essays in Honour of Gareth Jones* (Hart 1998) 1. This account of events is taken from S Pitel, 'Characterisation of Unjust Enrichment in the Conflict of Laws' in J Neyers, M McInnes and S Pitel (eds), *Understanding Unjust Enrichment* (Hart 2004) at fn 73.

⁵⁹ P Birks, *An Introduction to the Law of Restitution* (Clarendon Press 1986) at 41-42.

Another example is Birks' adoption of a single principle of unjustified enrichment in his final publications. Birks abandoned the 'generic conception' of unjust enrichment that had been central to his earlier writings, after a number of English decisions had indicated that, in his view at least,⁶⁰ the law was developing in this manner.⁶¹ Birks believed that the law had developed to the point where unjust enrichment claims could be explained under the unifying principle of 'absence of basis', with the existing 'unjust factors' providing reasons for why there was no basis for the enrichment.⁶² This represented a fundamental shift in his approach to unjust enrichment as he had earlier rejected any unifying doctrine of unjust enrichment.⁶³ It cannot be doubted that Birks was more than prepared to amend his theories to accommodate developments in the courts. Therefore, Birks' approach to legal classification placed a large degree of importance on the posited law.

The prescriptive element of Birks' approach to taxonomy

Although there is a descriptive element to his thesis, Birks would often advocate changes in the substantive law by arguing that the law *ought* to have been decided in a certain way.⁶⁴ This is where it may seem that the comparison with legal positivism collapses, as it is not simply an effort to describe the legal rules, but it is also an

⁶⁰ M McInnes, 'Misnomer- A Classic' [2004] Restitution L Rev 79.

⁶¹ P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) at 108-114.

⁶² P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) at 116.

⁶³ P Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) at 25.

⁶⁴ Such as his disagreement with the reasoning in *Foskett v McKeown* [2001] 1 AC 102 (HL), and the House of Lords denial that the change of position defence applied to claims in tracing; P Birks, 'Property, Unjust Enrichment, and Tracing' (2001) 54 Current Legal Problems 231.

attempt to prescribe changes in the legal system.⁶⁵ In fact, Birks utilised normative arguments in his methodology a number of times. For example, in discussing the separation of common law and equity Birks stated that, ‘unnecessary and accidental differences merely create confusion. Confusion in the law is a close cousin to injustice, since it means that parties lose litigation they should win.’⁶⁶ It has already been noted above that Birks was strongly opposed to broad notions of fairness and justice, particularly in the categorisation of rules and principles deriving from the courts of equity.⁶⁷ Birks’ opposition to equitable doctrines was not an actual rejection of ‘justice’ per se, but represented his own distinct definition of what ‘justice’ is.⁶⁸ This form of justice is characterised by consistency, clarity and more generally the rule of law, rather than justice in the substantive sense of the term.⁶⁹ Therefore, those principles or concepts which did not fit into Birks’ conception of clarity or consistency were rejected, no matter how well-established they might be. On closer inspection, Birks was not merely describing what the law is, and he was not a positivist in the mould of Austin.⁷⁰

⁶⁵ J Coleman, ‘Negative and Positive Positivism’ in J Coleman, *Markets, Morals and the Law* (CUP 1988) at 11. Some positivists would disagree with this, eg J Raz, *The Authority of Law: Essays in Law and Morality* (OUP 1983).

⁶⁶ P Birks, ‘Definition and Division: A Meditation on *Institutes* 3.13’ in P Birks (ed), *The Classification of Obligations* (Clarendon Press 1997) at 17.

⁶⁷ P Birks, ‘Definition and Division: A Meditation on *Institutes* 3.13’ in P Birks (ed), *The Classification of Obligations* (Clarendon Press 1997) at 17.

⁶⁸ M Bryan, ‘Unjust Enrichment and Unconscionability in Australia’ in J Neyers, M McInnes and S Pitel (eds) *Understanding Unjust Enrichment* (Hart 2004) at 56.

⁶⁹ “Every argument which rests on words of unanalysed approbation and disapprobation is in some degree a rejection of the rule of law.” P Birks, ‘Equity, Conscience and Unjust Enrichment’ (1999) 23 *Melbourne Univ L Rev* 1; and also P Birks, ‘Three Kinds of Objection to Discretionary Remedialism’ (2000) 29 *U West Aust L Rev* 1.

⁷⁰ Rumble compares Austin to the legal realist movement: WE Rumble, ‘The Legal Realism of John Austin and the Realist Movement in American Jurisprudence’ (1981) 66 *Cornell L Rev* 986 at 1025.

The form of positivism that encapsulates Birks' thesis is generally referred to as 'soft' positivism.⁷¹ This form of positivism is concerned with the development of a clear, precise and rational legal system.⁷² To explain how positivism can be 'ethical' we need to go back to the basic premise of positivism, which is the effort to describe the law. In turn this leads to the more fundamental question of what constitutes the 'law'. Whereas Austin took the view that 'laws' are commands backed by sanctions, modern positivists such as MacCormick⁷³ and Coleman⁷⁴ tend to agree with Hart that the legal system itself defines whether or not a law is valid under the rule of recognition.⁷⁵ This rule lays down the requirements of valid laws and, under soft positivism, these requirements are seen to be consistency, clarity and the rule of law. Therefore, just as in Birks' methodology, soft positivism places rationality as the first virtue of the legal system.⁷⁶ If a rule is not predictable, or if it contravenes the general rule of law, then it should be changed as it does not pass the rule of recognition. This methodology can be seen in Birks' work, as he made it quite apparent in a number of his writings that he valued consistency and clarity over the actual substantive content of the law; 'judgment(s) *must* be rational, intelligible, and consistent with others.'⁷⁷ This 'positivist' trait can also be traced in Birks' suspicion of judge-made law and his

⁷¹ E Mitrophanous 'Soft Positivism' (1997) 17 OJLS 621.

⁷² T Campbell, *The Legal Theory of Ethical Positivism* (Aldershot 1996). Although Coleman has noted that it is questionable whether this is really positivism at all, the actual label of this approach is not central to this discussion. J Coleman, 'Negative and Positive Positivism' in J Coleman, *Markets, Morals and the Law* (CUP 1988). See also F Atria, 'Legal Reasoning and Legal Theory Revisited' (1999) 18 Law and Philosophy 537.

⁷³ N MacCormick, 'Limits of Rationality in Legal Reasoning' in N MacCormick and O Weinberger, *An Institutional Theory of Law: New Approaches to Legal Positivism* (D Reidel Publishing 1986) at 189.

⁷⁴ J Coleman, 'Negative and Positive Positivism' in J Coleman, *Markets, Morals and the Law* (CUP 1988).

⁷⁵ B Leiter, 'Legal Realism and Legal Positivism Reconsidered' (2001) 111 Ethics 278 at 286-287. The rule of recognition is taken from HLA Hart, *The Concept of Law* (Clarendon Press 1961).

⁷⁶ N MacCormick, 'Limits of Rationality in Legal Reasoning' in N MacCormick and O Weinberger, *An Institutional Theory of Law: New Approaches to Legal Positivism* (D Reidel Publishing 1986) at 189.

⁷⁷ P Birks, 'Equity, Conscience and Unjust Enrichment' (1999) 23 Melbourne Univ L Rev 1 at 21.

rejection of social, political or moral explanations for judicial reasoning.⁷⁸ For example, Birks strongly opposed the use of nebulous legal concepts such as ‘unconscionability’ or ‘fairness’ that could give a wide discretion to judges to decide each case on its merits.⁷⁹ It is apparent that Birks did have a normative basis for his methodology, one which placed consistency and logic as the rules for recognition.

Criticisms of Birks’ Methodology

Rewriting history

Unless there are to be widespread changes in the structure of the private law, any realistic attempt to re-classify the law as it currently stands needs to show that it can be adopted with minimum fuss.⁸⁰ Indeed it would be almost unworkable to replace the private law system without creating untold uncertainty and confusion. Therefore, any realistic taxonomy must demonstrate that not only can the map cover the current legal system, but that the map can effortlessly be incorporated into the legal system. Birks himself stated that it would be too late to start the common law anew and that categories are ‘abolished only in the last stages of Alzheimer's disease.’⁸¹ This is why it was necessary for Birks to show that he was not really *prescribing* major changes in the English legal system, but rather that he was identifying a hidden structure.

⁷⁸ P Birks, *Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) at 19.

⁷⁹ P Birks, ‘Equity, Conscience and Unjust Enrichment’ (1999) 23 *Melbourne Univ L Rev* 1; P Birks, ‘Equity in the Modern Law, An Exercise in Taxonomy’ (1996) 26 *U West Austl L Rev* 1 at 198.

⁸⁰ A point conceded in P Birks, ‘Introduction’ in P Birks (ed), *English Private Law* (2 vols, OUP 2000) at xxxv and xlvi.

⁸¹ P Birks, ‘Introduction’ in P Birks (ed), *English Private Law* (2 vols, OUP 2000) at XXXV-XXXVI.

The problem with this approach is that it means selectively picking out existing parts of the law to support the categories, and marginalising parts of the law that do not fit into the taxonomic model.⁸² For example, the case of *Chase Manhattan Bank NA v Israeli-British Bank (London) Ltd*⁸³ (where Goulding J recognised that a mistaken payment was held under a ‘constructive trust’) is a central part of Birks’ thesis that there are some ‘trusts’ which can be viewed as responses to unjust enrichment.⁸⁴ At the same time, Virgo claims that the case is nothing more than an anomaly and therefore cannot provide authoritative support.⁸⁵ Virgo himself presents a similar classification to Birks’ with an additional category which is named ‘vindication of property rights’. Using the Birksian approach, Virgo has argued that ‘trusts’ and unjust enrichment are analytically distinct. This is why *Chase Manhattan* is regarded by Virgo as anomalous.⁸⁶ Ultimately, one’s interpretation of the case law will almost inevitably be guided by the taxonomic model proposed. If the effort is to describe the law, this method of selection does not ensure the objectivity of the description.

Simplicity and Logic

Hedley argues that another major problem with Birks’ taxonomy is that Restitution/Unjust Enrichment is given a central importance in the taxonomic scheme

⁸² S Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Reasoning* (CUP 2003) at 222-223.

⁸³ [1981] Ch 105 (Ch).

⁸⁴ P Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) at 377-378.

⁸⁵ G Virgo, ‘Vindicating Vindication: *Foskett v McKeown*’ in A Hudson (ed), *New Perspectives on Property Law, Obligations and Restitution* (Cavendish 2004) at 211.

⁸⁶ G Virgo, *The Principles of the Law of Restitution* (OUP 2006) at 570.

but in practice it is a very small area of the law.⁸⁷ In fact, Hedley went on to conclude that the only plausible purpose of Birks' taxonomy was to establish restitution as a foundational subject.⁸⁸ Indeed, the consequence of Birks' taxonomy is that a large portion of the law of trusts is placed in this smaller and relatively undeveloped area of the law. To illustrate this, Birks argued strongly that the establishment of some instances of resulting or constructive 'trusts' could not be based upon legal principle unless it was accepted that they were explained by reference to unjust enrichment.⁸⁹ This would mean that a 'trust' could be imposed in claims for mistaken payments. However, the complexities inherent within the private law system means that even small changes can have significant consequences on how the law operates in practice. The House of Lords realised this in *Westdeutsche Landesbank Girozentrale v Islington LBC*,⁹⁰ when their Lordships rejected Birks' argument that 'trusts' can be imposed for the receipt of mistaken payments on the basis that it could lead to 'practical consequences and injustice'⁹¹ for third parties. Sometimes cases may seem quite similar, but they are treated separately for important economic, social or moral reasons.⁹² Attempts to classify the law cannot capture all of the complexities and nuances of the legal system, but unforeseen consequences arise when the

⁸⁷ S Hedley, 'The Taxonomic Approach to Restitution' in A Hudson (ed), *New Perspectives on Property Law, Obligations and Restitution* (Cavendish 2004) at 156-157.

⁸⁸ S Hedley, *Restitution: Its Division and Ordering* (Sweet & Maxwell 2001) at 204. This is supported by Birks' statement that '[t]he mission was and is to organize the law of unjust enrichment'. P Birks, 'Misnomer' in WR Cornish et al (eds), *Restitution Past, Present and Future: Essays in Honour of Gareth Jones* (Hart 1998) at 6.

⁸⁹ P Birks, 'Trusts Raised to Reverse Unjust Enrichment; The Westdeutsche case' [1996] 4 *Restitution L Rev* at 3. In Chapter 7 we look at the constructive trust in more detail. The other consequence of this analysis would be that the change of position defence would then be available to defendants, where at present it is not one of the recognised defences; see P Millett, 'Proprietary Restitution' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (LawBook Co 2005) at 325. His Lordship refers directly to his judgment in *Foskett v McKeown* [2001] 1 AC 102 (HL), concluding that change of position is not available for claims involving trust assets.

⁹⁰ [1996] AC 669 (HL) at 715.

⁹¹ Lord Browne-Wilkinson (ibid), at 709.

⁹² See generally, C Webb, 'Treating like cases alike: principle and classification in private law' in A Robertson and HW Tang (eds), *The Goals of Private Law* (Hart 2009).

classification is presented as having normative force.⁹³ The search for simplicity and logic, therefore, comes at a price.

Within his own scheme, Birks proceeded to provide even more general dichotomies for his taxonomy; after categorising the law into consents, wrongs, unjust enrichment and ‘others’, he would later go on to generalise a dichotomy between wrongs and not-wrongs.⁹⁴ The problem of oversimplification is one that was identified by Pound some 60 years ago;

‘From the standpoint of a systematist, seeking to apply the method of formal logic, four or even three categories seem too many. He asks at once why he cannot conform to the requirements of dichotomous division by reducing them to two. The answer is that the system exists for the sake of the ends of law, not the law for the ends of system -something that analytical systematists have not always kept in mind.’⁹⁵

The lesson that we should learn from Pound is that sometimes the classifier will try to simplify material, whether or not that achieves a greater understanding of the rules and principles of the legal system. The Birksian approach to classification seems to suffer from exactly this problem, as the coherence of the classificatory system seems to take precedence over the substance of the law. As Pound tells us, this approach tells us little about the substantive content of the law, as it is less descriptive and more

⁹³ K Low, ‘The Use and Abuse of Taxonomy’ (2009) 29 *Legal Studies* 355 at 358-359. The danger, as Low points out, is that if the taxonomical structure does not reveal the actual purposes behind legal rules, its adoption could have unforeseen consequences.

⁹⁴ P Birks, ‘Rights, Wrongs, and Remedies’ (2000) 20 *OJLS* 1 at 1. That this was an actual dichotomy can be seen at 27, where Birks includes ‘consent’ in the category of not-wrongs.

⁹⁵ R Pound, ‘Classification of Law’ (1924) 37 *Harvard L Rev* 933 at 936.

prescriptive in arranging the law.⁹⁶ Instead of seeing simplicity and logic as a *tool* in our understanding of the law it becomes the underlying *purpose* of the law.

Classification as a Scientific Exercise

Birks sought to classify the law along the same lines as classification in biological taxonomy. He often compared classification in English law with the ‘flawed’ classifications in zoology that preceded Darwin.⁹⁷ However, despite Birks’ comparisons between Gaius and Darwin, it is argued that the comparisons are flawed. In a 1924 article, Pound pointed out that even biological classification had long ago abandoned formal logic.⁹⁸ In fact, taxonomies developed before Darwin relied on similarities among organisms without explicit reference to the origin or the basis of these similarities.⁹⁹ Birks’ classification of consent, wrongs and unjust enrichment is one such taxonomy as he rejects the evolutionary basis of equitable and common law doctrines.¹⁰⁰ One of the central themes of his categorisation is that the categories are discrete and exclusive, and no regard is paid to the way in which these legal groups have evolved.¹⁰¹ But even in the natural sciences, discrete categorisation has long

⁹⁶ R Pound, ‘Classification of Law’ (1924) 37 Harvard L Rev 933.

⁹⁷ See G Samuel ‘Can Gaius really be compared to Darwin’ (2000) 49 ICLQ 297.

⁹⁸ R Pound, ‘Classification of Law’ (1924) 37 Harvard L Rev 933 at 937-938.

⁹⁹ E Mayr, ‘Biological Classification: Toward a Synthesis of Opposing Methodologies’ (1981) 214 Science 510.

¹⁰⁰ P Birks, ‘Definition and Division: A Meditation on *Institutes* 3.13’ in P Birks (ed), *The Classification of Obligations* (Clarendon Press 1997) at 16.

¹⁰¹ Indeed it is well recognised that English private law has always lacked any coherent structural model.

been abandoned as the result of unclassifiable organisms such as the platypus.¹⁰² The comparison with biological taxonomy is attractive, but ultimately unconvincing.

This does not mean that private law should necessarily follow the lead of the natural sciences. This is for the simple reason that the two are very different disciplines. Writing in 1910, Andrews pointed out that the differences between law and science provided ‘the great impediment’ to classifying the law.¹⁰³ More recently, the argument has also been made by both Samuel and Low.¹⁰⁴ Samuel effectively demonstrates that legal classification cannot be compared to scientific classification as it is not a naturally occurring phenomenon.¹⁰⁵ Legal classification is an inherently human construct, not one that already exists and is waiting to be discovered. Thus, the taxonomic approach suffers from a lack of observability, as ‘law is the object of its own science.’¹⁰⁶ In other words, since the classifier can set the definition of what the law ‘is’, he can reject or adapt any rule which does not fit into his overall theory. As Leff pointed out, efforts to classify the law face a constant tension between ‘simplification and falsification’.¹⁰⁷ The more material that someone tries to analyse, the more difficult it will be to predict the outcome of judicial decision making. Conversely, the less one tries to analyse, the less accurate the analysis will be. This is the balance which classification must achieve, but arguably Birks set the level of

¹⁰² E Mayr, ‘Biological Classification: Toward a Synthesis of Opposing Methodologies’ (1981) 214 *Science* 510.

¹⁰³ JD Andrews, ‘The Classification of Law’ (1910) 22 *Green Bag* 556. Andrews referred specifically to problems of communication; that words could mean one thing to the author, but other things to the reader (at 556).

¹⁰⁴ G Samuel, ‘English Private Law: Old and New Thinking in the Taxonomy Debate’ (2004) 24 *OJLS* 335 at 337; K. Low, ‘The Use and Abuse of Taxonomy’ (2009) 29 *Legal Studies* 355 at 358-359.

¹⁰⁵ G Samuel, ‘English Private Law: Old and New Thinking in the Taxonomy Debate’ (2004) 24 *OJLS* 335 at 337.

¹⁰⁶ G Samuel ‘Can Gaius really be compared to Darwin’ (2000) 49 *ICLQ* 297 at 312.

¹⁰⁷ AA Leff, ‘Economic Analysis of Law: Some Realism about Nominalism’ (1974) 60 *Virginia L Rev* 451 at 477. Leff states that ‘tunnel-vision’ is the price we pay for avoiding blindness (also at 477).

analysis at too high a level by looking for single events which gave rise to private law rights. This provides an important distinction with the overlapping analysis which is developed in this thesis; although we recognise that some form of generality is required, we also seek to establish that concepts are multi-factual and cannot be reduced to a single event.

The point about seeking a balance between generality and specificity was conceded by Birks himself, when he stated that '[d]efinitions are dangerous. They can easily mislead. The artificiality must be kept to a minimum.'¹⁰⁸ The accusation of artificiality can be directed towards the category of wrongs, as Birks claimed that wrongs can only be defined as a breach of duty,¹⁰⁹ while at the same time he rejected the use of moral propositions in categorising the law.¹¹⁰ This leaves the term 'duty' without any concrete meaning, as it only refers to what the classifier recognises as a duty.¹¹¹ For example, Birks distinguished unjust enrichment and wrongs on the basis that, where one receives a mistaken payment, the primary obligation is to return the payment, which is directly enforced by the order for restitution.¹¹² It was then argued that '[t]here is no conception of wrong which will reach the receipt of a mistaken payment.'¹¹³ But Birks undermined the strength of this argument when he pointed out

¹⁰⁸ P Birks, 'Definition and Division: A Meditation on *Institutes* 3.13' in P Birks (ed), *The Classification of Obligations* (Clarendon Press 1997) at 6-7.

¹⁰⁹ P Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) at 313; P Birks, 'Rights, Wrongs, and Remedies' (2000) 20 OJLS 1 at 31-32.

¹¹⁰ P Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) at 313; P Birks, 'Rights, Wrongs, and Remedies' (2000) 20 OJLS 1 at 31-32.

¹¹¹ For example, there are cases of 'unjust enrichment' where the obligation to make restitution has been regarded as a 'duty'; eg *Rowe v May* (1854) 18 Beav 613 at 616; 52 ER 241 at 243, which involved a payment under a failed contract. Sir John Romilly held that the recipient was under a 'duty to repay' at (1854) 18 Beav 616, 52 ER 243.

¹¹² P Birks, 'Definition and Division: A Meditation on *Institutes* 3.13' in P Birks (ed), *The Classification of Obligations* (Clarendon Press 1997) at 25-26.

¹¹³ P Birks, 'Rights, Wrongs, and Remedies' (2000) 20 OJLS 1 at 28.

that there are several duties which can be characterised as strict liabilities, such as the unauthorised profit of a fiduciary or liability in conversion.¹¹⁴ Additionally, Birks conceded that there can be a ‘blind’ primary right, ‘that does not flower’ such as the duty not to defame.¹¹⁵ One could quite easily formulate a general ‘blind’ primary right not to be unjustly deprived by the enrichment of another, which is breached when the defendant receives the mistaken payment.¹¹⁶ This would make the response of restitution a secondary right and therefore capable of being a ‘wrong’. Birks never went this far, one presumes because such liability does not have the ‘whiff of blameworthiness’,¹¹⁷ despite his declaration that questions of morality are irrelevant to the classification of ‘wrongs’. On closer inspection Birks’ separation of unjust enrichment from ‘wrongs’ seems like a moral proposition and not one based solely on legal principle. The logic does not hold under close scrutiny. The legal taxonomist is not an objective observer, as he or she is the very person who is constructing the thing that is being studied.

A Question of Semantics

This is not just an epistemological concern; it seriously undermines the force of Birks’ criticisms of English legal reasoning. Take Birks’ earlier position that restitution is

¹¹⁴ P Birks, ‘Rights, Wrongs, and Remedies’ (2000) 20 OJLS 1 at 31.

¹¹⁵ P Birks, ‘Definition and Division: A Meditation on *Institutes* 3.13’ in P Birks (ed), *The Classification of Obligations* (Clarendon Press 1997) at 24.

¹¹⁶ P Birks, ‘The Concept of a Civil Wrong’ in DG Owen (ed), *Philosophical Foundations of Tort Law* (Clarendon Press 1996) at 48-49: ‘in general there is no point in saying that the reason why a defendant has to make restitution is that he is in breach of his duty to make restitution. It merely restates the primary duty. The ‘wrong’ explanation of the duty to make restitution is thus wholly unnecessary’ at 48-49. This fails to explain why areas of law which have their own explanations, such as fiduciary duties, should be regarded as torts as well.

¹¹⁷ P Birks, ‘Rights, Wrongs, and Remedies’ (2000) 20 OJLS 1 at 31.

only a response for unjust enrichment claims. In his later writings, Birks reconsidered this position and argued that restitution could be a response to wrongs as well as unjust enrichments.¹¹⁸ Other academics have resisted this move and argued that restitution is only a response to unjust enrichment, providing an alternative name of ‘disgorgement’ to describe gain-based response to wrongs.¹¹⁹ The debate becomes little more than a discussion about semantics, for example, one of Birks’ arguments against the use of the term ‘disgorgement damages’ is that it is an ‘ugly phrase.’¹²⁰ In fact, Birks himself accepted that the debate was little more than a question of semantics.¹²¹ There is no ‘right’ answer to such a debate because the test for validity is determined by subjective rather than objective criteria. Unjust enrichment, as a concept, can be as wide or narrow as we want to define it. So too is the claim for restitution.

Concluding Remarks

As Waddams effectively demonstrated in his book *Dimensions of Private Law*, the use of legal reason and logic has often been much less important than the circumstances of the cases and the policy considerations that have influenced judicial decision making.¹²² Past decisions have been rationalised as examples of concepts or categories even where they did not exist and this, in turn, can purportedly justify the

¹¹⁸ P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) at 20-28.

¹¹⁹ M McInnes, ‘Misnomer- A Classic’ [2004] Restitution L Rev 79.

¹²⁰ P Birks, ‘Misnomer’ in WR Cornish et al (eds), *Restitution Past, Present and Future: Essays in Honour of Gareth Jones* (Hart 1998) at 13.

¹²¹ P Birks, *The Foundations of Unjust Enrichment: Six Centennial Lectures* (Victoria UP 2002) at 43-44.

¹²² S Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (CUP 2003) at 205.

writer's system of classification.¹²³ The point is conceded by Smith, who argues that it does not necessarily follow that taxonomy itself is a futile exercise.¹²⁴ Admittedly, the methodology used in the following chapters of this thesis also seeks to re-analyse cases. The important distinction is that this is *not* an attempt to use this analysis as criteria for determining which decisions are substantively correctly or wrongly decided. Re-interpretation must be used carefully; one cannot use this as a mechanism for re-shaping the substantive rules of private law. To quote Pound; 'I doubt whether a classification is possible that will do anything more than classify.'¹²⁵ Once this is accepted, we can start to bring our attention to the real issue in the classification debate. This is identifying the purposes and aims of the private law, and how (if at all) does the classification can assist in achieving our objectives.

The taxonomy presented by Birks raises the question of how classification can balance both description *and* prescription. Is it possible to describe something while also attempting to re-align it? Legal scholarship would be a very limited enterprise if it were not possible to try to do both at the same time. There would be little purpose in the publication of case notes if the writer was not describing judgments, while also providing some worthwhile comment about the outcome of the decision. The issue with Birks' approach is that it is not sufficiently clear when the author is merely describing the law and when the author is prescribing a substantial change in the law. If classification is to provide a useful purpose then the methodology must expressly

¹²³ S Hedley, 'Unjust Enrichment: The Same Old Mistake' in A Robertson, *The Law of Obligations: Connections and Boundaries* (UCL 2004) at 75 and S Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (CUP 2003) at 21-22.

¹²⁴ S Smith, 'A Map of the Common Law' (2004) 40 Can Bus LJ 364.

¹²⁵ R Pound, 'Classification of Law' (1924) 37 Harvard L Rev 933 at 938.

allow room for both description and prescription, but in a way that separates these stages of inquiry.

4. Weinrib, Formalism and Corrective Justice

Weinrib's Approach

As Campbell has noted, Weinrib's legal classification is an attempt to eliminate from private law 'considerations of social context which cannot be dealt with by abstract doctrinal scholarship.'¹²⁶ Weinrib presents a 'juridical' classification of the private law which, in essence, seeks to present an internal account of the law.¹²⁷ In doing so, Weinrib separates public from private law, and focuses his attention on the latter. Weinrib concludes that the 'unifying structure that renders private law intelligible' is corrective justice.¹²⁸ The concept of corrective justice 'treats the plaintiff as the sufferer and the defendant as the doer of the same injustice.'¹²⁹ According to Weinrib, private law categories must reflect the correlativity between the defendant and plaintiff, otherwise they cannot be included in the classification of the private law.

One immediate objection to Weinrib's formalism is that it is far from conclusive that the immanent rationality of the law is corrective justice. In this writer's opinion, the

¹²⁶ D Campbell, 'Classification and the Crisis of the Common Law' (1999) 26 *Journal of Law and Society* 369 at 371.

¹²⁷ E Weinrib, *The Idea of Private Law* (Harvard UP 1995) at 25.

¹²⁸ E Weinrib, *The Idea of Private Law* (Harvard UP 1995) at ch 3.

¹²⁹ E Weinrib, 'Juridical Classification of Obligations' in P Birks (ed), *The Classification of Obligations* (Clarendon Press 1997) at 41.

salient characteristic of private law is not correlativity between the plaintiff and defendant but, to use Weinrib's own words, "...the massive complex of cases, doctrines, principles, concepts, procedures, policies, and standards..."¹³⁰ It is the inability of many skilled legal scholars to find unifying principles in contract,¹³¹ tort,¹³² property,¹³³ fiduciary duties,¹³⁴ estoppel¹³⁵ and even arguably unjust enrichment¹³⁶ that characterises and encapsulates the common law. If 'complex phenomenon'¹³⁷ can be identified as the immanent rationality of the private law then Weinrib's corrective justice-based classification is, by his own standards, fundamentally flawed. Ultimately, it is impossible to prove or disprove that corrective justice is the unifying characteristic of the private law, as the identification of this inner rationale has been produced under a philosophical ideology, rather than through an exercise in description.¹³⁸

¹³⁰ E Weinrib, *The Idea of Private Law* (Harvard UP 1995) at 9.

¹³¹ M Eisenberg, 'The Theory of Contracts' in P Benson (ed), *The Theory of Contract Law: New Essays* (CUP 2001) 206-264; RE Barnett, 'The Richness of Contract Law: An Analysis and Critique of Contemporary Theories of Contract Law' (1999) 97 Michigan L Rev 1413 (Publication Review).

¹³² Lord Bridge in *Caparo Industries plc v Dickman* [1990] 2 AC 605 [HL] at 617-618; G Williams, 'The Aims of the Law of Tort' [1951] Current Legal Problems 137; A Tettenborn, 'From Chaos to Cosmos- or is Confusion?' [2000] 2 Web JCLI <<http://webjcli.ncl.ac.uk/2002/issue2/tettenborn2.html>> accessed 18 January 2011.

¹³³ K Gray 'Property in Thin Air' (1991) 50 CLJ 252; S Waddams, 'Property and Obligation' in *Dimensions of Private Law* (CUP 2003) at 172-190.

¹³⁴ Millett LJ, in *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) at 18.

¹³⁵ Lord Goff in *Johnson v Gore Wood* [2001] 2 WLR 72 [HL].

¹³⁶ See Hedley's discussion of the varieties of unjust enrichment; S Hedley, 'Unjust Enrichment: The Same Old Mistake' in A Robertson, *The Law of Obligations: Connections and Boundaries* (UCL 2004) at 82-85. P Saprai, 'Restitution Without Corrective Justice' (2006) 14 Restitution L Rev 41. A recent attempt was made by Lord Walker in *Deutsche Morgan Grenfell Group Plc v IRC* [2006] UKHL 49, [2007] 1 AC 558 at [150]-[158]. Whether this decision provides authority for 'absence of basis' as the unifying principle of unjust enrichment is discussed in Chapter 5.

¹³⁷ E Weinrib, 'Juridical Classification of Obligations' in P Birks (ed), *The Classification of Obligations* (Clarendon Press 1997) at 37.

¹³⁸ G Samuel, 'Classification of Obligations and the Impact of Constructivist Epistemologies' (1997) 17 Legal Studies 448 at 480.

Consequently, it is doubtful that Weinrib's approach can provide the starting point for a logical and coherent body of law.¹³⁹ As the starting point is so basic, there is no convincing rationale for the subsequent alignment of the categories that he presents. For example, Weinrib's distinction between corrective justice and distributive justice is comparable to Atiyah's reductionist interpretation of tort law.¹⁴⁰ Atiyah identified that negligence failed effectively to compensate victims or to punish wrongdoers who were often indemnified by insurance. Tort law was therefore intelligibly incoherent as it did not satisfy the requirement of either distributive justice or corrective justice.¹⁴¹ In turn, Atiyah argued for the introduction of a state-sponsored no-fault compensation scheme.¹⁴² Under Weinrib's classification, this scheme satisfies the requirement of distributive justice and so tort law could now be classified as part of public law rather than private law. That is not to say that Atiyah was a formalist in the same manner as Weinrib, but it does demonstrate that tort law is not an inevitable or even logical consequence of the inner rationality of the private law. The rationale of corrective justice may just as well lead to the conclusion that the law of tort should be removed from the ambit of private law altogether. Corrective justice is too simple to be used effectively to provide a useful guide for the development of legal rules and principles. A similar point was made by Lord McClaren when discussing Bentham's philosophical approach to the codification of private law: '[t]his type of code need not be further considered. No state which has grown up under a reasonably good legal

¹³⁹ A point also made by S Smith, *Contract Theory* (OUP 2004) at 150.

¹⁴⁰ P Atiyah, *Accidents, Compensation and the Law* (Weidenfield 1970).

¹⁴¹ P Atiyah, 'Personal Injuries in the 21st Century: Thinking the Unthinkable' in P Birks (ed), *Wrongs and Remedies in the 21st Century* (OUP 1996); J Morgan, 'Tort, Insurance and Incoherence' (2004) 67 MLR 384 at 393.

¹⁴² P Atiyah, 'Personal Injuries in the 21st Century: Thinking the Unthinkable' in P Birks (ed), *Wrongs and Remedies in the 21st Century* (OUP 1996).

system would agree to abandon its native institutions and accept a system of laws devised by philosophers.’¹⁴³

To conclude that rules and principles which are not compatible with corrective justice are not in fact part of the private law, therefore, rests on some very circular reasoning. It is no different than drawing a primitive map of England, and then denying that certain parts of the country are English on the basis that they are not represented by the primitive map. What this discussion of Weinrib’s approach has shown is that a purely theoretical approach to legal classification is neither strictly possible nor desirable. It is only once we have effectively described the legal system that we can begin to propose changes to the structure and substance of the law.

5. Classification as a Descriptive Exercise

The methods used by those seeking to reclassify private law have varied considerably. Some attempts have sought to reconstruct the private law with the aim of defending the existing legal system, whereas others have been purely theoretical attempts to construct a more logical and rational legal system. One of the criticisms of the effort to reclassify the law is that it is possible that the author is selectively describing the law so as to achieve social, political or economic goals.¹⁴⁴ For example, in other legal systems, classification has been used as a means for achieving equality between the

¹⁴³ J McLaren, ‘Codification of the Laws of the United Kingdom’ (1897) 9 *Juridical Rev* 1 at 1.

¹⁴⁴ For example P Atiyah, *The Damages Lottery* (Hart 1997) sought to reclassify the tort system from an area governed by the private law to a public law issue.

ruling elite and the common people.¹⁴⁵ It has also been used as a way of achieving political unity and a common sense of nationality in newly formed countries.¹⁴⁶ This is why methodology is fundamentally important; if we are using classification for some wider objective, we must be open and frank about this. Even then, it is questionable whether there is any desire or need for such an exercise; the common law has developed perfectly well without the need for such drastic intervention.

Even Smith, who supports the methods applied by Birks, would concede that '[n]one of these maps of the common law has been successful in the sense of being widely adopted by judges or even by scholars.'¹⁴⁷ This does not necessarily undermine the effort to classify the law, but it does suggest that an over-reliance on logic and theory will take us too far away from the very legal system we are trying to study. If we were to view a consistent and clear classification as the sole aim of our law (as Birks at many times appears to do) then the solution would be to abolish those claims that are not based on a single principle such as the law of negligence.¹⁴⁸ Or just to keep things clear and simple, we could simply say that the only obligations that are enforceable are those that are expressly agreed to by both parties in the form of a deed. This is in fact how the medieval equivalent of 'covenant' operated, but it soon became redundant because

¹⁴⁵ P Stein, *Roman Law in European History* (CUP 1999) at 3-4. See also G Pugliese, 'Customary and Statutory Law in Rome' (1973) 8 *Israel L Rev* 23 at 28; R Reed, 'The Influence of the Civil Code: Style and Substance' in D Fairgrieve (ed), *The Influence of the French Civil Code on the Common Law and Beyond* (British Institute of International and Comparative Law 2007) at 47.

¹⁴⁶ S Williston, 'Written and Unwritten Law' (1931) 17 *American Bar Association Journal* 39 at 40; M John, 'The Politics of Legal Unity in Germany, 1870-1896' (1985) 28 *The Historical Journal* 341 at 352; P Omar, 'Lessons from the French Experience: The Possibility of Codification of Commercial Law in the United Kingdom' (2007) 18 *ICCLR* 235.

¹⁴⁷ S Smith, 'A Map of the Common Law' (2004) 40 *Can Bus LJ* 364 at 365.

¹⁴⁸ The rejection of the single principle approach in *Anns v Merton LBC* [1978] AC 728 [HL] in favour of the three-stage test in *Caparo Industries plc v Dickman* [1990] 2 AC 605 [HL] provides a perfect example of why negligence is not easily categorised under the umbrella of a single unifying legal concept.

this was too rigid and formal, and almost inevitably the courts began to recognise other methods of enforcing agreements.¹⁴⁹ Simplicity itself has never been the priority of the private law. It would be an inadequate system if this were the case. Unfortunately, for those seeking to identify core principles or moral justifications for private law claims, external justifications which provide better explanations are often ignored.¹⁵⁰ Within a rigid system of classification, even rules which appear to be inherently legal are rejected for failing to fit within an institutional scheme. The approach taken in the following chapters does not take the same view; if there are areas of law which are flexible and unpredictable, it is argued that we must first try to identify why this is the case, before trying to impose rigid and inflexible rules.¹⁵¹

6. Conclusion

Once it is accepted that law is not just concerned with theory and principles, then it can in turn be accepted that an over-reliance on legal reasoning only serves to increase uncertainty, as the true functions of the law can become distorted. As Holmes taught us, paper rules do not produce certainty.¹⁵² This is not to say that classifying the law into areas such as contract and tort becomes irrelevant in our understanding of the law, but it does tell us that we cannot achieve a full understanding of the legal order just by relying on legal concepts. To take these concepts down to even more abstract

¹⁴⁹ DJ Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP 1999) at ch 2, 24-30.

¹⁵⁰ A Beever and C Rickett, 'Interpretative Legal Theory and Academic Lawyer' (2005) 68 MLR 320 at 335-356; A Burrows, *Understanding the Law of Obligations: Essays on Contract, Tort and Restitution* (Hart 1998) at 113 and 119. See also, S Hedley, 'Looking Outward or Inward: Obligations Scholarship in the Early 21st Century' in A Robertson and TH Wu, *The Goals of Private Law* (Hart 2009) at 209-210.

¹⁵¹ P Finn, 'Equitable Doctrine and Discretion in Remedies' in WR Cornish et al (ed), *Restitution Past, Present and Future: Essays in Honour of Gareth Jones* (Hart 1998) at 252.

¹⁵² OW Holmes, 'The Path of Law' (1897) 10 Harvard L Rev 457.

and wider legal concepts like ‘consent’, ‘wrongs’ or ‘unjust enrichment’ may take us in the wrong direction. The law may be more complex than this for good and proper reasons.

We began by addressing the interpretivist account of legal theory. Whereas Beever and Rickett and Smith see interpretative theories as neither descriptive nor prescriptive, this chapter has sought to show that there is no halfway point. All classifications include elements of both. One of the problems with Birks’ approach is that it sidelines rules which cannot be perfectly placed within the institutional scheme; simplicity is favoured over reality. In rejecting abstract approaches to classifying private law, we are led into the territory of legal realism. Instead of treating legal concepts and principles as metaphysical, legal realism seeks to expose the myth that the law can be treated independently from external factors. A realist classification is an attempt to understand the complexity of the legal system without sidelining the substantive content of the legal order. What follows is therefore not a taxonomy of the law at all, but rather an exercise in what Hayek would have labelled *kosmos*; a legal cosmology.¹⁵³ It is an effort to *describe* in simpler terms the structure of a complex and spontaneous legal order. Yet, the adoption of legal realism comes with a warning. What needs to be avoided is the criticism made by Twining of American legal realism; ‘it had been more successful in its iconoclastic and negative aspects than in providing a basis for constructing coherent alternatives.’¹⁵⁴ This leads us into a more

¹⁵³ FA Hayek, *Law, Legislation and Liberty* (Routledge & Kegan Paul 1973) at 38.

¹⁵⁴ W Twining, ‘Reflections on Law in Context’ in P Cane and J Stapleton (eds), *Essays for Patrick Atiyah* (Clarendon Press 1991) at 2-3.

in depth discussion of legal realism in the next chapter; in particular we need to adopt a realist methodology that explains and justifies the classification exercise.

CHAPTER 3: LEGAL REALISM, CONCEPTUALISM AND CLASSIFICATION

1. Introduction

In contrast to interpretivist methods of private law classification, this project adopts a legal realist approach. Legal realism is a perspective which acknowledges the complexity of private law. At least for *the purposes of classification*, it is important to reject any normative proposition about the aims or goals of private law. It may very well be that private law can eventually be reduced to a single principle; however, this conclusion cannot be the starting point of the classification exercise. Since there has never been a unified school of legal realism, and there has been much debate about the true nature of legal realism,¹ the start of this chapter sets out to define the approach and methodology that is adopted within this thesis. It is also important to dispel some common misconceptions about legal realism, such as the often held belief that realists were fundamentally opposed to legal reasoning and conceptualism.² That is not the position adopted by Llewellyn, who spearheaded the realist movement,³ and neither is it the position which is adopted here. We go on to construct a conceptual methodology that fits with this realist approach.

¹ W Twining, *Karl Llewellyn and the Realist Movement* (Weidenfeld and Nicolson 1973) 375-87.

² C Saiman, 'Restitution in America: Why the US Refuses to Join the Global Restitution Party' (2008) 28 OJLS 99.

³ W Twining, *Karl Llewellyn and the Realist Movement* (Weidenfeld and Nicolson 1973).

2. Descriptive and Prescriptive Elements in Legal Classification

As we saw in the last chapter, Waddams pointed out that attempts to classify the law usually contain elements of description and prescription; the author is making an attempt to describe what the law *is* but also trying to prescribe changes in the way the law *should* be.⁴ Yet, one cannot criticise the law for being inconsistent or even wrong without knowing what it is that the law is doing in the first place. It is only by separating description and prescription that we can identify *why* the courts treat certain scenarios differently. It is suggested that this problem can be avoided by adopting a realist approach to legal classification.

It is important to note that Llewellyn himself did not see realism as a theory of law; rather it was a methodology.⁵ The basic definition of ‘law’ in a realist approach is ‘the decisions reached by the courts’, which is not always in line with the rules and principles laid down in the speeches of the judgments.⁶ The realists were influenced by Holmes, and in particular his view that ‘(t)he prophecies of what the courts will do

⁴ S Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (CUP 2003) at 222. A Beever and C Rickett, in ‘Interpretative Legal Theory and Academic Lawyer’ (2005) 68 MLR 320 at 325 argue that the efforts to reclassify the law are actually interpretative. However this is unconvincing as the authors then go on to argue that legal theory can be used as a basis to reject substantive law. This is not interpretative, but a normative argument that theory can be used not only to explain law but also to remake it.

⁵ G Gilmore in ‘In Memoriam: Karl Llewellyn’ (1962) 71 Yale LJ 813 quotes Llewellyn as stating; ‘You go wrong...when you look at realism as a theory or a philosophy. It was neither. It was never meant to be either. What it was meant to be, and what it was, was a methodology’ (at 814).

⁶ K Llewellyn, ‘A Realistic Jurisprudence – The Next Step’ in K Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Univ of Chicago Press 1962) at 21-23.

in fact, and nothing more pretentious, are what I mean by the law.’⁷ Similarly, Llewellyn emphasised the distinction between ‘paper’ rules and ‘real’ rules.⁸ According to Llewellyn, a legal system may consist of paper rules, however these paper rules are abstract and provide little guidance for predicting decision making.⁹ We saw examples of this in the previous chapter; the idea that there is an area of law which can be deemed ‘wrongs’ is an example of a paper rule. Real rules, on the other hand, are those that do predict how the courts behave.¹⁰ Accordingly, ‘rules’ are not always determinative of the decisions of the courts; it depends on whether the rule is a realistic one.

It was the search for *real* rules which underlined the realist movement. At the same time, Llewellyn also noted that some form of ordering and arrangement was a necessary tool for understanding how the law operates;

‘Behaviour is too heterogeneous to be dealt with except after some artificial ordering. The sense impressions which make up what we call observation are useless unless gathered into some arrangement. Nor can thought go on without categories.’¹¹

A similar point is made by another of the legal realists¹², Radin;

⁷ OW Holmes, ‘The Path of the Law’ (1897) 10 Harvard L Rev 457 at 461. This is reiterated by M Green in ‘Legal Realism as Theory of Law’ (2005) 46 William & Mary L Rev 1915 at 1928: ‘we must predict how a judge will decide to determine what the law is.’

⁸ K Llewellyn, ‘A Realistic Jurisprudence – The Next Step’ in K Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Univ of Chicago Press 1962) at 21-25.

⁹ K Llewellyn, ‘A Realistic Jurisprudence – The Next Step’ in K Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Univ of Chicago Press 1962) at 22.

¹⁰ K Llewellyn, ‘A Realistic Jurisprudence – The Next Step’ in K Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Univ of Chicago Press 1962) at 25-26.

¹¹ K Llewellyn, ‘A Realistic Jurisprudence – The Next Step’ in K Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Univ of Chicago Press 1962) at 27.

‘We must speak of “contracts”, of “tenure”, of “insolvency”, of “divorce”, of “property”, of “rights”, because we cannot possibly arrange in our memories or indicate in our speech a whole series of special facts that may have a bearing on the situation in which we need guidance.’¹³

The search for ‘real’ rules does not mean that we completely abandon the use of abstract or conceptual tools. These realists recognised that it would be impossible to get by without some form of arrangement of the decisions of the courts. Otherwise we would need to learn the full set of facts of every decision of the courts; this would be an impossible task for even the greatest minds. Nonetheless, the emphasis was that conceptualism must be *rooted* in reality. As with everything, the key is in finding the balance between, on the one hand, trying to process too many facts and, on the other, giving up the task of processing facts altogether.

The methodology for this thesis follows the guidance provided by Llewellyn and Radin. This realist approach is an attempt to redefine the basic legal concepts of our common law, but through description and not prescription. Certainly this rests upon a normative proposition, namely that we *should* be more descriptive when classifying the law.¹⁴ However, the most important distinction between this classification and those discussed in the previous chapter is that there is no attempt to argue that judges

¹² For Radin’s credentials as a legal realist, see M Radin, ‘Legal Realism’ (1931) 31 Columbia L Rev 824.

¹³ M Radin, ‘A Restatement of Hohfeld’ (1938) 51 Harvard L Rev 1141 at 1145.

¹⁴ This aim is one that is shared by most commentators; A Burrows, *Understanding the Law of Obligations: Essays on Contract, Tort and Restitution* (Hart 1998) at 102; A Beever and C Rickett, ‘Interpretative Legal Theory and Academic Lawyer’ (2005) 68 MLR 320 at 325; S Hedley, ‘The Taxonomic Approach to Restitution’ in A Hudson (ed), *New Perspectives on Property Law, Obligations and Restitution* (Cavendish 2004) at 154; P Birks, *Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) at 7.

should stay within the guidance of this classification. A realist classification cannot fall into this trap; the law as it is must not be confused with arguments about the way that the law should be.¹⁵

This does not mean that the legal realist must reject any constructive argument about what the courts should be doing. Indeed, realism itself is in many circles a by-word for arguing *for* the reform of the legal system.¹⁶ However, realism *is* opposed to any methodology that uses a normative framework to dictate the description of the law. As Llewellyn noted ‘(t)he argument is simply that no judgment of what ought to be done in the future with respect to any part of law can be intelligently made without knowing objectively, as far as possible, what that part of law is now doing.’¹⁷ Cohen went even further, stating that ‘[u]nless a legal “problem” can be subsumed under one of these forms [of what the law *is* doing, or what it *should* be doing], it is not a meaningful question and any answer to it must be nonsense.’¹⁸ Going back to the interpretivism method seen in Chapter 2, we can see that the methodology of Birks was guilty of this error. As far as the realist is concerned, that is an error which needs to be avoided to ensure that we can achieve the most accurate description of private law.¹⁹ As lawyers we can, and should, argue for changes in the law where they are needed, but the first step in this process is to understand the law in the first place. This

¹⁵ C Dahlman, ‘Fused Modality or Confused Modality?’ (2004) 17 Ratio Juris 80.

¹⁶ WE Rumble, *American Legal Realism: Skepticism, Reform, and the Judicial Process* (Cornell UP 1968)

¹⁷ K Llewellyn, ‘Some Realism about Realism: Responding to Dean Pound’ (1931) 44 Harvard L Rev 1222 at 1236-1237. A point also made by K Barker in ‘Theorising Unjust Enrichment Law: Being Realist(ic)?’ (2006) 26 OJLS 609: ‘[n]ormative theory of whatever type cannot be allowed to ‘reconstruct’ that which the law is’ (at 625).

¹⁸ F Cohen, ‘Transcendental Nonsense and the Functional Approach’ (1935) 35 Columbia L Rev 809 at 824.

¹⁹ As K Llewellyn stated in ‘Some Realism about Realism: Responding to Dean Pound’ (1931) 44 Harvard L Rev 1222; ‘Freed of the check of the concrete, the most learned err’ (at 1225).

is why the separation of description and prescription can be achieved through a realist approach.

3. Realism Re-Assessed

While there is no unified school of legal realism, the main characteristic of legal realists is their opposition to the elevated status of legal rules in traditional legal science.²⁰ As Leiter has pointed out, to a degree, the realist approach can be considered as a form of positivism, as it is concerned with what courts in fact do, rather than being concerned with ethics, ideals or rules.²¹ Leiter compares legal realism with ‘hard’ positivism, which rejects morality as criterion for legal validity.²² Writing recently, Priel concludes that ‘[i]n a loose sense Leiter is surely right.’²³ However, Priel goes on to point out that there are still some fundamental differences between the two approaches. Notably, realism is concerned with what the courts do, whereas positivism entails norms which determine the validity of legal rules.²⁴ Arguably, this is simply a question of how one approaches the test of validity, since the *norm* which determines the validity of legal rules under the realist approach is that they *should accurately predict* the decisions of the courts.²⁵ A full discussion of this debate is one that is outside the scope of this chapter; however, the similarities

²⁰ R Dias, *Jurisprudence* (5th edn, Butterworths 1985) at 447.

²¹ B Leiter, ‘Legal Realism and Legal Positivism Reconsidered’ (2001) 111 *Ethics* 278 at 279; R Dias, *Jurisprudence* (5th edn, Butterworths 1985) at 447.

²² B Leiter, ‘Realism, Hard Positivism, and Conceptual Analysis’ (1998) 4 *Legal Theory* 533; B Leiter, ‘Legal Realism and Legal Positivism Reconsidered’ (2001) 111 *Ethics* 278 at 287.

²³ D Priel, ‘Were the Legal Realists Legal Positivists’ (2008) 27 *Law and Philosophy* 309 at 311.

²⁴ D Priel, ‘Were the Legal Realists Legal Positivists’ (2008) 27 *Law and Philosophy* 309 at 348-349.

²⁵ D Beylveled and R Brownsword, ‘Normative Positivism: The Mirage of the Middle Way’ (1989) 9 *OJLS* 463 at 466-467; ‘Because it espouses the separation thesis, Legal Realism is a variant of Legal Positivism.’

between realism and positivism are acknowledged even by Priel.²⁶ Part of the confusion, it is contended, is created by the failure to distinguish between two very different schools of realism; fact-sceptics and rule-sceptics.²⁷

Fact-Scepticism

Rumble separated the realists into two broad groups; the fact-sceptic realist, as exemplified by Frank, and the rule-sceptic realist, as exemplified by Llewellyn.²⁸ Frank's fact-scepticism centred on the unpredictability of factual analysis by judges and juries.²⁹ It did not matter how certain a legal rule was, there was always subjectivity in the way in which courts or juries interpreted facts. Accordingly, law 'always has been, is now, and will ever continue to be, largely vague and variable.'³⁰ Frank is correct that we can no more effectively predict how the courts will weigh up the inherent tensions that are seen in the private law than a biologist can predict protean behaviour.³¹ This does not undermine the attempt to understand this complex phenomenon, but simply illustrates that even naturally occurring events are not always predictable. Frank went so far as to claim that if one were to take into account the judges' background, the social facts and aims, then the outcome of disputes would

²⁶ D Priel, 'Were the Legal Realists Legal Positivists' (2008) 27 *Law and Philosophy* 309 at 350.

²⁷ See in particular B Leiter's distinction between conceptual rule-scepticism and empirical rule-scepticism in 'Legal Realism and Legal Positivism Reconsidered' (2001) 111 *Ethics* 278 at 288-289.

²⁸ WE Rumble, 'The Legal Realism of John Austin and the Realist Movement in American Jurisprudence' (1981) 66 *Cornell L Rev* 986 at 1025.

²⁹ E Cahn, 'Jerome Frank's Fact-Skepticism and Our Future' (1957) 66 *YLJ* 824.

³⁰ J Frank, *Law and the Modern Mind* (Tudor Pub 1936) at 5-6.

³¹ Eg P Driver and D Humphries, *Protean Behaviour; The Biology of Unpredictability* (Clarendon Press 1988).

be predictable.³² But, as Samuel has pointed out, if this were so it would be possible to predict legal rulings using artificial intelligence, which has never been accomplished.³³

Goode has also stated that in other disciplines such as mathematics it has been accepted that some events are incapable of prediction.³⁴ If natural science can concede that human knowledge is imperfect and incomplete, then the realist should also concede that we are in no position to identify *every* factor which will influence judicial decision making. Instead, we can only identify the main factors which are likely to have an impact upon judicial decision making. A fact-sceptic would reject any attempt to classify private law as a futile exercise, but not all realists would. It is this second type of realism which this thesis adopts for the purposes of classification.

Rule-Scepticism

The more rewarding methodology for the process of classification can be drawn from the rule-sceptics, and in particular the writings of Llewellyn. As Rumble noted, the rule-sceptic approach seeks to achieve “real” rules that describe the actual

³² For example; J Frank, *Law and the Modern Mind* (Stevens and Sons 1949).

³³ G Samuel, ‘The Challenge of Artificial Intelligence: Can Roman Law Help us Discover Whether Law is a System of Rules?’ (1991) 11 *Legal Studies* 24.

³⁴ See R Goode, ‘The Codification of Commercial Law’ (1988) 14 *Monash Univ L Rev* 135 at 135: ‘In recent years some of the world’s most brilliant mathematicians, who have spent a lifetime seeking to reduce their science to a state of order, have evolved a theory of Chaos - that is, of certain types of event so random in their nature that it can be mathematically established that they are incapable of prediction.’

uniformities in judicial decisions.’³⁵ The focus under the rule-sceptic approach is on the reported cases; at this level it does not represent a complete rejection of legal rules, but instead ‘strives for greater legal certainty.’³⁶ It should also not be forgotten that it was, after all, Llewellyn who became the chief reporter for the Uniform Commercial Code.³⁷ Llewellyn was a firm supporter of the project.³⁸ There is no reason why the classification of private law should be incompatible with the realist approach.

Llewellyn stated that the aim of legal realism, under the rule-sceptic approach, is to describe and predict the behaviour of the courts.³⁹ A ‘realist classification’ may appear to be a contradictory phrase but this could not be further from the truth. Certainly, some rule-sceptic realists were strongly critical of the use of legal concepts such as ‘property’ and ‘contract’ as they believed the real social issues were hidden by these terms.⁴⁰ Although some legal realists did argue against the overuse of terms such as property, contract and tort, a realist does not necessarily have to reject the continued application of these terms. Many legal realists acknowledged that legal

³⁵ WE Rumble, ‘The Legal Realism of John Austin and the Realist Movement in American Jurisprudence’ (1981) 66 Cornell L Rev 986 at 1025.

³⁶ WE Rumble, ‘The Legal Realism of John Austin and the Realist Movement in American Jurisprudence’ (1981) 66 Cornell L Rev 986 at 1025.

³⁷ G Gilmore, ‘In Memoriam: Karl Llewellyn’ (1962) 71 Yale LJ 813. ‘Make no mistake: this Code was Llewellyn’s Code’, at 814. The same point was made by another contributor to the Code; W Schnader, ‘Karl N Llewellyn’ (1962) 29 Univ of Chicago L Rev 617.

³⁸ K Llewellyn, ‘Why a Commercial Code?’ (1953) 22 Tennessee L Rev 779.

³⁹ K Llewellyn, ‘A Realistic Jurisprudence – The Next Step’ in K Llewellyn, *Jurisprudence: Realism in Theory and Practice*, (Univ of Chicago Press 1962) at 17-22.

⁴⁰ One such example of the realist’s cynicism of legal terms and concepts is F Cohen, ‘Transcendental Nonsense and the Functional Approach’ (1935) 35 Columbia L Rev 809; also J Frank, *Law and the Modern Mind* (Stevens and Sons 1949). A succinct and balanced summary of some these criticisms can be found in J Newman, ‘Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values’ (1984) 72 California L Rev 200. Similar points are made in S Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (CUP 2003) at fn 63 on 205 and R Hillman, ‘The Many Dimensions of Private Law: Commentary on Stephen Waddams, *Dimensions of Private Law: Categories, Concepts and Reasoning*’ (2004) 40 Can Bus LJ 384 at 391.

concepts can play an important role in predicting the behaviour of the courts.⁴¹ Accordingly, a realist must acknowledge any analysis which will develop our understanding of what the courts are actually doing and how to predict future decisions.⁴² For example, Llewellyn criticised Langdell's approach to consideration and unilateral contracts, on the basis that it did not 'work according to that pattern'.⁴³ At the same time, he saw the usefulness in the 'c.i.f.' (cost, insurance, freight) as it had 'proved in test after test as surely, as cleanly, as smoothly gauged to the work it had to do as any legal engine man has yet designed.'⁴⁴ What we are looking for are rules or concepts that describe and predict how the courts decide cases. One of the most effective methods for predicting the behaviour of the courts is to look at past judicial *reasoning* and to identify patterns of judicial *outcomes* to particular facts. Any reference to legal realism from this point onwards will be a reference to rule-sceptic realism as opposed to fact-scepticism.

Dagan's Realism

Another attempt to provide a realist approach to the classification debate has been produced by Dagan. As with this project, Dagan has taken his lead from the rule-

⁴¹ K Llewellyn, 'Some Realism about Realism: Responding to Dean Pound' (1931) 44 Harvard L Rev 1222 at 1243; M Radin, 'In Defense of an Unsystematic Science of Law' (1942) 51 Yale LJ 1269; M Golding, 'Holmes' Jurisprudence: Aspects of its Development and Continuity' (1979) 5 Social Theory and Practice 182; B Leiter, 'Legal Realism and Legal Positivism Reconsidered' (2001) 111 Ethics 278. Also see H Dagan, 'Legal Realism and The Taxonomy of Private Law' in C Rickett and R Grantham (eds), *Structure and Justification in the Private Law: Essays for Peter Birks* (Hart 2008) and J Waldron, "'Transcendental Nonsense" and System in the Law' (2000) 100 Columbia L Rev 16.

⁴² J Waldron, "'Transcendental Nonsense" and System in the Law' (2000) 100 Columbia L Rev 16.

⁴³ K Llewellyn, 'The Good, the True, the Beautiful, in Law' in K Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Univ of Chicago Press 1962) at 173.

⁴⁴ K Llewellyn, 'The Good, the True, the Beautiful, in Law' in K Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Univ of Chicago Press 1962) at 173.

sceptic realists. Thus, he cites Llewellyn and Cohen as the forefathers of his realist methodology.⁴⁵ Many of the conclusions reached by Dagan are insightful and certainly avoid the narrowness of formalistic or positivist classifications of law. However, there is an evident flaw with his methodology, which is his failure to separate the ‘is’ from ‘ought’. Dagan’s entire project rests on normative principles of autonomy, utility and community.⁴⁶ In fact Wyman contends that Dagan’s realism is as much formalistic as it is realist.⁴⁷ As Sherwin notes, Dagan ‘defends existing rules, sometimes proposes refinements to rules, and sometimes argues for significant reforms’.⁴⁸ Llewellyn himself noted that an attempt to classify the law would inevitably ‘obscure some of the data under observation and give fictitious value to others- a process which can be excused only insofar as it is necessary to the accomplishing of a purpose’.⁴⁹ However, Dagan goes too far in this regard, and as noted throughout this chapter and the preceding Chapter 2, the separation of the descriptive and prescriptive is essential for any realist analysis. It is for these reasons that Dagan is not regarded as a realist in the tradition of Llewellyn and Cohen, despite his claims. Our efforts will, therefore, move forward by developing a very different realist methodology.

4. Realism and Determinacy of Legal Rules

⁴⁵ H Dagan, *The Law and Ethics of Restitution* (CUP 2004) at 3-4.

⁴⁶ H Dagan, *The Law and Ethics of Restitution* (CUP 2004) at 100-102.

⁴⁷ KM Wyman, ‘Is Formalism Inevitable?’ (2007) 57 *Univ of Toronto LJ* 685.

⁴⁸ E Sherwin, ‘Rule-Oriented Realism’ (2005) 103 *Michigan L Rev* 1578 at 1579.

⁴⁹ K Llewellyn, ‘A Realistic Jurisprudence – The Next Step’ in K Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Univ of Chicago Press 1962) at 27.

Indeterminacy of Legal Rules

The aim of legal realism is to identify the social factors which influence the outcome of judicial decision making and to predict the future behaviour of the courts. The realist movement has been treated (unfairly) by some opponents as a complete rejection of legal rules⁵⁰ and also as a ‘jurisprudential joke.’⁵¹ The most damning criticism levelled against legal realism was Hart’s exposition in *The Concept of Law* where he attacked the realist’s argument that rules do not guide judicial behaviour but are merely predictions of judicial behaviour.⁵² Hart pointed out that some legal rules may be indeterminate at the margins, but at their core they are not indeterminate. Even modern legal realists concede to some degree that the outright rejection of any legal theory is a philosophical mess.⁵³ It is difficult to argue that Hart is not correct when he asserts that legal rules are important in any effort to understand the law, no matter how strongly one may disagree with interpretivist approaches. However, as we have already seen, Hart’s critique can be applied to fact-sceptic realists, but not necessarily to the rule-sceptic realists.⁵⁴ It is therefore necessary to explain the core determinacy of the law under a realist approach.

⁵⁰ HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994) at 136; R Dworkin, *Law’s Empire* (Hart 1986) at 36-37.

⁵¹ B Leiter, ‘Legal Realism and Legal Positivism Reconsidered’ (2001) 111 *Ethics* 278 at 278.

⁵² HLA Hart, ‘Formalism and Rule Skepticism’ in HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994) at ch 7.

⁵³ B Leiter, ‘Legal Realism and Legal Positivism Reconsidered’ (2001) 111 *Ethics* 278 at 279. See also; M Green, ‘Legal Realism as a Theory of Law’ (2005) 46 *William & Mary L Rev* 1915 at 1918; H Dagan, ‘Legal Realism and the Taxonomy of Private Law’ in C Rickett and R Grantham (eds), *Structure and Justification of Private Law: Essays for Peter Birks* (Hart 2008).

⁵⁴ B Leiter, ‘Legal Realism and Legal Positivism Reconsidered’ (2001) 111 *Ethics* 278.

Determinacy of Legal Rules under a Functional Approach

There are several reasons why, from a realist perspective, we can accept the influence of previous decisions when judges settle disputes. The first is that English judges have traditionally been careful (or at least make it appear so) to stay within their role as enforcers of the law and not to usurp the powers of the legislature.⁵⁵ Even where we see judicial creativity, in many cases, this limits the behaviour of the courts by requiring the judges to make links with the decisions of past courts. For example, even Lord Denning, who is generally regarded as an activist judge,⁵⁶ went to great lengths in many of his judgments to try to show that his rulings were at least compatible with the existing legal framework.⁵⁷ Yet where Lord Denning could not convincingly show that his decisions were in line with previous rulings of the courts, it was likely that the decision would be reversed by the House of Lords upon appeal. An example is when their Lordships rejected the deserted wife's equity that Denning had introduced in the Court of Appeal.⁵⁸ There is also a more cynical reason for explaining the importance of adhering to past decisions. Higgins and Rubin argued

⁵⁵ A perfect example of this is *Re Polly Peck (No 2)* [1998] 3 All ER 812 (CA), where Nourse LJ in the Court of Appeal stated that; 'You cannot grant a proprietary right to A where he did not have one beforehand, without taking some proprietary right away from B. No English court has ever had the power to do that, except with the authority of Parliament' (at 830). In another case Lord Simmons strongly criticised the decision of a lower court on the basis that it was 'a naked usurpation of the legislative function under the thin disguise of interpretation': *Magor & St Mellons Rural District Council v Newport Corporation* [1952] AC 189 (HL) at 191.

⁵⁶ According to EW Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (CUP 2005) at 94: Lord Denning is seen by legal fundamentalists as 'the very epitome of judicial activism.'

⁵⁷ For example Lord Denning is credited with introducing the doctrine of promissory estoppel in *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130 (KB) (for example in E McKendrick, *Contract Law: Text, Cases and Materials* (2nd edn, OUP 2005) at 238). In the case Denning strongly argued that the earlier case of *Hughes v Metropolitan Railway Co* (1877) LR 2 App Cas 439 (HL) could be cited as a direct authority for promissory estoppel.

⁵⁸ This was rejected by the House of Lords in *National Westminster Bank Ltd v Ainsworth* [1965] AC 1175, citing the lack of any clear authorities for this principle: at 1252 and 1260.

that there were economic motivations for consistency in judicial decision-making.⁵⁹ Any judge who simply came to his decision without reference to existing legal materials would not get very far in his profession.⁶⁰ According to Posner, judges would either find themselves out of a job very quickly, or at the very least they would never have the chance to advance to a higher position in their profession.⁶¹

If we leave to one side these more cynical arguments, probably the most significant reason for the importance of precedent within the legal system is the wealth of experience that is embodied by the culmination of hundreds of years of judicial decision making.⁶² To use the map analogy that is often referred to by those seeking to classify the law,⁶³ someone who believes they have a good sense of direction will usually want to make use of maps made by those who have made similar journeys in the past. As Hayek pointed out, one of the benefits provided by precedent based systems of law is that the rules developed by the courts are context specific rather than the result of some grand design.⁶⁴ This means that when the English courts seek to address social, economic and moral issues they will often find that their

⁵⁹ R Higgins and P Rubin, 'Judicial Discretion' (1980) 9 *Journal of Legal Studies* 129.

⁶⁰ E Posner, 'Decline of Formality in Contract Law' in FH Buckley (ed), *The Rise and Fall of Freedom of Contract* (Duke Univ Press 1999) at 73-74.

⁶¹ R Posner, 'What do Judges and Justices Maximize? (The Same Things as Everybody Else Does)' (1999) 3 *Supreme Court Economic Rev* 1; R Posner, *How Judges Think* (Harvard UP 2008) at 13 and 133.

⁶² FA Hayek, *Law, Legislation and Liberty* (Routledge & Kegan Paul 1973) 65-67.

⁶³ Eg A Burrows and A Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006) at 267. See also EJ Weinrib, 'The Juridical Classification of Obligations' in P Birks (ed), *The Classification of Obligations* (Clarendon Press 1997) at 54; P Birks, 'Definition and Division: A Meditation on *Institutes* 3.13' in P Birks (ed), *The Classification of Obligations* (Clarendon Press 1997) 1. The various maps of the common law are discussed in S Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (CUP 2003) at ch 1.

⁶⁴ FA Hayek, *Law, Legislation and Liberty* (Routledge & Kegan Paul 1973) at 118.

predecessors have left a well trodden path to follow.⁶⁵ Therefore, when judges are deciding cases they have the benefit of the experience and insight of their predecessors. Unless the judge identifies a particular reason to depart from the decisions of the preceding courts, it can often be assumed that the existing rules and concepts are the most appropriate approach for these situations.⁶⁶ Llewellyn noted that, ultimately, the judge in any given case may decide that there are good reasons for distinguishing the case before him from previous decisions of the courts or that a new approach is to be taken.⁶⁷ However, the fact that the existing rules have been developed and tweaked over a long period of time means that for the most part what has been decided in the past is a valuable indicator for how things will be decided in the future. The search then turns to finding the tools for identifying the past behaviour of the courts.

Before moving on, it should be noted that realism also accounts for a stronger level of determinacy when it comes to legislation.⁶⁸ For example, Llewellyn explained that judges ‘must accept them, to start with: you are no independent agents.’⁶⁹ What this means is that, just as with precedent, the courts will not simply ignore the rules laid

⁶⁵ Lord Denning in *The Discipline of Law* (Butterworths 1979) at 314; ‘I would treat it as you would a path through the woods. You must follow it certainly, so as to reach your end, but you must not let the path become too overgrown. You must cut out the dead wood and trim off the side branches, else you will find yourself lost in the thickets and the brambles.’

⁶⁶ K Llewellyn, ‘Frank’s Law and the Modern Mind’ in K Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Univ of Chicago Press 1962) at 110: ‘Rules guide, although they do not control, decision. The rule of the case or the code does lay its hand upon the future, though one finger or several may slip or shift position’.

⁶⁷ K Llewellyn, ‘Impressions of the Conference on Precedent’ in K Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Univ of Chicago Press 1962) at 122-123.

⁶⁸ K Llewellyn took the view that judges based their decisions ‘in the main from authoritative sources (which in the case of law are largely statutes and the decisions of the courts)’ in *The Bramble Bush*, (New York 1930) at 13.

⁶⁹ K Llewellyn, ‘The Current Recapture of the Grand Tradition’ in K Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Univ of Chicago Press 1962) at 227.

down by others. This is regularly seen in those cases where Parliament has laid down a structured and comprehensive legislative regime.⁷⁰ There are justifiable concerns that the courts are sometimes not the appropriate forum for addressing some of the social and economic issues raised in certain cases, because of the limited resources and the time restraints placed upon the courts.⁷¹ This does not mean that all statutes are enforced without question, as Llewellyn and Radin both emphasised the flexibility which the courts often employ when interpreting statutes.⁷² Moreover, there are some statutory provisions which are simply ignored by the courts because there are more compelling reasons for *not* applying them.⁷³ The simple point is that it will be more difficult for a judge to depart from statutory provisions than it will be to depart from judge-made rules. It is for these reasons that this project is primarily concerned with judge-made law, as statutory law is generally more static and gives less room for the courts to address social, economic and moral issues.

⁷⁰ This has been very important in nuisance cases where claimants seek to show that private remedies are available where these statutory regimes are breached; *Ali v City of Bradford MDC* [2010] EWCA Civ 1282 at [39] (Toulson J): ‘In these circumstances, for the courts to impose such a liability through the law of nuisance would be to use a blunt instrument to interfere with a carefully regulated statutory scheme and would usurp the proper role of Parliament.’ See also *Birmingham City Council v Shafi* [2008] EWCA Civ 1186, [2009] 1 WLR 1961. This was also one of the reasons for Lord Hoffmann’s reticence in recognising a tort of causing intentional distress at [46] in *Wainright v Home Office* [2003] UKHL 53, [2004] 2 AC 406 .

⁷¹ K Holland, ‘Review: Judicial Activism vs Restraint: McDowell, Miller, and Perry Reconsider the Debate’ (1983) 8 American Bar Foundation Research Journal 705 at 706 onwards. A recent example can be seen in Lord Hoffmann’s judgment in *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1 at 54, where his Lordship argued that the courts are not well qualified to address competition law.

⁷² K Llewellyn, ‘The Current Recapture of the Grand Tradition’ in K Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Univ of Chicago Press 1962) at 227-229. M Radin, ‘Statutory Interpretation’ (1930) 43 Harvard L Rev 863; M Radin, ‘Realism in Statutory Interpretation and Elsewhere’ (1935) 23 California L Rev 156. The judge’s role in interpreting statute is more generally discussed in J Willis, ‘Statute Interpretation in a Nutshell: Preliminary Observations’ (1938) 16 Can Bar Rev 1 (as reprinted in (1938) 55 South African LJ 322).

⁷³ For example in *Pepper v Hart* [1993] AC 593 (HL). Another example is the way in which the courts have applied section 53 of the Law of Property Act 1925, which has been criticised as being inconsistent with the terms of the statute in B Green, ‘Grey, Oughtred and Vandervell: A Contextual Reappraisal’ (1984) 47 MLR 385.

5. A Realist Approach to Conceptualism

It is one thing to argue that contract, tort and property are not metaphysical institutions waiting to be discovered,⁷⁴ but we have seen that this does not necessarily mean that legal concepts cannot play a useful guide in predicting the behaviour of the courts.⁷⁵ According to Llewellyn, concepts can be a ‘helpful device’⁷⁶ that will in most cases help us to identify the most likely outcome in a predetermined set of circumstances. Radin, one of Llewellyn’s fellow legal realists, also made this argument using the phrase ‘expository function’ to describe the role of legal concepts.⁷⁷ A similar view is adopted by Cane who argues that we can regard ‘categories’ such as contract, tort, trusts and restitution as ‘expository devices’.⁷⁸ According to Llewellyn, such concepts provide the necessary balance between consistency and flexibility that we are seeking to achieve in this realist classification.⁷⁹ Llewellyn identified three functions for concepts; they guide the courts, they help to predict judicial decisions, and provide flexibility which is

⁷⁴ G Samuel, ‘Can Gaius really be compared to Darwin’ (2000) 49 ICLQ 297 at 312.

⁷⁵ J Dickinson, ‘Legal Rules: Their Function in the Process of Decision’ (1931) 79 Univ of Pennsylvania L Rev and American Law Register 833 at 835.

⁷⁶ K Llewellyn, ‘Some Realism about Realism: Responding to Dean Pound’ (1931) 44 Harvard L Rev 1222 at 1249.

⁷⁷ M Radin also states that conceptualism provides a valuable expository function in ‘Legal Realism’ (1931) 5 Columbia L Rev 824 at 827.

⁷⁸ P Cane, *The Anatomy of Tort Law* (Hart 1997) uses the phrase expository devices in a similar fashion (at 198-201). Cane went on to argue that concurrent claims, where claims can be brought under different conceptual devices on the same set of facts, but where the concept applied led to different results, should be abolished (*The Anatomy of Tort Law* at 200). There is nothing wrong with this proposal, as it is a normative one. Since the purpose of this thesis is to describe the law, the merit of concurrent claims is, therefore, outside the scope of this work.

⁷⁹ K Llewellyn, ‘On Reading the Newer Jurisprudence’ in K Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Univ of Chicago Press 1962) at 139.

essential in facilitating the dynamism of the law.⁸⁰ We will now go on to consider how concepts can be constructed to ensure that they perform these three functions.

The Importance of Social Reality

One of the central features of legal realism is the search for more accurate descriptions of the behaviour of the courts.⁸¹ In that regard, the aim of this chapter is one that is shared by legal taxonomists and their critics alike.⁸² However, there are a number of distinct ways to describe naturally occurring events and this creates the possibility that the observer may subjectively describe the material.⁸³ As Llewellyn pointed out, this is something that needs to be avoided, if possible, under a realist approach.⁸⁴ This is why it is important that legal concepts can be defined by reference to social reality. If the concept can only be defined by further references to legal rules and principles then it will be of little use in identifying the relevant issues and facts

⁸⁰ K Llewellyn, 'On Reading the Newer Jurisprudence' in K Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Univ of Chicago Press 1962) at 133; '(1) They help control and guide the judge or other official in ways and places in which the rules of law, as such, fail to control and guide. (2) They are factors which are given and present in the legal system as we have it, so that they can be known, felt, even seen by a lawyer, and they therefore can guide him both in predicting and in working out an argument to a court. (3) They are factors which afford, however, some very real degree of flexibility of adjustment both of the outcome of a particular case and of the rule laid down in a case to changing times and needs and case situations.'

⁸¹ K Llewellyn, 'Some Realism about Realism: Responding to Dean Pound' (1931) 44 *Harvard L Rev* 1222 at 1255.

⁸² Although Birks was strongly opposed to the realist tradition, he undoubtedly favoured the use of more clear and insightful language, P Birks, 'Equity in The Modern World: An Exercise in Taxonomy' (1996) 26 *University of West Austl L Rev* 1 at 4. A similar point is made by one of his harshest critics, S Hedley, 'The Taxonomic Approach to Restitution' in A Hudson (ed) *New Perspectives on Property Law, Obligations and Restitution* (Cavendish 2004) at 155.

⁸³ G Samuel, 'Can Gaius really be compared to Darwin' (2000) 49 *ICLQ* 297 at 311.

⁸⁴ K Llewellyn, 'A Realistic Jurisprudence – The Next Step' in K Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Univ of Chicago Press 1962) at 27.

that influence the decisions of the courts.⁸⁵ As Samuel has pointed out, the success of the Roman model lay in the fact that its categories were not just legal concepts, but were also reflective of social reality.⁸⁶ Persons and things ‘existed both as legal and as empirical realities and thus the scheme functioned like a scientific model.’⁸⁷ The Roman classification undoubtedly provides great benefits in this regard. However, it must always be used with caution.⁸⁸ It should not be assumed that legal concepts can become the primary object of study as their function is to serve as a bridge between factual events and the decisions of the courts.⁸⁹ This is why the basic concepts of the Roman system are *adapted* rather than *adopted* in this thesis. The approach which we adopt looks at concepts as multi-factual; by looking for multiple facts we ensure that our concepts are closely rooted in reality.

6. Concepts as Links between Facts and Outcomes

It was Holmes who stated that to identify the law we have to, first, ‘determine what are the facts to which the special consequences are attached; second, to ascertain the

⁸⁵ For example in *Daraydan Holdings v Solland* [2004] EWHC 622 (Ch), [2005] Ch 119 at 132, Lawrence Collins J stated that some formulations of the fiduciary duties were very often ‘circular’. There is no better example of this than the following excerpt taken from Millett J’s (as he then was) speech in *Bristol & West Building Society v Mothew* [1998] Ch 1 (CA); ‘The expression “fiduciary duty” is properly confined to those duties which are peculiar to fiduciaries and the breach of which attracts legal consequences differing from those consequent upon the breach of other duties’ (at 16).

⁸⁶ G Samuel, ‘English Private Law: Old and New Thinking in the Taxonomy Debate’ (2004) 24 OJLS 335 at 344; G Samuel ‘Classification of Obligations and the Impact of Constructivist Epistemologies’ (1997) 17 Legal Studies 448 at 457. Although Samuel is at times a rule-sceptic, it would appear that he would not agree to being called a legal realist; G Samuel, *Epistemology and Method in Law* (Ashgate 2003) at 32.

⁸⁷ G Samuel, ‘English Private Law: Old and New Thinking in the Taxonomy Debate’ (2004) 24 OJLS 335 at 344.

⁸⁸ G Samuel, ‘Classification of Obligations and the Impact of Constructivist Epistemologies’ (1997) 17 Legal Studies 448 at 456-458.

⁸⁹ P Cane, *Anatomy of Tort Law* (Hart 1997) at 198.

consequences.⁹⁰ Simply put, there is little point in conceptualising facts or issues if they have no bearing on the decisions made by the courts. To take an extreme example, a classification that separated cases by reference to the defendant's eye colour will be grounded in social reality, but the colour of the defendant's eyes will most probably not be a useful guide for predicting when the courts will or will not find liability. What we need are facts which lead to predictable *outcomes*. So, for example, an agreement between parties to make an exchange will lead to the court finding a contract, which will normally attract expectation damages if one party fails to perform their side of the agreement. Contract is undoubtedly a wide concept which is relevant in several areas of private law, and it would be naive to think that the outcome in every contract case is the same. Nevertheless, the identification of a contract provides a bridge between the facts and the likely decision of the courts. It can, therefore, be regarded as a realist concept; as this bridging role assists in both predicting the law and in identifying the primary factors that are influencing the decisions of the courts. As we have explained earlier, this approach would not be compatible with fact-sceptic realism. It is however, compatible with rule-sceptic realism. The boundaries of realist concepts are facts; they cannot be boundaries that are based on technical or abstract principles. Without factual elements, we cannot predict how the legal system will work, and this would defeat the very purpose for classifying private law. The effort throughout this thesis will be to define realist concepts; this will entail redefining and cutting down a number of core private law concepts such as property and tort. This is done in the next chapter, where it is argued that these concepts can have use, but only by adopting narrower versions of them.

⁹⁰ OW Holmes, *The Common Law* (Little, Brown and Company 1881) at 289.

7. Dynamism of the Legal System

A narrow approach to concepts may appear to inhibit the development of the law. This concern can easily be rebutted. Firstly, it should be emphasised again that under a realist methodology, we are not laying down rules which have normative force. If concepts become stretched to the point where they no longer retain their link between reality and predictable outcomes, then a new concept (or set of concepts) must be found instead.⁹¹ The same concern should be applied throughout the law of obligations. As we will see, the thesis presents an overlapping approach to conceptualism which explains the progression and development of law, while at the same time trying to avoid undermining the cohesion of core legal concepts. Secondly, the thesis presents an overlapping approach, which allows us to recognise new types of claims which can share factual similarities with existing concepts whilst avoiding the problem of pigeon-holing new claims.

8. Overlaps

⁹¹ This echoes Lord Rodger's comments in *Customs and Excise Commissioners v Barclays Bank Plc* [2006] UKHL 28, [2007] 1 AC 181 at 204, about the concept of a voluntary assumption of responsibility analysis of pure economic losses in negligence. His Lordship stated that the concept should be narrowly defined, otherwise this concept could end up 'being stretched beyond its natural limits-which would in the long run undermine the very real value of the concept as a criterion of liability in the many cases where it is an appropriate guide.' Note that the analysis of 'assumption of responsibility' is rejected in Chapter 6 of this thesis. The reasoning of his Lordship is insightful nonetheless.

'I do not mean in this classification to make mutually exclusive groups. The heads are convenient for description, not the framework of a logical system. Things overlap.'⁹²

Llewellyn recognised that concepts were not mutually exclusive, and indeed that they often overlapped. This happened in two ways; firstly, it was seen in cases where there might be a combination of concepts, such as a contract for the sale of land. This situation is an overlap of 'contract' and 'property.' Indeed this is the way in which Birks viewed the term overlap.⁹³ Yet there was also a second form which Llewellyn identified, and this is the very type of overlap to which this thesis is concerned with. This second type of overlap occurs when cases cannot be 'brought under one or another of these main heads.' This overlapping analysis finds its roots not only in the work of the realists, but also the more recent writings of Waddams and Dietrich. As explained in Chapter 1, both have argued that overlaps can and do occur.⁹⁴ This thesis seeks to further develop that argument and explain how it assists in predicting the law.

The next chapter sets up the framework within which these overlaps occur. In doing so, we redefine the core concepts of property, contract and tort. However, it is not enough simply to develop narrower concepts, we must also explain what happens with the content which has been removed. An overlapping approach allows us to do this whilst also not requiring us to completely break the links with other legal concepts. For this reason, it is important for the purposes of this thesis that we are talking about concepts and not categories. Concepts are expositive devices for

⁹² K Llewellyn, *The Bramble Bush* (New York 1930) at 9-10. In this piece, Llewellyn had a four-fold division in mind; property, contract, something which resembled a law for associations and laws which govern things outside of agreements, primarily the law of tort.

⁹³ P Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) 44-48.

⁹⁴ See text at n 49 in Chapter 1.

describing facts, and there are no convincing reasons for supporting a discrete categorisation of private law.

9. Conclusion

The purpose of this chapter has been to demonstrate that a realist methodology can provide the groundwork for a classification of private law that incorporates a conceptual analysis. Any useful concept should perform the functions set out in this chapter; it is predictable, it is identifiable and there should also be room for development and flexibility. Thus, in the next chapter we assess whether the concepts of property, contract and tort lead to predictable outcomes in the courts, and whether they are socially observable (which performs the function of identifiability.)

CHAPTER 4: A LEGAL FRAMEWORK FOR PRIVATE LAW

‘The quest for narrower, more significant categories is always a sound first approach to wide categories which are not giving satisfaction in use. But of course, once satisfactory narrow categories have been found and tested, the eternal quest recurs for wider synthesis- but one which will really stand up in issue.’¹

1. A Three-Fold Classification of Private Law

Llewellyn cited contract, tort and property as providing the three important functions of predictability, identifiability and flexibility.² The concepts of property,³ contract⁴ and tort,⁵ are terms that we have taken from Roman law,⁶ although the English

¹ K Llewellyn, ‘Some Realism about Realism’ in K Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Univ of Chicago Press 1962) at [c] on 56. See also D Phillips, ‘The Commercial Culpability Scale’ (1982) 92 YLJ 228 at 290.

² As mentioned at n92, in the last chapter, Llewellyn also had a fourth category of a law relating to associations which he set out in another piece, K Llewellyn, *The Bramble Bush* (New York 1930) at 9-10. We do not explore this fourth category in much detail, although it is discussed in our analysis of negligence further on in this chapter. Note that the main influence is on methodology; it does not require the exact replica of Llewellyn’s basic approach. There is not enough room in this thesis to discuss the fourth category, and there is less overlap between this possible fourth area and the private law concepts which are being explored in this thesis.

³ The House of Lords recognised in *Hunter v Canary Wharf Ltd* [1997] AC 655 that the various torts aimed at protecting land could be identified as forming part of an English law of property; at 687, 708 and 723.

⁴ D Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP 1999) at 141-151.

⁵ D Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP 1999) at 153-168.

⁶ More recently in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour* [1943] AC 32, Lord Wright recognised contract and tort, but added another category of restitution. Although the concept is referenced in some early texts, Roman law never developed a general concept of unjust enrichment; P Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) at 22-23. Roman law instead placed a number of miscellaneous rules and principles within categories of quasi-contract and quasi-delict, R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Juta & Co 1995) at 16. The term quasi-contract was also used by the English courts primarily to refer to money transfers, such as in *Sinclair v Brougham* [1914] AC 398 (HL), but has been replaced in favour of the terms restitution or ‘unjust enrichment’. In any case the status of restitution in English private law is a much more complex issue, and it will be argued that the concept of unjust enrichment

versions of these concepts are not used in the same way as their Roman counterparts. It is argued that, at their core, these concepts can and do have an important role as expositive devices. Nonetheless, it is also argued that we must also look for narrower accounts of these concepts. We need not abandon our existing tools; for example, one of Llewellyn's fellow realists, Cohen, whilst acknowledging the descriptive utility of legal concepts also called for the 'redefinition of concepts'.⁷ It must, therefore, be stressed, once more, that rule-sceptic realists were not calling for the absolute rejection of conceptualism. Those such as Llewellyn and Cohen were, instead, arguing that many terms and concepts had become so far removed from reality that they failed to perform any useful guidance.⁸ Some sort of arrangement of private law is not only compatible with legal realism, it also plays an integral role in assisting our understanding of the legal system.

Llewellyn also provided invaluable guidance for setting out how such a classification could be constructed: '[i]n view of the tendency toward overgeneralization in the past this is likely to mean the making of smaller categories- which may either be subgroupings inside the received categories, or may cut across them'.⁹ Similarly, Gilmore noted that 'when our categories become over-defined we lose touch with reality.'¹⁰ Thus the search is to identify narrower concepts of the law. In particular, for the purposes of this thesis, we see that Llewellyn recognised that a 'realist' classification

fails to describe the relevant circumstances that lead the courts to award restitution. This is to be discussed further on in this Chapter.

⁷ F Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 Columbia L Rev 809 at 824.

⁸ K Llewellyn, 'A Realistic Jurisprudence – The Next Step' in K Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Univ of Chicago Press 1962) at 27.

⁹ K Llewellyn, 'A Realistic Jurisprudence – The Next Step' in K Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Univ of Chicago Press 1962) at 27-28.

¹⁰ G Gilmore, 'Legal Realism: Its Cause and Cure' (1961) 70 Yale LJ 1037 at 1039.

would not be tidy or discrete. This chapter lays down the basic framework for the classification adopted in this thesis, through the redefinition of property, contract and tort.

At this stage, we must keep in mind the distinction between paper and real rules. This rests on the differentiation between the language used by the courts and the actual decisions they reach.¹¹ In relation to the concepts of property, contract and tort, we are not following the *language* used by the courts, as the courts undoubtedly use these terms in a much wider sense. This, it is argued, is the only way to achieve narrower concepts. However, it is not an attempt to sideline those rules that do not fit into these concepts. Instead the exploration of overlapping concepts in the following chapters will demonstrate how this arrangement can assist in our understanding of private law. It is only possible to do this by accepting narrower constructions of property, contract and tort and then to explore the territory which is left unclassified. This chapter provides the first step in the process; in the following chapters the overlapping territory is looked at in more depth.

2. The Law of Property

This section will provide an alternative analysis of ‘property’ which seeks to redefine the concept of property as control of a tangible thing to which the claimant has title.

¹¹ M Green in ‘Legal Realism as Theory of Law’ (2005) 46 William & Mary L Rev 1915 at 1928: ‘we must predict how a judge will decide to determine what the law is.’

There are three constituent facts which we look for; title, control and tangible things. Even at this early stage, the nature of the overlap with other legal concepts will hopefully be emerging. Our definition requires us to separate other legal concepts which are sometimes referred to as 'property'. For example, a trust is often stated to be a property right; however, the consequence of our narrower account of property is that we must distinguish the trust scenario. Leaving aside for the time being the issue of tangibility, it is the lack of the third element, control, which indicates that the trust is to be treated differently. This analysis does not require us to completely distinguish the two concepts; there is always an overlap in the example of a trust as the beneficiary has title, but the trustee has control. We shall explore these distinctions further on.¹² For now, we need to set out the arguments against a wider concept of property which identifies all of these situations as being examples of 'property.'

The most controversial distinction between our approach and the current approach in English law is that we require something tangible. Admittedly, this is controversial; Samuel has pointed out that, generally, English lawyers have no reservations about confining the term 'property' to corporeal things.¹³ As a result the view that property is concerned with tangible things is usually treated as crude and outdated.¹⁴ There are, however, some academics that have adopted a narrow concept of property, the most recent being McFarlane, who has argued that, a 'right can only qualify as a property

¹² See generally Chapter 7.

¹³ G Samuel, *Epistemology and Method in Law* (Ashgate 2003) at 155; K Gray points out that English law does not confine the use of the term property to tangible things in 'Property in Thin Air' (1991) 50 CLJ 252.

¹⁴ 'Someone who believes that property is a right to a thing is assumed to suffer from a childlike lack of sophistication- or worse.' T Merrill and H Smith, 'What Happened to Property in Law and Economics?' (2001) 111 Yale LJ 357 at 358.

right if it relates to the use of a thing: an object that can be physically located.¹⁵ Even so, this view is controversial, as seen by Rahmatian's response to McFarlane's approach; '[i]t is hard to understand how anyone in the 21st century can question that there are property rights in intangibles.'¹⁶ Birks also stated that '[n]o modern system gives very much weight to the distinction between corporeal and incorporeal things.'¹⁷ We will argue that English law does indeed continue to recognise the distinction between corporeal and incorporeal things. There is no need to employ property concepts to identify other types of situations, as this will only lead to the disintegration of property as a useful concept.¹⁸ The argument is that tangibility is a key fact which identifies the way in which we treat property; there may be overlaps as in the law of trusts, or money interests, but this should not obscure the differences.

Property as a Nebulous Concept

Out of all the terms and concepts which we use in our private law system, 'property' is probably one of the most nebulous and overused.¹⁹ As Grey has noted, the term 'property' is used to describe such a wide variety of circumstances that it has lost all meaning and utility.²⁰ Notably, in a recent comparative study by von Bar and Drobnig, English property was referred to as a 'broad concept', at least in comparison

¹⁵ B McFarlane, *The Structure of Property Law* (Hart 2008) at 132.

¹⁶ A Rahmatian, 'The Structure of Property Law by Ben McFarlane' (2009) 72 MLR 877 (Publication Review) at 877.

¹⁷ P Birks, 'Definition and Division: A Meditation on *Institutes* 3.13' in P Birks (ed), *The Classification of Obligations* (Clarendon Press 1997) at 9.

¹⁸ A Hudson, 'The Unbearable Lightness of Property' in A Hudson (ed), *New Perspectives on Property Law, Obligations and Restitution* (Cavendish 2004) at 9.

¹⁹ S Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (CUP 2003) at ch 9.

²⁰ T Grey, 'The Disintegration of Property' in JR Pennock and J Chapman (eds), *NOMOS XXII: Property* (New York Univ Press 1980) 69-70.

with the versions of property in Germany and Greece.²¹ This is shown by the numerous situations where the English courts have used the term ‘property.’ Those situations include money held in a bank account,²² interests in cheques,²³ rights to sue in private nuisance,²⁴ trademarks,²⁵ copyrights,²⁶ goodwill between a business and its customers²⁷ and any assets that form the subject matter of trusts.²⁸ Therefore, it should be quite apparent that ‘property’, as it is commonly used by English lawyers, is a very wide concept that constitutes a substantial part of private law. In short, property, when used this way, cannot be a realist concept. The overuse of property did not escape the criticism of the realists; Cohen famously referred to property as one of the ‘magic solving words of traditional jurisprudence.’²⁹ From a realist perspective, property can only be useful if we establish a narrower version of the concept. First, we must consider whether it is possible to discover a concrete meaning behind the wider concept of ‘property’.

Exclusion, Transferability and Excludability

²¹ C von Bar and U Drobnig, *The Interaction of Contract Law and Tort and Property Law in Europe: A Comparative Study* (Sellier 2004) at 317-319.

²² *Trustee of the Property of FC Jones and Sons (a Firm) v Jones* [1997] Ch 159 (CA).

²³ *United Australia Bank Ltd v Barclays Bank Ltd* [1941] AC 1 (HL).

²⁴ *Hunter v Canary Wharf* [1997] AC 655 (HL).

²⁵ Jacob LJ in *Boehringer Ingelheim Ltd and others v VetPlus Ltd* [2007] EWCA Civ 583, [2007] Bus L Rev 1456 at [36].

²⁶ *HRH Prince of Wales v Associated Newspapers Ltd* [2006] EWCA Civ 1776, [2008] Ch 57: ‘Copyright is a property right’ at 102.

²⁷ *Star Industrial Co Ltd v Yap Kwee Kor (Trading as New Star Industrial Co)* [1976] FSR 256 (PC) at 259.

²⁸ *Foskett v McKeown* [2001] 1 AC 102 (HL) at 127.

²⁹ F Cohen, ‘Transcendental Nonsense and the Functional Approach’ (1935) 35 Columbia L Rev 809 at 820.

Rights against the Rest of the World

The idea of property as consisting of rights which are good against the rest of the world can be traced back to Roman law. Adopting the Roman model, Birks stated that ‘the really bright line has to be drawn between rights *in rem* and *in personam*.’³⁰ The *in rem* right is itself a personal link between individual and ‘thing’ which provides a right to exclude the rest of the world. Birks noted that this requires a ‘thing’, however for Birks this is any item which is specifically identifiable.³¹ Although we disagree with Birks as to what a ‘thing’ is (in this thesis a thing is something tangible) the idea of specific assets is at least a ‘fact’; if it is money, we can identify notes, coins and even bank balances. However, as this chapter will demonstrate, it would be inaccurate to classify the trust as a property right. The same point has been made by Stone; ‘the broad statement that the right of the cestui que trust is a right *in rem*, even if true because of the breadth of the definition adopted, serves no useful purpose because it ignores the fundamental differences between the rights of the *cestui que trust* and other classes of rights which are more or less perfectly described by the phrase “rights *in rem*”.’³² Thus, the realist questions why the definition is made so wide when the patterns of judicial behaviour are so different. For the purposes of categorising legal concepts, it is, therefore, of fundamental importance that we distinguish between property and the trust.³³ As we saw in the previous chapter, Birks would reduce property to a response; in essence this is a rejection of property as a legal concept.

³⁰ P Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) at 9

³¹ The same view is taken by J Penner, *The Idea of Property in Law* (Clarendon Press 1997) at 23–31.

³² HF Stone, ‘The Nature of the Rights of the Cestui Que Trust’ (1917) 17 *Columbia L Rev* 467 at 473.

³³ HF Stone, ‘The Nature of the Rights of the Cestui Que Trust’ (1917) 17 *Columbia L Rev* 467 at 473. It is with some trepidation that Stone is referred to as a realist, G Rutherglen instead refers to Stone as a ‘legal progressive from an earlier generation’ in ‘International Shoe and the Legacy of Legal Realism’ [2001] *Supreme Court Rev* 347 at 354.

The classification of property as a response is surely attributable to the failure to recognise how overlaps work in private law. For example, an overlap of contract and property will entail a different set of rules than a contract which does not involve tangible things.

A narrower version of this *in rem* approach is adopted by McFarlane. For McFarlane, property rights consist of one right; ownership, which means that ‘B has a right to immediate exclusive control of a thing forever’.³⁴ Notably, McFarlane, defines ‘thing’ in the same way as we do here, so that it means a tangible thing. The distinction between our approach and McFarlane’s is his focus on *rights* to a thing. This is unnecessary and methodologically questionable. As Hudson has pointed out the ‘rights-based’ approach is not a reference to natural rights, simply a reference to the situations where the courts recognise interests.³⁵ The first issue is how to balance this with the inevitable ‘rights’ of other parties, and it is very difficult to identify the limits of these rights without knowing about every other competing right which might exist. For example, even if one has an absolute right to a thing, someone else may come along and cause damage to this thing; so long as they have not done so carelessly or with intent they will not have infringed any right of the owner.³⁶ Explaining that property interests are rights becomes little more than a concept within a concept; the same argument was made by Ross who concluded that ‘rights’ of ownership are not facts at all.³⁷ The danger, as any realist will know is that by justifying an interest on the basis of ‘rights’ it allows the author to argue that other decisions should conform

³⁴ B McFarlane, *The Structure of Property Law* (Hart 2008) at 140.

³⁵ A Hudson, ‘The Unbearable Lightness of Property’ in A Hudson (ed) *New Perspectives on Property Law, Obligations and Restitution* (Cavendish 2004) at 29-30.

³⁶ Eg *Mansfield v Weetabix Ltd* [1998] 1 WLR 1263 (CA).

³⁷ A Ross, ‘Tû-Tû’ (1957) 70 Harvard L Rev 812 at 819.

to the pattern of these rights. Academia is the appropriate place for discussing why the law should be different, but this cannot be done purely by the analysis of abstract 'rights'.³⁸ Although the substance of McFarlane's arrangement is similar to the one made here, the important distinction is that McFarlane can only explain the relationship between property and other concepts, such as the trust, by further reference to 'rights.' It is at this point that his approach starts to lose cohesion as it becomes very expansive. McFarlane's attempt to classify 'trusts' is discussed in Chapter 7 in more detail.

There is also a current trend among commentators to take the view that property is simply any asset that can be exchanged and is enforceable against the rest of the world.³⁹ Gray refers to this more generally as excludability, which provides the 'constitutive criterion of property'.⁴⁰ More recently, Worthington states that the 'twin attributes of 'transferability' and 'excludability' characterise property rights'.⁴¹ Even though the term excludable is more attractive than 'exclusive', there is still a problem insofar as this is ultimately a legal response. To modify slightly an example made by Holmes, if a child has a pocketbook and a ruffian tries to take this, we know that in reality the child will not have the physical power to exclude the adult.⁴² It is the law which gives the child the power which protects the interest in the book, not reality. We must avoid this problem of conflating facts and judicial responses in our definition of the core concept of property.

³⁸ A Ross, 'Tû-Tû' (1957) 70 Harvard L Rev 812 at 819.

³⁹ A Hudson, 'The Unbearable Lightness of Property' in A Hudson (ed), *New Perspectives on Property Law, Obligations and Restitution* (Cavendish 2004) at 12; D Fox, *Money as Property Rights* (OUP 2008) at 18.

⁴⁰ K Gray, 'Property in Thin Air' (1991) 50 CLJ 252 at 301.

⁴¹ S Worthington, *Equity* (2nd edn, OUP 2006) at 58-63.

⁴² OW Holmes, *The Common Law* (Little, Brown and Company 1881) at 235.

Bundle of Rights

An alternative approach, which accommodates both corporeal and incorporeal 'property', is Hohfeld's definition of property as a 'bundle of rights'.⁴³ This approach treats the concept of property as a number of specific rights, such as the rights to use, possess and control the property.⁴⁴ From the realist perspective, rights-based approaches are too detached from legal reality to be used as a reliable method for describing the legal system. Under this definition property loses any social meaning as it can only be defined in legal terms, which removes any conceptual boundary for 'property'. Therefore, as Penner points out, this definition could be equally used to describe many other areas of the law such as contract or tort.⁴⁵ In fact some commentators have gone so far as to argue that 'contract' can therefore be seen as a form of property.⁴⁶ Seipp has warned against expanding our notions of property in this way; '[t]hus expanded, the concept of property threatens to disintegrate. If it includes

⁴³ W Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale LJ 16; J Waldron, *The Right to Private Property* (Clarendon Press 1988); A Honoré, 'Ownership' in A Guest (ed), *Oxford Essays in Jurisprudence: A Collaborative Work* (OUP 1961) at 107. Not all commentators share this view of property, for example J Penner, 'The "Bundle of Rights" Picture of Property' (1996) 43 UCLA L Rev 711 and C Rotherham, *Proprietary Remedies in Context: Study in the Judicial Redistribution of Property Rights* (Hart 2002) at 54-55. The courts also sometimes refer to this definition; *Slough Estates v Slough BC (No 2)* [1968] 19 P & CR 326 (Ch) at 357.

⁴⁴ A Honoré, 'Ownership' in A Guest (ed), *Oxford Essays in Jurisprudence: A Collaborative Work* (OUP 1961) at 165-166.

⁴⁵ J Penner, 'The "Bundle of Rights" Picture of Property' (1996) 43 UCLA L Rev 711 at 739-741.

⁴⁶ D Friedmann, 'Restitution of Benefits Obtained through the Appropriation of Property or the Commission of a Wrong' (1980) 80 Columbia L Rev 504 at 513; Lord Nicholls in *Attorney General v Blake* [2001] 1 AC 268 (HL) at 283; H Carty, *An Analysis of the Economic Torts* (OUP 2001) at 68-70. These arguments are discussed in R Cunningham, 'Contract Rights as Property Rights' in A Robertson (ed), *The Law of Obligations: Connections and Boundaries* (UCL 2004).

everything, does it mean anything?’⁴⁷ When facts no longer become relevant in our classification of property, it becomes a non-realist concept.

The bundle of rights approach has sometimes been equated to a ‘realist’ approach, as for example by Dagan who argues that ‘property as a bundle of rights’ captures the essence of ‘property’ as a human construct.⁴⁸ However, Merrill and Smith have explained that the reason for the realist adoption of ‘bundle of rights’ is that it signals that ‘property’ had no fixed meaning.⁴⁹ For these realists, if property was simply a ‘bundle of rights’, it would mean that we should abandon ‘property’ altogether as a legal concept. This is only necessary if we maintain the wide version of ‘property’. The ‘bundle of rights’ analysis may be useful in analysing the *operation* of property interests, but it does not add anything to the initial step of identifying of what can and cannot fall within ‘property’. Since the bundle of rights explanation of property is not grounded in social reality, it subsequently fails to identify the factual circumstances that influence the decisions of the courts.⁵⁰ The only achievement of the bundle of rights approach to ‘property’ is to construct a version of ‘property’ which would have no place within a realist concept of private law.

Redefining the Unity of Property

⁴⁷ D Seipp, ‘The Concept of Property in the Early Common Law’ (1994) 12 Law and History Rev 29 at 30.

⁴⁸ H Dagan, ‘The Craft of Property’ (2003) 91 California L Rev 1517 at 1532-1535.

⁴⁹ T Merrill and H Smith, ‘What Happened to Property in Law and Economics?’ (2001) 111 Yale LJ 357 at 365.

⁵⁰ See J Penner’s critique of the bundle of rights approach in J Penner, ‘The “Bundle of Rights” Picture of Property’ (1996) 43 UCLA L Rev 711 at 739.

As Penner has stated, ‘we cannot ‘flexibly’ apply property to anything we choose without leading ourselves into confusion about the reasons why we have the concept in the first place, and misunderstanding its usefulness to us.’⁵¹ Certainly there are other situations which share factual characteristics with property; with regards to equitable interests and ‘intellectual property’ we are talking about assets which are identifiable, specific and transferable. But it is worth reminding ourselves that factual similarities alone should not determine whether or not we can identify a realist concept. We must search for patterns between facts and judicial outcomes. The concept of property which is presented throughout this thesis can be summarised as follows; it consists of title, and direct control of a specific and corporeal thing.

Property as Direct Control of Tangible Things

Title

By breaking down legal concepts such as property we can avoid some of the confusion which is produced by absolute legal rules. In the context of property two terms have proven difficult; ownership and possession.⁵² Ownership carries the connotations of an absolute right to a thing, which we looked at earlier.⁵³ It is also the case that lawyers often use the phrase ‘to own’ when describing a number of rights

⁵¹ J Penner, ‘The “Bundle of Rights” Picture of Property’ (1996) 43 UCLA L Rev 711 at 799.

⁵² ‘Some distinguish between ‘ownership’ and ‘possession’, though this is unsatisfactory, for, despite what a layperson might think, English law has no notion of ‘ownership’. Moreover, if it did exist, ownership would be nothing more than a right to possession.’ W Swadling, ‘Ignorance and Unjust Enrichment: the Problem of Title’ (2008) 28 OJLS 627 at 640.

⁵³ JC Tate, ‘Ownership and Possession in the Early Common Law’ (2006) 48 American Journal of Legal History 280.

including those under a contract.⁵⁴ In Harris' discussion of ownership, he indicated that possession might be a more factual term.⁵⁵ However, the phrase can be just as misleading as possession does not always require *physical* possession of the property. For this reason, we adopt 'title' instead, a reference to the connection between individual and the thing. In disputes about property, one of the main elements in proving that one person has a superior interest than another is to show title.

Economists have identified the 'first in time' approach to the allocation of title.⁵⁶ Although we are looking at title first, it is inextricably linked to control; it is not enough merely to be the first person there, it is also important to take control. From then on, the title is established. It is a very simple proposition, but the first one to take control of goods or land will find that the courts are more likely to side with him than with a person who arrives on the scene afterwards.⁵⁷ Importantly, first in time is also a *fact*; it is proved by evidence that A's title existed before B's. Thus we see that finders can gain title to land or goods; this can be defeated by those who came *before* them in time, but it will not be defeated by those who come along *afterwards*.⁵⁸ Once title is established, it can be passed along, transferred or divided. It becomes a fact which we can witness and identify in the real world. We will see throughout the thesis that title is an important element in determining private law disputes; in other situations title is also the element which creates the overlap with claims involving bank transfers and

⁵⁴ J Harris, *Property and Justice* (Clarendon Press 1996) at 79.

⁵⁵ J Harris, *Property and Justice* (Clarendon Press 1996) at 79.

⁵⁶ R Epstein, 'Possession as the Root of Title' (1979) 13 *Georgia L Rev* 1221; C Rose, 'Possession as the Origin of Property' (1985) 52 *Univ of Chicago L Rev* 73.

⁵⁷ *Armory v Delamirie* (1721) 1 *Stra* 505, 93 *ER* 664.

⁵⁸ *Costello v Chief Constable of Derbyshire* [2001] *EWCA Civ* 381; *Gough v Chief Constable of the West Midlands* [2004] *EWCA Civ* 206; *J A Pye (Oxford) Ltd v Graham* [2002] *UKHL* 30, [2003] 1 *AC* 419.

trust interests. The conceptual analysis presented here merely sees this *fact* as one of multiple facts required for this concept of property; its presence in other situations does not mean that they should also be referred to as ‘property’.

Direct Control

Title alone cannot explain property without the additional element of control. A titleholder has an interest in the thing, but if the control element is lacking then this will not fall under our concept of property. This happens quite often in practice; freeholders can rent land to a tenant, who will then gain primary control.⁵⁹ Similarly, a title holder of goods may lend them to someone else, who will also gain primary control.⁶⁰ In both cases the original title-holder retains title, but control passes and creates another title in the hands of the tenant or the lende. Control is, therefore, also required to explain who can enforce property interests at common law.⁶¹ This has proven especially important in the sale of goods, as the sale of a particular item may transfer title, but until the seller commits an act which signifies that he is also transferring control, then the buyer will lack a proprietary interest.⁶² It is also important in the context of land; the various actions which are available to protect

⁵⁹ *Ocean Estates Ltd v Norman Pinder* [1969] 2 AC 19 (PC); *Hall v Rogers* [1925] All ER Rep 145; *Jewish Maternity Society's Trustees v Garfinkle* (1926) 95 LJKB 766.

⁶⁰ *Brierly v Kendall* (1852) 17 QB 937, 117 ER 1540.

⁶¹ G Samuel, ‘Wrongful Interference with Goods’ (1982) 31 ICLQ 357 at 365-368; P Cane *Anatomy of Tort Law* at 76; C Rose, ‘Possession as the Origin of Property’ (1985) 52 Univ of Chicago L Rev 73; D Lueck, ‘The Rule of First Possession and the Design of Law’ (1995) 38 Journal of Law and Economics 393.

⁶² *Lord v Price* (1873) LR 9 Ex 54.

property at common law such as trespass to land and private nuisance, require control, which is usually demonstrated by occupation.

It is, therefore, important to note that not all title-holders will enjoy direct control over the property. If this was not the case, a defendant could find that he is liable to multiple claimants for the same act.⁶³ Wonnacott provides a convincing explanation that if this was not the case any claim for the unauthorised use of another's land could lead to the defendant being liable to the landlord, the tenant and the beneficial owner.⁶⁴ This position is reflected in the judgment of Lord Lloyd in *Hunter v Canary Wharf* '[i]t follows that the quantum of damages in private nuisance does not depend on the number of those enjoying the land in question.'⁶⁵ The requirement of control of the property, therefore, has an important role in limiting the potential liability of defendants by restricting the number of title-holders who are able to sue. It also makes it easier to avoid liability; defendants only have to concern themselves with the most identifiable individual, namely the person in control. A title without control would leave the concept of property incomplete.

The Requirement of Corporeal Things

⁶³ This was one of the main reasons for the court's decision that family members without any direct interest in the property could not sue in nuisance in *Hunter v Canary Wharf* [1997] AC 655 (HL) at 711-712.

⁶⁴ M Wonnacott, *Possession of Land* (CUP 2006) at 24.

⁶⁵ *Hunter v Canary Wharf Ltd* [1997] AC 655 at 696.

Our efforts to redefine property also takes us back to its traditional meaning; as Seipp has stated, property simply meant an interest in a thing.⁶⁶ Although medieval lawyers restricted this term to chattels, we can also adopt the wider view that it applies to land as well. Property can *only* be a useful concept if it is narrowly restricted to interests in corporeal things. Merrill and Smith have referred to this as a somewhat crude and basic definition.⁶⁷ However, the term ‘property’ only starts to lose its descriptive value when it is used to describe beneficial interests and intellectual property rights. This analysis is important for the simple reason that there is an identifiable pattern in the way that the courts treat the title-holder. As Cane points out, at common law the courts primarily use the term ‘property’ to describe interests in physical things in the form of land or chattels.⁶⁸ Interests in property are protected under the guise of a variety of actions which traditionally form part of the law of tort.⁶⁹ For our purposes, we need not do this and they can be seen as falling under our concept of property. The main essence of these actions is that the subject of the claim relates to something tangible, whether that is in the form of land or moveable things. In all of these situations we see that standing to sue also follows the pattern set out here; the first in time to control a thing has a better title than others, and intentional interferences with this interest will be protected by the courts, even against innocent defendants. For example, interests in land are protected by claims for nuisance, the rule in *Rylands v. Fletcher*,⁷⁰ trespass to land⁷¹ and also by the statutory scheme which requires land

⁶⁶ D Seipp, ‘The Concept of Property in the Early Common Law’ (1994) 12 Law and History Rev 29 at 30.

⁶⁷ T Merrill and H Smith, ‘What Happened to Property in Law and Economics’ (2001) 111 Yale LJ 357 at 358.

⁶⁸ P Cane, *Anatomy of Tort Law* (Hart 1997) at 75.

⁶⁹ P Cane, *Anatomy of Tort Law* (Hart 1997) at 75.

⁷⁰ (1866) LR 1 Ex 265; (1868) LR 3 HL 330.

⁷¹ *Bocardo SA v Star Energy UK Onshore Ltd* [2010] UKSC 35; [2011] 1 AC 380.

registration and other formalities.⁷² Chattels are also protected by the various actions for wrongful interference with goods.⁷³ It should also be recognised that, since the concept of property is multi-factual, the interest is not limited to the tangible thing itself.⁷⁴ Take, for example, a claim in nuisance for an interference with the possessor's enjoyment of the land. This can arise even where there has not been any physical interference with the property itself, such as in those cases where a neighbour causes excessive noises or pungent smells.⁷⁵ The claimant's interest is not confined to the physical interferences with the property that they possess, but it provides one of the key components in this pattern of property.

Explaining the Importance of Tangible Things

By identifying these core facts, we can begin to see *why* property is protected this way. One of the most important factors that influence the courts in their treatment of 'property' is the historical and cultural significance of tangible things. Under the feudal system, land was the main way in which status was protected under English law, and thus the courts traditionally afforded landowners a high degree of legal protection.⁷⁶ Similarly, in the time before the industrial revolution most economic assets were in the form of chattels, such as livestock or the products of skilled

⁷² Law of Property Act 1925 and the Land Registration Act 1925.

⁷³ Baroness Hale in *OBG v Allan*, [2007] UKHL 21; [2008] 1 AC 1, at 87.

⁷⁴ K Gray, 'Property in Thin Air' (1991) 50 CLJ 252-307.

⁷⁵ *Halsey v Esso Petroleum Co Ltd* [1961] 1 WLR 683 (QB).

⁷⁶ R Graveson, 'The Movement from Status to Contract' (1941) 4 MLR 261 at 263; J Lawler and G Lawler, *A Short Historical Introduction to the Law of Real Property* (Beard Books 2000) at 35.

labour.⁷⁷ This would continue even after the industrial revolution; a point made by Arnold who stated that ‘[i]n the 19th century, the wealth of nations consisted of railroads, factories and goods.’⁷⁸ The accumulation of wealth within the economy, which is an essential step in the development of capitalist economies, requires a settled concept of property. Although today money plays a much more central role in representing wealth and status, this is a relatively new development. Despite the rise of money as the primary means for accumulating wealth, money plays a particular role as the primary means of facilitating transfers. When we look at corporeal things the situation is different; even today property plays a much wider role. Witting notes that one of the notable characteristics of our culture and history is that people look to attain land and material possessions.⁷⁹ For example, when people purchase luxury automobiles they have extra value because of their non-essential features.⁸⁰ Land and material possessions can also attain significant personal value that far outweighs its economic value on the open market. This was noted by Lord Nicholls in *Attorney General v Blake*; ‘[t]he buyer of a house may be attracted by features which have little or no impact on the value of the house.’⁸¹ Tangible things still stand as important symbols of wealth and status in our society.⁸²

⁷⁷ P O’Brien, ‘British Incomes and Property in the Early Nineteenth Century’ (1959) 12 *Economic History Rev* 255.

⁷⁸ T Arnold, ‘Judge Jerome Frank’ (1957) 24 *Univ of Chicago L Rev* 633 at 637.

⁷⁹ C Witting, ‘Distinguishing Between Property Damage and Pure Economic Loss in Negligence - A Personality Thesis’ (2001) 21 *Legal Studies* 481 at 505. A similar point is made by J Gordley in *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (OUP 2006) at 61-65.

⁸⁰ B Dubois and P Duquesne, ‘The Market for Luxury Goods: Income versus Culture’ (1993) 27 *European Journal of Marketing* 35 at 42-43.

⁸¹ [2001] 1 AC 268 [HL] at 282.

⁸² This has been shown in a number of psychological studies; RW Belk, ‘Three Scales to Measure Constructs related to Materialism: Reliability, Validity, and Relationships to Measure of Happiness’ (1984) 11 *Advances in Consumer Research* 291; AN Christopher and BR Schlenker, ‘The impact of perceived material wealth and perceiver personality on first impressions’ (2000) 21 *Journal of Economic Psychology* 1; PT Vargas and S Yoon, ‘On the Psychology of Materialism: Wanting Things, Having Things, and Being Happy’ (2006) 7 *Advertising & Society Rev*, Article 5.

Measures Applied by the Courts

Once it has been shown that a defendant has interfered with the claimant's direct control of the property, the measures applied by the courts are quite predictable, depending upon the nature of the interference. Where the defendant has interfered in this relationship it will be open to the claimant to claim for actual losses or alternatively the market value for the use of the property. There is little difficulty with the first measure, as the court will make an award based on the cost of repairs or replacing the damaged property.⁸³ It also permits the claimant to pursue a claim based on the subsequent rise in value of an asset, as in the Court of Appeal decision in *IBL v Coussens*.⁸⁴ The second measure allows the court to put an objective valuation on a defendant's unauthorised use of the property.⁸⁵ Generally, these are regarded as 'strict' liability claims, which are particular to the concept of property. Apart from interests in our physical integrity, no other interest receives the same level of protection from the courts. From a realist perspective, this narrower version of property is indeed a useful concept.

Why Property is distinct from Equitable Interests

⁸³ *Bryant v Macklin* [2005] EWCA Civ 762.

⁸⁴ [1991] 2 All ER 133 (CA).

⁸⁵ Once again the same measure applies to both land and chattels; *Penarth Dock Engineering Co v Pounds* [1963] 1 Lloyd's Rep 359 (QB); *Strand Electric and Engineering Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246 (CA); *Sinclair v Gavaghan* [2007] EWHC 2256 (Ch).

The narrow version of property presented here excludes beneficial titles.⁸⁶ This can be summarised for two reasons; firstly, the factual make-up of beneficial titles is different from what we see in this property concept, and secondly the interests are treated differently by the courts. However, the distinction between the common law conception of property and the equitable principle of beneficial ownership is often overlooked by judges and academics.⁸⁷ If we compare the narrow use of property at common law, we can see that equitable ‘property’ is a much more flexible and expansive concept. Firstly, an equitable ‘property’ interest can attach to corporeal as well as incorporeal things. Worthington has traced the development of wider notions of ‘property’ in equity when compared with its use at common law, noting that in equity different types of assets are recognised as ‘property.’⁸⁸ So for example one can set up a trust for tangible property,⁸⁹ intellectual property⁹⁰ and even contractual rights to sue for performance.⁹¹ Secondly, in trust arrangements the beneficial title holder and the person in control of the asset are separate persons. In fact, where one has an immediate right to possess and control the property this will usually indicate that there is no equitable ‘property’ interest.⁹² Notably, when compared to the version of

⁸⁶ The courts certainly do recognise this distinction. For example, in a reference by the Court of Appeal to the European Court of Justice, it was concluded in Case C-294/92 *Webb v Webb* [1994] QB 696 that a beneficial interest in realty only constituted a personal rather than a proprietary right under Article 16(1) of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968 [1972] OJ L299/32.

⁸⁷ Take for example the speeches of Lord Steyn and Lord Millett in *Foskett v McKeown* [2000] 3 All ER 97 (HL) at 105 and 120 respectively. Also P Birks, ‘The Necessity of a Unitary Law of Tracing’ in R Cranston (ed), *Making Commercial Law: Essays in Honour of Roy Goode* (Clarendon Press 1997) 239–58.

⁸⁸ S Worthington, *Equity* (2nd edn, OUP 2006) at 58-63.

⁸⁹ *Lloyds Bank plc v Rosset* [1991] 1 AC 107 (HL).

⁹⁰ *John Richardson Computers v Flanders (No 2)* [1993] FSR 497 (Ch).

⁹¹ *Don King Productions v Warren* [2000] Ch 291 (CA).

⁹² For example in the House of Lords decision in *Vandervell v IRC* [1967] 2 AC 291 (HL) it was decided that a beneficial interest would cease to exist when the beneficiary was also in possession of the legal title, at 311 and 317-318. Also, Lord Brown-Wilkinson in *Westdeutsche v Islington BC* [1996] AC 669 (HL) stated, ‘A person solely entitled to the full beneficial ownership of money or property,

property which has been developed here, the separation of the control and the benefit of an asset inevitably carries an added degree of risk. As Sitkoff points out, the absence of such control creates a risk which is more generally known (at least to company lawyers)⁹³ as an ‘agency cost’: when someone else is given responsibility to do something for you, it is possible that they will fail to do it in accordance with their instructions, or might deliberately breach their duties.⁹⁴ This lack of control makes it less justifiable to impose strict standards on third parties, as we have already noted that this is important in the operation of claims in our core concept of property.

These distinctions are legally significant; this explains why the title of the beneficiary can be defeated by the bona fide purchaser for value without notice.⁹⁵ It also explains why this defence is usually not available for property interests.⁹⁶ What we see in the comparison between common law property and the wider concept of ‘property’ at equity is that tangibility and direct control both provide a clear demarcation between the two concepts. It makes little sense to use the same term to define both areas of private law; property can have no descriptive utility as a legal concept if we have to include equitable version of ‘property’. As noted throughout this section, we need not set up a complete divide between these concepts; an overlapping analysis still permits us to draw similarities, especially when the facts are the same. An example is where a

both at law and in equity, does not enjoy an equitable interest in that property. The legal title carries with it all rights’ (at 706).

⁹³ Eg M Jensen and WH Meckling, ‘Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure’ (1976) 3 *Journal of Financial Economics* 305.

⁹⁴ RH Sitkoff, ‘An Agency Costs Theory of Trust Law’ (2004) 89 *Cornell L Rev* 621.

⁹⁵ *Taylor v Blakelock* (1886) LR 32 ChD 560 (CA).

⁹⁶ P Matthews, ‘The Legal and Moral Limits of Common Law Tracing’ in P Birks (ed), *Laundering and Tracing* (OUP 1995); *Fowler v Hollins* [1872] LR 7 QB 616; *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1 at 952.

beneficiary has title *and* control.⁹⁷ In those cases, the interest will indeed be a proprietary one. Without control, that cannot be the case.

Intellectual Property

It is useful to note that the common law does not offer any direct protection for ‘intellectual property’ rights. The issue has been traced by Deazley, who has referred to the ‘myth’ of copyright at common law.⁹⁸ Although there are a number of common law claims where the courts protected these types of interests, there was no comprehensive or purposeful attempt to develop rules to serve this purpose. The closest we see is the tort of passing off.⁹⁹ However, as some commentators have noted; ‘all that the common law protects through its passing off action is the goodwill between a trader and his customers which the mark helps to sustain; there is no property in a name as such.’¹⁰⁰ The tort of passing off was no more a property interest than the interest in one’s reputation.¹⁰¹

In the absence of any comprehensive regime for protecting ‘intellectual property’, the legal protection afforded to the owners of ‘intellectual property rights’ has been

⁹⁷ *Leigh & Sullivan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] AC 785 (HL) Lord Brandon at 812.

⁹⁸ R Deazley, ‘The Myth of Copyright at Common Law’ (2003) 62 CLJ 106.

⁹⁹ For example, the common law action of passing off is often regarded as an early example of intellectual property law. This is the view of J Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (Hart 2002) at 219.

¹⁰⁰ WR Cornish and D Llewellyn, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (5th edn, Sweet & Maxwell 2003) at 593-594.

¹⁰¹ Probably the best example of this is the House of Lords decision in *Erven Warnink BV v J Townend & Sons (Hull) Ltd (No 1)* [1979] AC 731 (HL) at 755.

developed primarily within a statutory framework.¹⁰² There are indeed similarities in the responses given to these interests with our core concept of property. For example, as with common law property rights, the owners of ‘intellectual property rights’ have a claim against unauthorised uses of their ‘property’, even against those who are unaware that they are interfering with the owner’s interest.¹⁰³ Also, the measure of damages for unauthorised use of another’s ‘intellectual property’ right is in most circumstances the market value that the defendant would have reasonably been expected to pay for the right to use the protected asset.¹⁰⁴

Nonetheless, the absence of a tangible thing is relevant from a realist perspective. By limiting the common law property actions to corporeal things, the subject matter is also restricted to things which, by their very nature, are limited resources.¹⁰⁵ The subject matter of ‘intellectual property’ rights on the other hand, constitute pieces of work that can easily be reproduced.¹⁰⁶ In the past, the legislative provisions sometimes failed to recognise this; as in the measurement of damages for breach of copyright, which were assessed on the full economic value of the property. This was heavily criticised by the House of Lords in *British Leyland Ltd. v Armstrong Ltd.*¹⁰⁷ In such cases the claimant has not been deprived of the asset itself and there is therefore

¹⁰² S Masterson, ‘Copyright History and Development’ (1940) 28 California L Rev 620; P Cane P Cane, *The Anatomy of Tort Law* (Hart 1997) at 76-77.

¹⁰³ Copyright, Designs and Patents Act 1988 and 233.

¹⁰⁴ *Ludlow Music Inc v Williams (No 2)* [2002] EWHC 638 (Ch), [2002] EMLR 29.

¹⁰⁵ F Cohen, ‘Transcendental Nonsense and the Functional Approach’ (1935) 35 Columbia L Rev 809 at 815.

¹⁰⁶ S Picciotto and D Campbell, ‘Whose Molecule Is It Anyway? Private and Social Perspectives on Intellectual Property’ in A Hudson (ed), *New Perspectives on Property Law, Obligations and Restitution* (Cavendish 2004) at 280-282; R Posner, ‘Intellectual Property: The Law and Economics Approach’ (2005) 19 Journal of Economic Perspectives 57 at 62-64.

¹⁰⁷ [1986] AC 577 [HL]. Lord Bridge stated that; ‘Thus, to award conversion damages for infringing industrial copies of a protected industrial design is irrationally generous to the designer and punitive of the infringer’ at 623. Also D Bainbridge, *Intellectual Property* (6th edn, Longman 2006) at 164.

less justification for imposing liability for the full value of the economic asset.¹⁰⁸ Furthermore, this provided the copyright owner with a financial reward that was disproportionate to his production costs.¹⁰⁹ This was recognised by Parliament soon after the *British Leyland* case when it introduced the Copyrights, Designs and Patents Act 1988.¹¹⁰ Under this Act, it is no longer possible to claim for the full value of these interests, even when they have been copied or used by a defendant. It is important to recognise that ‘intellectual property’ is distinct from property.¹¹¹ A final and very important distinction lies in the fact that it is only the title holder who is protected in these cases. So a licensee, even when given an exclusive license, cannot sue others for making use of copyrighted recordings; only the title holder can.¹¹² Again, the distinction need not be absolute, but at the same time there are clear differences between these types of interests. As Cohen noted, simply calling these interests ‘property’ cannot hide what in reality is a very different situation.¹¹³

Conclusion on the Concept of Property

¹⁰⁸ Even in the common law a claim for the unauthorised use of property will be measured by the objective market value where the defendant has not damaged or permanently deprived the claimant of the property; *MOD v Ashman* [1993] 25 HLR 513 (CA).

¹⁰⁹ *British Leyland Ltd v Armstrong Ltd* [1986] AC 577 [HL] at 623. E Hettinger, ‘Justifying Intellectual Property’ (1989) 18 *Philosophy and Public Affairs* 31; S Breyer, ‘The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs’ (1970) 84 *Harvard L Rev* 281; W Landes and R Posner, ‘An Economic Analysis of Copyright Law’ (1989) 18 *Journal of Legal Studies* 325; also Baroness Hale in *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1 at 997. (87?)

¹¹⁰ Section 31(2).

¹¹¹ An alternative term that has been suggested by M Boldrin and D Levine, is intellectual monopoly in ‘The Case against Intellectual Property’ (2002) 92 *American Economic Review* 209; also by the same authors ‘Against Intellectual Monopoly’.

<<http://www.dklevine.com/general/intellectual/againstfinal.htm>> accessed 18 January 2011.

¹¹² *RCA Corporation v Pollard* [1983] Ch 135 (CA), approved of by Lord Hoffmann in *OBG v Allan* [2007] UKHL 21, [2008] 1 AC 1 at 33.

¹¹³ F Cohen, ‘Transcendental Nonsense and the Functional Approach’ (1935) 35 *Columbia L Rev* 809 at 815.

Once we recognise the multi-functionality of property we can see that the requirements of title, control and a 'thing' provide the courts with a unifying concept that helps to identify the various functions of property law. These facts are not exclusive to the concept of property, and indeed the same issues that influence the courts' decisions in property may be relevant in other situations. The proposition is that we need not apply the same language to refer to these similar situations; we can recognise that these areas are overlaps. It has been contended that the disintegration of property is a result of the expansive use of the phrase 'property'. No useful definition of property can be achieved if we try to incorporate all of the cases where the courts have referred to 'property rights'. A narrower concept is required, and it is argued here that property requires the presence of corporeal things, control and title. Once property is redefined as a narrower, more realistic concept, it becomes a valuable and essential expositive device in our understanding of private law. The leftovers can be explained using an overlapping analysis, and we do not need to stretch the concept of property to explain these situations. In the next chapter we explain the interaction of money and property, and in the final chapter we explain the trust mechanism, both of which are overlaps of property. Thus, a narrower approach does not at all require us to reject situations which fall outside our core concept.

3. Contract

Unlike ‘property’, English contract law is more narrowly defined.¹¹⁴ In fact, it may appear that we are attempting to *expand* the law of contract as it is argued that the ‘intention to create legal relations’ requirement is unhelpful and artificial. At the same time, we narrow our definition by removing unilateral contracts and deeds. Our definition of ‘contract’ refers to an agreement between two parties that requires an exchange of something of economic value.¹¹⁵ Although ‘agreement’ and ‘exchange’ are legal definitions of facts, they can still be defined outside the science of law.¹¹⁶ Just as with our concept of property, we are dealing with an area of private law that covers a wide range of activities. As a result of this, it is worth keeping in mind that the factors involved in the concept of contract are not normative conditions, but they do help to reveal the patterns of contract.

The Unity of ‘Contract’

There are a number of special types of contract each with their own specific rules and principles, which might suggest that the concept of contract is too wide to be of any practical use. This was one of the arguments presented by Atiyah in his critique of modern contract.¹¹⁷ Contracts of employment, consumer purchases, shareholder rights and marriages are now regulated by their own particular sets of rules and statutory regulations. It has subsequently made much more sense to place these contracts within

¹¹⁴ This was noted by Lord Goff in *White v Jones* [1995] 2 AC 207 [HL], where he discussed the ‘narrow’ version of contract in English private law.

¹¹⁵ J Penner, ‘Voluntary Obligations and the Scope of the Law of Contract’ (1996) 2 *Legal Theory* 325 at 327-330 at 740.

¹¹⁶ G Samuel, *Law of Obligations and Legal Remedies* (2nd edn, Cavendish 2001) at 285-286.

¹¹⁷ P Atiyah, ‘Contracts, Promises, and the Law of Obligations’ in P Atiyah, *Essays on Contract* (OUP 1990) at 10.

contextual subjects such as employment law, consumer law and company law.¹¹⁸ Special approaches apply in these situations, which are not applicable in general. For example, unfair contract terms are unenforceable in consumer contracts, regardless of whether they have clearly been agreed under the terms of the contract.¹¹⁹ We also see special rules on terminating contracts and the content of each party's rights in the employment context.¹²⁰ From the realist perspective, we cannot ignore the fact that the remedies available may differ considerably depending on the context of the situation. In company law the relationship between the shareholders and the company is said to be contractual;¹²¹ however, it is debateable whether the rights of the shareholder can be regarded as contractual.¹²² As noted in one of the leading company law textbooks, 'there is a conflict here between proper recognition of the contractual nature of the company's constitution and the traditional policy of non-interference by the courts in internal affairs of companies.'¹²³ Therefore, it appears that we cannot have any conceptual unity for all of these specialist areas; different facts are present, which result in different approaches by the courts.

¹¹⁸ R Stone, *The Modern Law of Contract* (9th edn Cavendish 2011) at 16.

¹¹⁹ Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159; Unfair Contract Terms Act 1977, sections 12 and 13.

¹²⁰ For example, Employment Rights Act 1996 section 86 (on wrongful dismissal) and section 98 (4) (on unfair dismissal); *Malik v BCCI* [1998] AC 20 (HL) and *Johnstone v Bloomsbury Health Authority* [1991] 2 All ER 293 (CA) (on implied terms in employment contracts).

¹²¹ *Rayfield v Hands* [1960] Ch 1 (Ch); also Law Commission, *Shareholders Remedies* (Law Com No 246, 1997) at [2.9].

¹²² James LJ in *MacDougall v Gardiner* (1875) LR 1 Ch D 13 (CA); 'I cannot conceive that there is any equity on the part of a shareholder, on behalf of himself and the minority, to say, 'True it is that the majority have a right to determine everything connected with the management of the company, but then we have a right - and every individual has a right - to have a meeting held in strict form in accordance with the articles' at 23.

¹²³ P Davies, *Gower and Davies: The Principles of Modern Company Law* (8th edn Sweet & Maxwell 2008) at 72.

The development of special rules in certain contexts appears to undermine the value of any general law of contract. Nevertheless, what we see in these contextual areas is an overlap between common law and statute. Therefore, the basic elements of these special contractual relationships are still dependent on the recognition of an exchange and agreement. These statutory provisions alter the patterns of judicial responses by identifying additional facts; but the core factual elements remain.¹²⁴ The overlap arises because of the presence of contractual elements *and* the factual context, which brings into play the specific rules enacted by legislation. For situations where the legislation is silent, it is still important to be aware of the general law of contract in predicting how the court will deal with the situation. Therefore, despite the development of contextual ‘contracts’, they do not undermine the need to identify a basic concept of contract. We can proceed on the basis that we are not looking to incorporate the similar but distinct forms of contract which fall within these statutory regimes.

Promises and Contract

In achieving an objective and fact-based approach to contract formation, it is necessary to reject some of the elements of classic contract doctrine. Firstly, the ‘will theory’ places central importance on the intentions of the contracting parties. As Smith notes, ‘[t]he traditional and still orthodox view of the nature of contractual

¹²⁴ For example, Lord Diplock’s discussion of the interaction of the rules in the Sale of Goods Act 1893 and the rules which have been developed by the courts; *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441 (HL) at 501-502.

obligations is that they are self-imposed *promissory* obligations.’¹²⁵ An example is provided by Fried who argued that contracts are enforceable as they constitute promises, which in turn are morally binding.¹²⁶ This raises the question as to what is the moral content of promising. The most obvious justification for the binding force of promises is the fact that they are likely to be relied upon by the promisee.¹²⁷ However, in contract, it is not necessary for the promisee to base his claim upon his reliance on the promise and, moreover, reliance on its own will not be sufficient to establish a contract between the parties.¹²⁸ Another, more significant issue with promising is that not all promises are enforced in the law of contract.¹²⁹

What is enforced in the law of contract is an ‘agreement’; a correlation between the expressed desires of both parties. The differences between a promise and an agreement may at first appear slight.¹³⁰ According to Penner an agreement identifies the need to establish a common ground, whereas a promise identifies unilateral

¹²⁵ S Smith, *Contract Theory* (OUP 2004) at 56.

¹²⁶ C Fried, *Contract As Promise: A Theory of Contractual Obligation* (Harvard University Press 1981).

¹²⁷ M Cohen, ‘The Basis of Contract’ (1933) 46 *Harvard L Rev* 553 at 591. P Atiyah, ‘Contracts, Promises, and the Law of Obligations’ in P Atiyah, *Essays on Contract* (OUP 1990). This was also one of the explanations for the award of expectation damages given by Fuller and Perdue in their seminal article, ‘The Reliance Interest in Contract Damages’ (1936) 46 *Yale LJ* 52. Also K Llewellyn in ‘What Price Contract? An Essay in Perspective’ (1931) 40 *Yale LJ* 704 at 709.

¹²⁸ *Centrovincial Estates PLC v Merchant Investors Assurance Co Ltd* [1983] *Com LR* 158 (CA); P Atiyah, ‘The Hannah Blumenthal and Classical Contract Law’ (1986) 102 *LQR* 363 at 368-369. This does not mean that reliance does not influence the behaviour of the courts, as it is an essential requirement in the various forms of estoppel that we will look at in Chapter 5. However, the measure of expectation damages that the courts award for breach of contract will not be available simply because there has been reliance: *Combe v Combe* [1951] 2 *KB* 215 (CA).

¹²⁹ *White v Bluett* (1853) 23 *LJ Ex* 36; *Pitts v Jones* [2007] *EWCA Civ* 1301, [2008] *QB* 706. Also, R Craswell, ‘Contract Law, Default Rules, and the Philosophy of Promising’ (1989) 88 *Michigan L Rev* 489.

¹³⁰ Accordingly Smith sees little distinction between the two, S Smith, *Contract Theory* (OUP 2004) at 56-57.

intent.¹³¹ Agreement is, therefore, important as it explains why not all promises are enforced, as not all promises are reciprocated. It is also difficult to see how the promissory theory can be relevant in cases where there is an immediate transfer of services, goods or money. For example, in some cases agreement is evidenced by an immediate exchange.¹³² As Penner also points out, it is difficult to apply the word promise to explain this situation, as promise ‘creates a future, or executory obligation’.¹³³ This formed one of Atiyah’s criticisms of traditional contract theory, as it ignores the prevalence of non-executory contracts.¹³⁴

Reliance and Contract

Reliance theories seek to explain the enforceability of agreements. As Smith points out, few reliance theories attempt to explain *all* of the law of contract.¹³⁵ Atiyah, for example, separated cases into reliance-based and benefit-based claims. The origins of this reliance approach can be traced back to the legal realist movement. Llewellyn, for example, identified reliance as the initial justification for official intervention in private disputes.¹³⁶ Indeed, according to Milsom, reliance provided the original basis

¹³¹ J Penner, ‘Voluntary Obligations and the Scope of the Law of Contract’ (1996) 2 Legal Theory 325 at 327-330.

¹³² OW Holmes, *The Common Law* (Little, Brown & Co 1881) at 304.

¹³³ J Penner, ‘Voluntary Obligations and the Scope of the Law of Contract’ (1996) 2 Legal Theory 325 at 330.

¹³⁴ P Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press 1979) at 430.

¹³⁵ S Smith, *Contract Theory* (OUP 2004) at 78.

¹³⁶ K Llewellyn, ‘What Price Contract?: An Essay in Perspective’ (1931) 40 Yale LJ 704 at 709.

for *assumpsit*, which in turn provided the springboard for our modern law of contract and tort.¹³⁷

It was the work of one of Llewellyn's fellow realists, which would have a profound impact on US private law through the incorporation of reliance-based liability in the American Restatement of the Law of Contract.¹³⁸ Corbin's work was very much in the realist mould; he pointed out to the compilers of the Restatement that many promises were enforced even in the absence of consideration. Corbin's response was to establish a secondary mechanism for the recognition of contracts, which was available when the defendant could reasonably expect a promise to induce the promisee to act upon to his or her detriment. It is, however, important to note that Corbin saw reliance as an alternative form of consideration.¹³⁹ The resulting provisions in the American Restatement do distinguish consideration and reliance, but treat them both as types of contract. What this means is that a contract can be valid even without reliance. This is why reliance-based approaches do not provide a complete account of contract law.

Secondly, it is generally accepted that a reliance-based approach does not protect one's full expectations. Despite the description of the reliance-based claim as a contractual one, section 90 of the Second Restatement provides a flexible remedy in cases of reliance. Therefore, reliance based and bargain based 'contracts' are treated differently by the courts. For this reason we separate reliance from contract. However, we also recognise that in many cases an overlap with contract may exist where the

¹³⁷ SFC Milsom, *Historical Foundations of the Common Law* (2nd edn, Butterworths 1981) 338, 353:

'That reliance in a general sense was the original basis of *assumpsit* is almost certain.'

¹³⁸ G Gilmore, *The Death of Contract* (Ohio State Univ Press 1974) at 61-65.

¹³⁹ D Epstein, M Arbuckle and K Flanagan, 'Contract Law's Two "P.E.'s": Promissory Estoppel and the Parol Evidence Rule' (2010) 62 *Baylor L Rev* 397 at 406-407.

claimant relies on an agreement made with the defendant. The overlapping analysis allows us to recognise the co-existence of contract and reliance-based claims, which avoids the problem of having two very distinct forms of ‘contract.’ If we regard legal concepts as multi-factual (e.g. contract involves more than one factual event), there is no reason why one or more of these factual elements cannot be recreated in other contexts.

An Agreement between the Parties

In this section, we adopt a less technical approach to contract. This includes the rejection of the ‘intention to create legal relations’ as it is argued that it is an unhelpful term. As noted at the start, Llewellyn stated that ‘the eternal quest recurs for wider synthesis- but one which will really stand up in issue.’¹⁴⁰ We are, therefore, only adopting *narrower* concepts when it assists in predictability. If a high level of generality can be achieved which aids in predicting judicial behaviour it can be adopted. At the same time, some situations fall outside of our core concept of contract; those are unilateral contracts and deeds.

Defining Agreement

When trying to establish whether there is an agreement between private parties, a frequent problem for the courts is that both parties might have completely different

¹⁴⁰ K Llewellyn, ‘Some Realism about Realism’ in K Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Univ of Chicago Press 1962) at [c] on 56.

perceptions about what has been agreed.¹⁴¹ According to Cohen, in many cases, '[I]tigation usually reveals the absence of genuine agreement between the parties ab initio.'¹⁴² Indeed, when considering the nature of the contract, the courts look past the subjective intentions of *both* parties. Thus the courts have developed an objective approach when identifying the agreement between the parties.¹⁴³ This focuses upon the external manifestation of the agreement, for example if there is a written agreement then it will be the written terms that are enforced by the court.¹⁴⁴ This will be so, even where there is evidence that the written terms do not correspond to the actual intentions of the parties.¹⁴⁵

We need to take a realistic view of agreement, which is what Holmes and Llewellyn adopted in their analysis of contract.¹⁴⁶ For Holmes, an agreement was premised 'not on the parties having meant the same thing but on their having said the same thing.'¹⁴⁷ In more recent times, Howarth has also adopted a detached and objective approach to agreement.¹⁴⁸ The content of the agreement will largely depend on what has been expressed by the parties, but it does not *necessarily* represent the promises or intentions of the parties. This is not without controversy.¹⁴⁹ However, the criticisms of

¹⁴¹ A classic example is *Felthouse v Bindley* (1862) 11 CB NS 869, 142 ER 1037.

¹⁴² M Cohen, 'The Basis of Contract' (1933) 46 Harvard L Rev 553 at 577.

¹⁴³ Eg *Investors Compensation Scheme LTD v West Bromwich Building Society* [1998] 1 WLR 896 (HL). According to Lord Hoffmann, '[t]he law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent' (at 913).

¹⁴⁴ *L'Estrange v Graucob Ltd* [1934] 2 KB 394 (CA).

¹⁴⁵ Lord Steyn in *Deutsche Genossenschaftsbank v Burnhope* [1995] 1 WLR 1580 (HL); 'The methodology is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. Intention is determined to expressed rather than actual intention' (at 1587). A similar statement was made by Blackburn J in *Smith v Hughes* (1871) LR 6 QB 597, at 607.

¹⁴⁶ E Zamir, 'The Inverted Hierarchy of Contract Interpretation and Supplementation' (1997) 97 Columbia L Rev 1710 at 1713.

¹⁴⁷ OW Holmes, *Collected Papers* (Harcourt, Brace and Co 1920) at 178.

¹⁴⁸ W Howarth, 'The Meaning of Objectivity in Contract' (1984) 100 LQR 265.

¹⁴⁹ J Vorster, 'A Comment on the Meaning of Objectivity in Contract' (1987) 104 LQR 274.

the objective approach are based on the misconception that it makes the parties' intentions irrelevant. The parties are free to treat the contract however they wish; it is simply the case that when the issue reaches the court, the court is faced with the prospect of having to 'pick a side.' The courts avoid this by focusing on what is observable in the dealings between the parties.

Although offer and acceptance are helpful indicators that an agreement has been reached, we need to avoid an overly technical and narrow definition of these facts. In many cases, the search for separate instances of 'offer and acceptance' is futile and misleading.¹⁵⁰ Cohen gave the example of '[a] citizen going to work boards a street car and drops a coin in the conductor's or motorman's box,' and pointed out that, although this would be regarded as a contract, there was no apparent offer or acceptance.¹⁵¹ Although Cohen argued that there was no 'agreement' here, it needs to be pointed out that his formulation of agreement was narrower than the one adopted here. In Cohen's example, there is a single instance where the external observer would conclude that an agreement has been reached, which is when the 'citizen' drops his coin in the box. The lack of a wider version of agreement, which looks at the context of the situation, was attributed by Llewellyn to the almost inevitable formalisation of contract formation.¹⁵² The formalisation of contracts is precisely what happened in the development of the covenant, which initially began as a flexible method of enforcing agreements, before the courts introduced the requirement that the

¹⁵⁰ J Steyn, 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 LQR 433 at 435, referred to cases where negotiations for building work are not finalised but '[i]n the meantime the work starts. Payments are made. Often it is a fiction to identify an offer and acceptance' (at 435).

¹⁵¹ M Cohen, 'The Basis of Contract' (1933) 46 Harvard L Rev 553 at 568-569. See also Lord Wilberforce in *New Zealand Shipping Co v Satterthwaite (The Eurymedon)* [1975] AC 154 (PC).

¹⁵² K Llewellyn, 'What Price Contract?: An Essay in Perspective' (1931) 40 YLJ 704 at 710.

agreement was made under seal.¹⁵³ According to Llewellyn there is a tendency to look for a single form which represents formation; whether that is by seal, the shaking of hands, or, as in the experience of English private law, an offer and acceptance.¹⁵⁴ As Cohen's example shows, agreement need not be defined in this way if it is to account for most contract situations.

Situations which are not Agreements

The identification of agreement can only make sense if we recognise that it does not apply to all cases which are described as 'contract.' A unilateral 'contract' is one where the 'offeror' expresses that he or she will do something, on the condition that the 'offeree' performs a requested act. The most well known example is the 'unilateral contract' in *Carlill v Carbolic Smoke Co*, where the defendants issued an advertisement offering to pay £100 to anyone who contracted influenza after using their product.¹⁵⁵ In cases such as *Carlill*, a binding 'contract' can only arise after the 'offeree' has carried out the performance set out in the 'offer'. Since it is not a binding contract before that moment, the legal consequences of finding a contract do not apply to this situation, and it makes little sense to refer to it as a 'contract' at all. This was the view of Llewellyn, who thought that the predictable patterns of contract could only be achieved by rejecting unilateral contracts.¹⁵⁶ Instead they should be

¹⁵³ D Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP 1999) at 21-25.

¹⁵⁴ K Llewellyn 'What Price Contract? An Essay in Perspective' (1931) 40 Yale LJ 704 at 711-712.

¹⁵⁵ [1893] 1 QB 256 (CA).

¹⁵⁶ K Llewellyn, 'On Our Case-Law of Contract: Offer and Acceptance I' (1938) 48 Yale LJ 1.

placed ‘in the freak-tent as an interesting and often instructive curiosity.’¹⁵⁷ That said, it would appear that a unilateral contract has some binding effect where partial performance has begun, as stated by Waller LJ in *Schweppe v Harper* ‘[w]here there is an offer to pay for the performance of a certain task, part performance can produce a contract under which that offer cannot be withdrawn.’¹⁵⁸ Even so, it still supports the proposition made by Llewellyn that we should distinguish ‘unilateral’ and normal contracts, as up until partial performance no contract will be found. Therefore, it is not a contract at all; this would instead fit within our reliance-based approach which we set out in Chapter 6.

Agreement and Contractual Terms

The nature of the agreement determines the extent to which the court can flesh out the contractual obligations of the parties. However, Collins has criticised the objective interpretation approach as it conceals ‘a hidden premiss which sets standards of fair play’.¹⁵⁹ For example, where the courts have sought to protect vulnerable and weaker parties, the court has reasoned that the party who was seeking to escape onerous terms did not really agree to them.¹⁶⁰ This approach is not just used by the courts to exclude unfair contractual terms, as terms are often implied under the basis that the courts are

¹⁵⁷ K Llewellyn, ‘On Our Case-Law of Contract: Offer and Acceptance I’ (1938) 48 Yale LJ 1 at 36.

¹⁵⁸ [2008] EWCA Civ 442 at [46].

¹⁵⁹ H Collins, *The Law of Contract* (Weidenfeld and Nicolson 1986) at 92.

¹⁶⁰ *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163 (CA); *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433 (CA). In *National Westminster Bank Plc v Morgan* [1985] AC 686 (HL), Lord Scarman rejected any general doctrine against inequality of bargaining power. In his view a disadvantageous contractual term merely indicated that the parties had not freely negotiated the contract, at 703-707. The courts will also consider that a contract has come to an end if an unforeseen event occurs that makes performance impossible for one of the parties; *Krell v Henry* [1903] 2 KB 740 (CA). This is still framed within the concept of the agreement itself; if the event is addressed in the contract then the impossibility of performance will not bring the contract to an end; *Atisa SA v Aztec AG* [1983] 2 Lloyd's Rep 579 (QB).

fleshing out the actual agreement between the parties.¹⁶¹ So, in some circumstances, the courts will imply certain terms that are necessary for business efficacy if the term is necessary to make the contract work.¹⁶² In other situations the courts will imply terms of quality or that require the promisor to behave in a certain way.¹⁶³

Nonetheless, even in these situations, the courts will still act within the conceptual boundaries of the parties' agreement. It is through this external manifestation of the agreement that the court imposes certain standards that are aimed at protecting weaker parties and satisfying the reasonable expectations of both parties.¹⁶⁴ The courts will rarely imply a term where the agreement expressly excludes this, *unless* there are any statutory provisions which require such a term to be incorporated.¹⁶⁵ It is sensible to conclude that the agreement between the parties is never conclusive in determining the nature of the terms which the courts will incorporate within the contract. Nevertheless, there is a correlation between the nature of the agreement and the extent to which the court can add terms. In general, the clearer the agreement, the less likely it is that the court will add anything to the terms of the contract. Agreement is, therefore, not just an example of an empirically observable fact, but also plays a role in determining the boundaries of the concept of contract.

¹⁶¹ For example, Lord Millett, in *Agnew v Länsförsäkringsbolagens AB* [2001] 1 AC 223 (HL); 'If the parties voluntarily enter into a contract, they seldom express all the contractual terms in the contract. It is often necessary for the law to imply terms into the contract' (at 264). The common law approach is quite distinct from that in the Unfair Contract Terms Act 1977, as the Act does not operate within the conceptual framework of the parties' agreement. The Act is primarily concerned with the substantive fairness of the terms that have been incorporated into the agreement; S Smith, *Contract Theory* (OUP 2004) at 153.

¹⁶² *The Moorcock* (1889) LR 14 PD 64 (CA).

¹⁶³ *Mody v Gregson* (1868-69) 4 LR 4 Ex 49; *Liverpool City Council v Irwin* [1977] AC 239 (HL).

¹⁶⁴ *J Spurling Ltd v Bradshaw* [1956] 1 WLR 461 (CA).

¹⁶⁵ *Scottish Special Housing Association v Wimpey Construction UK Ltd* [1986] 1 WLR 995 (HL). Since the protection afforded by statute is not framed within this concept of 'agreement', unfair terms can be void regardless of whether the parties had clearly assented to them.

The Requirement of Bargain

To complete the conceptual framework of contract, an agreement must also be accompanied by an exchange between the parties. Corbin took the view that consideration was an unhelpful term, and that greater certainty would be achieved by adopting the phrase 'bargain'.¹⁶⁶ Like agreement, this is a fact which is required for there to be a contract. The requirement of consideration has sometimes been defined as the requirement that consideration must move from the promisee; in essence this prevented third parties from enforcing the contract. For example, in *Tweddle v Atkinson*, the claimant was trying to enforce a promise between his father and father-in-law.¹⁶⁷ Although the agreement was for his benefit, the claim failed as he had not provided consideration. In *Williams v Roffey Bros*,¹⁶⁸ the Court of Appeal confirmed that the implication of this rule is simply that the claimant cannot be a third party to the contract, a rule which has been slightly modified by statute. There are additional rules, such as the requirement that consideration must be something which is of ascertainable value in the eye of the law and that past consideration is not good consideration. In essence, they are mechanisms for identifying bargains.

Atiyah argued that consideration was a mechanism for deciding whether there was a good reason for enforcing a promise.¹⁶⁹ Smith also takes the view that the requirement of exchange has an important role as a formality requirement that provides evidence

¹⁶⁶ D Klau, 'What Price Certainty - Corbin, Williston, and the Restatement of Contracts' (1990) 70 Boston Univ L Rev 511 at 533-534.

¹⁶⁷ (1861) 1 B & S 393, 121 ER 762.

¹⁶⁸ [1991] 1 QB 1 (CA).

¹⁶⁹ P Atiyah, *Essays on Contract* (OUP 1990) at 182.

of the agreement between the parties.¹⁷⁰ In this role, the doctrine of consideration eliminates the need for other formality requirements such as evidence in writing, which would slow down the process of sales and purchases.¹⁷¹ However, as Smith points out, this cannot be the only role of consideration as contract law in civil legal systems manages to operate without this requirement.¹⁷² In response, it can be pointed out that consideration also performs the channelling and cautionary functions identified by Fuller.¹⁷³ The cautionary function ‘raises clear concerns about whether the promisor reflected carefully on his promise.’¹⁷⁴ The channelling function harmonises the form of enforceable contracts, reducing uncertainty and also reducing the need for litigation. Too much litigation would be a waste of time and resources, and therefore the requirement of exchange addresses the wider issue of facilitating the ease of transactions. From a practical point of view, it makes sense to have a flexible method of identifying which agreements can be enforced.

In addition, economic analysts have emphasised that enforcing exchanges provides an ‘economic’ function, which is to encourage people to engage in the market place.¹⁷⁵ To maximise wealth, it is essential that economic gains are actively pursued by claimants through bargains and exchanges, and the courts are reluctant to reward

¹⁷⁰ S Smith, *Contract Theory* (OUP 2004) at 151; M Mason, ‘Utility of Consideration-A Comparative View’ (1941) 41 *Columbia L Rev* 825. Mason concludes that the main role of consideration is as a formality requirement (at 831-848).

¹⁷¹ The role of exchange as a formality requirement is further demonstrated by the fact that contracts can be enforceable in the absence of consideration when they are signed by deed, ‘...nor is it really unreasonable or practically inconvenient that the law should require particular solemnities to give to a gratuitous contract the force of a binding obligation’ in *Foakes v Beer* (1883-84) LR 9 App Cas 605 (HL) at 613.

¹⁷² S Smith, *Contract Theory* (OUP 2004) at 217.

¹⁷³ L Fuller, ‘Consideration and Form’ (1941) 41 *Columbia L Rev* 799.

¹⁷⁴ S Smith, *Contract Theory* (OUP 2004) at 217.

¹⁷⁵ Economic analysts have argued that consideration provides the important function of identifying and enforcing efficient exchanges, eg R Posner, *Economic Analysis of Law* (2nd edn, Little, Brown & Co 1977) at 69-71.

those who merely rely upon promises by others.¹⁷⁶ This means that an agreement to pay income to one's wife will not be contractual and neither will agreements that are described as binding in honour.¹⁷⁷ The implications of the 'efficient exchange' explanation is also demonstrated in the way in which the courts will take a very loose interpretation of 'exchange' where there is a clear economic function behind the arrangement.¹⁷⁸ For example, the courts have recognised an 'exchange' even where one party has provided a nominal payment.¹⁷⁹ Consideration itself does not provide any normative explanation for the law of contract, but it is one of its core facts.

Cases Which Fall Outside Contract

In some cases one party has not provided anything beneficial under a contract. Instead, the party may rely on an agreement. An example is *Williams v Roffey Bros*,¹⁸⁰ where the claimant was already under contract with the defendant, but, because the claimant was facing financial difficulties and the defendants wanted to avoid a penalty clause with a third party, they agreed to restructure their contract.¹⁸¹ In the Court of Appeal it was concluded that this gave rise to a new contract, even though it appeared to lack consideration. We should not simply accept that because this was described as a contract that it is to be regarded as one. As Chen-Wishart pointed out, the award in

¹⁷⁶ Lord Hoffmann in *Stovin v Wise* [1996] AC 923 (HL) at 943-944. This is also explored from a comparative perspective in J Gordley, *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (OUP 2006) at ch 16.

¹⁷⁷ *Balfour v Balfour* [1919] 2 KB 571 (CA); *Jones v Vernon's Pools Ltd* [1938] 2 All ER 626 (Liverpool Spring Assizes); *Appleson v H Littlewood Ltd* [1939] 1 All ER 464 (CA).

¹⁷⁸ FMB Reynolds and G Treitel, 'Consideration for the Modification of Contracts' (1965) 7 Malaya L Rev 1 at 1.

¹⁷⁹ *Mounford v Scott* [1975] Ch 258 (CA) at 765; *Chappell & Co v Nestlé* [1960] AC 87 (HL).

¹⁸⁰ [1991] 1 QB 1 (CA).

¹⁸¹ *Williams v Roffey Brothers and Nicholls (Contractors) Ltd* [1991] 1 QB 1 (CA).

Williams was not based on expectation damages as we see normally in contract, but the actual value of the work.¹⁸² This correlates to an argument which we fully develop in Chapter 6 in regards to reliance-based claims for non-contractual services. Similarly, a reliance-based analysis explains another case, *De La Bere v Pearson* where Williams LJ found that consideration was established by providing a newspaper with a question which could be published as this ‘might obviously have a tendency to increase the sale of the defendants' paper.’¹⁸³ Today one can see that this would be a simple *Hedley Byrne v Heller* type case. We do not need to accommodate these cases within the concept of contract under an overlapping analysis, as there are alternative concepts which can achieve these results.

Deeds

Since we are adopting contract as an expositive device, we can see what happens in the absence of consideration, which forms an integral factual element of the concept of contract. The deed requirement is much more onerous than the necessity of an exchange between the parties, as the agreement must be made in writing in the presence of a third party witness, and it must also be very clear that the deed is intended to be a binding agreement.¹⁸⁴ This indicates that promises can have some relevance in determining the behaviour of the courts. However, the high evidential burden that is required in the absence of an exchange and the slightly different

¹⁸² M Chen-Wishart, ‘Consideration: Practical Benefit and the Emperor's New Clothes’ in J Beatson and D Friedmann (eds), *Good Faith and Fault in Contract Law* (Clarendon Press 1997) at 124.

¹⁸³ [1908] 1 KB 280 (CA) at 287.

¹⁸⁴ Law of Property (Miscellaneous Provisions) Act 1989 section 1.

treatment of deeds indicates that the courts are reluctant to enforce promises without any additional factors.¹⁸⁵ Again, we do not need to stretch our core concept to incorporate non-bargain agreements.

Measure of Damages

Expectation Damages

The boundaries of the concept of contract are defined by the presence of both agreement and exchange. Within these situations, we see a predictable set of judicial responses. Where a defendant has breached his contractual obligations he will be liable to pay ‘expectation’ damages, which will put the claimant in the same position as if the contract had been performed.¹⁸⁶ Nevertheless, since the contract is an amalgamation of agreement *and* bargain, the agreement will not determine the damages for a breach of contract.¹⁸⁷ Therefore, it is usually necessary to show that the defendant’s breach has resulted in a financial loss or failure to make a profit for the claimant.¹⁸⁸ When deciding whether to make an award for a breach of contract, the courts will also require the claimant to mitigate his loss, by considering alternative possibilities to limit any losses.¹⁸⁹ The duty to mitigate losses prevents the

¹⁸⁵ As R Hyland points out ‘no legal system enforces all promises that are made in the course of daily life’ in AS Hartkamp et al (eds), *Towards a European Civil Code* (2nd edn, Kluwer Law International, 1998) at 68. Even in civil systems where consideration is not required, bargain agreements are the most common types of contract that are enforced by the courts.

¹⁸⁶ *Robinson v Harman* (1848) 1 Ex 850, 154 ER 363.

¹⁸⁷ *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 (HL).

¹⁸⁸ *Teacher v Calder* [1899] AC 451, [1899] 1 F (HL) 39.

¹⁸⁹ *British Westinghouse Co v Underground Electric Ry Co* [1912] AC 673 (HL).

unnecessary waste of resources and provides a limit to the potential liability of defendants. It is a principle that Atiyah said was difficult to justify on a purely theoretical basis,¹⁹⁰ but when we acknowledge that contract performs a wider role than simply enforcing agreements, this rule starts to make more sense.

Finally, it should always be remembered that we are not attempting to construct a *complete* picture of the law of contract. There are indeed several rules and principles which can apply in the creation and operation of a contract. All we are seeking to do is to establish the boundaries and the usual responses for this concept. There are many contextual contracts where the results seem out of place with the ordinary approach. These are explicable on the basis that additional facts can alter the approach to these contract situations. Predictability can only be established by recognising that other facts can be relevant. There are cases where the normal rules of contract cannot, in truth, predict the result. For example, in the case of *A-G v. Blake*,¹⁹¹ the court applied a measure to strip profits from a former double agent who had an agreement for the publication of his memoirs. Although it has been occasionally followed, it lies as an isolated decision.¹⁹² One cannot use this decision for predicting the law at present as no discernable pattern seems to be emerging. The odd decision which steps out of line does not reduce the conceptual structure to an empty shell.

¹⁹⁰ P Atiyah, 'Contracts, Promises, and the Law of Obligations' in P Atiyah, *Essays on Contract* (OUP 1990) 10-56, at 55.

¹⁹¹ *Attorney-General v Blake* [2001] 1 AC 268 (HL).

¹⁹² *Esso Petroleum Co Ltd v Niad Ltd* [2001] All ER (D) 324, *Luxe Holding Ltd v Midland Resources Holding Ltd* [2010] EWHC 1908 (Ch).

Conclusion on the Concept of Contract

The various functions and principles in contract law led Atiyah to argue that the ‘the theory is in a mess.’¹⁹³ Admittedly, there is no unifying principle behind the law of contract. However the combination of these apparently contradictory approaches is not problematic in practice. In most cases it is not difficult to identify a contractual relationship, and the behaviour of the courts in interpreting the agreement is usually quite predictable. Moreover, the expectation measure of damages is also regularly applied, and it is only in limited circumstances mentioned above that the courts have taken a different approach. The apparent inconsistencies in the case law can be better understood once it is acknowledged that the law of contract is an expositive device; the boundaries of the concept do not fully explain how the courts apply it; it merely assists in predicting its application.

4. Tort

If the boundaries of property are drawn widely, then the same can also be said of the boundaries of tort; Rudden once identified around seventy five torts in the common law legal systems.¹⁹⁴ We make no attempt to search for a narrower concept of tort, instead we focus on one particular area of tort, which is negligence. As Birks stated ‘[t]ort courses now centre on negligence, and many never look at anything else.’¹⁹⁵ By

¹⁹³ P Atiyah, *Pragmatism and Theory in English Law* (Stevens 1987).

¹⁹⁴ B Rudden, ‘Torticles’ (1991-1992) 6/7 *Tulane Civil Law Forum* 105. Also mentioned in C von Bar and U Drobnig, *The Interaction of Contract Law and Tort and Property Law in Europe: A Comparative Study* (Sellier 2004) at 26.

¹⁹⁵ P Birks, ‘Personal Property: Proprietary Rights and Remedies’ (2000) 11 *KCLJ* 1 at 2.

doing this, we have immediately narrowed the overall scope of the law of tort, and kept what in practice is its most important area.¹⁹⁶ First, we will look at attempts to explain tort law as a coherent subject to justify this much narrower approach. Then we will explain how even negligence itself must be broken down to form a narrower concept if it is to be a useful concept. We take our lead in this regard from James, who himself has been described as a modern realist.¹⁹⁷ James noted that tort law was simply everything which did not appear to fit into contract,¹⁹⁸ a proposition also noted by Waddams.¹⁹⁹ Applying an overlapping approach, we need not shoehorn every claim into contract, tort or property. This is not as drastic as it may sound; in particular, we see no need to treat the protection of property as falling under a law of tort.

Attempts to Explain Tort as a Unitary Concept

Corrective Justice

In Chapter 2 we looked at the methodology of Weinrib's attempts to classify private law. For Weinrib, tort law is characterised by the correlation between the tortfeasor

¹⁹⁶ T Weir, 'The Staggering March of Negligence' in J Stapleton and P Cane (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (OUP 1998).

¹⁹⁷ F James, 'Tort Law in Midstream: Its Challenge to the Judicial Process' (1959) 8 *Buff L Rev* 315. See C Robinette, 'Can There Be a Unified Theory of Torts? A Pluralist Suggestion from History and Doctrine' (2005) 43 *Brandeis LJ* 369.

¹⁹⁸ F James, 'Tort Law in Midstream: Its Challenge to the Judicial Process' (1959) 8 *Buff L Rev* 315 at 315.

¹⁹⁹ S Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (CUP 2003) at 10.

and the victim. Tort law is concerned with limiting the independent pursuit of one's separate interests where this wrongfully infringes on another's rights. Within tort law, Weinrib looks for normative structures; intentional torts are united by their search for intention, negligence is connected by the act of the defendant and the harm suffered by the claimant.²⁰⁰ One of the major concerns with this approach is that Weinrib himself concedes that his theory is not one that can easily identify the specific structure of the law.²⁰¹

Even if we accept that corrective justice lies at the heart of tort law, the search for correlativity ignores the often complex situations which give rise to tortious liability. Take, for example, Weinrib's attempt to explain vicarious liability rules. Weinrib has argued that corrective justice would justify vicarious liability where an employee has been at fault, as the employee's actions in the course of his employment provide the connection between the employer and the victim.²⁰² However, Cane points out that this ignores the fact that liability may be strict in the event of a non-negligence tort such as trespass to land, and it will arise regardless of the employer's fault.²⁰³ This is why, once again, the preference is for overlaps. One need not explain vicarious liability using the same principles as for negligence in general. Simply recognising that the status of the defendant is a *fact*, and that this can alter the requirements and results of the core concept, provides a more open account. A similar problem, again to

²⁰⁰ E Weinrib, 'The Monsanto Lectures: Understanding Tort Law' (1989) 23 Valparaiso Univ L Rev 485 at 522.

²⁰¹ P Cane, 'Corrective Justice and Correlativity in Private Law' (1996) 16 OJLS 471 (review article) at 479-480. A point also made by Smith, *Contract Theory* (OUP 2004) at 150.

²⁰² E Weinrib, *The Idea of Private Law* (Harvard UP 1995) at 185-187.

²⁰³ P Cane, 'Corrective Justice and Correlativity in Private Law' (1996) 16 OJLS 471 (review article) at 485-487; also D Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP 1999) at 182 discusses the public policy basis of vicarious liability.

do with overlaps, arises from Weinrib's analysis that different standards apply to different tortfeasors. As we have seen, Weinrib sought to distinguish public from private law.²⁰⁴ However, Weinrib then recognises that 'special' considerations apply to cases where the defendant is a public authority.²⁰⁵ In other words, this is a 'hidden' overlap, which we will deal with further on.²⁰⁶ One cannot adopt a rigid classification between private and public law, only to then use a grey area to explain cases where elements of both seem to have been relevant. It is only by recognising that overlaps happen in the first place that this conclusion can make any sense.

Duties, Rights and Interests

In Chapter 2 we touched upon Birks' classification of the law of torts as any breach of duty.²⁰⁷ This approach has proven popular amongst some scholars.²⁰⁸ However, as Birks admitted, this does not distinguish tort from breach of contract, which leads to a very wide area of law. As Stevens explains, the biggest problem with this category is that it also fails to indicate what types of responses will be made by the courts.²⁰⁹ As

²⁰⁴ E Weinrib, *The Idea of Private Law* (Harvard UP 1995) at 8.

²⁰⁵ E Weinrib, *Idea of Private Law* (Harvard UP 1995) at n 16 on 153.

²⁰⁶ In another piece, he argues that this does not violate the autonomy of a public authority, as they should only be liable when they have decided to act; E Weinrib, 'The Case for a Duty to Rescue', (1980) 90 Yale LJ 247 at 278.

²⁰⁷ Although Birks was not the first to make this conclusion; H Terry, 'Duties Rights and Wrongs', (1924) 10 American Bar Association Journal 123. A Burrows, 'We Do this at Common Law and That in Equity' (2002) 22 OJLS 1 at 8-9; D Sheehan, 'Implied Contract and the Taxonomy of Unjust Enrichment' in P Giliker (ed), *Re-Examining Contract and Unjust Enrichment: Anglo-Canadian Perspectives* (Martinus Nijhoff 2007) at 197. Sheehan defends this view of tort, arguing that duties require positive acts.

²⁰⁸ Another example of this approach is S Green and J Randall, *The Tort of Conversion* (Hart 2009) at 169; 'a wrong (a defendant's breach of a duty imposed on him by the law), for which the aim and purpose of the law is to provide just compensation.'

²⁰⁹ R Stevens, *Torts and Rights* (OUP 2007) at 286.

Fleming once stated, '[t]his is certainly not a very helpful definition.'²¹⁰ In short, this has very little descriptive quality. For this reason it simply cannot be adopted under a realist approach as it obscures facts and does not identify them.

Stevens has offered an alternative account which develops Birks' definition; in short a breach of duty is a breach of somebody's right. The rights-based approach divides the law into primary and secondary rights. As with McFarlane, to an extent there are some similarities between the arrangement adopted by Stevens and the one presented here. Both this approach and the one presented by Stevens, for example, criticise the general duty of care, and seek to distinguish negligent acts which cause physical injuries and those which result in pure economic losses. This is for the simple reason that Stevens only seeks to recognise those rights which correlate between the decisions of the courts, and there is no more grandiose definition of rights.²¹¹ However, by presenting 'rights' as the justification for tort law, it allows Stevens to argue that various rules and doctrines should be decided in a different way. For example, he argues that vicarious liability should be limited to situations where it can be said that the acts of an employee represent the acts of the employer.²¹² For that reason the rights-based approach mixes description with prescription. Stevens' analysis depends on what Holmes would call the 'brooding omnipresence in the sky';²¹³ the law enforces primary rights which we can only recognise and identify because there has been a 'tortious' act. This criticism is noted by Murphy, who

²¹⁰ J Fleming, 'Tort Law in Midstream: Its Challenge to the Judicial Process' (1959) 8 Buff L Rev 315 at 315.

²¹¹ J Murphy, 'Rights, Reductionism and Tort Law' (2008) 28 OJLS 393 at 399.

²¹² R Stevens, *Torts and Rights* (OUP 2007) at 259-267; S Douglas, 'Torts and Rights; Robert Stevens' (2008) 124 LQR 715 (Publication Review) at 720.

²¹³ *Southern Pacific Co. v. Jensen* 244 US 205 at 222 (1917).

questions how a rights-based approach helps to predict the law.²¹⁴ An overlapping approach allows us to recognise the distinctions as well as the points of similarity.

The final approach to consider at this junction is the one proposed by Cane.²¹⁵ Cane adopts an expositive approach to classifying tort law, which seeks to identify interests and sanctioned conduct. As we noted in the previous chapter, this has parallels with the methods of the realists.²¹⁶ Cane also identifies four main interests which are protected in tort; interests in personal integrity, property interests, contractual rights and monetary wealth. The benefit of this approach is that Cane is looking to identify facts in relation to each interest and also the fact which determines that the conduct is ‘tortious.’ However, Cane’s methodology seems to obscure the ‘end product’ which must occur for many tort claims; it is not enough to have an interest, and sanctioned conduct, we also look for what happened and how it happened. The methodology here does not seek to show that every instance is treated the same by the courts, simply it is looking for the most discernible pattern. Indeed, outside of negligence the differences between personal integrity and property become much more apparent. Although we adopt property as an independent concept, it is argued that *for the most part* the protection afforded to personal integrity and property against careless acts is the same.²¹⁷ However, since negligence is the largest area of tort law and touches on many other areas, it is the best place to start for our analysis.

²¹⁴ J Murphy, ‘Rights, Reductionism and Tort Law’ (2008) 28 OJLS 393 at 406-407.

²¹⁵ P Cane, *Anatomy of Tort Law* (Hart 1997) at 1.

²¹⁶ See Chapter 3, at text above n77. M Radin, ‘Legal Realism’ (1931) 31 Columbia L Rev 824 at 827.

²¹⁷ It would be wise to recognise that there are some cases where the distinction can be relevant; for example, Lord Denning thought that this was relevant for insurance purposes, *Lamb v Camden LBC* [1981] QB 625 (CA) at 637. This also provides the best explanation for the decisions in *Roberts v Ramsbottom* [1980] 1 WLR 823 (QB) and *Mansfield v Weetabix Ltd* [1998] 1 WLR 1263 (CA); in *Roberts* the claimants suffered personal injuries as a result of the defendant driving while unwell,

Negligence

It is proposed that any attempt to find unity within the ‘law of tort’ would require unnecessarily wide definitions, which would provide little assistance in predicting the law. We do not seek to do this; instead we argue that we can take negligence as a conceptually distinct area. There may be overlaps with other ‘torts’, but this must be identified by independent analysis, which is outside of the scope of this chapter. Thus, acts of carelessness may be relevant in providing a lower level of damages in other torts when compared to intentional acts.²¹⁸ This is not meant to sideline these claims; whereas Birks’ miscellaneous category was a place for causative events which did not fit into his main categories, the presence of other torts which may overlap poses no such problem to the approach presented in this thesis. It is also intended to be a warning against efforts to harmonise various ‘torts’, which accords with the views of Fleming and Weir.²¹⁹ Indeed even within the current ‘sphere’ of negligence, the search for unifying principles has caused untold chaos and confusion. For this reason we seek to construct a much narrower version of negligence than the wider version which is currently used in English private law.

whereas in *Mansfield* no personal injuries were suffered. The claimants in *Roberts* succeeded but those in *Mansfield* failed.

²¹⁸ For example, in defamation, a lower sum will be awarded for careless defamation as opposed to malicious defamation; exemplary damages are not available in the former but may be in the latter: Sir Thomas Bingham in *John v MGN* [1997] QB 586 (CA) at 618; ‘[c]arelessness alone, however extreme, is not enough unless it properly justifies an inference that the publisher had no honest belief in the truth of what he published.’ The same applies in the tort of conversion, as Lord Nicholls indicated in *Kuwait Airways Corp v Iraqi Airways Co* [2002] UKHL 19; [2002] 2 AC 883 at 1098.

²¹⁹ T Weir, ‘The Staggering March of Negligence’ in J Stapleton and P Cane (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (OUP 1998); J Fleming, ‘Remoteness and Duty: Control Devices in Liability for Negligence’ (1953) 31 Can Bar Rev 471 at 481.

Our core concept of negligence requires (i) damage (ii) damage of a physical nature and (iii) careless physical acts. Notably, this also leads to a narrower version of ‘negligence’ than its current application. Of central importance to this narrower version is the removal of pure economic losses from this core concept. This does not mean that those cases are wrongly decided, simply that we are looking for an alternative analysis, which is more fully developed in Chapter 6. We also remove many omissions cases. This is on the basis that much of the case law involves public authorities or employers, where different considerations arise in comparison with disputes between private individuals. Again, we do not need to adopt a discrete separation of these situations from negligence. Instead, the argument is that we can avoid stretching what is a realist concept by recognising that an overlapping analysis can provide both separation and comparison. Firstly we expressly reject the idea of a ‘duty’ of care as it does little to explain the law. Instead it is argued that the duty is little more than a control device. This also requires us to distinguish omissions and pure economic losses. This leaves a narrower concept which in fact covers the majority of the case law, and allows these other situations to be regarded as overlaps.

Rejecting the ‘duty’ of care

One of the problems in constructing a realist concept of negligence is the role of the duty of care.²²⁰ As Buckland noted, the duty of care has a long-standing tradition in English law, and it can be traced as far back as the 19th century.²²¹ This duty is

²²⁰ As set out by Lord Bridge in *Caparo Industries Plc v Dickman* [1990] 2 AC 605 (HL) at 617-618.

²²¹ WW Buckland, ‘The Duty to Take Care’ (1935) 51 LQR 637 at 637-638.

presented as a prerequisite to any successful claim in negligence.²²² Despite the tradition of this ‘duty’, it is arguable that it plays a limited role as a useful guide. Arguably, this is a result of trying to include too much within a single principle. This is not a new idea; writing in 1935 Buckland argued that the duty of care is ‘incapable of sound analysis and possibly productive of injustice’.²²³

McBride has provided a strong defence of the role played by the duty of care principle.²²⁴ He presents an example where a manufacturer produces cars with faulty brakes, who fails to inform its customers of the defect. As McBride himself concedes, this example ignores the statutory mechanisms for preventing such unscrupulous behaviour.²²⁵ Nevertheless, McBride argues that the duty can require action even before any injury has occurred. The only authority to support this point is *E Hobbs (Farms) Ltd v Baxenden Chemicals*,²²⁶ where it was stated that a manufacturer had a duty to inform existing customers of any faults which it subsequently discovers. However, the failure to inform customers did not result in any increase to the level of damages. It is a duty without a legal consequence, despite the reprehensible behaviour of the manufacturer. Therefore, it is an irrelevant duty from a realist perspective. Moreover, to argue that this deterrent effect exists arguably does more harm than good. Even if it was reflected in the case law, it would provide a weak deterrence.²²⁷ To use an argument which would resound with Bentham, it is only by recognising the

²²² *Donoghue v Stevenson* [1932] AC 562 (HL) per Lord Atkin, at 580.

²²³ WW Buckland, ‘The Duty to Take Care’ (1935) 51 LQR 637 at 639.

²²⁴ NJ McBride, ‘Duties of Care- Do They Really Exist?’ (2004) 24 OJLS 417.

²²⁵ Consumer Protection Act 1987 and Road Vehicles (Brake Linings Safety) Regulations 1999, SI 1999/ 2978.

²²⁶ [1992] 1 Lloyd’s Rep 54 (QB).

²²⁷ The lessons from *Grimshaw v Ford Motor Company* (1981) 119 Cal App 3d 757 surely demonstrate that negligence is ill-equipped to deal with such problems.

law's failure to address this serious issue that we could ever hope to achieve a legal mechanism which achieves the deterrent objective.²²⁸ The realist's separation of *is* and *ought* should not be interpreted as an attempt to prevent changes in the law. Description is simply the first and necessary step in this process.

Adopting the Control Device Explanation

The more sensible analysis, therefore, is that the duty of care is simply a controlling device.²²⁹ This is the approach adopted by Cane who concludes that 'the duty of care concept operates negatively to impose limits on the potentially enormous breadth of the principle that people ought to be liable for negligently-caused injury.'²³⁰ This is a perfectly acceptable restriction, but how the phrase 'duty' assists in this exercise is questionable. As Conaghan has stated, a more open account of these policy-driven reasons is required.²³¹ Instead we see the duty being adopted as 'an attempt to play down the role of policy in judicial decision-making.'²³² This, we argue, has been necessary because negligence is being deployed in too many situations. When we remove omissions and the liability of employers from the equation there is very little need for a control device in most cases. Statute has already done this in regards to the liability of occupier's of land; it is clear that an occupier can be liable for acts or

²²⁸ G Postema, *Bentham and the Common Law Tradition* (Clarendon Press 1986).

²²⁹ See P Cane, *Atiyah's Accidents, Compensation and the Law* (6th edn, Butterworths 1999) at 58.

²³⁰ P Cane, *The Anatomy of Tort Law* (Hart 1997) at 125. *White v Chief Constable of South Yorkshire* [1999] 2 AC 455 (HL) at 511. Also P Cane, *Atiyah's Accidents, Compensation and the Law* (6th edn, Butterworths 1999) at 58.

²³¹ J Conaghan, *Wrongs of Tort* (Pluto Press 1999) at 50-51.

²³² J Conaghan, *Wrongs of Tort* (Pluto Press 1999) at 17.

omissions because of the *fact* that they occupy land.²³³ It is this combination of facts which explains the cases of omissions, not any general duty of care.

Take for example the liability of public authorities.²³⁴ Now, one must always be careful with one's realist credentials, as the realist generally argued against any attempt to provide a rigid distinction between private and public law.²³⁵ However, it does appear that the status of the defendant is a fact which is of relevance in any decision.²³⁶ This has been pointed out by Samuel who argues that any discrete distinction between private and public law is undesirable, but then goes on to conclude that it can also be a useful *fact* for distinguishing different decisions.²³⁷ Indeed the patterns are there. Much of the work provided by the control mechanism in duty of care is to protect public authorities from an open liability for careless acts which result in harm to others.²³⁸ So, for example, a general reluctance to allow actions against the police force may lead to the court denying liability under the language of the duty of care.²³⁹ There are many reasons for providing different standards where the defendants are doctors, local authorities and police forces. As we

²³³ For example, the Occupiers' Liability Act 1957 section 1 sets out the 'duty which an occupier of premises owes to his visitors in respect of dangers due to the state of the premises or to things done or omitted to be done on them.'

²³⁴ *JD v East Berkshire Community Health NHS Trust* [2005] UKHL 23, [2005] 2 AC 373.

²³⁵ JW Singer, 'Review: Legal Realism Now' (1988) 76 California L Rev 465 at 477.

²³⁶ C Harlow, 'Public and Private Law: Definition Without Distinction' (1980) 43 MLR 241.

²³⁷ G Samuel, 'Public and Private Law: A Private Lawyer's Response' (1983) 46 MLR 558 at 566-568.

²³⁸ P Vines, 'Straddling the Public/Private Divide: Tortious Liability of Public Authorities Judicial Review' (2010) 9 Judicial Review 445.

²³⁹ *Hill v Chief Constable of West Yorkshire* [1989] AC 53 (HL). The validity of this decision was questioned by a ruling of the European Court of Human Rights in *Osman v United Kingdom* (2000) 29 EHRR 245. The European Court subsequently reviewed this in *Z v United Kingdom* [2001] ECHR 333/ (2002) 34 EHRR 3, concluding that the striking out of a negligence claim does not necessarily breach the right to a fair trial. Consequently the courts continue to refuse to hear many cases where the defendant is a public authority; J Morgan, 'The Rise and Fall of the General Duty of Care' (2006) 22 Professional Negligence 206 at 221.

will see below, the status of the defendant is also relevant in any discussion of omissions, as in some cases public bodies can be liable for failing to act.

Omissions

Public bodies

Since our core concept of negligence requires positive acts,²⁴⁰ it leaves a number of cases where the courts have still recognised liability for omissions. The relevance of the status of the defendant is also important in regards to omissions; most of the cases involve public bodies or employers. Just as there are different reasons for excluding liabilities where the defendant is a public body, it is also the case that in some situations a public body will be liable where they have been provided with powers to look after the claimant. So, recent developments have seen the liability of public bodies extend to failures to prevent domestic abuse,²⁴¹ failures in child care,²⁴² and cases involving the liability of police forces for failing to prevent prisoners from committing suicide.²⁴³ A public body has a different role to play in society from private individuals, and thus the limits of liability we saw above (where the courts can

²⁴⁰ Eg *Mercer v South Eastern & Chatham Ry Companies Managing Committee* [1922] 2 KB 549 (KB).

²⁴¹ *W v Essex County Council* [2001] 2 AC 592 (HL).

²⁴² *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619 (HL); *Barrett v Enfield London Borough Council* [2001] 2 AC 550 (HL); *A v Essex County Council* [2010] UKSC 33, [2011] 1 AC 280.

²⁴³ *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360 (HL).

exempt liability where it would be fair, just and reasonable to do so) is balanced with the possibility of liability for failing to act.

Employers

We also see the relevance of what Llewellyn identified as a ‘law of associations.’²⁴⁴ This factual element presents another specialised approach, as employers are liable for the acts of employees. Fleming argued that liabilities imposed on employers can be described as a *quid pro quo* for the benefits that employers receive from their activities.²⁴⁵ In a way, it can be said that employers are liable because they have set in motion the activities where the damage occurs. However, Waddams is surely right that to find a solitary premise for the rules on vicarious liability is unnecessary; they serve a number of functions.²⁴⁶ The case law shows that it is not just a case of profit stripping as a defendant may be liable even if they are a non-profit organisation.²⁴⁷ This is not simply a tangential discussion of vicarious liability, this tells us that employers have potential liabilities which exceed those of other private individuals. The courts are much more willing to place liability on employers. We mentioned earlier the contextual differences which arise when a contract governs an employment relationship. The presence of special rules need not undermine the core concept of contract, instead we can recognise the overlap with the employment context. We are not saying that all cases involving employers must be taken out of the core concept of

²⁴⁴ K Llewellyn, *The Bramble Bush* (New York 1930) at 9-10.

²⁴⁵ J Fleming, *The Law of Torts* (9th edn Sydney Law Book 1988) at 410.

²⁴⁶ S Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (CUP 2003) at 102-105.

²⁴⁷ *The Mersey Docks and Harbour Board Trustees v William Gibbs* (1866) LR 1 HL 93.

negligence, but instead that the core concept need not accommodate those cases which are particular to employment situations.

It is not just that employers can be liable for the careless acts of employees, but also for not protecting their employees.²⁴⁸ The courts have recognised the importance of the employer in the life of the employee, and the requirement that employees take positive steps to look after the well-being of their employees. In these cases it is more realistic to refer to ‘duties’ as the employer is expected to look after the employee and if this is done carelessly, the employee can sue for damages.²⁴⁹ It seems almost otiose to say it, but these cases demonstrate the problems inherent in trying to identify a common duty in all of these cases, since the courts expect different standards behaviour from different defendants, even when the damage suffered by the claimant is of the same nature.

We can summarise the majority of these cases as overlaps with the core concept of negligence where the addition of alternative *facts* can be sufficient in the absence of a positive physical act. This provides a good example of how the overlapping concept analysis works; since a concept is a collection of facts, in cases where one of the core factual elements is missing it will be much more difficult to establish liability. Since we have explained these cases, we can return to our core concept of negligence; a careless act which creates a danger, resulting in physical injury to the claimant.

²⁴⁸ *Paris v Stepney BC* [1951] AC 367 (HL); *Rahman v Arearose Ltd* [2001] QB 351 (CA).

²⁴⁹ Lord Steyn in *Johnson v Unisys Ltd* [2001] UKHL 13; [2003] 1 AC 518 at 532. B Barrett, ‘Clarification of Employer's Liability for Work-Related Stress’ (2002) 31 ILJ 285.

Social Reality of 'Negligence'

Once we get past the cases of omissions, much of the confusion in the law of negligence is caused by attempts to construct a single conception of 'duty' which can deal with non-physical harms. In fact, the issue of 'duty of care' becomes an unnecessary gloss when our focus is purely on physical harms. The law of negligence is grounded in empirically observable reality not because of some elusive concept of duty or responsibility, but by the requirement of physical acts and physical losses.²⁵⁰ Stapleton points this out when she states that 'a defendant who, by his own positive act, has carelessly caused physical damage to the claimant or his property is always held to owe a duty of care to the victim.'²⁵¹ The simplicity of this approach lies in the fact that, as opposed to other forms of losses, '[t]he infliction of physical injury to the person or property of another universally requires to be justified.'²⁵²

The Requirement of Carelessness

This may be a debatable conclusion, but carelessness is a *fact*. Now admittedly, it is a much harder to identify carelessness as a fact than it is to discover other elements

²⁵⁰ D Nolan, 'New Forms of Damage in Negligence' (2007) 70 MLR 59. The author identifies cases where it did not appear that there was any physical damage, but concludes that the damage was still measurable, at 87.

²⁵¹ J Stapleton, 'Duty of Care Factors: A Selection from the Judicial Menus' in J Stapleton and P Cane (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (OUP 1998) at 72. Admittedly this contradicts Lord Steyn in *Marc Rich & Co AG v Bishop Rock Marine Co Ltd (The Nicholas H)* [1996] AC 211 (HL) at 235, who thought that the different elements of duty of care had to be shown even in cases of physical loss. However, we are not arguing here that the courts lose any discretion as to how to decide each case, merely that the patterns point towards the application of this control device in cases which primarily involve the police or local councils.

²⁵² Lord Oliver in *Murphy v Brentwood DC* [1991] 1 AC 398 (HL) at 487.

such as physical damage.²⁵³ No attempt is made here to justify ‘carelessness’ as an obvious and unimpeachable fact; none of the facts which we look for are clear and unquestionable. We simply rely on an enquiry as to whether this *fact* provides a perceptible boundary which distinguishes things in the real world. Further, given that we have narrowed the scope of this claim, the varying standards that are in particular applied to public authorities and the health service (where more leniency is afforded)²⁵⁴ and also in relation to employers (where a stricter liability is applied), we find that carelessness becomes much easier to identify.

Acts

In our narrower version of negligence, we also look for positive acts. According to Cane, this forms the *paradigm* scenario of negligence.²⁵⁵ Admittedly, it is not always easy to distinguish acts from omissions. For example, a man who parks a car on a hill and forgets to put the handbrake on will be liable if the car rolls down the hill and injures someone.²⁵⁶ However, Honore has explained that, in general, a required act is satisfied by asking whether the defendant intervened ‘in the world so as to bring about change.’²⁵⁷ The US Third Restatement on Torts also adopts this position, and

²⁵³ C von Bar, ‘Damage Without Loss’ in W Swadling and G Jones (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (OUP 1999).

²⁵⁴ This can be attributed to concerns about budgetary constraints, the complexity caused by the various obligations to the public at large and also a reluctance to provide public funds to compensate private individuals.

²⁵⁵ P Cane, *Atiyah's Accidents, Compensation and the Law* (7th edn, CUP 2006) at 72.

²⁵⁶ ‘A similar example is provided in the ALI, ‘Restatement Third, Torts: Liability for Physical and Emotional Harm’ at section 3, commentary (c); ‘a driver can be negligent for failing to step on the brakes when the driver's car approaches other traffic on the road.’

²⁵⁷ T Honoré, ‘Are Omissions Less Culpable?’ in P Cane and J Stapleton (eds), *Essays for Patrick Atiyah* (Clarendon Press 1991) at 41-42.

separates omissions from the general inquiry.²⁵⁸ This analysis means that we do not need to adopt an artificial definition of acts; the focus is on the act which directly causes the danger or harm. Our perceptions of what is necessary only gets distorted when we start to take into account liability for omissions.

Physical Damage

It is contended that to construct a concept of negligence that is descriptive, it is necessary to take a narrow view of ‘loss.’ This requires *physical* damage to things or to the bodily integrity of the claimant. The same position applies in the US Third Restatement of Torts, where there is a standard provision for liability for physical injuries.²⁵⁹ As we have seen in the paragraph above, much of the current formulation of the ‘duty’ is really spent on setting out rules which can apply to *all* types of losses. The concept of negligence will be much more useful if we narrow our concern to physical losses. This contains two factual elements; the requirement of loss (which could apply to pure economic losses and psychiatric damage) and also the necessity of physical damage (which excludes pure economic losses and psychiatric damage.)

The requirement of physical loss plays an important function in limiting the potential liability of defendants, and it also prevents excessive litigation.²⁶⁰ As we noted earlier, in *Anatomy of Tort Law*, Cane argued that tort law can be seen as protecting a number

²⁵⁸ ALI, ‘Restatement Third, Torts: Liability for Physical and Emotional Harm’ at section 3, commentary (c).

²⁵⁹ ALI, ‘Restatement Third, Torts: Liability for Physical and Emotional Harm’ at section 6; ‘An actor whose negligence is a factual cause of physical harm is subject to liability for any such harm within the scope of liability, unless the court determines that the ordinary duty of reasonable care is inapplicable.’

²⁶⁰ Lord Oliver in *Murphy v Brentwood DC* [1991] 1 AC 398 (HL) at 485.

of different interests.²⁶¹ Different interests call for different levels of protection. So, for example, the interest in one's bodily integrity and property is distinct from the interest in monetary affairs. As noted by Stapleton, there are convincing economic, moral and social reasons for placing more stringent levels of protection for interests in property and our physical well-being.²⁶² Thus, in *Murphy v Brentwood DC*, Lord Oliver stated that '[t]he infliction of physical injury to the person or property of another universally requires to be justified.'²⁶³ One should not assume that the question of physical loss is always straightforward,²⁶⁴ but the law is much clearer when we focus on constructing a core concept which does not account for *all* types of losses.

Overlap with Reliance

In particular, this explains why it is necessary to have an overlapping approach which can allow us to construct narrower concepts. We can aspire to say that one should not cause his or her neighbour financial loss, and there may be moral, economic and social reasons for saying that this *should* be the case. But causing financial harm raises particular concerns. Generally, we expect individuals to safeguard their own financial health.²⁶⁵ According to Heydon, there is no general responsibility to ensure the gains or even status quo of one's neighbours; in fact our economy dictates that

²⁶¹ P Cane, *The Anatomy of Tort Law* (Hart 1997) at 67 and 75.

²⁶² J Stapleton, 'Duty of Care Factors: A Selection from the Judicial Menus' in J Stapleton and P Cane (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (OUP 1998) at 74.

²⁶³ [1991] 1 AC 398 (HL) at 487.

²⁶⁴ Witting, for example, explains that the courts may be moving away from a test of alteration to physical things, towards a test of social perception of damage. C Witting, 'Physical Damage in Negligence' (2002) 61 CLJ 189.

²⁶⁵ *Crossley v Faithful and Gould Holdings* [2004] EWCA Civ 293, [2004] 4 All ER 447.

first and foremost we should encourage individuals actively to seek gains at the expense of others.²⁶⁶ As one Australian judge has explained, there are clear differences in the policies which underlie claims for physical injuries when compared to pure economic losses; ‘pure economic losses frequently result in mere transfers of wealth. The claimant's loss is the defendant's or a third party's gain [whereas] harm to a person or property ordinarily involves a new loss to social wealth.’²⁶⁷ Some economic losses, however, are easily avoidable and the desire to protect these interests requires an additional limiting factor in addition to the loss suffered by the claimant. For most of the cases, the sufficient control mechanism is reliance, and this overlap of negligence, reliance and financial loss is discussed in more detail in Chapter 6.

Conclusion

The conclusion which must be drawn is that it is not possible to construct a general law of negligence and neither is it possible to reduce negligence to a single factual element.²⁶⁸ People are not obliged to act carefully every time they come into proximity with others.²⁶⁹ This may sound strange, but as Markesinis has argued, English law ‘has always displayed a pragmatic tolerance towards institutions which,

²⁶⁶ JD Heydon, ‘The Defence of Justification in Cases of Intentionally Caused Economic Loss’ (1970) 20 *The Univ of Toronto LJ* 139.

²⁶⁷ *Perre v Apand Pty Ltd* (1999) 198 CLR 180 (HCA) at 209 (by McHugh J).

²⁶⁸ G Christie, ‘The Uneasy Place of Principle in Tort Law’ in DG Owen (ed), *Philosophical Foundations of Tort Law* (OUP 1997); R Stevens, *Torts and Rights* (OUP 2007) at 20-21.

²⁶⁹ Lord Edmund-Davies in *Moorgate Mercantile v Twitchings* [1977] AC 890 (HL) at 919; ‘[i]n most situations it is better to be careful than careless, but it is quite another thing to elevate all carelessness into a tort.’

though superfluous, cause little harm'.²⁷⁰ Negligence traditionally covers cases where the defendant has committed an act which has caused physical damage to the property or bodily integrity of the claimant.²⁷¹ Under the rubric of the duty of care, the courts have retained a device which provides a flexible method of limiting claims in negligence.²⁷² However, the incorporation of claims for omissions of public authorities and claims for pure economic loss have seen the boundaries of this claim being stretched too far (as a descriptive tool.)²⁷³ For this reason, a more coherent concept of negligence emerges when claims for pure economic loss are removed from the core framework for negligence. We return to these claims in Chapter 6, where it is explained that claims for pure economic loss represent an overlap between elements of negligence and reliance-based claims. Thus, we need not remove these claims from negligence altogether; the overlapping approach allows us to recognise that since it does not fall into the core concept of negligence, additional factual elements are required.

5. Identifying a basic Framework for English private law

The Overlapping of Legal Concepts

²⁷⁰ B Markesinis, 'Negligence, Nuisance and Affirmative Duties of Action' (1989) 105 LQR 104 at 123.

²⁷¹ This was also discussed by Steyn LJ in the Court of Appeal decision in *White v Jones* (reproduced in the report of the appeal to the House of Lords; [1995] 2 AC 207), where his Lordship noted that traditionally expectations were protected in contract, not tort, at 238.

²⁷² C Witting, 'Duty of Care: An Analytical Approach' (2005) 25 OJLS 33 at 37-38.

²⁷³ As Stevens points out in *Torts and Rights* (OUP 2007), there is no general right that protects against economic loss, particularly in the tort of negligence (at 20-21).

One may question the appropriateness of separating concepts like property and contract, as property rights are often created or altered by contracts. Further, it is apparent that we have a concept of property, and at the same time, an independent concept of negligent damage to property. As Llewellyn pointed out, the structure need not be neat and tidy and inevitably areas within the schema may cut across each other.²⁷⁴ This framework is not intended to provide a series of analytical questions, such as ‘is it property or a personal obligation?’, ‘if it is personal then is it contract or tort?’ Instead the aim is to show that the basic legal concepts which are frequently used by lawyers can be an invaluable tool in predicting the behaviour of judges and revealing the various goals and functions of private law. The legal framework is, therefore, used to treat like cases alike by reference to the facts of the cases and the decisions of the courts, rather than through a rigidly structured system of categorisation. Neither does this legal framework presuppose that legal concepts are ‘metaphysical’ or capable of being somehow detached from reality. The simple truth is that the utility of these legal concepts lies in the fact that they provide a bridge between the more general private law functions and social reality.

The relationship between legal concepts and social reality is, therefore, of extreme importance in simplifying the incredibly complex body of rules, principles and policies that exist within the legal system. A good description of the law should arrange the legal system in a way that treats legal concepts for what they are; expositive devices for predicting judicial behaviour. The complexity of our private

²⁷⁴ K Llewellyn, ‘A Realistic Jurisprudence – The Next Step’ in K Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Univ of Chicago Press 1962) at 27-28.

law not only creates the possibility that the concepts will overlap, but in fact makes it almost inevitable. This has been observed by the courts when, for instance, they have had to address the issue of concurrent liabilities.²⁷⁵ For example, a defendant might be simultaneously liable under a contract and in negligence for causing some avoidable harm to the claimant.²⁷⁶ If the facts are exactly the same, we should not be surprised if the outcome is too. The overlap is not simply concerned with concurrent claims; we also often see contracts where the subject of agreement is the use or transfer of property; it is not at all surprising that a contract for the sale of land will have different requirements than a contract for the sale of services. Finally, much of the law of tort is concerned with protecting property against harmful acts. Since this is not designed as an exclusive system of categorisation, this does not undermine the utility of this conceptual framework.

6. Conclusion

Classification will inevitably involve generalisations and the simplification of legal concepts. We have attempted to draw the boundaries of these concepts as close as possible to observable reality; things which can be tested and identified outside the language used by lawyers. It needs to be remembered that (a) we are not arguing that any of this structure is normative, and (b) there are always differences in our interpretations of the real world. The objection has been made against concepts that simply make reference to further legal terms and principles. A system of classification

²⁷⁵ *Henderson v Merrett Syndicates* [1995] 2 AC 145 (HL).

²⁷⁶ *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555 (HL).

that draws the lines of generalisation too low will begin to lose any element of predictability. At the same time, a system of classification which draws the generalisations at too high a level will cease to have any descriptive utility. The balance needs to be achieved. Unfortunately, real rules are often stretched beyond their ordinary meaning to achieve the desired result and the law abandons the facts which are necessary for predictability. Property becomes more than the material and tangible; contract becomes a tool to describe any situation where there is a promise; and negligence is expanded to cover omissions and non-physical losses. The categories or concepts which are over-generalised will stand only as paper rules. As the legal realists pointed out, paper rules do not produce certainty.²⁷⁷ Although these concepts may have begun their lives as relatively well settled and understood concepts, they soon lose their usefulness if they become the only analytical tools within which we try to shoehorn all private law claims. If judges are required to act within the confines of fixed or exclusive categories then they will almost inevitably expand these ideas to cover new and novel problems. There seems to be an almost crippling fear of stepping outside of the comfort zone of contract, tort or property.²⁷⁸ This is much more likely to cause uncertainty than a less doctrinal and more practical approach to legal reasoning.²⁷⁹

²⁷⁷ K Llewellyn, 'A Realistic Jurisprudence – The Next Step' in K Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Univ of Chicago Press 1962) at 21-25; J Frank, *Law and the Modern Mind* (Stevens and Sons 1949) at xx-xxi; OW Holmes, 'The Path of Law' (1897) 10 *Harvard L Rev* 457.

²⁷⁸ To quote D Stevens and J Neyers in 'What's Wrong with Restitution' (1999) 37 *Alberta L Rev* 221; '[t]he common law has a weak and deficient theory of sources of obligation since no court has ever been, nor ever will be, seized of the question. Its theory is deficient because in the prevailing, largely implicit, view, there are only three sources of obligation: contract, tort, and unjust enrichment' (at 241).

²⁷⁹ For example Lord Rodger's statement in *Customs and Excise Commissioners v Barclays Bank Plc* [2006] UKHL 28, [2007] 1 AC 181, where he stated that 'Part of the function of appeal courts is to try to assist judges and practitioners by boiling down a mass of case law and distilling some shorter statement of the applicable law...But the unhappy experience with the rule so elegantly formulated by Lord Wilberforce in *Anns v Merton London Borough Council* [1978] AC 728, 751–752, suggests that appellate judges should follow the philosopher's advice to "Seek simplicity, and distrust it"' (at 204).

After setting up the main concepts in our structure, the thesis will now go on to consider many of the areas that we have removed from the three concepts of property, contract and negligence. The following chapters explore the overlaps in money claims, reliance-based claims and the law of trusts. In particular, these are areas which share overlaps with the concepts looked at in this chapter. These further overlaps would probably be considered by followers of Birks to be the legal equivalent of the platypus. The platypus was often described by biological taxonomists as a quasi-species²⁸⁰ (the similarity with quasi-contract in Justinian's *Institutes* is striking). The existence of quasi-species in the natural world does not undermine the efforts to classify biological organisms, but rather it illustrates that even in the natural sciences there are limits to the utility of classification. For this reason, it is of fundamental importance that we recognise the overlapping nature of legal concepts in the English legal system. It enables dialogue between different branches of the law and the creation of new legal concepts to adapt to novel situations or gaps within the legal framework. The concepts of English private law interact and indeed overlap. We should not reject this; instead we should recognise that this assists the wider objectives of achieving a descriptive classification of private law.

²⁸⁰ A Moyal, *Platypus: The Extraordinary Story of How a Curious Creature Baffled the World* (Johns Hopkins UP 2004).

CHAPTER 5: MONEY TRANSFERS

1. Introduction

The aim of this chapter is to explore the concept of money and the relevance of monetary transfers within private law claims. Claims concerning the transfers of money are sometimes placed in property,¹ contract,² the law of trusts and unjust enrichment. Although we are arguing that money should be regarded as a special type of interest, an overlapping analysis does not require the separation of money transfers from these other concepts; facts can be relevant in more than one concept. Indeed it would be surprising if elements such as title and control were relevant in property but not in money claims. Even so, we have determined that tangibility is an essential component of the concept of property, and most money claims involve intangible assets. Furthermore, money itself is legally significant, even in its tangible form it ‘weakens’ the concept of property and requires a special approach. As we have said throughout, the presence or absence of other facts can alter the response of the courts.

¹ See generally D Fox, *Money as Property Rights* (OUP 2008): ‘Money in its different forms belongs to that class of assets called ‘personal property’ (at 18). Since a narrower concept of property has been adopted in this chapter, it is sufficient to note that the strict liability regime of the common law only applies to money when it is corporeal *and* it is not being used as currency: E McKendrick (ed), *Goode on Commercial Law* (4th edn, LexisNexis 2009) at 486-487 and *Miller v Race* [1758] 1 Burr 452, 97 ER 398.

² Money is also sometimes classified as a contractual arrangement such as where a bank receives funds which are to be held in a personal account for a customer. See B McFarlane, *The Structure of Property Law* (Hart 2008) at 12-13.

Our definition requires; money, to which the claimant has title and control, which is then transferred to the defendant. Our view, therefore, is that every money claim shares a strong overlap with our core concept of property. Nonetheless, we identify two legally significant facts which alter the dynamics of this concept; the first being that in the vast majority of cases, the interest lies in *intangible* money. Secondly, money itself is legally significant. As Nussbaum once stated, '[m]oney is a fundamental concept of the law. There are perhaps few other juridical notions of greater importance.'³ The view presented is that even if money is in tangible form, it should not be regarded as 'property'. The presence of money as the subject matter *dilutes* the proprietary nature of the claim.

It must be noted at the start that, whilst not completely rejecting the 'unjust enrichment' analysis outright, we seek to modify, and as always, narrow the concept. At the start of this chapter, we explain why we have modified unjust enrichment and also why this narrower approach is to be preferred. In particular, the failure to distinguish property and money leads to the error of over-generalisation; under unjust enrichment the two concepts would be treated the same when in reality they are not. A further concern lies in the failure of current theories to recognise the importance of the defendant's actions in either inducing a money payment or after they receive one. It is argued that an overlap is becoming apparent between an element from our core concept of negligence and these cases of money payments. This can be found when the *positive act* of the defendant results in losses to the claimant. In these cases a special measure is being introduced by the courts to protect the interest of the

³ A Nussbaum, 'Basic Monetary Conceptions in Law' (1937) 35 Michigan L Rev 865 at 866.

claimant. The final overlap we see is in cases involving an agreement between the parties. In short, these cases show that, not only is there no wider principle of unjust enrichment, there is also no wider principle of money transfers. For this reason, we do not adopt the terminology of ‘unjust enrichment’. Facts alter cases, and it is the identification of facts, not principles, which assists in predicting the law.

Opposing Theories of Monetary Transfers: Unjust Enrichment and Resulting Trusts

As the law in this area is dominated by ‘unjust enrichment’, it will be worthwhile distinguishing the approach in this chapter. Unjust enrichment, as it is currently understood in English law, consists of enrichment at the expense of the claimant, where there is a recognised unjust factor, without any available defence.⁴ Examples of unjust factors are claims for mistaken payments or restitution for payments made under unenforceable agreements. There are several reasons why a narrower approach which focuses on *money* transfers is preferable to a wider concept of unjust enrichment. Firstly, the patterns of judicial responses in this area are *not* of general application.⁵ In particular we argue that non-monetary transfers are governed by the rules on property, trusts or reliance-based claims. Again, reference can be made to Cane, who noted that different interests call for different levels of protection.⁶ Thus,

⁴ *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349 (HL); *Deutsche Morgan Grenfell v IRC* [2006] UKHL 49, [2007] 1 AC 558. A wider version of unjust enrichment is where there is an absence of legal basis for the receipt of an enrichment; P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) at 108-114; *Deutsche Morgan Grenfell v IRC* [2006] UKHL 49, [2007] 1 AC 558.

⁵ I Jackman, *The Varieties of Restitution* (Federation Press Sydney 1998) at 4.

⁶ P Cane, *The Anatomy of Tort Law* (Hart 1997).

the one recurring idea in this chapter is that the patterns which can be found in cases of money transfers are not of general application for other types of transfers.

Therefore, it is argued that the requirement of enrichment only serves to confuse in this area, as it is always established in monetary transfers. The only relevance for this wider idea of enrichment in the context of money transfers would be to explain those cases where a defendant receives money and makes an expenditure which he would have made anyway.⁷ It is unnecessary to adopt this approach; the recipient of a mistaken payment receives an abstract measure of wealth, a view also shared by Birks⁸ and Sheehan.⁹ This leaves the only other application of enrichment as a way of incorporating non-monetary ‘enrichments’. Outside of the context of monetary transfers, enrichment has proven an elusive and difficult term, especially in relation to non-contractual services.¹⁰ Non-contractual services in the form of services are outside of the scope of this chapter, but we explore this in more detail in Chapter 6. It has even proven controversial in claims based on property, as it has been argued that a recipient who does not receive title is never enriched at all.¹¹

Thirdly, the ‘at the expense of’ requirement is only necessary if we want to incorporate into our enquiry *all* gain-based awards. This would allow us to use the same approach for money which is received not only from the claimant, but also from third parties, such as unauthorised profits of fiduciaries and gains made from the

⁷ E.g. *Scottish Equitable v Derby* [2001] EWCA Civ 369, [2001] 3 All ER 818.

⁸ P Birks, *Unjust Enrichment* (OUP 2005) at 78-79.

⁹ D Sheehan, ‘Identifying Gain in the Law of Restitution; in C Rickett (ed), *Justifying Private Law Remedies* (Hart 2008) at 336-337.

¹⁰ See generally, J Beatson, *The Use and Abuse of Unjust Enrichment* (Clarendon 1991) from 39-44.

¹¹ W Swadling, ‘Ignorance and Unjust Enrichment: The Problem of Title’, (2008) OJLS 28 627 at 642-643.

receipt of the claimant's property. Yet, the rules on property, trusts and agency can be explained without reference to unjust enrichment. Fourthly, despite the statements by numerous academics that there is strict liability for the receipt of monetary transfers, there are various defences such as good faith purchase or expenditure in good faith, which would not apply to recipients of another's property.¹² A more specific identification of the factual elements involved in claims for the restitution of money transfers is, therefore, required.

Unjust Factors

To a limited extent, the area where we share a common ground with 'unjust enrichment' is the idea of 'unjust factors'. In other words, it is sensible to take the view that no core concept can explain all claims arising from money transfers, and that in every claim additional elements are required.¹³ However, one major difference is that we do not find uniformity in the approach of the courts for all cases of money transfers; each individual 'fact' has an important impact on how the courts will deal with any dispute. Therefore, it must also be noted that, whilst not rejecting the 'unjust enrichment' analysis outright, we seek to modify the concept to aid in predicting the law.

Moreover, although we acknowledge the conceptual clarity provided by an 'unjust factors' approach, it is argued here that they are in desperate need of realignment. To

¹² *Fowler v Hollins* [1872] LR 7 QB 616.

¹³ M Chen-Wishart, 'Unjust Factors and the Restitutory Response' (2000) 20 OJLS 557.

explain what is meant by this, a brief overview is required. Birks characterised the main grounds for restitution as claimant-orientated, meaning that the justification for restitution centred on the intention of the claimant.¹⁴ When aligned in this way, restitution did not require any initial inquiry into the actions of the defendant, as he was liable merely for receipt of the money.¹⁵ This is certainly true for *mistaken payments*,¹⁶ but whether it is true for other enrichments is extremely questionable. Nonetheless, the claimant-orientated approach to mistake has, as Hedley noted, influenced the *formulation* of the other unjust factors. Most are presented in a way which indicates that it is the intention or acts of the claimant which provides the justification for awarding restitution.¹⁷ For example, ‘failure of consideration’, where money is paid for a purpose which fails, was said to be an example of a conditional intention. Although this does not sound problematic, further on in this chapter it is explained that restitution for ‘failure of consideration’ is based on an agreement (not necessarily one to repay the money.) However, there is no evidence that the courts will impose restitution for uncommunicated conditions. Thus ‘failure of condition’ requires the initial knowledge of the recipient. We argue that this is not just a difference in the relevant facts; it is also argued that the availability of the change of position defence will not be available in this situation, whereas it is for mistaken payments. Indeed, in a recent monograph on the change of position defence, Bant found no cases which supported the view that change of position can apply to this

¹⁴ McKendrick uses the term ‘plaintiff orientation’ to describe the focus of the ‘unjust’ factors; E McKendrick, ‘Tracing Misdirected Funds’ [1991] LMCLQ 378.

¹⁵ P Birks, ‘The Role of Fault in the Law of Unjust Enrichment’ in W Swadling and G Jones (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (OUP 1999).

¹⁶ P Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) at 140; ‘my judgment was not properly exercised (or, was not exercised at all) in the matter of your getting (the enrichment).’

¹⁷ S Hedley, ‘The Empire Strikes Back? A Restatement of the Law of Unjust Enrichment’ (2004) 28 Melbourne Univ L Rev 759 at 767.

alternative ‘unjust factor.’¹⁸ We return to this at the end of the chapter, in our discussion of the overlap between contract and monetary transfers.¹⁹ From a realist perspective, again it reveals that even in cases of monetary transfers, there is no uniform approach. This is why we argue that recognising the overlap with contract is the best way of understanding the ‘failure of consideration’ cases.

The claimant-orientated approach has even been stretched to cases where more obvious reasons for restitution are present. For example, according to some academics the unjust factor in cases of stolen money is ‘ignorance’;²⁰ the supposed justifying element is not that the defendant has stolen money, rather that the claimant was ‘ignorant’ of the transfer. By focusing the inquiry on the claimant, we hide the fact that the more serious issue is that the transfer was induced by the recipient. The relevance of this lies in the nature of the remedy; we argue further on that the courts are now regularly applying specific restitution (this term is used in preference to the ‘constructive trust’ but it operates in the same way) in cases involving fraud, even when the initial payment was due to an error made by the claimant.²¹ For our purposes, this is an overlap with tort. Although there is not enough space here to discuss other ‘unjust factors’ such as duress and undue influence, this chapter also serves as a warning against any attempt to reduce these issues to a claimant-orientated

¹⁸ E Bant, *The Change of Position Defence* (Hart 2009) at 197-198.

¹⁹ See text at n 136 in this Chapter.

²⁰ W Swadling, ‘Ignorance and Unjust Enrichment’ (2008) 28 OJLS 627 at 629-630. The term also has what may be called the badge of legitimacy, as it has its roots in Justinian’s Institutes. R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Juta & Co 1995) at 850-851.

²¹ *Getronics v Logistic & Transport Consulting* (QBD, 30 April 2004). Please note that we use this term to explain the ‘proprietary response’. Specific restitution is used to avoid the word property as this would only serve to confuse given what we have set out in the previous chapter. Furthermore, we do not apply the phrase ‘trust’ for the similar reason that we develop a very different concept of trust in Chapter 7.

approach. One could not hope to accommodate all of these other factors into a generic approach for monetary transfers.²²

The overall argument which is presented throughout this chapter is that monetary transfers involve a number of complicated issues, and these have a particular impact on the way in which the courts decide the cases. Understanding the relationship between monetary transfers and property cannot be achieved without adopting an overlapping approach; unjust enrichment is over-inclusive and does not identify the very important factual distinctions between these concepts. That is why ‘unjust enrichment’ is not adopted as the explanation of these cases. Furthermore, the ‘enrichment’ of the defendant certainly is relevant in these cases, but this is part and parcel of the receipt of money. We also avoid the fiction of having to claim that someone is enriched when they transferred the money elsewhere, as in the recent case of *Jones v Churcher*.²³ There, both defendants were held liable for allowing a mistaken payment to be transferred to a third party. Neither were enriched by this set of events, but they were nonetheless liable. Arguing that enrichment is strict makes little sense when we consider that the change of position defence is said by most to be a test of continuing enrichment.²⁴

Absence of Basis

²² Even within each ‘unjust factor’ there are complexities which are not immediately obvious. This is a further warning against over-simplification. See N Enonchong, ‘Presumed Undue Influence: Continuing Misconceptions?’ (2005) 121 LQR 29.

²³ [2009] EWHC 722 (QB), [2009] 2 Lloyd’s Rep 94.

²⁴ P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) at 208-219.

The danger, from a realist perspective, of this claimant-orientated approach can be found in the proposals for an ‘absence of basis’ approach to the ‘unjust’ requirement. In the wake of the swaps litigation, Zimmermann and Meier,²⁵ and also later on Birks,²⁶ called for an absence of basis approach which would avoid the need to establish an unjust factor. An absence of basis approach would ask whether (a) the payment was made to satisfy a valid obligation, or (b) was it made voluntarily to achieve some outcome.²⁷ If neither (a) nor (b) applied, (or (b) did apply and the purpose had failed), a claim for restitution could succeed.²⁸ Birks concluded that this approach would be preferable to the attempts that had been made by the courts to explain the swaps cases ‘on the uncertain metaphysics of mistake.’²⁹ In response to this proposal, Virgo has pointed out that one must question how the absence of basis approach correlates to the case law.³⁰ For example, as we will see further on,³¹ the courts have often refused restitution under the ‘failure of consideration’ ground where there has been partial performance of the condition.³² Under Birks’ approach, restitution would be readily available in this situation.³³ The consequence of the

²⁵ R Zimmermann and S Meier, ‘Judicial Development of the Law, Error Iuris, and the Law of Unjustified Enrichment - A View from Germany’ (1999) 115 LQR 556-565.

²⁶ P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) at 129-142.

²⁷ P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) at 129.

²⁸ P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) at 129.

²⁹ P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) at 113.

³⁰ G Virgo, ‘Demolishing the Pyramid- The Presence of Basis and Risk-Taking in the Law of Unjust Enrichment’ in A Robertson and H Tang (eds), *The Goals of Private Law* (Hart 2009) at 484-486. See also C Hunt, ‘Unjust Enrichment Understood as Absence of Basis: a Critical Evaluation with Lessons from Canada’ (2009) Oxford U Comparative L Forum 6 at text after n 41 <<http://ouclf.iuscomp.org/articles/hunt.shtml>> accessed 18 January 2011.

³¹ See text at n 158 in this Chapter.

³² P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) at 119-125.

³³ P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) at 120-121.

absence of basis approach is that it expands the situations where restitution is currently available, which runs against the concern to limit the scope of the action.³⁴

Another significant criticism of the absence of legal basis approach is that it does not assist in describing the circumstances where restitution will be awarded. Birks himself recognised this problem.³⁵ He acknowledged that the absence of basis approach would leave ‘the law of unjust enrichment abstract and further out of touch with the Clapham Omnibus’.³⁶ In other words, it would leave unjust enrichment even further removed from a realistic description. This is because legal concepts need to assist in predicting the circumstances of liability. By trying to include too much within ‘unjust enrichment’, the task becomes impossible. A higher level of abstraction makes it more difficult to predict cases, and therefore, the absence of basis approach should also be avoided.

Money as a type of ‘Property’

Another method for dealing with money transfers would be to regard them as examples of ‘property’. The ‘proprietary’ approach for money transfers is best exemplified by Watts, who describes monetary payments as the ‘proprietary

³⁴ G Virgo, ‘Demolishing the Pyramid- The Presence of Basis and Risk-Taking in the Law of Unjust Enrichment’ in A Robertson and H Tang (eds), *The Goals of Private Law* (Hart 2009) at 487-488.

³⁵ He stated that it requires us to ‘begin the account at invalidity and abstain altogether from explaining the causes of invalidity.’ P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) at 125.

³⁶ P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) at 125. The point is also made by Barker, who argues that the absence of basis frames the cause of action at too high a level of generality. K Barker, ‘Responsibility for Gain: Unjust Factors or Absence of Legal Ground? Starting Points in Unjust Enrichment Law’ in C Rickett and R Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart 2008) at 63.

principle’, which involves transfers of money and goods.³⁷ Watts argues that ‘there is no general need to distinguish between transfers of goods and transfers of money’.³⁸ Even the strongest money claims can be defeated by third parties who act in good faith, the same cannot be said of tangible property. Furthermore, the defences available are significantly different.³⁹ We will consider another ‘property’ argument further on when we look at specific restitution, namely the idea that the reversal of some transfers is based on the ‘vindication of property rights’.⁴⁰ This vindication analysis is not applied to all monetary transfers, hence we will leave this discussion to one side for the time being.

A more recent approach, which also treats monetary transfers as part of the law of property, is provided by Fox.⁴¹ Fox states that ‘[t]he assets which fulfil money’s economic functions can all be categorized as varieties of personal property.’⁴² This conclusion is attributable to the wide definition of ‘property’ adopted by Fox, who sees ‘property’ as something which has the hallmarks of transferability and excludability, which was earlier discussed in Chapter 4.⁴³ Even though he adopts this wide definition of ‘property’, Fox still appears to recognise that claims involving money transfers often overlap with the concepts of ‘trusts, contract and personal property.’⁴⁴ Denning LJ, (writing extra-judicially) also took the view that claims for transfers of money were based on a concept of ‘property’ whereby the money ‘in

³⁷ P Watts, ‘Restitution – A Property Principle and a Services Principle’ [1995] Restitution L Rev 49.

³⁸ *Fowler v Hollins* [1872] LR 7 QB 616, *Miller v Race* [1758] 1 Burr 452, 97 ER 398

³⁹ *United Australia Ltd v Barclays Bank* [1941] AC 1 (HL) at 7.

⁴⁰ See text at n 102 in this Chapter.

⁴¹ D Fox, *Property Rights in Money* (OUP 2008).

⁴² D Fox, *Property Rights in Money* (OUP 2008) at 5.

⁴³ See text above n 29 in Chapter 4 .

⁴⁴ D Fox, *Property Rights in Money* (OUP 2008) at 4.

justice and equity belonged to the plaintiff.’⁴⁵ Furthermore, he also distinguished between conversion, which was available for claims involving tangible money, and the claim for money had and received, which was available for ‘money generally.’⁴⁶ Denning recognised that the two claims ‘overlapped’; in many occasions the results were the same in trover and for money had and received, but that this was not always the case. On the basis that we established in Chapter 4 that property was limited to tangibles, we need not extend property to explain the treatment of money which is often transferred as an intangible asset. The concepts are not exclusive, but the importance of the factual distinctions between these concepts dictates the application of special rules for claims involving tangible money. The overlap, where money is in the form of property, is fully developed further on. The first step, then, is to set out how the courts treat transfers of intangible money.

2. Money as an Overlap with Property

There are many complicated economic and theoretical issues about the nature of money which are beyond the scope of this chapter, although we do mention these briefly in this section. At the start, it is necessary to reiterate the realist methodology. As a legal concept, monetary transfers do not have normative force, and neither does it require uniform treatment in all situations. We are instead searching for general patterns based on facts and judicial outcomes. However, we cannot hope to provide a

⁴⁵ AT Denning, ‘The Recovery of Money’ (1949) 65 LQR 37 at 38. This view was one that he had expressed earlier in his career. Whilst acting as Counsel for the claimants in *United Australia Ltd v Barclays Bank* [1941] AC 1 (HL), Denning KC stated; ‘[t]he action for money had and received is founded on a concept of property, that is, that the money belongs in justice and equity to the plaintiff’ (at 7).

⁴⁶ AT Denning, ‘The Recovery of Money’ (1949) 65 LQR 37 at 40.

realist account of monetary transfers without further narrowing our focus. The basic concept of a monetary transfer requires three factual elements; (i) money, (ii) title and control of this money (before the transfer) and (iii) the transfer of that money. What this chapter will reveal is that money itself is a significant fact and the rules developed by the courts rely heavily on the presence of a monetary transfer.

Money

The word ‘money’ is one with which we are all familiar, but it is also a term that is difficult to define.⁴⁷ As Proctor points out in the latest edition of *Mann on the Legal Aspect of Money*; “‘money’ has a variety of different meanings in different situations, and individual cases require separate scrutiny; no hard and fast rules exist in this area.”⁴⁸ Therefore, as a general term of description, ‘money’ may appear to lack any factual meaning.⁴⁹ It may be hard to provide a concrete definition of money, but it does appear that something can become ‘money’ through the patronage of large financial institutions, such as the state or banks.⁵⁰ Thus non-state authorised methods of payment can be regarded as money if they are expressed by reference to state-authorised units of currency, and so long as the currency is intended to serve as a general measure of value and exchange.⁵¹ Accordingly, a bank account with a credit

⁴⁷ C Proctor, *Mann on the Legal Aspect of Money* (OUP 2005) at 5.

⁴⁸ C Proctor, *Mann on the Legal Aspect of Money* (OUP 2005) at 8.

⁴⁹ C Proctor, *Mann on the Legal Aspect of Money* (OUP 2005) at 9.

⁵⁰ C Proctor, *Mann on the Legal Aspect of Money* (OUP 2005) at 35-37.

⁵¹ As noted by E McKendrick (ed), *Goode on Commercial Law* (4th edn, LexisNexis 2009) at 486, the State theory would exclude bank payments from the definition of money, also C Proctor, *Mann on the Legal Aspect of Money* (OUP 2005) at 35-36.

of £1000 has the same value as a unit of currency as £1000 in cash.⁵² At the same time, this definition would also preclude government bonds, store credit or vouchers, which are not intended to be of general use, but are special arrangements between private individuals.⁵³ Therefore, we need not account for these types of assets. As a factual element, money is something which can, and indeed is identifiable by reference to common practice.

Title and Control

In most cases, title is an important element in a claim for restitution. Since we adopt a multi-factual approach to concepts, the requirement of title and control does not simply make this the same as property or trusts. Nonetheless, this does provide an overlap with those concepts. Immediately we also restrict the analysis here to money transfers, and remove any consideration of the conferral of services (which are considered in the next chapter.) If title is to have any legal significance, then it will predictably provide the claimant with the means of enforcing that title in cases of what Birks described as ‘non-consensual transfers.’⁵⁴ That means that it should, presumably, be possible to regain money when it is stolen, or more commonly, when the payment has been induced by fraud. Another example of a non-consensual transfer would be mistaken payments, which we deal with further on.

⁵² C Proctor, *Mann on the Legal Aspect of Money* (OUP 2005) at 37.

⁵³ C Proctor, *Mann on the Legal Aspect of Money* (OUP 2005) at 37.

⁵⁴ P Birks, ‘Receipt’ in P Birks and A Pretto (eds), *Breach of Trust* (Hart 2002) 213 at 218.

Transfers

The next requirement is that this money has been transferred from the claimant to the defendant. Just as money is a fact, so too is the transfer of money. One of the essential characteristics of money is its ease of transfer; its very purpose is to facilitate the movement of goods and services. The ease of transferring money reflects commercial and social reality. An owner can easily transfer money not only by physical delivery, but also by authorising withdrawals from a bank account through cheques, passing on account details, standing orders and direct debits. In contrast, transfers of land usually require contracts to be made in writing while transfers of chattels also require writing or delivery of the thing.⁵⁵ Thus, it is much more likely where money is being transferred that mistakes will be made, or that the owner may not fully comprehend the consequences of the transfer. Therefore, claims arising from transfers are much more important in relation to money than in relation to tangible things. In relation to money, a transfer is an identifiable fact; this is because the rules regarding transfers are governed as much by the practice of the banks as by the decisions of the courts. In short, there will be many situations where claimants will want to reverse transfers of money. In turn, this is reflected by the need to restrict the circumstances where such claims can be made, so as not to undermine security of receipt. As Hedley notes, this concern calls for a narrow definition of the grounds for restitution for monetary transfers.⁵⁶ It has, therefore, been necessary for the courts to narrowly define the

⁵⁵ *Irons v Smallpiece* (1819) 2 B & Ald 55,106 ER 467.

⁵⁶ S Hedley, 'Restitution and Taxes Mistakenly Paid' [2003] 5 Web JCLI
<<http://webjcli.ncl.ac.uk/2003/issue5/hedley5.html>> accessed 18 January 2011.

circumstances where claims based on monetary transfers can be made because of simple mistakes.⁵⁷

Intangible Money

In practice, most claims for the restitution of money will not rely on the presence or identification of tangible moneys. Most payments involve a transfer of an intangible form of money. This is because, as Fox notes, around ‘3.5% of the money held in the British economic is actually represented by corporeal currency in the form of coins and banknotes’.⁵⁸ These cases are more complex than those involving tangible money. This is due to the fact that, as Hedley points out, in most cases the transfer includes at least four parties; ‘the payer, the payee and each of their banks.’⁵⁹ This intangibility element also impacts on the way in which courts treat transfers of money. Further on, it is argued that the courts (and statute) require higher standards of the recipients of tangible money than they do for those who receive intangible money. The element of intangibility, therefore, further weakens the strength of the claimant’s interest.

3. Mistaken Payments

⁵⁷ See the concerns of Lord Hoffmann in *Kleinwort Benson v Lincoln CC* [1999] 2 AC 349 (HL): ‘allowing recovery for mistake of law without qualification, even taking into account the defence of change of position, may be thought to tilt the balance too far against the public interest in the security of transactions’ (at 401). Also, Lord Porter, in *Reading v Attorney General* [1951] AC 507 (HL): [unjust enrichment] ‘forms no part of the law of England and that a right to restitution so described would be too widely stated’ (at 514).

⁵⁸ D Fox, *Property Rights in Money* (OUP 2008) at 43.

⁵⁹ S Hedley, *A Critical Introduction to Restitution*, (Butterworths 2001) at 91.

To demonstrate the argument presented above, it will be useful to look at restitution for mistake. The reasons for reversing mistaken payments, even those made carelessly, are not immediately apparent. Smith points this out when he states that liability without fault 'is, for many commentators, a puzzle'.⁶⁰ This puzzle can only be solved by adopting a realist account. Carelessness is a legally significant fact, and although it may provide a reason for restitution, we should also recognise that it provides a reason for not giving the claimant the strongest possible protection. By making a transfer under mistake, the claimant relinquishes control of his money, leaving him with his title and little more. The absence of control affords the title holder the lowest form of protection. Whereas the current approach is to reject the relevance of fault, it is argued here that elements of fault are important in these claims. A claimant will only be able to claim restitution for a careless error, but not for a reckless one. This seems to be the real basis for the distinction between mistakes and mispredictions which is adopted by most unjust enrichment scholars. As part of this approach, the key issue is the degree of care taken by the claimant.⁶¹ What this means, therefore, is that we have a situation where the factual matrix includes elements of property and also the element of carelessness from our concept of negligence.

⁶⁰ L Smith, 'Restitution: The Heart of Corrective Justice Symposium: Restitution and Unjust Enrichment' (2001) 79 Texas L Rev 2115 at 2115.

⁶¹ A good example is *Dextra Bank and Trust Co Ltd v Bank of Jamaica* [2001] UKPC 50, [2002] 1 All ER (Comm) 193. The claimants were careless, and despite the conclusion that this was not relevant in the case, it does provide the best explanation of the decision. In particular, it was noted that whereas the defendant had acted in complete good faith without notice of the nature of the transaction, the trial judge had criticised the conduct of Dextra as 'less than prudent', at [16]. Birks himself concluded that the facts of *Dextra* were very similar to the earlier House of Lords decision in *RE Jones Ltd v Waring and Gillow Ltd* [1926] AC 670 (HL), in P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) at 145. In *RE Jones* it was concluded that the claim could succeed as a mistaken payment. In *RE Jones* itself it is notable that Lord Sumner, who was in the majority, concluded that neither party was at fault, at 693. In contrast, Viscount Cave, who would have denied the claim for restitution, took the view that the defendant had acted 'unwisely' and possibly even 'recklessly', at 682.

To summarise, the relevance of this carelessness element really depends on one's point of view. If one is attempting to construct an entire concept around mistaken payments, then the mistake is the reason *for* recognising a claim for restitution. Yet, if we approach it from a different angle, and compare it to other situations such as money which has been stolen or paid under an agreement, then the mistake in fact tells us that the carelessness is a reason for *not* providing a stronger claim for the claimant. We will also demonstrate that it is not every error for which one can claim restitution. The law seemingly draws a distinction between careless and reckless errors.

Carelessness

In *Barclays Bank v Simms*,⁶² Goff J proposed a causal test for a mistaken payment, which has recently received support by Lord Walker in the *Deutsche Morgan Grenfell v IRC* judgment.⁶³ This test asks whether the payment would have been made 'but-for' the mistake.⁶⁴ Tettenborn has criticised the causal test for being too wide, giving an example of a father who would not have provided for his daughter if he had known she was marrying a man that he detested.⁶⁵ Even Birks described the 'causal test' as a 'disarmingly simple proposition', which required further 'qualifications and

⁶² *Barclays Bank v Simms & Cooke* [1980] QB 677 (QB).

⁶³ [2006] UKHL 49, [2007] 1 AC 558 at 591 and 609 respectively.

⁶⁴ *Barclays Bank v Simms & Cooke* [1980] QB 677 (QB).

⁶⁵ A Tettenborn, *Law of Restitution in England and Ireland* (2nd edn, Cavendish 1996) at 61.

exceptions'.⁶⁶ In short, the causal test of mistake is a simplistic tool that does not fully explain when restitution will be available for mistake. Hedley also argues that it is difficult to accept that the causal mistake is 'reasonable, at least without the introduction of defences going far beyond those currently envisaged.'⁶⁷ A more descriptive account of mistaken payments is required.

Given the very wide definition of mistakes, one of the controlling devices for preventing restitution for all types of mistakes is said to be the distinction between mistakes and mispredictions. Both Birks and Sheehan adopt a definition of mistake that is restricted to errors of fact, i.e. where the transfer is due to a mistake about a current state of affairs, rather than predictions about what will happen in the future.⁶⁸ The explanation for this distinction is that the mistaken payor has not taken the risk that the payment was made under an error, whereas the mispredictor has taken the risk that the prediction may not come to pass.⁶⁹ This 'risk' analysis is a neat way of saying that the degree of care taken by the claimant will be relevant in determining whether or not restitution will be awarded. The very basis of the distinction between mistakes of fact and mispredictions explicitly accepts that the latter constitutes a higher degree of carelessness.⁷⁰ It is suggested here that there is no need for such an artificial restriction as this. Instead, the more sensible analysis is that the error is a careless one,

⁶⁶ P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) at 139.

⁶⁷ S Hedley, *A Critical Introduction to Restitution* (Butterworths 2001) at 107.

⁶⁸ P Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) at 147-148; D Sheehan, 'What is a Mistake' (2000) 20 *Legal Studies* 538 at 551-552. 'It is here necessary to observe - what is indeed very elementary as a distinction - that the imposition of a condition has relation to the future, whereas a mistake in fact has relation to the past.' *RE Jones Ltd v Waring and Gillow Ltd* [1926] AC 670 (HL), Lord Shaw at 690. More recently, *Dextra Bank and Trust Co Ltd v Bank of Jamaica* [2001] UKPC 50, [2002] 1 All ER (Comm) 193.

⁶⁹ W Seah, 'Mispredictions, Mistakes and the Law of Unjust Enrichment' (2007) RLR 93.

⁷⁰ Zimmermann notes that even classical lawyers recognised the distinction between reasonable and unreasonable errors. R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Juta & Co 1995) at 850-851.

but not a reckless error. This explains why there are cases which succeed despite being mispredictions, and also why others fail despite being examples of mistakes.⁷¹

The key is carelessness, not recklessness.

The guidelines of the mistake and misprediction distinction are indeed useful, as *generally* a misprediction which is not part of an agreement will not allow restitution in commercial transactions. We should not ignore the fact that the courts are not applying a rigid test of mistake or misprediction. This supports the proposition that the real issue is the reasonableness of the error. A clear dividing line between mistakes and mispredictions will only serve to confuse this issue.

The Nature of the Claim

What distinguishes most claims for mistaken payments from some of the other ‘unjust factors’, is that the award provided by the court will nearly always be a simple claim for repayment of an equivalent sum.⁷² This is what has been described by Birks as the first measure.⁷³ The first measure is more commonly referred to as a ‘personal’ claim, one that lies against the recipient for the value of the money. It is similar to a debt, as the recipient is under no obligation to return the specific money he received. Although this claim is stated to be one of strict liability,⁷⁴ the defendant will not be liable if generally speaking he or she has been made worse off by the innocent receipt of the

⁷¹ *Kerrison v Glyn, Mills, Currie & Co* (1911) 81 LJKB 465 (QB).

⁷² For example in Lord Abinger CB in *Calland v Loyd*: ‘[t]here is no doubt that if I pay money to A., who pays it to his banker to his own account, without notice, I cannot recover it from the banker.’ (1840) 6 M & W 26; 151 Eng Rep 307.

⁷³ P Birks, *Restitution: The Future* (Federation Press 1992) at 106-107.

⁷⁴ P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) at 207-209

money.⁷⁵ The reason for identifying this as the ‘first measure’ was that Birks also sought to establish the availability of a second measure which would provide the claimant with an interest which would bind third party volunteers. In cases of insolvency this would be of extreme importance. As Watts explains, the most sophisticated analysis is present in Birks’ final writings, when he stated that the second measure was available for initial failures of basis (i.e. mistakes) but not subsequent failures (i.e. failure of consideration.)⁷⁶ This was more generally explained by Burrows under the basis that where there is an initial failure, the claimant has not taken the risk of the defendant’s insolvency. Lord Millett, writing extra-judicially, has pointed out that this position has ‘no firm support in authority and none in principle’.⁷⁷ Therefore, as of yet, English law does not recognise this second measure merely because there has been a careless payment. We argue that the courts are moving towards a limited means of protecting such interests, but only where there is an additional factual overlap with elements of tort and criminal law, which we discuss after defences. In summary, there is only one type of response to a mistaken payment, which is a claim for the repayment of an equivalent sum of money which does not grant any rights in insolvency and is restricted to the recipient of the funds.

Defences

⁷⁵ *Jones v Commerzbank AG* [2003] EWCA Civ 1663; (2003) 147 SJLB 1397.

⁷⁶ P Watts, ‘Birks and Proprietary Claims, with Special Reference to Misrepresentation and to Ultra Vires Contracts’ in C Rickett and R Grantham (eds), *Structure and Justification in Private Law* (Hart 2008) at 363-365.

⁷⁷ P Millett, ‘Proprietary Restitution’ in S Degeling and J Edelman (eds), *Equity in Commercial Law* (LawBook Co 2005) at 317.

It is now well established that a number of defences apply to claims for the receipt of money transferred under mistake, the most unique one being ‘change of position’. We restrict our discussion of this defence to mistake as it is questionable whether it applies in other situations. For example, Bant has recently stated that the defence seems to be of little application in cases of undue influence or duress and has noted the fact that it has not been applied in cases of payments made under a condition which subsequently fails.⁷⁸ Even more enlightening is the dictum of Lord Walker in *Deutsche Morgan Grenfell v IRC*, where he stated that ‘the defence of change of position could seldom, if ever, apply to wrongfully exacted tax.’⁷⁹ This has been affirmed in subsequent decisions.⁸⁰ The only authority which suggests that change of position is relevant outside of the context of mistaken payments is *Lipkin Gorman v Karpnale*.⁸¹ Even so, it must be noted that this defence would probably not have been available if the claimants had pursued their claim for ‘specific restitution’ which, on the current state of the law, would have been available to them. It seems that the defence is primarily restricted to mistaken payments.

Whereas other systems have a defence which looks at the relative fault of the parties, the English approach attempts to remove the relevance of fault altogether.⁸² This has not proved easy to do. Under the approach which the courts have adopted, it is said that a defendant can avoid liability, if they can show that they have made an ‘extra-

⁷⁸ E Bant, *The Change of Position Defence* (Hart 2009) ch 7.

⁷⁹ [2007] 1 AC 558 (HL) at 610.

⁸⁰ *Haugesund Kommune v Depfa ACS Bank* in both the high court and the court of appeal: [2009] EWHC 2227 (Comm); [2010] Lloyd's Rep PN 21 and [2010] EWCA Civ 579, [2010] 1 CLC 770.

⁸¹ [1991] 2 AC 548 (HL).

⁸² J Beatson and W Bishop, ‘Mistaken Payments in the Law of Restitution’ (1986) 36 *University of Toronto LJ* 149.

ordinary' expenditure in the honest belief that they are entitled to the money.⁸³ It has also been said that the defence will not be available where the claimant is a 'wrongdoer.' Nonetheless, the courts have struggled to define and to apply this defence.⁸⁴ The most obvious reason is pointed out by Hedley, who explained that the defence seems inadequate to deal with complex financial planning.⁸⁵ A similar point was recently made by Lord Brown in the Supreme Court, who has stated that '[a]s is well known, common law restitution claims are, at the best of times, far from straightforward. Not the least of their difficulties...is the defence of change of position.'⁸⁶ Bant has sought to explain it more generally as a mechanism which prevents restitution where the transfer is 'irreversible.'⁸⁷ This is an important approach as it recognises changes in social circumstances which may be a result of the payment. This is supported by a number of authorities, which show that the English courts are moving closer to the approach in the Restatement of the Law of Restitution, which looks at relative fault.⁸⁸ Although we talk of 'good faith', it is argued here that the relevant degree of fault is that the defendant has suffered a detriment and does not have knowledge about the mistake or is recklessness as to the origins of the money. Therefore, where the defendant has paid the money away, it is necessary for the

⁸³ Lord Goff in *Lipkin Gorman v Karpnale* [1991] 2 AC 548 (HL); 'the mere fact that the defendant has spent the money, in whole or in part, does not of itself render it inequitable that he should be called upon to repay, because the expenditure might in any event have been incurred by him in the ordinary course of things.'

⁸⁴ The problems in applying the defence can be seen in *Phil Collins v Davis* [2000] 3 All ER 808 (Ch) where Parker J stated that 'in applying this principle it seems to me that the court should beware of applying too strict a standard. Depending on the circumstances, it may well be unrealistic to expect a defendant to produce conclusive evidence of change of position, given that when he changed his position he can have had no expectation that he might thereafter have to prove that he did so, and the reason why he did so, in a court of law' (at 827).

⁸⁵ S Hedley, *A Critical Introduction to Restitution* (Butterworths 2001) at 106-107.

⁸⁶ *R (on the application of Child Poverty Action Group) v Secretary of State for Work and Pensions*, [2010] UKSC 54, [2011] 2 WLR 1 at [14].

⁸⁷ E Bant, *The Change of Position Defence* (Hart 2009) at 132.

⁸⁸ *Jones v Commerzbank AG* [2003] EWCA Civ 1663; (2003) 147 SJLB 1397; *Niru Battery Manufacturing Co v Milestone Trading Ltd (No.1)* [2003] EWCA Civ 1446; [2004] QB 985.

claimant to demonstrate that the recipient has knowledge that the payment was made under a mistake⁸⁹ or was acting recklessly.⁹⁰ A careless payment by the defendant will not prevent the defence of change of position.⁹¹ The requirement works well, as we have already seen that a claim will fail if the payment was made recklessly, and so defendants will only be deprived of the change of position if they are more at fault than the claimant.⁹²

Summary on Mistaken Payments

According to Huber, if carelessness was a bar to restitution, then corporations would likely spend much more resources on administrative departments.⁹³ Beatson and Bishop have also justified the restitution of mistaken payments on this basis.⁹⁴ The simple fact is that any society must accommodate the inevitability of mistakes, especially when we take into account the inevitable agency costs of a complex economy. But it is when those mistakes are easily avoidable that we stop talking

⁸⁹ *Papamichael v National Westminster Bank Plc* [2003] EWHC 164 (Comm) [2003] 1 Lloyd's Rep 341. In this case, Chambers QC stated that the bank's assistance in transferring money from the account gave rise to a claim in 'knowing assistance'.

⁹⁰ *Jones v Churcher* [2009] EWHC 722 (QB), [2009] 2 Lloyd's Rep 94. There were two defendants in this case, the account holder who recklessly transferred the money to a third party, who absconded, and the bank who were informed of the error on numerous occasions but failed to prevent the money from being transferred.

⁹¹ Unless it is a careless payment when the defendant received tangible money: eg *United Australia Bank Ltd v Barclays Bank Ltd* [1941] AC 1 (HL).

⁹² As Gummow J stated in the Australian High Court decision in *Roxborough v Rothmans of Pall Mall Australia Ltd*; '[t]he defendant may rely upon any defense which shows that the plaintiff, in equity and good conscience, is not entitled to recover in whole or in part.' (2001) 208 CLR 516 at 549. English law does not adopt this approach.

⁹³ P Huber, 'Mistaken Transfers and Profitable Infringement on Property Rights: An Economic Analysis' (1988) 49 Louisiana L Rev 71 at 80; Giving the example of a legal system where there would be no restitution for mistaken payments, Huber concludes that 'the transferor will incur transfer avoidance costs. The employer in the example may choose to invest in control mechanisms in his accounting department.'

⁹⁴ J Beatson and W Bishop, 'Mistaken Payments in the Law of Restitution' (1986) 36 University of Toronto LJ 149.

about ‘mistakes’ and we become less sympathetic. This has an inevitable influence on the way in which the courts identify whether or not the transfer was made under a mistake.⁹⁵ Therefore, fault underlies this claim; it is available for mistakes which are careless, not reckless, and the defendant can only escape liability if he has been careless, not reckless in his dealings with the money. The standards of care which we see in negligence are hidden beneath the language of unjust enrichment. What we see is a complex overlap between property and negligence. An even clearer overlap occurs with tort more generally: the positive act of the defendant in turn leads to a stronger form of protection. This is the focus of our next section.

4. The Overlap of Tort, Criminal Offences and Monetary Transfers

As indicated above, Birks argued that a second measure was available in claims for mistaken payments. We have already stated that, generally, no such claim is available for mistaken payments. In cases where this second measure is available (which we will refer to as ‘specific restitution’) the overlap lies with *facts* which are relevant in criminal law; namely knowledge or recklessness about the origins of the money and an attempt to deprive the claimant of this money.⁹⁶ Before we explore this, we must first distinguish this type of claim from two alternative approaches; the first treats specific restitution as a ‘trust’ and the second would only permit specific restitution

⁹⁵ For example, Lord Scott in *Deutsche Morgan Grenfell v IRC*, suggested that restitution would not be available if the claimant made a gift on the basis that the recipient was poor and it was later discovered that the recipient is in fact of substantial wealth.; ‘eg a gift of £1,000 by A to B where B is believed by A to be impecunious but is in fact a person of substantial wealth and where A would not have made the gift if he had known that to be so. My present opinion is that unless there were some other reason, such as a misrepresentation by B, to enable the gift to be set aside, the mistake made by A would not suffice, notwithstanding that the payment had not been made pursuant to any legal obligation and that but for the mistake it would not have been made.’ [2006] UKHL 49, [2007] 1 AC 558 at 592.

⁹⁶ Eg *Getronics v Logistic & Transport Consulting* (QBD, 30 April 2004).

after the claimant rescinds the transfer. Both need to be rejected to fully understand the developing patterns.

Overcoming the Tracing Issue

The first problem that our analysis faces is that to claim for specific restitution, the claimant must identify that the defendant received the money in the first place. To do so, the money must be traced.⁹⁷ Traditionally, it has been said that there are two sets of tracing rules: common law tracing and equitable tracing. First, it is said that, at ‘common law’, it is only possible to trace into substitute assets, and once there has been a mixture that the tracing process comes to an end.⁹⁸ This is one of the main reasons for the paucity of common law tracing claims. ‘Equitable tracing’, on the other hand, has no such problem tracing intangible money into mixtures. However, it has been stated that (a) there must be a breach of trust or (b) that there must be an initial fiduciary relationship, such as in a trust or agency situation.⁹⁹

⁹⁷ L Smith, *The Law of Tracing*, (Clarendon Press 1997).

⁹⁸ Rimer J, in *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281 at 317; ‘If the thief mixes stolen money with other money in a bank account, the common law cannot trace into it. Equity has traditionally been regarded as similarly incompetent unless it could first identify a relevant fiduciary relationship, but in many cases of theft there will be none.’ *Lipkin Gorman v. Karpnale* [1991] 2 AC 548 (HL); *Trustee of the Property of FC Jones and Sons (a Firm) v Jones* [1997] Ch 159 (CA); *Banque Belge pour l’Etranger v Hambrouck* [1921] 1 KB 321 (CA); *Agip v Jackson* [1990] Ch 265 (Ch).

⁹⁹ *Re Diplock* [1948] Ch 465 (CA); ‘In our judgment it must be the principle clearly indicated by Lord Parker, that equity may operate on the conscience not merely of those who acquire a legal title in breach of some trust, express or constructive, or of some other fiduciary obligation, but of volunteers provided that as a result of what has gone before some equitable proprietary interest has been created and attaches to the property in the hands of the volunteer.’ Lord Greene at 530. D Hayton, ‘The *Interrelated Liability in Equity of Financial Institutions Used in the Furtherance of Fraud*’ (2010) 31 *Company Lawyer* 103 at 103.

Although these rules have been laid down by the courts, it is contended that the distinction between the two sets of tracing rules is merely a paper rule which is not reflected in reality. If this was an accurate account of the law, it would not be possible to trace money in the absence of an initial trust or fiduciary relationship. Even so, there are clear indications that intangible money *can* be traced even where there has not been any breach of trust or fiduciary duty. A recent example is *Barclays Bank Plc v Kalamohan*,¹⁰⁰ where Proudman J concluded that money could be traced into assets which had been purchased by a customer, who had induced fraudulent transfers from a bank. According to the judge, the defendant ‘was acting in breach of fiduciary duty and the moneys were received by or on behalf of the defendants in circumstances where it would be unconscionable for them to retain them.’¹⁰¹ This conclusion was reached despite the fact that the defendant was not a fiduciary, but merely a customer of the claimant bank. The courts are merely paying lip service to the requirement of a fiduciary relationship, which is misleading and will lead to confusion about the phrase ‘fiduciary.’ A realist account must search for something more accurate to describe when specific restitution is available.

Rejecting the ‘Trust’ Explanation

One of the added benefits of the phrase ‘specific restitution’ is that it indicates that the claim is not based on property or trusts. McFarlane, for example, takes the view that

¹⁰⁰ *Barclays Bank Plc v Kalamohan and Kalamohan* [2010] EWHC 1383 (Ch).

¹⁰¹ *Ibid* at [74].

specific restitution imposes a ‘trust’ on behalf of the claimant.¹⁰² This view is also present in cases such as *Henry v Hammond*, where Channell J considered that situations with mixtures of money would be regarded as either a trust or mere debtor relationship.¹⁰³ This analysis needs to be avoided: the trust already is a large concept, and loses its descriptive value when it is used in too many situations. The point was made by Lord Nicholls who argued that the application of the ‘trust’ concept to third party recipients ‘distorts the ordinary principles of trusteeship’.¹⁰⁴ For this reason, the word trust is not used in this chapter to describe general claims for the return of money, even for those cases where the courts use the phrases ‘resulting’ or ‘constructive’ trusts. Instead the phrase ‘specific restitution’ is adopted.¹⁰⁵

Rejecting the Vindication of Property Rights Approach

It is first necessary to consider the arguments made by those who propose that ‘specific restitution’ is only available in claims based on the ‘vindication of property rights’. This is exemplified by the writings of Virgo, Swadling, Grantham and Rickett, which distinguish cases where the claimant enjoys a continuing interest in money (where this represents a ‘proprietary interest’) from ‘personal’ claims for unjust

¹⁰² B McFarlane, *The Structure of Property Law* (Hart 2008) at 295-296.

¹⁰³ [1913] 2 KB 515 (KB) at 520.

¹⁰⁴ Lord Nicholls, ‘Knowing Receipt: The Need for a New Landmark’ in WR Cornish et al (eds), *Restitution, Past, Present and Future* (Hart 1998) at 243. A similar point was made by Rimer J in relation to fraudulently obtained money when he stated that ‘C’s proprietary rights entitle him to recover the property, but his claim to do so cannot and does not need to be dependent on the existence of a supposed trust relationship.’ *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] 2 WLR 1213 at 1251.

¹⁰⁵ Although this term is not without controversy; C Murphy, ‘What is Specific about Specific Restitution’ (2009) 60 *Hastings LJ* 853.

enrichment.¹⁰⁶ Firstly, it will be apparent that, just as we reject the use of the term ‘trust’, we also do not adopt the language of ‘property’ to distinguish cases where specific restitution is available. While we agree with the premise that a mistaken payment is very different from cases of misapplied trust funds or even ‘resulting trust’ cases, it does not mean that specific restitution is *never* available for a mistaken payment. Rotherham has correctly criticised this debate for being based on absolute categories, and a failure to realise that different legal concepts may also be interlinked.¹⁰⁷ The vindication of property rights approach makes the same error as the ‘unjust factors’ approach, by attempting to provide a claimant-orientated explanation as the sole criteria for determining the appropriate response. In some cases, it clearly is relevant that the claimant placed some restrictions on the transfer of money and, in those cases, specific restitution can be attributed to the acts of the claimant. We look at this in Chapter 7, under our discussion of resulting trusts where we argue that this element of ‘control’ provides another overlapping factor with property. However, it is also argued here that specific restitution can be established through the actions of the recipient. This has not proven popular with those endorsing the vindication of property rights approach, but as we shall see it is certainly supported in the case law.¹⁰⁸

¹⁰⁶ G Virgo, ‘What is the Law of Restitution About?’ in WR Cornish et al (eds), *Restitution Past, Present and Future: Essays in Honour of Gareth Jones* (Hart 1998) at 312-316; R Grantham and C Rickett, ‘Property and Unjust Enrichment: Categorical Truths or Unnecessary Complexity’ [1997] 5 New Zealand L Rev 668; W Swadling, ‘Property and Unjust Enrichment’ in JW Harris (ed), *Property Problems: From Genes to Pension Funds* (Kluwer 1997).

¹⁰⁷ C Rotherham, ‘Property and Unjust Enrichment: A Misunderstood Relationship’ in A Hudson (ed), *New Perspectives on Property Law, Obligations and Restitution* (Cavendish 2003)

¹⁰⁸ G Virgo, *Principles of the Law of Restitution* (2nd edn, OUP 2006).

Rejecting the 'Rescission' Analysis

To show how confused the law is in this developing area, we find yet another competing analysis. The other analysis which must be rejected is the rescission analysis that has been adopted by Rimer J in *Shalson v Russo*¹⁰⁹ and Etherton J in *London Allied Holdings Limited v Lee*.¹¹⁰ Hacker describes this as the power-model of 'proprietary restitution', where the order for specific restitution originates from the claimant's decision to rescind the transfer.¹¹¹ This approach would rule out specific restitution where the recipient passes on money or becomes insolvent *before* the claimant exercises the right to rescind. Again, it seeks to justify an order for specific restitution by reference to the actions of the claimant. Despite the judicial support for this analysis, it does not correspond to the way in which the courts have actually been applying specific restitution in both mistaken transfers and also fraudulently obtained money. In the latter type of cases, specific restitution is available at the moment of receipt.¹¹² This is demonstrated by the very simple fact that specific restitution is available against the fraudster even before the claimant has rescinded the transfer. For example, in *Bank of Ireland v Pexxnet*,¹¹³ four defendants were involved in a fraudulent transfer to a Swiss bank account. Before the claimants even discovered that they had been deceived, the money had already been passed on to third parties.

¹⁰⁹ 'There is no doubt that a transaction induced by fraud is voidable and, subject to equitable considerations, may be rescinded' at [276].

¹¹⁰ [2007] EWHC 2061 (Ch).

¹¹¹ B Häcker, 'Proprietary Restitution After Impaired Consent Transfers: A Generalised Power Model' (2009) 68 CLJ 324 at 339-341.

¹¹² *Trustor AB v. Smallbone (No. 3)* [2000] EWCA Civ 150. Here, a chairman and the managing director were both involved in fraud, and transferred money to companies owned by the fraudsters. Specific restitution was available, meaning that the money could be traced into the hands of the fraudster's company. Admittedly the defendants could be regarded as fiduciaries, although this was not mentioned in the Court of Appeal decision. There was no fiduciary relationship in *Bank of Ireland v Pexxnet* [2010] EWHC 1872 (Comm).

¹¹³ [2010] EWHC 1872 (Comm).

Specific restitution was available even against the third party recipients of the money. Even in *London Allied Holdings v Lee*, where Etherton J claimed to be applying the rules on rescission, the claim for specific restitution was successfully made *after* the money had been transferred to the wives of the defendants.¹¹⁴ An even clearer example is *Commerzbank Aktiengesellschaft v IMB Morgan Plc*,¹¹⁵ where many of the claimants had apparently been unaware that they had been the victims of fraud. Despite the fact that the recipient bank was insolvent, the claims for specific restitution were successful. The rescission analysis adds little except for confusion and would in fact have led to a different outcome in each of these decisions.

According to Hacker, the relevance of the rescission model is that if the money had been transferred to someone who purchased the money in good faith before the claimant sought restitution, the money could not be traced into the third party's hands.¹¹⁶ This presumes that rescission resurrects the original legal title of the claimant and that this title will not be defeated by a good faith purchaser. It treats money in the same way as property, when they are clearly treated differently by the courts. The issue about whether the transfer is *void* or *voidable* is unnecessary given the fact that *any* claim for a transfer of intangible money, whether void or voidable, will be defeated by a good faith purchaser. As we will see in the following paragraphs, it is the defendant's knowledge and intent to deprive the claimant which explains specific restitution. In many cases, this correlates with the realisation by the

¹¹⁴ [2007] EWHC 2061 (Ch).

¹¹⁵ [2004] EWHC 2771 (Ch), [2005] 2 All ER (Comm) 564.

¹¹⁶ B Hacker, 'Proprietary Restitution After Impaired Consent Transfers: A Generalised Power Model' (2009) 68 CLJ 324 at 351-352.

claimant that the money has been paid by mistake or under a fraudulent transfer. However, the key question is when the defendant becomes aware of this.

Recognising the Overlap with Tort and Criminal law

The argument presented here is that this ‘something else’ is an overlap between the part of our tort element and standards imposed by statute. The tort element lies in the requirement that the defendant has committed a positive act which establishes the claim for specific restitution. The nature of that act is one of appropriation. The strongest authority for this comes from two comments made by Lord Browne-Wilkinson in *Westdeutsche v London Islington LBC*, both of which have proven controversial.¹¹⁷ The first comment was his suggestion that ‘when property is obtained by fraud equity imposes a constructive trust on the fraudulent recipient.’¹¹⁸ This has been criticised for circumscribing the equitable tracing rules, but we have already dealt with this argument. The second was that, if the recipient of a mistaken payment realises that the money was paid under a mistake, they are bound by conscience to hold that money for the claimant.¹¹⁹ This has undoubtedly been a controversial statement, as Chambers and Virgo have both argued that this should not be followed.¹²⁰ One complication, identified by Millett LJ, is that this reasoning would suggest that in *Westdeutsche* itself specific restitution should have been possible once

¹¹⁷ [1996] AC 669 (HL).

¹¹⁸ *Westdeutsche v London Islington LBC* [1996] AC 669 (HL) at 716.

¹¹⁹ *Westdeutsche v London Islington LBC* [1996] AC 669 (HL) at 716. Writing more recently, McFarlane also argues that specific restitution is available where the recipient becomes aware, or at least should be aware, that the payment was made in error. B McFarlane, *The Structure of Property Law* (Hart 2008) at 305-312.

¹²⁰ R Chambers, *Resulting Trusts* (Clarendon Press 1997) at 208; G Virgo, ‘Vindicating Vindication: *Foskett v McKeown*’ in A Hudson (ed), *New Perspectives on Property Law, Obligations and Restitution* (Cavendish 2003) at 211.

the recipient discovered that the money was paid under a void contract.¹²¹ Millett's criticism in particular suggests that knowledge itself is insufficient, but this does not mean that it is not relevant. Our position is that the case law has developed along the lines set out by Lord Browne-Wilkinson, with an additional requirement that the defendant attempts to deprive the claimant of the money. No such conduct was present in *Westdeutsche*, as both parties recognised that the money was to be repaid and the only contentious issue was the quantum of interest. The reason why this analysis is important is that it would allow specific restitution in the situation where the recipient of a mistaken or fraudulently obtained payment empties his bank account and transfers the money to a third party.

Recognising the Overlaps

Specific restitution will not be available until the money is received by someone who attempts to deprive the claimant of this money. This is a positive act, thus creating an overlap with our core concept of tort. This is not the only overlap we see. The claim also brings in elements of criminal law. The relevant statute is the Theft Act 1968, which indicates that two factual elements are required. In particular, sections 15 and 15A of the Theft Act 1968 define fraud as a dishonest appropriation with the 'intention of permanently depriving the other of it.' Furthermore, section 3 extends 'appropriation' to 'innocent recipients who keep or deal with the stolen property as owner.' As this is an overlap, we are in no way saying that specific restitution requires

¹²¹ PJ Millett, 'Restitution and Constructive Trusts' (1998) 114 LQR 399 at 413.

a criminal offence to be recognised by the court.¹²² Instead we are stating that two factual elements which are identified as *relevant* in the criminal context also have relevance in establishing specific restitution. The first is that the recipient has knowledge or shown a reckless disregard of the circumstances in which the money was transferred. For our purposes, this will more generally be referred to as the requirement of *knowledge*.¹²³ The second, of equal importance, is that the claimant tries to permanently deprive the claimant of the money. By this, it is meant that the recipient deliberately transfers the money to another recipient or enters *voluntary* liquidation. This approach is applied both to fraudsters and innocent recipients.

It will also be useful to explain that we are not attempting to construct specific restitution on the basis of unconscionability. Birks rejected any role for ‘conscience’ in justifying specific restitution on the basis that it would be ‘too vague’ and also was ‘not sufficiently supported by history’.¹²⁴ The term conscience certainly is vague, and the reason for our avoidance of the term is that it does not identify any factual elements. Conscience may be the general principle, but a realist account is concerned with first identifying the factual elements of the concept if there is any pattern to be found. The argument is that there is indeed a pattern at play here, and the relevant facts are knowledge and an attempt to deprive the claimant of the money. Where both elements are present, we can predict that specific restitution will be available. That this may be described as ‘unconscionable behaviour’ is neither here nor there.

¹²² This was one of the issues Master Whittaker had to deal with in *Getronics v Logistic & Transport Consulting* (QBD, 30 April 2004).

¹²³ As Gibson J pointed out in *Baden v Societe Generale*, a reckless and wilful shutting of one’s eyes can be regarded as knowledge. *Baden v Societe Generale* [1993] 1 WLR 509 (Ch) at 575-576.

¹²⁴ P Birks, ‘The Role of Fault in the Law of Unjust Enrichment’ in W Swadling and G Jones (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (OUP 1999).

Knowledge and Depriving the Claimant

The requirements of knowledge and an act of deprivation are readily satisfied in cases of fraudulently obtained money transfers.¹²⁵ On the basis of the cases which we discussed in the preceding section on rescission, this seems to be a straightforward proposition. What is more problematic is the argument that these facts can also provide the basis for specific restitution of mistaken payments. The first case that needs to be addressed is *Chase Manhattan Bank NA v Israeli-British Bank (London) Ltd.*¹²⁶ In *Chase Manhattan*, the claimant had mistakenly paid money to the recipient, who was declared bankrupt before the claimant realised the error. The case is of limited authority primarily because Gouding J was applying the law of New York, and wrongly concluded that the position under English law would be the same. However, the decision has been re-analysed by Lord Browne-Wilkinson, who argued that the decision was nonetheless a correct one.¹²⁷ On the approach adopted here, the facts of *Chase Manhattan* would allow a claim for specific restitution. Both of our requirements were present in this case. Firstly, the recipient knew that it had received a mistaken payment, and, secondly, it took no steps for an entire month before voluntarily petitioning for a winding up order. Although this latter fact was not explicitly mentioned by his Lord Browne-Wilkinson, the defendant's voluntary act of liquidation seems to be the factor which made its actions 'unconscionable' in this

¹²⁵ *Commerzbank Aktiengesellschaft v IMB Morgan Plc* [2004] EWHC 2771 (Ch), [2005] 2 All ER (Comm) 564.

¹²⁶ [1981] Ch 105 (Ch).

¹²⁷ *Westdeutsche v London Islington LBC* [1996] AC 669 (HL) at 716.

case. As noted above, we do not need to apply broad generalisations such as unconscionability once we have identified these legally significant facts. In *Chase Manhattan*, the defendant had knowledge of the mistake and committed an act which would have deprived the claimant of the money.

This analysis is supported by *Fitzalan-Howard v Hibbert*¹²⁸ which is similar to *Chase Manhattan* except for the fact that specific restitution was not available to the claimant. In *Fitzalan-Howard*, a substantial sum was mistakenly paid to the recipient, who was notified of the mistake. The defendant had an opportunity to repay the money, but there was no obvious need for urgency. A few days later the defendant's creditors withdrew their support and administrators were appointed. Although knowledge was present, the defendant had not intentionally deprived the claimant of this money. The appointment of the liquidators was the act of the bank, not the defendant itself. The claimant stood as a mere creditor, and specific restitution was not available in these circumstances. This analysis is also reflected in other cases that are described as being based on 'mistake', such as *Getronics v Logistic & Transport Consulting*.¹²⁹ In *Getronics*, it was unclear if the defendant had deliberately induced the payments. However, it was also apparent that, under the arrangement with the defendants, the claimants would make payments when the defendants forwarded invoices. The defendants had sent duplicate invoices and overcharged the claimants. Specific restitution was recognised for two reasons. Firstly, the defendants must have

¹²⁸ [2009] EWHC 2855 (QB), [2010] PNL R 11.

¹²⁹ (QBD, 30 April 2004).

known at some point that the payments were made under a mistake.¹³⁰ Secondly, and importantly, the money was then paid to two other companies which were owned by the initial recipients. This act quite clearly was an act done to deprive the claimant of the money. Specific restitution is only available for mistaken payments when there is an overlap with tort, and more specifically when the recipient defendant has knowledge that the money was paid under a mistake and attempts to deprive the claimant of this money.

Defences

Bona Fide Purchaser

Where specific restitution is available, and the money is in the hands of an innocent recipient, it will be necessary to address the merits of the claimant and defendant's claims to the money. Given the role of money as a means of facilitating transfers, where the money is transferred under a contract, the tracing process will come to an end, even if specific restitution was available. This was noted earlier in our rejection of Hacker's argument for adopting a rescission analysis. Additionally, we also have an overlap with the concept of contract, which provides a further justification for protecting the receipt by the third party. However, it is important to define the

¹³⁰ Ibid at [24]: 'In my judgment, when money is paid under a mistake of fact to party A — who at the time does not realise that it has been paid under a mistake of fact — there is a potentiality for a constructive trust to arise in respect of those monies. If those monies, or an identifiable part of those monies, are paid to party B who did not know that they were originally paid under a mistake of fact, then there is still the potentiality for a constructive trust to arise in respect of that party. The question of whether it does or not and whether there is a proprietary remedy to trace the money will depend on the circumstances'.

standards in these cases. A recipient can only stand as a good faith purchaser if they do not have knowledge or are not reckless as to the origins of the money.¹³¹ The phrase ‘bona fide purchaser for value’ conceals this issue. This is also relevant in transfers of tangible money, where a similar defence of bona fide purchaser applies, but the defendants are required to act without carelessness. This is discussed, briefly, in the next section.

An example of this defence is the aforementioned decision in *Shalson v Russo*, where it was accepted that specific restitution was available due to the fraudulent nature of the transaction. In *Shalson v Russo*, the money was paid into an overdrawn account, which creates competing claims between the bank and the claimant. By crediting the bank account, the bank stands as a good faith purchaser. The same approach was applied in *Independent Trustee Services Ltd v GP Noble Trustees Ltd* where a fraudster had paid over money to his ex-wife as a lump sum as part of their divorce settlement, which also constituted the satisfaction of a debt.¹³² This clearly demonstrates that specific restitution does not provide the claimant with an undefeatable title. The courts balance the interests of third parties, even in cases involving fraud or deliberate attempts to deprive the money from the claimant. Although it may look like a trust, the claim for specific restitution stands as an overlap between the factual elements of a money transfer on the grounds of mistake, an element from tort and the statutory definitions of theft and fraud. At present, the unjust enrichment analysis is incapable of accommodating this basis of liability.

¹³¹ *Papamichael v National Westminster Bank Plc* [2003] EWHC 164 (Comm) [2003] 1 Lloyd's Rep 341.

¹³² [2010] EWHC 3275 (Ch).

Conclusion on the Overlap with Criminal Law

The analysis presented here is consistent with the developing case law in this area and demonstrates a predictable pattern which is emerging. It might sound quite elementary and straightforward, but the start of this section shows how (a) very few academics predicted this development and (b) even now the academics as well as the judges are failing to describe the operation of this claim properly. The tools which are being used to describe this area of law are deficient; broad concepts of unjust enrichment, vindicating property rights or a power-based rescission model, all of which are over-generalised and lack predictability. For some reason, very few consider the role of the defendant in monetary transfers, one would suspect because we see the mistaken payment as the paradigm of a wider concept which simply does not exist.

5. The Overlap of Money and Property

Money in its Tangible Form

Although the last section primarily focused on specific restitution for mistaken payments, it also established that specific restitution is available for stolen intangible money. As it was explained in that section, specific restitution is subject to the defence of good faith purchaser, which is not available where the defendant has knowledge or has acted recklessly as to the origins of the money. The brief point that we wish to make at this point is that, even in cases of money transfers, the element of

tangibility still has relevance. It creates another type of overlap, bringing the situation closer to our core concept of property; however, the presence of money, as stated at the beginning of the chapter, makes this a ‘weaker’ form of property. Therefore, one would *predict* that the courts would provide a stronger protection of tangible money than they do for intangible money.

This, it is argued, is in fact reflected in the case law. The significance of *tangible* money lies in the standards expected of recipients. As stated in the previous section, one must be extremely careful here, as the relevant standards are concealed by the generality of the phrase ‘bona fide purchaser for value without notice.’ When a recipient receives stolen money, we stated that specific restitution is available, subject to a defence of good faith purchase where the defendant does not have knowledge or was not reckless as to the origins of the money. However, when we consider stolen *tangible* money, the defendant additionally is required to act with *due care*. In other words, we find a halfway approach between tangible things (which are generally protected through ‘strict liability’ claims) and intangible money (where the standard is receipt without knowledge or recklessness as to the origin of the money). The reason for the special treatment of money was expressed by Diplock LJ; ‘[a] banker’s business, of its very nature, exposes him daily to this peril....So strict a liability, so absolute a duty upon bankers, would have discouraged the development of banking business.’¹³³ There are many, often overlooked, examples in the case reports where a recipient was found liable for acting without ‘due diligence’. These include *Easley v*

¹³³ *Marfani & Co Ltd v Midland Bank Ltd* [1968] 1 WLR 956 (CA) at 971.

Crockford,¹³⁴ *Snow v Peacock*,¹³⁵ *Clarke v Shee*¹³⁶ and *Solomons v Bank of England*.¹³⁷ . It would be too simplistic to assume that the phrase bona fide purchaser means the same standard in all cases. In the context of tangible money, to avoid liability, a recipient also must act without carelessness.

The standards expected of recipients of tangible money are further reflected in statutory provisions. These are special defences which apply to tangible and not intangible money. Section 82 of the Bills of Exchange Act, for example, provides a defence to banks where they receive stolen or altered cheques, so long any alteration is not apparent.¹³⁸ Additionally, section 4 of the Cheques Act 1957 protects banks where they receive cheques or money in good faith and, importantly, *without negligence*. An example of this standard being applied by the courts is *United Australia v Barclays Bank*, where the House of Lords found the defendant to be liable for conversion as its employees had acted carelessly in accepting a fraudulently obtained cheque.¹³⁹ According to Lord Atkin, ‘every bank clerk sees the red light when a company's cheque is endorsed by a company's official into an account which is not the company's. The manager, however, made no inquiries.’¹⁴⁰ In short, there are higher standards expected of the recipients of tangible money than intangible money payments. It is not only a predictable pattern using the overlapping approach, but it also reflects commercial reality. There are simply more opportunities for a recipient to realise that tangible money has been stolen, and this is reflected in the required

¹³⁴ *Easley v Crockford* (1833) 10 Bing 243, 131 ER 897.

¹³⁵ (1826) 3 Bing 406, 130 ER 569.

¹³⁶ (1774) 1 Cowp 197, 98 ER 1041.

¹³⁷ (1810) 13 East 135, 104 ER 319.

¹³⁸ *Marfani & Co Ltd v Midland Bank Ltd* [1968] 1 WLR 956 (CA).

¹³⁹ *United Australia Bank Ltd v Barclays Bank Ltd* [1941] AC 1 (HL).

¹⁴⁰ [1941] AC 1 at 24.

standard of care. Issues, such as this, can only be hidden away by general categories such as property or unjust enrichment. The cases, however, deserve independent analysis. In particular, they inform us about the overlap and interaction of property, negligence and money concepts.

6. An Overlap of Money and Contract; Conditional Payments

As with the overlap of money and property, the overlap of money and contract will also justify a special set of rules. The nature of this overlap lies in the fact that money has been transferred under an *agreement* between the claimant and the defendant. The overlapping approach avoids any need to place this within a contractual framework, but allows us to identify the legal significance of the agreement. The agreement element explains why monetary claims in these cases are treated differently from mistaken money or stolen funds. As Waddams notes, this ground of restitution for money payments can operate both outside of a contractual arrangement, but also within a contractual arrangement.¹⁴¹ On the analysis presented here, an exchange between the parties is not a necessary requirement. The defendant is liable to repay the money, even for gratuitous agreements. An example would be where an employer makes an interest free loan to one of its employees.¹⁴² It also needs to be noted that the grounds for this claim are usually sufficient to establish a reliance-based claim. The payor's reliance on an agreed state of affairs provides an added reason for the

¹⁴¹ S Waddams, 'Contract and Unjust Enrichment: Competing Categories, or Complementary Concepts?' in C Rickett and R Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart 2008) 167.

¹⁴² *Hochstrasser v Mayes* [1960] AC 376 (HL): at 392, such a loan is regarded as a free benefit without consideration.

award of restitution. As always under our overlapping approach, this causes little difficulty as there is no need for any discrete categorisation. This simply indicates that there are numerous reasons for justifying restitution in these circumstances, which are distinguishable from the situations explored earlier on in this chapter.

There are four significant consequences of this overlap which separate ‘failure of consideration’ from mistaken payments or stolen money. Firstly, restitution is always available for mispredictions where the parties have made an agreement on the basis of a future event.¹⁴³ It is only where there is an uncommunicated condition that this basis for restitution will be unavailable. Secondly, the agreement will determine whether or not restitution will be available for partial performance. Thirdly, whether specific restitution is available will depend on the agreement itself and finally, the recipient is not subject to the change of position defence.

Failure of the Agreed Condition

The type of situation being considered here has long been recognised as a ground for restitution in English law under the basis of ‘failure of consideration’.¹⁴⁴ Considering that most unjust enrichment lawyers are critical of misleading language, it is surprising that this term is still in use, as ‘consideration’ here has a distinct meaning from the term used in the law of contract.¹⁴⁵ According to Virgo, consideration here

¹⁴³ P Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) at 219.

¹⁴⁴ Lord Mansfield in *Moses v MacFerlan* (1760) 2 Burr 1005, 1012; 97 ER 676 at 681.

¹⁴⁵ In *Unjust Enrichment* (2nd edn, OUP 2005). Birks professed regret that this obscure and outdated term was still in use, at 117-119. In his earlier writings he was happy to use this term.

refers to the ‘reason’ or ‘basis’ for the payment.¹⁴⁶ Therefore, it needs to be distinguished from contractual consideration, which, at least under the concept set out in Chapter 4, is concerned with an exchange between the parties. This means that restitution will also be possible where the contract is *void ab initio* and also when the contract is no longer in existence. For example, in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*¹⁴⁷ the claimant had made a payment to the defendant for the production of machinery. Before the contract could be completed, the contract was frustrated by the outbreak of war. The claimant, having never received the machinery, made a claim in restitution for the payment that had already been made, which was successful in the House of Lords. Their Lordships decided that the basis of the payment was merely one for the delivery of the machinery which had not been fulfilled.¹⁴⁸ For our purposes, failure of condition will be used instead of ‘failure of consideration’ to describe these situations.

Restitution for Mispredictions

Despite Birks’ argument that restitution was never available for mispredictions, this was contradicted by his recognition that restitution would be available for a

¹⁴⁶ G Virgo, ‘Failure of Consideration: Myth and Meaning in the English Law of Restitution’ in D Johnston and R Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (CUP 2002) 103.

¹⁴⁷ [1943] AC 32 (HL).

¹⁴⁸ *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 (HL) at 56, 64 and 83. Interestingly, it is doubtful that the same conclusion would be reached by a modern court, as an initial payment in such circumstances would usually be regarded as a down payment for the other party to start work on the machinery; *Hyundai Heavy Industries Co Ltd v Papadopolous* [1980] 1 WLR 1129 (HL) affirmed by the House of Lords in *Stocznia Gdanska SA v Latvian Shipping Co and Other* [1998] 1 WLR 574. Subsequent decisions have indicated that in this situation there will be no failure of consideration at all, as the basis has succeeded and the claimant has taken the risk that the contract will not be completed.

misprediction when it was framed as a ‘failure of consideration’.¹⁴⁹ For example, the facts of a case like *Fibrosa* can easily be reanalysed as a misprediction that the contract will be completed, as the completion of the contract in that case was a future event. Birks tried to show that the appropriate formulation (misprediction or failure of condition) was dependent upon the strength of the condition.¹⁵⁰ Accordingly, if it is a mere hope that an event will happen it would be a misprediction, but if the claimant has ‘taken pains to qualify the transfer’ it would, instead, constitute ‘a failure of condition’.¹⁵¹ This has the benefit of simplicity, and there is elegance to this approach. The real distinction seems to lie in asking whether the payment was careless or if it was made under an agreement. A claimant-orientated approach simply will not work with regards to money paid under conditions. It may appear to be a very slight difference of approach, but it could be very important. This is because the case law informs us that the condition *must* be one that is objectively ascertainable from the dealings between the parties.¹⁵² We can also see this by looking at *Dextra Bank v Jamaica*,¹⁵³ as the claimant made a very clear point to the third party that the money was being transferred for a particular purpose, but the claimant was negligent in transferring its money in the first place.¹⁵⁴ Therefore, the claimant could not use the failure of a condition ground, as this information had never been communicated to the recipient. For that reason, merely placing a condition upon a payment is not sufficient to lead to a claim for restitution, even if the claimant does ‘take pains’ to make the purpose clear. Since the *fact* is one of agreement, it must be identified objectively.

¹⁴⁹ P Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) at 219.

¹⁵⁰ P Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) at 219.

¹⁵¹ P Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) at 219.

¹⁵² *Watson v Russell* (1862) 3 B&S 34, 122 ER 14.

¹⁵³ *Dextra Bank and Trust Co Ltd v Bank of Jamaica* [2001] UKPC 50, [2002] 1 All ER (Comm) 193.

¹⁵⁴ [2002] 1 All ER (Comm) 193 (PC).

Therefore, unlike cases of mistakes or fraudulently obtained money, the claim under a conditional payment cannot be established by simply looking at the actions of the claimant *or* the defendant. It requires a bilateral relationship which is established through an initial agreement. Not all commentators would agree with this statement; Matthews, for example, has argued that many cases of mistaken payments are really payments made for a purpose, and should be regarded as examples of ‘failure of consideration’.¹⁵⁵ Under Matthews’ analysis, ‘failure of consideration’ could be applied to cases where the purpose is not communicated. The more sensible view is that, as Birks himself noted, the condition must always be *communicated* to the recipient beforehand.¹⁵⁶ If this was not the case, a claimant could make a payment and then, when he changes his mind, state that there was an undisclosed condition for the transfer. A good example of this is *Thomas v Brown* where the claimant paid a deposit for the purchase of a house and signed a statement which read ‘without prejudice to any question which may arise as to the contract of purchase herein’.¹⁵⁷ The payor refused to complete the transaction on the basis that the name of the vendor had not been disclosed. Nevertheless, this was not sufficient to establish a claim for failure of consideration. Admittedly it could be argued that the claimant was bound when she signed the contract and, thereafter, she forfeited the freedom to introduce a condition of the payment. However, the court did not decide on the validity of the contract itself, and the following statement from Patteson J in *Duke of Cadaval v Collins* was

¹⁵⁵ P Matthews, ‘Money Paid Under a Mistake of Fact’ (1980) NLJ 587.

¹⁵⁶ P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) at 142.

¹⁵⁷ (1875-76) LR 1 QBD 714.

cited with approval,¹⁵⁸ ‘where there is bona fides and money is paid with full knowledge of the facts, though there be no debt, still it cannot be recovered back.’¹⁵⁹ This may be simply an evidential requirement of proving the state of mind of the claimant. The more sensible analysis is that ‘failure of consideration’ cannot be used where the claimant has failed to express the terms of the payment. The distinction would be relevant in some circumstances, for example if there is evidence that the claimant clearly placed a condition on the payment, but the recipient was not aware of this.

The relevance of agreement is also reflected in the fact that the case law indicates that neither the payor’s subjective intention nor the recipient’s actual knowledge of the condition is essential in establishing a conditional payment. This provides a strong reason for recognising the overlap with contract and, in turn, recognising that the rules which we use to establish agreement in contract are also relevant in these cases as well. For example, in *Guardian Ocean Cargoes v Banco do Brasil*,¹⁶⁰ Saville LJ stated that; ‘the understanding or agreement of the parties must be ascertained objectively, and that the parties’ uncommunicated subjective thoughts cannot be called in aid.’¹⁶¹ As it was established in Chapter 4, this is the same approach that the courts use when establishing the intentions of contracting parties.¹⁶² Since it is necessary for there to be an understanding between the parties, this would preclude restitution where the recipient refused to accept the condition, but the payment was

¹⁵⁸ (1836) 4 Ad & E 858 at 866; 111 ER 1006 at 1009.

¹⁵⁹ (1836) 4 Ad & E 858 at 866; 111 ER 1006 at 1009.

¹⁶⁰ [1994] 2 Lloyd's Rep 152 (CA).

¹⁶¹ [1994] 2 Lloyd's Rep 152 (CA). at 159.

¹⁶² Eg *Investors Compensation Scheme LTD v West Bromwich Building Society* [1998] 1 WLR 896 (HL). According to Lord Hoffmann, ‘[t]he law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent’ (at 913).

made regardless. The overlapping analysis helps us to reach this conclusion; a discrete categorisation of contract and money transfers (or ‘unjust enrichment’) only conceals the importance of identifying agreement in *both* situations.

Total Failure of the Condition

The overlap between monetary transfers and the agreement element of contract will also be relevant when determining if restitution is available where partial performance of the condition has been made. This is one of the more controversial issues in restitution, as the courts have often stated that it is only when the condition fails totally that restitution for the failure of a conditional payment is possible.¹⁶³ It has also led to some commentators to refer to the ‘primacy’ of contract.¹⁶⁴ However, it is only necessary to show the primacy of one concept over another if the classifier is adopting discrete categories. This is shown by the decision in *Whincup v Hughes*,¹⁶⁵ where a father had paid a watchmaker to take his son as an apprentice for a period of six years. One year into the contract, the watchmaker died, resulting in the premature termination of the contract. Since the watchmaker had partially performed the condition, the father’s claim for restitution failed. However, it would also seem that the courts will be willing to overlook any trivial or minor performance of the condition. If in *Whincup v Hughes* the recipient had passed away after only one or two

¹⁶³ Eg *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour* [1943] AC 32 (HL)

¹⁶⁴G McMeel, ‘Unjust Enrichment, Discharge for Breach, and the Primacy of Contract’, in A Burrows and Lord Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006).

¹⁶⁵ [1871] LR 6 CP 78.

days had passed, the case law indicates that this will be considered as a total failure of consideration.¹⁶⁶

It is surely the agreement which determines the possibility of restitution in these cases, or more specifically, the courts' objective interpretation of the agreement. Returning to the *Whincup* case, it was stated that during 'the early part of the term the teaching would be most onerous, and the services of the apprentice of little value; as time went on his services would probably be worth more, and he would require less teaching.'¹⁶⁷ So the court's decision was influenced by the possibility that the costs of the one year apprenticeship were equal to or possibly even higher than the fee paid by the father. This was an objective interpretation of the agreement itself; no evidence was required to support this possibility. The court will look at the condition objectively, and if partial performance is not precluded by the nature of the agreement then the court will have room to apportion the value received by this performance.¹⁶⁸

The clearest example of the courts allowing apportionment of a partially completed condition is in *D O Ferguson v Sohl*,¹⁶⁹ where the court found that the claimant's payment for services was of a higher value than those actually performed. The agreement between the parties seems to have been the operative factor in determining the availability of restitution. In *D O Ferguson*, evidently the claimant had been

¹⁶⁶ Eg *Rowland v Divall* [1923] 2 KB 500.

¹⁶⁷ Hirst LJ; 'The contractor had left the site in July 1988, the work then being only partly completed. By that date the employer had paid the contractor £20,470 and in August paid a further £6,268. The value of the work done was found by the judge to be £22,065, thus the employer had overpaid by £4,673.'

¹⁶⁸ *Ministry of Sound v World (Online)* [2003] EWHC 2178 (Ch) [42]-[44].

¹⁶⁹ *The Times*, 24 December 1992 (CA); 62 BLR 95.

willing to pay for parts of the contract price as work progressed on the building.¹⁷⁰ This suggests that, if it appears that *both* parties have been willing at some point to apportion the payment for services, then it is likely that the court will allow the condition to be considered as a series of separable conditions.

Strict Liability

Since it is the agreement which governs the claim for the repayment of money, there is generally little application for the defence of change of position. The claim for restitution of money which is paid under an agreement is, therefore, more accurately described as one based on strict liability. This has argument has been made by Stevens who has stated that ‘the defence of change of position should rarely, if ever, succeed where the ground of recovery is failure of consideration.’¹⁷¹ In *Goss v Chilcott*, Lord Goff, who delivered the Opinion of the Privy Council, accepted that, in principle at least, the defence of change of position could be available for failure of a condition.¹⁷² The defence did not apply in that case because the defendants knew that the money was expected to be repaid and they had transferred the money to a third party.¹⁷³ As Birks explained, this suggests that the basis of the claim in *Goss v Chilcott*¹⁷⁴ is distinct from the earlier cases of mistaken or fraudulent payments (as examples of ‘unjust enrichment’) due to the fact that the change of position defence was not available. For Birks, the solution would be to make the defence available in

¹⁷⁰ The Times, 24 December 1992 (CA); 62 BLR 95.

¹⁷¹ R Stevens, ‘Why do Agents “Drop Out”?’ [2005] LMCLQ 101 at 109-118.

¹⁷² [1996] AC 788 (PC) at 799.

¹⁷³ [1996] AC 788 (PC) at 799.

¹⁷⁴ [1996] AC 788 (PC).

failure of condition cases, otherwise this becomes a ‘contractual’ claim.¹⁷⁵ Waddams explains that it would be too simplistic to argue that the claim is either contractual or based on ‘unjust enrichment’, as elements of both concepts interact.¹⁷⁶ The option is not ‘contract’ or ‘unjust enrichment’, and neither is it necessary to treat this in the same way as other ‘monetary transfers.’ Thus, an overlapping approach recognises that the agreement is legally significant, but does not mean that it suddenly becomes contractual.

More recently, Bant has also concluded that change of position will not generally be available for cases involving failure of consideration.¹⁷⁷ Bant argues that it may sometimes be available and cites as an example the Law Reform (Frustrated Contracts Act 1943). However, the scope of this ‘statutory’ defence does not correspond to the general change of position defence. The Act only applies for expenditure which has been made ‘in, or for the purpose of, the performance of the contract.’¹⁷⁸ It is, in fact, a defence which relates to the nature of the performance and not for general changes of position. In essence, it is a more flexible method of ensuring that restitution will be available for partial performance when this is required under the agreement. For cases outside of frustration, it seems that the defence of change of position has little application. Recently, the Court of Appeal refused to allow a change of position defence where money was transferred under a void contract, and then was spent on investments which resulted in heavy losses for the recipient.¹⁷⁹ After identifying the

¹⁷⁵ P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) at 217.

¹⁷⁶ S Waddams, ‘The Relation between Contract and Unjust Enrichment’, in P Giliker (ed), *Re-Examining Contract and Unjust Enrichment: Anglo-Canadian Perspectives* (Martinus Nijhoff 2007).

¹⁷⁷ E Bant, *The Change of Position Defence* (Hart 2009) at 197-198.

¹⁷⁸ Section 1.

¹⁷⁹ *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579, [2010] 1 CLC 770.

principles of change of position, Aikens LJ essentially concluded that they did not apply.¹⁸⁰ Aikens LJ did not express what would happen where it was not clear at the outset that the money would need to be returned, as for example in cases where there is a void transaction. The analysis is supported by the overlap that we have identified. These are not normal cases of restitution, and they will not be treated in the same way. An *absolute* rejection of change of position is not necessary, nor sensible. It does, however, indicate again that the presence of agreement in these cases provides an important factual element in determining the court's approach to money transfers.

7. Conclusion

What we have seen in this chapter is that no single approach can explain or accurately predict how the courts will award restitution for monetary transfers. It has been argued that any general principle of unjust enrichment will lead to oversimplifications and will also lead to attempts to provide symmetry for all types of payments. The overlapping approach provides benefits due to the way in which it can identify and incorporate significant factual elements within the conceptual model of monetary transfers. We recognise that, at its core, the rules on monetary transfers display a pattern which makes it useful as a legal concept. At the same time, we recognise that this pattern can change in the presence of other legally significant facts. The complexity will lead to confusion if we do not recognise the points of distinction,

¹⁸⁰ *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579, [2010] 1 CLC 770At 811 'where a Defendant obtains money and, at the time of receipt, he understands that he will have to repay that sum at some stage in the future, which point has usually been identified between the payer and the payee, usually in a contract or what was, at the time, thought to be a valid contract.'

which have been highlighted by the overlaps in this chapter. Monetary transfers in general share similarities with our law of property; the claimant has title to the money, and despite the transfer, it is the identification of his initial title to the money that gives him the standing to sue for restitution. It also explains how that interest is lost. Just as with the law of property, there are certain actions which will result in the loss of title to which no recovery will be available. At the same time, it is of fundamental importance that we balance the title interest of the claimant with the receipt of the defendant. The very purpose of money is to facilitate transfers, and additionally, there are fewer warning signs that the transfer is faulty when a defendant receives intangible money. That balance is achieved, firstly, by allowing restitution only for careless, not reckless errors. Secondly, it is also achieved by recognising that the claim to restitution is defeated if the money is spent and the claimant cannot show that the defendant knew of the fault, or was reckless as to the origins of the money. Fault is therefore, despite the claims of some scholars and judges, clearly of fundamental importance.

We have also seen how the overlapping analysis can be further developed. An overlap can exist as a combination of different factual elements, even where those factual elements already exist in other legal concepts. The example given has been specific restitution, which overlaps with tort by identifying a positive act committed by the defendant. This overlap also brings into play the factual elements that we know to be relevant in the Theft Act 1968. It would be unwise to assume that private law is immune from standards imposed by statute in criminal cases. The courts have clearly responded to this in the most recent cases, demonstrating how an overlapping approach permits the development of flexible and adaptive legal reasoning. In

somewhat prophetic terms, Virgo once concluded that the role of fault will ‘determine the future of the law of restitution generally, and unjust enrichment specifically.’¹⁸¹ The analysis presented here, in regards to the initial reasons for restitution, and the availability of specific restitution, show that this is already the case.

Additionally, we have seen a stronger overlap with money and property, where money is in a tangible form. The rules are very similar to those related to recipients of intangible money, but the overlap recognises that the situation is slightly different. There are more possible warning signs that the money has been stolen in this context, and therefore a defendant will not simply be expected to act without knowledge or reckless disregard about the origins of the money, they will also be expected to act with due diligence. Finally, we have also seen another overlap with contract where the money is paid under an agreement. The agreement itself need not spell out that the money must be returned, but it does justify restitution as it is unlikely that restitution will be available in this context if no agreement has been reached. It has also been stated that the agreement itself determines whether partial performance will defeat the claim, and can also justify specific restitution. Our argument is that this type of restitution is a special type of overlap, i.e. one that is distinct from general restitution. From the realist perspective, this is demonstrated by the fact that the general defence of change of position appears to have little relevance. To restate the main point of the thesis, the overlapping analysis is one that is an invaluable tool in a realist classification. Narrow concepts allow us to focus more closely upon the facts which determine the decisions of the courts. It avoids over-generalising the law and assists in

¹⁸¹ G Virgo, 'The Role of Fault in the Law of Restitution' in A Burrows and Lord Rodger (eds) *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006) at 103.

predicting the decisions of the courts. As we have seen with unjust enrichment theory, this area of the law cannot be encapsulated by a single principle. The law is much more complex as this chapter has shown.

CHAPTER 6: RELIANCE

1. Introduction

Our concern here lies with situations that can more generally be described as reliance-based claims, although even that term must be treated with care. We cannot presume that reliance refers to a single factual element. Nor, is there a general principle underlying this term 'reliance.' We will begin the discussion by looking at the different ways in which the term 'proprietary estoppel' is used within private law. The next step is to construct a basic definition of reliance that can provide us with a realist concept; i.e. a concept that is grounded in social reality, and in turn can be used to identify predictable patterns of judicial responses. It is then argued that this concept of reliance can provide a descriptive account of two areas of the law that have resisted attempts to classify them; the claim for economic loss under the *Hedley Byrne v Heller*¹ principle, which has traditionally been regarded as a claim for negligence, and the claim for non-contractual services which is sometimes described as forming part of the law of unjust enrichment. As Atiyah pointed out, reliance is relevant in most areas of private law, but on its own it does not accurately describe or predict any area of the law.² What we instead look for is the overlaps with our core concepts.

¹ [1964] AC 465 (HL).

² P Atiyah, *Promises, Morals and Law* (Clarendon Press 1981), who concludes that reliance alone is insufficient at 68.

The Place of Reliance on the Map

The concept of reliance raises potential issues of conflict with contract and tort, as it appears to have similarities with both concepts, yet it does not squarely fit into either of them. There are a number of ways to deal with this. We can ask for discrete categorisation, which requires reliance-based claims to be assigned to one or the other of these categories. There are those who try to frame reliance-based claims as examples of contractual obligations, such as Corbin, Atiyah,³ Hedley⁴ and Jaffey.⁵ This requires expanding the concept of contract to include instances where there is reliance without offer, acceptance or even consideration. There have been just as many attempts to assign estoppel, or more generally reliance claims, within tort law; for example, Snyder⁶ and Robertson.⁷

Alternatively we can accept that this situation creates an overlap. To put it clearly, we argue that all reliance based claims involve elements of contract and elements of tort. The element of contract is the communication made from the representor to the representee. It operates in the same way as 'offer' does in contract. It is a partial agreement. The tortious element is that the communication is a positive act; the requirement of a positive act is one of the factual elements that we identified in our analysis of the core concept of tort. All reliance claims represent 'weak' overlaps with

³ P Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press 1979); G Gilmore, *The Death of Contract*, (Ohio State Uni Press 1974).

⁴ S Hedley, 'Implied Contract and Restitution' (2004) 63 CLJ 435.

⁵ P Jaffey, *The Nature and Scope of Restitution: Vitiating Transfers, Imputed Contracts and Disgorgement* (Hart 2000).

⁶ O Snyder, 'Promissory Estoppel as Tort' (1949) 35 Iowa L Rev 28 at 41-44.

⁷ A Robertson, 'Situating Equitable Estoppel within the Law of Obligations' (1997) 19 Sydney L Rev 32.

contract and tort. By adopting this analysis, we can maintain the utility of contract and tort, and we avoid stretching these concepts beyond their settled meaning.

A similar argument has been made by Dietrich, who points out that reliance-based claims overlap with both contract and tort, and that the two concepts are not mutually exclusive.⁸ The same observation has been made by Koziol, who concludes that there is a continuum between contract and tort where reliance lies, which consists of various constituent elements.⁹ For example, in the immediate aftermath of *Hedley Byrne v Heller*, which we argue is an example of a reliance-based claim, Stevens referred to the liability for economic loss as an ‘hermaphrodite.’¹⁰ This admixture of contract and tort is possible because, not only are legal concepts multi-factual, but also because they do not operate in isolation from one another.¹¹ Teeven provides an insightful explanation about why reliance-based claims have been favoured by legal realists, but often rejected by those who apply a more formalist approach to private law. For Teeven, the rejection of reliance has been fuelled by ‘the logic that commercial promises should be governed exclusively by a market bargain test.’¹² The sidelining of reliance-based claims is, therefore, the unfortunate consequence of attempts to discretely categorise private law.

⁸ J Dietrich, ‘The ‘Other’ Category in the Classification of Obligations’ in A Robertson (ed), *The Law of Obligations: Connections and Boundaries* (Cavendish 2004). Also, J Holyoak, ‘Tort and Contract After Junior Books’ (1983) 99 LQR 591.

⁹ H Koziol, ‘The Borderline Between Tort liability and Contract’ in H Koziol (ed), *The Unification of Tort Law: Wrongfulness* (Kluwer Law International 1998).

¹⁰ R Stevens, ‘Hedley Byrne v Heller: Judicial Creativity and Doctrinal Possibility’ (1964) 27 MLR 121 at 161. In the same paper, the author also identifies the similarity of this claim with that of estoppel, at 158.

¹¹ T Brettel Dawson, ‘Estoppel and Obligation: The Modern Role of Estoppel by Convention’ (1989) 9 Legal Studies 16.

¹² K Teeven, ‘A History of Promissory Estoppel: Growth in the Face of Doctrinal Resistance’ (2005) 72 Tennessee L Rev 1111.

2. The Overlap of Reliance and Property

Proprietary Estoppel

In this section, the analysis will centre on ‘proprietary estoppel’, which is the most commonly accepted form of reliance-based claim in English private law. The analysis of ‘proprietary estoppel’ will be invaluable, as it will establish the conceptual framework for reliance-based claims in general. The argument is that the reliance concept does not exist on its own;¹³ we see it overlapping with the core concepts of property, tort and contract in various contexts. The first issue we have to contend with is the argument, which is accepted by most commentators, that ‘proprietary estoppel’ is based on unconscionability.¹⁴ It is contended here that the adoption of this term indicates either that there is no discernible pattern of judicial behaviour or that the boundaries of ‘proprietary estoppel’ have been set too wide. Since most commentators accept that there is a general pattern in ‘proprietary estoppel’, it is a good indicator that the problem is that we are classifying too much material. In other words, we are trying to explain too many situations under the umbrella of ‘proprietary estoppel.’ That is the position which is adopted in this section, which will then go on to distinguish two distinct types of claim which fall under the prevalent definition of ‘proprietary estoppel.’ There is a strong line of authority in cases which can be described as ‘proprietary estoppel’ where the claim can be explained under the basis of reliance, and it is the analysis of these cases which will form the bedrock of this

¹³ P Atiyah, *Promises, Morals and Law* (Clarendon Press 1981) at 68.

¹⁴ E Cooke, *The Modern Law of Estoppel* (Oxford, 2000), M Spence, *Protecting Reliance: the Emergent Doctrine of Equitable Estoppel* (Hart 1999).

chapter. However, as we shall see, not all ‘proprietary estoppel’ cases fit into this model. These cases are based on ‘acquiescence’, which, it will be argued, do not require reliance. Significantly, the two types of ‘proprietary estoppel’ are treated very differently by the courts. For the purpose of clarity, we will refer to these two types of claim as ‘acquiescence’ and the ‘reliance-based land claim.’

In developing the definition of reliance which will form the central theme of this chapter, it is suggested that there is no free-standing reliance-based claim. This means that the claimant must identify further factual elements which will support the claim. In this way, the concept operates in a very similar fashion to the ‘unjust enrichment’ analysis. However, we recognise that the contours of the reliance-based claims are altered depending on the presence or absence of other factual elements. In the context of land, reliance claims are ones which are made against the title-holder of the property. This is the first factual element which must be considered in all reliance-based land claims; the title of the landowner provides a strong defence to any general claim based on reliance. Thus, it is argued that it is not sufficient to merely show detrimental reliance, whereas it will be sufficient outside the context of reliance-based *land* claims. The argument here demonstrates two different types of overlaps which can circumscribe the title of the landowner in reliance-based land claims. Where the claimant is in *occupation* of the property, he or she can rely on an inducement and demonstrate that their position has been altered. The element of occupation brings us closer to our core concept of property, as this provides a claimant with *control*, which can overcome the title of the landowner. Where occupation is absent, the overlap with property is even weaker. Hence to make a successful claim it will require the induced party to show that they have provided an adequate ‘bargain’ before the court will

recognise a reliance-based land claim. This represents an overlap with contract, and since it is even further removed from the core concept of property, it will require strong evidence that there was a clear purpose for the benefits provided.

It must be noted even at this point, that the identification of two routes to reliance-based land claims are not intended to stand as 'exclusive' categories. Clearly there can be situations where the claimant is in occupation and has provided a valuable benefit to the landowner.¹⁵ Thus, even within the general overlap of reliance and property, further overlaps can alter the way that the courts treat these claims. The first task is to identify what reliance means; proprietary estoppel is an ideal candidate for this enquiry, because there are two very different strands of this estoppel. Our differentiation between these strands will identify the core elements of reliance. We will then go on to look how reliance operates within the more general overlap with property.

Reliance, Estoppel and Unconscionability

Applying a realist approach to this section, it is not necessary or even desirable to identify any core principle which underpins reliance-based land claims. However, in contrast to the realist approach, the principle of unconscionability is often said to form the basis of the concept of all cases of 'proprietary estoppel', including reliance-based claims.¹⁶ In this way, the claim is said to be justified on the basis that the defendant is

¹⁵ Eg *Lim Teng Huan v Ang Swee Chuan* [1992] 1 WLR 113 (PC).

¹⁶ Oliver J in *Taylor Fashions Ltd v Liverpool Victoria Friendly Society* [1982] QB 133 (Ch). M Dixon, 'Confining and Defining Proprietary Estoppel: The Role of Unconscionability' (2010) 30 *Legal Studies*

prevented from denying the interests of the claimant due to his unconscionable behaviour. Unconscionability is adopted as the unifying principle of estoppel by both Spence¹⁷ and Cooke.¹⁸ More recently, it was also described as ‘the key’ which unlocks the door to proprietary estoppel by Lord Scott in *Blue Haven v Tully*.¹⁹

Problems with Unconscionability

Firstly, the term unconscionability indicates that the boundaries of ‘proprietary estoppel’ have been drawn too wide, i.e. we are trying to accommodate too much within ‘proprietary estoppel.’ Spence presents the term as a method of balancing eight considerations which the courts take into account when identifying unconscionability.²⁰ These include looking at the strength of the representation, knowledge of the parties, nature of the relationship, vulnerability and the personal interests of both parties. The discussion of these various factors highlights that no single principle can encapsulate the issues which are relevant in ‘estoppel’ cases. The ‘unconscionability’ indicates that it is not possible to identify any recurring factual elements in ‘proprietary estoppel’ claims. Both Ferguson and Parkinson have noted that much of ‘equity’ could be said to be based on the prevention of ‘unconscionability’, but that this should not conceal the requirements of the various

408. Robertson has argued that unconscionability is of limited relevance in determining the response of the courts, but that it does underpin the initial concern of the courts; A Robertson, ‘Unconscionability and Proprietary Estoppel Remedies’ in E Bant and M Harding (eds), *Exploring Private Law* (CUP 2010).

¹⁷ M Spence, *Protecting Reliance: the Emergent Doctrine of Equitable Estoppel* (Hart 1999).

¹⁸ E Cooke, *The Modern Law of Estoppel* (Oxford, 2000) at ch 6. ‘[U]nconscionability is the deciding factor in the question whether or not there is to be an estoppel’ at 117.

¹⁹ [2006] UKPC 17.

²⁰ M Spence, *Protecting Reliance: the Emergent Doctrine of Equitable Estoppel* (Hart 1999) at 60-66.

rules developed by the courts of equity.²¹ From the realist's perspective, this indicates that we are simply trying to explain too much under a single principle. 'Proprietary estoppel' must, to be understood properly, be broken down into smaller concepts.

Secondly, the term unconscionability also implies that the reason for the court's intervention is the behaviour of the defendant. It is almost the reverse of what we saw in relation to the 'unjust factors', instead this time the focus is on the behaviour of the defendant. The classic example of unconscionability is the case of the man who stands by while somebody builds a house on his land. If the landowner knows that the builder mistakenly thinks he owns the property, he may very well be acting unconscionably if he later denies liability. However, 'proprietary estoppel' can come into play even without such behaviour. In contrast, the man who agrees to let his ex-wife live in his house and tells her he will put this in his will, has not acted with the same degree of unconscionable behaviour when he forgets to do this.²² It also seems fictional to argue that there is any unconscionable behaviour when the successor to the title-holder's estate denies the claim for 'proprietary estoppel', without any knowledge of an act of inducement in the first place.²³ Although the courts use the same language to refer to all 'proprietary estoppel' claims, most reliance cases do not actually require the same level of 'unconscionability' as we see in the classic example of the landowner who benefits from another's mistake. Nonetheless, the party who has acted in reliance may still succeed in establishing proprietary estoppel.

²¹ P Ferguson, 'Constructive Trusts - A Note of Caution' (1993) 109 LQR 114 at 126; P Parkinson, 'The Conscience of Equity' in P Parkinson (ed), *The Principles of Equity* (2nd edn, Lawbook Co 2003) at 29.

²² *Stallion v Albert Stallion* [2009] EWHC 1950 (Ch), [2009] WTLR 1437.

²³ *Inwards v Baker* [1965] 2 QB 29 (CA).

Just as there are those who see unconscionability as the key to estoppel cases, there are others who completely reject its role. Handley argues that unconscionability ‘has no real work to do and is little more than a vituperative and confusing epithet’.²⁴ More recently, McFarlane has echoed this viewpoint, stating that ‘proprietary estoppel, like contract or unjust enrichment, is *not* based on a general notion of justice or unconscionability.’²⁵ The more sensible analysis is that unconscionability can be useful in explaining a small part of the case law, but it should not be presented as an explanation of all types of ‘proprietary estoppel.’ We shall see below that there are two very different strands of estoppel. One is based on reliance, and the other is based on ‘acquiescence’. Although Robertson accepts a general principle of unconscionability, he recognises that ‘the requirement is fulfilled by the core elements of’ reliance.²⁶ It is submitted that there is no need to apply broad and nebulous concepts such as ‘unconscionability’, as the majority of the cases in this area can be described much more accurately by reference to reliance and explaining its role as an overlapping concept. The following section will set out the distinction between the two forms of ‘proprietary estoppel.’

The Two Forms of Proprietary Estoppel

Identifying a narrower concept of reliance-based lands claims will be central to the argument that we can abandon unconscionability. As Milne explained, it is important

²⁴ KR Handley, *Estoppel by Conduct and Election* (Sweet & Maxwell 2006) at 20.

²⁵ B McFarlane, *The Structure of Property Law* (Hart 2008) at 452 and 456-457.

²⁶ A Robertson, ‘Knowledge and Unconscionability in a Unified Estoppel’ (1998) 24 *Monash Univ L Rev* 115 at 117.

to distinguish between two very different approaches to ‘proprietary estoppel’.²⁷ This debate about the correct formulation of ‘proprietary estoppel’ can be traced back to *Ramsden v Dyson*,²⁸ which is still regarded as one of the founding cases of modern ‘proprietary estoppel’.²⁹ Lord Kingsdown’s version of proprietary estoppel identifies the importance of establishing that there has been an inducement which is communicated to the other party. This is, in essence, the form of reliance which we adopt throughout this chapter. The other version of proprietary estoppel is to be found in the judgment of Lord Cranworth, who declared that there would be a duty to inform a mistaken improver of the owner’s title, if the owner saw the claimant making these improvements. The distinction lies in those cases where the title-holder (the representor) *communicates* to the other party (the induced party) that they can use or live on the land (which is required for *reliance*), as opposed to those cases where no assurance has been communicated to the other party (this is based on the title-holder’s *acquiescence*). For example, there is no communication in the aforementioned classic example of ‘proprietary estoppel’, where the claimant is operating under a mistake and the defendant, knowing that the assumption is a mistake, does not correct him. The argument, which is developed below, is that cases of acquiescence are rare these days, and are treated differently by the courts from claims based on reliance. Under a realist approach, the two scenarios must, therefore be distinguished.

²⁷ P Milne, ‘Proprietary Estoppel in a Procrustean Bed’ (1995) 58 MLR 412-417, 421

²⁸ (1866) LR 1 HL 129.

²⁹ Eg Lord Walker in *Yeoman’s Row v Cobbe* [2008] UKHL 55, [2008] 1 WLR 1752 referred to the case as laying down the general principle of reliance (at [81]) and also referred to the decision as ‘the great case’ (at [52]).

Reliance and Causation

For the more general argument presented in this chapter, the other reason for separating the cases is that unless an unduly wide concept is adopted, it is extremely difficult to analyse cases of acquiescence as examples of reliance. This is because of the simple reason that the mistaken party is already going about making the improvements. Therefore, unlike the versions presented by Spence³⁰ and Cooke,³¹ reliance cannot be simply explained as a general ‘causal’ link between the actions or inactions of the inducing party and the party who then alters his or her position. This is because it would be possible to show a ‘causal link’ in cases of acquiescence between the failure to intervene and what the claimant has or has not done. For example, B mistakenly improves a piece of land, and A knows that B is acting under a mistaken assumption. If A stands by and allows B to continue in the mistaken belief, it will be possible to provide a causal link; B can simply argue that if A had taken the time to inform him of A’s rights, B would not have continued to make the improvements. In other words, ‘but-for’ A’s silence, the improvements would not have been made. This very wide concept of reliance is present in *Willmott v Barber*, where Fry J stated that the defendant must have ‘encouraged’ the claimant, which can be established through ‘abstaining from asserting his legal rights.’³² It is also on this basis that Cooke, for example, concludes that there is a sufficient causal link to establish reliance in cases of acquiescence.³³ This fictional account of reliance was more recently adopted by Lord Walker in *Thorner v Major*: ‘if all proprietary estoppel

³⁰ M Spence, *Protecting Reliance: the Emergent Doctrine of Equitable Estoppel* (Hart 1999) at 52.

³¹ E Cooke, *The Modern Law of Estoppel* (OUP 2000) at 28.

³² (1880) LR 15 ChD 96 at 106.

³³ E Cooke, *The Modern Law of Estoppel* (OUP 2000) at 28.

cases (including cases of acquiescence or standing-by) are to be analysed in terms of assurance, reliance and detriment, then the landowner's conduct in standing by in silence serves as the element of assurance.³⁴ This is an unnecessarily wide approach, and one that is likely to reduce the utility of reliance as a realist concept.

Therefore, the more descriptive analysis is that reliance is concerned with whether the *communicated* representation caused the induced party to act as they did. Restricting reliance to cases which involve communication will not always prevent silence from providing the required representation in a reliance-based claim. As Birks noted, silence can be relevant in two situations.³⁵ Silence may be relevant because it shows that the landowner acquiesced by allowing the other party to make use of the land and also not asserting their rights. In this way, silence does not give rise to reliance, but it is an example of acquiescence. However, in some cases, silence communicates the inducement, as in *Thorner v Major*³⁶ where the representation was communicated as 'a matter of implication and inference from indirect statements and conduct.'³⁷ Cases where an inducement has been communicated and those where there has been no communication cannot be combined without drawing an unnecessarily wide degree of artificiality. This is why communication is the key to a reliance-based claim. It also provides the factual elements of reliance which form our basic overlap between contract and tort; communication is a necessary ingredient in any agreement, and it also represents a positive act by the defendant.

³⁴ Lord Walker in *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776 at 793-794.

³⁵ P Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) at 290-293.

³⁶ [2009] UKHL 18, [2009] 1 WLR 776.

³⁷ Lord Hoffmann in *Thorner v Major* (ibid) at 778.

Why the Distinction is Relevant

It is not enough to show that there are factual distinctions between these two forms of ‘proprietary estoppel.’ We also must show that they are treated differently by the courts. Firstly, as Milne notes, the reliance-based approach to proprietary estoppel ‘explains most of the case law’ and ‘almost all the cases’ fall under this approach.³⁸ Lord Walker has also noted that acquiescence claims are the rarest examples of modern ‘proprietary estoppel’ cases.³⁹ When looking at the cases, it is apparent that this form of proprietary estoppel is being applied in a much more stringent way by the modern courts than by the courts of the past. Modern claims based on acquiescence have little chance of succeeding, except in cases of border disputes between neighbouring landowners.⁴⁰ An indication that the courts are taking a narrower approach to these claims is present in the Privy Council Opinion in *Elaine Knowles v George Knowles*.⁴¹ In this case, the claim failed on the basis that the owner of the disputed land had not encouraged his sister-in law that she would be granted an interest in the land, even though he had clearly acquiesced in her living there for a long period of time. Admittedly, an alternative explanation of this case is that it was a misprediction, not a mistake. This issue cannot be ignored as it had been previously stated by Fry J in *Willmott v Barber* that the ‘doctrine of acquiescence is founded on there having been a mistake of fact.’⁴² However, Birks points out that this type of

³⁸ P Milne, ‘Proprietary Estoppel in a Procrustean Bed’ (1995) 58 MLR 412 at 413.

³⁹ R Walker, ‘Which Side Ought to Win - Discretion and Certainty in Property Law’ [2008] Singapore Journal of Legal Studies 229 at 233.

⁴⁰ *Jones v Stones* [1999] 1 WLR 1739 (CA), *Lester v Woodgate* [2010] EWCA Civ 199, [2010] 2 P & CR 21.

⁴¹ [2008] UKPC 30.

⁴² *Willmott v Barber* (1880) LR 15 ChD 96 at 106.

estoppel is available for both mistakes and mispredictions.⁴³ Birks' analysis is supported by two Court of Appeal decisions in *Jones v Stones*⁴⁴ and *Lester v Woodgate*,⁴⁵ which demonstrate that, in acquiescence cases, the party seeking to establish the estoppel may have been acting under the belief that the acquiescing party would not enforce their rights in the future. This indicates that the real reason for the failure of the claim in *Elaine Knowles* was that it was one based on acquiescence, and that the courts are reluctant to recognise such claims.

A clearer example of the courts either restricting the use of 'acquiescence' or refusing to consider the claim altogether, even when the claimant was mistaken, is *Katana v Catalyst Communities Housing Ltd*.⁴⁶ Here, the claimants were seeking to regain possession from defendants who had been granted sub-tenancies by the original tenant. The original tenant's conferral of the sub-tenancies was made in breach of covenant; however, the sub-tenants continued to occupy the property and had established businesses at these addresses. The claimants were at least aware of the presence of the sub-tenants, but did nothing about this until four years later when they sought repossession of the land. Nonetheless, the estoppel claim failed due to the fact that the landowner was said to be unaware of the full terms of the sub-tenancies. According to Patten LJ, the estoppel argument was not even 'realistically arguable,' despite this being an obvious case of a landowner standing by whilst the claimant makes improvements to the land.⁴⁷ Additionally, in *National Trust v Timm*,⁴⁸ a claim

⁴³ P Birks, *An Introduction to the Law of Restitution* (Clarendon Press 1989) at 277-29.

⁴⁴ [1999] 1 WLR 1739 (CA).

⁴⁵ [2010] EWCA Civ 199, [2010] 2 P & CR 21.

⁴⁶ [2010] EWCA Civ 370, [2010] 2 EGLR 21.

⁴⁷ *Ibid* [31].

⁴⁸ *National Trust for Places of Historic Interest or Natural Beauty v Timm* [2010] EWCA Civ 128.

based on the defendant's standing by whilst the claimant operated a business on its land was dismissed on the basis that 'inaction does not constitute a positive representation on which reliance is placed.'⁴⁹ Thus, the courts are applying a strict approach to cases of acquiescence, which has narrowed the circumstances where such claims can be made.

Most importantly, from a realist perspective, cases of acquiescence rarely, if ever, lead to the court awarding the claimant the title to a legal estate. The more recent case law in this area proves that the scope for this claim is limited primarily to the right to use certain parts of the land, as in *Jones v Stones*⁵⁰ or the more recent example in *Lester v Woodgate* which concerned parking spaces.⁵¹ This conclusion is given further support by the Opinion of the Board in *Blue Haven v Tully*,⁵² where Lord Scott approved of a statement made by Sir James Wigram VC, that cases which were based on acquiescence would never preclude the owner from full possession of the land. To do so would constitute 'improving a man out of his own estate.'⁵³ Although the landowner may have acted 'unconscionably', at the same time the courts will not deprive the landowner of the entire estate because of the failure to speak. The doctrine has a very limited role in cases involving boundary disputes between neighbours, but it is a much less potent tool than a claim based on reliance.

⁴⁹ [2010] EWCA Civ 128 at [14].

⁵⁰ [1999] 1 WLR 1739 (CA).

⁵¹ [2010] EWCA Civ 199, [2010] 2 P & CR 21.

⁵² *Blue Haven v Tully* [2006] UKPC 17.

⁵³ Lord Scott in *Blue Haven v Tully* (ibid) at [27]. The reference is from *The Master or Keeper, Fellows and Scholars of Clare Hall v Harding* (1848) 6 Hare 273 at 296; 67 ER 1169 at 1180.

Two Patterns Which Explain the Role of Communication

One of the concerns with ‘proprietary estoppel’ in the acquiescence cases is that it seems to conflict with three patterns in English private law. These concerns, it is suggested, can be readily satisfied in cases of true reliance. The first is the importance of protecting the owner’s title to the land, the second is the general reticence of the courts to impose liability for mere omissions.⁵⁴ The first pattern, which the ‘acquiescence’ cases seem to be in conflict with, is the protection of title to land. This is not just a pattern which is seen in ‘judge-made’ law, it is also reflected in statutory provisions such as those which prevent oral contracts for the transfer of interests in land.⁵⁵ The attitude of the courts in cases of acquiescence cannot be properly assessed without having regard to the social circumstances which have enabled the role of title to take centre stage in our legal system. As Bogusz notes, the impact of legislation such as the Law of Property Act 1925 has led to the ‘alienability’ of land, meaning that the courts have taken a less prominent role in determining the way in which they deal with land disputes.⁵⁶

Furthermore, in *Yeoman’s Row v Cobbe*,⁵⁷ Lord Walker seemed willing to consign the acquiescence cases to the past: ‘[c]ases of unilateral mistake occurred quite frequently in the 19th century, when the construction of canals and railways, coupled with the complexity of unregistered conveyancing in those days, made it not uncommon for building works to be carried out on land whose owner (or part-owner) had not agreed

⁵⁴ E Cooke, *The Modern Law of Estoppel* (OUP 2000) at 76.

⁵⁵ Law of Property (Miscellaneous Provisions) Act 1989, s 2.

⁵⁶ B Bogusz, ‘Bringing Land Registration into the Twenty-First Century - The Land Registration Act 2002’ (2002) 65 MLR 556 at 563.

⁵⁷ [2008] UKHL 55, [2008] 1 WLR 1752.

to the works.⁵⁸ A similar point is made by Handley, who identifies the system of land registry, the intensity of land use and planning controls as factors which result in the decreasing relevance of claims based on acquiescence.⁵⁹ The circumstances of *Ramsden v Dyson*, where the owner of a vast estate ‘acquiesces’ to the claimant mistakenly improving the land engages less sympathy with a modern court. The 19th century example represented by the facts of *Ramsden v Dyson* of the owners of vast estates seems antiquated and out of touch with modern society.

As we noted in our chapter in realism, we must account for the dynamism of law. As society changes, so too does the law. The modern prominence of ‘title’ in the context of land reflects the fact that there is a predisposition to place a higher value on things which we already have, than on things which we have yet to obtain. This has been referred to as the ‘endowment effect’, which indicates that owners are not to lose their land simply because they have allowed someone else to live there.⁶⁰ This helps to explain why cases of acquiescence have become rarer. As title becomes a more prominent and important element in the distribution of land, it will require more legally significant acts to support a successful ‘proprietary estoppel’ claim.

With regard to the second pattern, liability in ‘acquiescence’ cases is problematic as the landowner loses out because of the failure to take positive steps to displace the assumption of the other party. As Cooke has pointed out, this pattern is best

⁵⁸ [2008] UKHL 55; [2008] 1 WLR 1752 at 1777.

⁵⁹ KR Handley, *Estoppel by Conduct and Election* (Sweet & Maxwell 2006) at 166.

⁶⁰ The term was introduced by R Thaler, ‘Toward a Positive Theory of Consumer Choice’ (1980) 1 *Journal of Economic Behavior and Organization* 39 at 44.

exemplified by the ‘traditional reluctance to attach liability to omissions.’⁶¹ The reluctance of the courts to make people liable for omissions is regularly demonstrated by the treatment of negligent claims where the defendant is accused of failing to prevent the claimant from suffering harm.⁶² As stated by Lord Hoffmann in *Stovin v Wise*:⁶³ ‘[c]ompulsory altruism needs more justification than an obligation not to create dangers to others when acting for one's own purposes.’⁶⁴ This reflects what one Canadian judge has referred to as ‘a philosophy of robust individualism,’⁶⁵ and what Stapleton refers to as ‘the core libertarian impulse.’⁶⁶ We take no view on the political leanings of this pattern, but simply recognise that the pattern is present in these judgments. In short, we can trace clear patterns throughout our private law of the idea that *generally* ‘no duty of affirmative action is recognized towards a stranger.’⁶⁷ The individual who ‘acquiesces’ in these cases of ‘proprietary estoppel’ merely plays a ‘passive’ role in the mistaken improvement.

Indeed, the reluctance to impose liability for omissions certainly seems to have been heavily influential in the decline of the acquiescence claim. For example, in *Elaine Knowles v George Knowles*,⁶⁸ Sir Henry Brooke, delivering the Opinion of the Board of the Privy Council, cited with approval the following statement made by Omrod LJ in *E & L Berg Homes Ltd v Grey*; ‘[i]t is a very unfortunate state of affairs when

⁶¹ E Cooke, *The Modern Law of Estoppel* (OUP 2000) at 76.

⁶² See for example; D Howarth, ‘My Brother's Keeper - Liability for Acts of Third Parties’ (1994) 14 *Legal Studies* 88 and B Markesinis, ‘Negligence, Nuisance and Affirmative Duties of Action’ (1989) 105 *LQR* 104.

⁶³ [1996] AC 923 (HL).

⁶⁴ *Ibid* at 930.

⁶⁵ McLachlin J in *Peel (Regional Municipality) v Canada* [1992] 3 SCR 762 at 785-786.

⁶⁶ J Stapleton, ‘Duty of Care Factors: A Selection from the Judicial Menus’ in J Stapleton and P Cane (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (OUP 1999) at 73.

⁶⁷ J Stapleton, ‘Duty of Care Factors: A Selection from the Judicial Menus’ in J Stapleton and P Cane (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (OUP 1999) at 74.

⁶⁸ [2008] UKPC 30.

people feel obliged to take steps which they do not wish to take, in order to preserve their legal rights, and prevent the other party acquiring rights against them.⁶⁹ So not only must the claimant overcome the strength of the owner's title to the land, he must also deal with the fact that the 'justification' is based on an omission by the landowner. If a passive defendant in cases of physical injuries is not expected to offer any assistance, even when they could easily protect the claimant, then it would be odd that a passive defendant is expected to offer assistance to correct the mistaken belief of another party. We can, therefore, explain the limited and diminishing role of the acquiescence cases. In the absence of reliance, the claim is a much more limited one.

Reliance-Based Land Claims

By removing the cases on acquiescence, a more realistic concept of reliance emerges. This reliance mechanism provides the foundations for reliance-based claims in general. In this more streamlined form, proprietary estoppel arises through the *communication* of a representation which leads to reliance by the other party. However, as has been noted, we must always keep in mind the value placed upon the landowner's title, which will not simply be defeated because of the expectations of the claimant. This means that, as with money transfers, a general approach to all reliance cases is not possible nor is it desirable.

⁶⁹ (1979) 253 EG 473; [1980] 1 EGLR 103 at 108.

Detrimental Reliance

Although we have moved past unconscionability, it would be a disservice to ignore the attempt by Cooke to formulate a more general doctrine of estoppel. This is reflected in Cooke's attempt to construct a coherent doctrine of 'estoppel', based on detrimental reliance. Cooke conceded that stronger instances of 'detriment' were required in 'proprietary estoppel', than in cases outside of proprietary estoppel.⁷⁰ Our view is that detriment has not ever, without further specification, been sufficient to establish a reliance-based land claim. Therefore, it is only in limited circumstances where the title to land will be defeated, even when the landowner has communicated that the land will be given to the induced party. The argument presented in the following sections identifies these circumstances as being either long-term occupation of the land, or where the other party provides something beneficial to the landowner. Both of these factual elements create different types of overlaps: the element of control brings the claim closer to property, and the element of bargain brings the claim closer to contract.

Another example of how detrimental reliance is unhelpful in this context is revealed by McFarlane's approach. One of the few attempts that have been made to classify 'proprietary estoppel' outside of the confines of unconscionability is McFarlane's rights-based approach. A recent example of how we can miss the fundamental facts is seen in McFarlane's view that in cases of 'proprietary estoppel' reliance must be

⁷⁰ E Cooke, *The Modern Law of Estoppel* (OUP 2000) at 100-103. Neyers has therefore pointed out that this undermines any search for a coherent principle of 'estoppel', a view which is shared in this chapter; J Neyers, 'A Coherent Law of Estoppel?' (2003) 2 *Journal of Obligations and Remedies* 25.

reasonable.⁷¹ He gives, as an example, a landowner who promises to give a house to a nephew who spends his savings at the casino in reliance.⁷² But on the approach here this would never be sufficient as the nephew is not in occupation, and neither is he providing a bargain in return for the property. This is important, as many of the cases involve informal arrangements between family members or close friends. What may be unreasonable to most other people may have been completely reasonable in the circumstances and in the context of the relationship. Relying on a promise that someone will leave you a very valuable piece of land for free seems to be outside the ambit of ‘reasonableness’. The error in reasoning can be attributed to the fact that, in pure economic loss cases, *reasonable* reliance is an additional control mechanism which is applied by the courts in claims for pure economic loss (we consider this further on in this chapter.) Without further specifying what *type* of detriment is suffered, either occupation or an unrewarded bargain, it is inevitable that we will resort to other control mechanisms even when they do not accurately describe the law. The context here is entirely different, and a search for uniformity is unnecessary and misleading.

Our Approach; Overlaps

Where a claimant seeks to establish a reliance-based land claim, there are two routes available. One stands as a closer overlap with our core concept of property, and the other stands as an overlap with our core concept of contract. Firstly, the claimant’s

⁷¹ B McFarlane, *The Structure of Property Law* (Hart 2008) at 452.

⁷² B McFarlane, *The Structure of Property Law* (Hart 2008) at 452.

possession of the land will bring the situation closer to the core concept of property which was set out in Chapter 4. Secondly, another factor which can come into play is where the claimant has provided something in return for the benefit of the land, which, as we have seen, is something which is similar to the role of bargain in our concept of contract law. From Chapter 4 we know that these are legally significant facts. Note that they are not exclusive elements in reliance-based land claims, as it is possible that someone is in occupation of land, but that they have also provided the landowner with significant benefits.⁷³ The argument is that where reliance is coupled with either possession or benefit to the owner, or both, it will be sufficient to establish an interest in the land. Notably, the oft-used phrase ‘detriment’ is too simple and imprecise to describe how reliance is demonstrated in these cases. Detriment itself, in the context of land disputes, will rarely be sufficient on its own due to the strength of the landowner’s title.

The Overlap of Property and Reliance

In Chapter 4, it was stated that control is one of the core factual ingredients of the concept of property.⁷⁴ Although it is rarely mentioned as a central element in ‘proprietary estoppel’, control is the most common element in establishing reliance-based land claims. For example, ‘possession’ was a central element in Lord Kingsdown’s pronouncement of the reliance-based claim.⁷⁵ In this context, a specific

⁷³ Eg *Lim Teng Huan v Ang Swee Chuan* [1992] 1 WLR 113 (PC).

⁷⁴ See text at n 59 in Chapter 4.

⁷⁵ ‘If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, *takes possession of such land*, with the consent of the landlord, and upon the faith of such

type of control is required; namely occupation of the land. This was clearly explained by Lord Denning when he stated that proprietary estoppel ‘arises from the expenditure of money by a person in *actual occupation* of land when he is led to believe that, as the result of that expenditure, he will be allowed to remain there.’⁷⁶ In these cases, the control element raises a particular concern about the value and use of the land to the occupier. As Robertson explains, ‘[a] person who occupies a particular home for a long period in the expectation that he or she is entitled to reside there for life will often develop a significant attachment to the home and may suffer a substantial emotional detriment if he or she is forced to make a new home elsewhere.’⁷⁷ A similar notion is discussed by Rotherham, who notes that where occupation is present, it can lead to the ‘endowment effect’,⁷⁸ which was mentioned earlier in this chapter.⁷⁹ We do not just have to consider the landowner’s title, but also the claimant’s occupation of the land. Here we see that there is a tension between the occupier and the landowner; a successful claim may lead to the landowner losing his title, whereas the denial of the claim will take away the occupation of the claimant.

At present, the current literature simply does not identify this clearly important issue. General categories of property, contract, tort and even unconscionability do not direct us to this element of occupation, which is both of social importance and also predicts

promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation’ (*emphasis added*) in *Ramsden v Dyson* (1866) LR 1 HL 129 at 170.

⁷⁶ *Inwards v Baker* [1965] 2 QB 29 (CA) at 37.

⁷⁷ A Robertson, ‘The Reliance Basis of Proprietary Estoppel Remedies’ [2008] 4 *The Conveyancer and Property Lawyer* 295 at 309.

⁷⁸ C Rotherham, *Proprietary Remedies in Context: a Study in the Judicial Redistribution of Property Rights* (Hart 2002) at 75-76. Another commentator, Fox, has traced the influence of this ‘endowment effect’ on the court’s focus on ‘possession’ in the context of land. See L Fox, *Conceptualising Home Theories, Law and Policies* (Hart 2006) at 282-283.

⁷⁹ See text around n60.

the law in this area. Our ability to describe the law is undermined when we try to describe too much: predictability cannot be achieved if we attempt to provide a mechanism that can account for cases of acquiescence and *all* types of reliance-based land claims. Instead, we can recognise different types of overlap with the reliance mechanism. Therefore, as it has already been stated above, it will not be argued here that *all* proprietary estoppel cases involve occupation. A reliance-based land claim can also succeed on the basis of a bargain between the parties.⁸⁰ However, the occupation of the property provides the simplest and most common explanation for the court's intervention.

Communication

Reliance in this context can be broken down into three intertwined elements; there is a representation which has been communicated by the landowner, the occupier has made a long-term commitment to the land and there is a causal link between what was communicated and the commitment to the land. Thus, these cases show that communication is the first step in establishing a reliance-based land claim. A straightforward example is *Pascoe v Turner*, where the representor stated that '[t]he house is yours and everything in it.'⁸¹ This can be contrasted with the recent Court of Appeal decision in *Cook v Thomas*;⁸² where the claim failed⁸³ as there had never been any representation by the landowner that the claimants had anything other than a

⁸⁰ Eg *Yaxley v Gotts* [1999] EWCA Civ 1680, [2000] Ch 162 (CA).

⁸¹ *Pascoe v Turner* [1979] 1 WLR 431 (CA)

⁸² [2010] EWCA Civ 227.

⁸³ This was despite the fact that the claimants had performed a number of acts which would have suggested otherwise such as repairs to the house and running a farm from the premises. Without communication that the land can be occupied, there is no inducement and hence no reliance.

temporary residence. Although the key to reliance is ‘communication’, it need not be explicitly stated that the induced party can remain on the land indefinitely; it might be implicated. For example, in *Inwards v Baker*,⁸⁴ a father told his son, who was trying to find the money to buy a plot of land to build a house, that he should build the house on the father’s land. Both parties knew what the purpose of the building was, and it was implied by the father’s statement that the son would be allowed to live there.

Control; The Property Element

As we stated earlier, although it is regularly stated that detriment is required, a different view is taken here. Something more specific is required. For our purposes, it is occupation. It would also be sensible to talk about *exclusive* occupation. When control is shared between landowner and induced party, any occupation will be less relevant as the landowner has as much control, if not more, than the other party. For example, *Jennings v Rice* involved a degree of occupation, as the claimant stayed at the house each night for a couple of years, however at the same time the claimant owned his own house with his wife.⁸⁵ Bright and McFarlane have argued that ‘this type of occupation is clearly less effective in establishing B’s attachment to the property.’⁸⁶ The more sensible analysis is that occupation in this context requires exclusive control. The success of the claim in *Jennings* is attributable to the bargain between the parties and not attributable to the issue of occupation.

⁸⁴ *Inwards v Baker* [1965] 2 QB 29 (CA).

⁸⁵ *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 FCR 501.

⁸⁶ S Bright and B McFarlane, ‘Proprietary Estoppel and Property Rights’ (2005) 64 CLJ 449 at 471.

According to Bright and McFarlane, a reliance-based land claim will not be established where there has only been a short-term occupation,⁸⁷ or in cases where the occupier makes it clear that they might leave the premises at any point.⁸⁸ A classic example of a long-term commitment by both parties is the Court of Appeal in *Bibby v Stirling*,⁸⁹ where the landowner had apparently encouraged his neighbours to believe that they could use a strip of land for the rest of their lives. What was clearly important in this decision was the fact that the claimant had built a greenhouse on the strip of land, which was, according to Millett LJ, a ‘major construction.’⁹⁰ This can be compared to *E&L Berg v Grey*, where the estoppel claim failed, in part, due to the lack of any acts of a ‘permanent character’,⁹¹ as the ‘home’ which had been made by the claimant was a mobile home. The need for a long-term commitment is also to be seen in the Privy Council decision in *A-G for Hong Kong v Humphreys*.⁹² In *Humphreys*, both parties believed that a contract would eventually be completed, but the defendant withdrew from negotiations before this happened. Although the claimant had already taken possession of the premises, the claimant could not show

⁸⁷ S Bright and B McFarlane, ‘Proprietary Estoppel and Property Rights’ (2005) 64 CLJ 449 at 471.

⁸⁸ For example *Attorney General for Hong Kong v Humphreys Estate (Queen’s Gardens)* [1987] AC 114 (PC), where Lord Templeman, delivering the Opinion of the Board, explained that the claim for proprietary estoppel failed as ‘in the present case the government chose to begin and elected to continue on terms that either party might suffer a change of mind and withdraw’ (at 128).

⁸⁹ An example of a case where there is not a long-term commitment was *Sledmore v Dalby* [1996] EWCA Civ 1305. In *Sledmore*, Mrs Sledmore sought the repossession of a house where her son-in-law had been living for 25 years. Although this may appear to be a long-term commitment, on the facts of the case the house was no longer being used by Mr Dalby, who had found a new partner and was now primarily residing at a separate address. It was, however, recognised that a claim may have existed in the past when Mr Dalby was in occupation of the land, per Hobhouse LJ at 209.

⁹⁰ *Bibby v Stirling* [1998] EWCA Civ 994; (1998) 76 P & CR D36 at D38. See also *Holman v Howes* [2007] EWCA Civ 877 where the parties had made a commitment which was demonstrated by the claimant investing most of her savings into the purchase of the house.

⁹¹ *E and L Berg Homes Ltd v Grey* [1979] 253 EG 473 per Sir David Cairns at 479.

⁹² *Attorney General for Hong Kong v Humphreys Estate (Queen’s Gardens)* [1987] AC 114 (PC).

that there was reliance since it had expressly retained the right to withdraw from the negotiations at any time.⁹³

These cases show that detriment is not a necessary ingredient in reliance-based land claims. The pattern is identified through our overlap; title itself will not usually be defeated, merely because the claimant has suffered a loss. Detriment does not identify the relevant facts in these cases, but it is submitted that the presence of control ‘strengthens’ the claimant’s interest and it is this element, when coupled with reliance, which can defeat the title of the landowner. Admittedly this argument that detriment is not sufficient is controversial. Lord Walker has argued that detriment is necessary, however, as his Lordship acknowledges, the courts take a very wide view of ‘detriment’ in such cases.⁹⁴ This wide view even stretches to cover cases where it may be argued that the claimant has already received even more than they have lost.⁹⁵ It is argued here that, whereas claimants will have to show detriments in other estoppel cases, it is not essential where the claimant has had continued occupation of the land. It is an unfortunate fiction that the courts state that this is required, and this fiction is only necessary if we try to accommodate all ‘proprietary estoppel’ cases under a catch-all definition. An overlapping approach allows us to break the cases down whilst being able to acknowledge that there may be similarities with other forms of ‘proprietary estoppel.’

⁹³ According to Lord Templeman, the claimant ‘chose to begin and elected to continue on terms that either party might suffer a change of mind and withdraw’ [1987] AC 114 (PC) at 124.

⁹⁴ R Walker, ‘Which Side Ought to Win - Discretion and Certainty in Property Law’ [2008] Singapore Journal of Legal Studies 229

⁹⁵ In *Gillett v Holt* Robert Walker LJ, despite stating that ‘detriment’ was essential for proprietary estoppel went on to conclude that this was satisfied when claimants ‘deprived themselves of the opportunity of trying to better themselves in other ways.’ [2001] Ch 210 (CA) at 232, 235.

In the occupation cases, the key is whether the parties have committed themselves to the arrangement. If it is one from which both parties can easily withdraw then it will be difficult to demonstrate the necessary element of reliance. A classic example where commitment was shown is *Crabb v Arun DC*,⁹⁶ where the claimant sold part of his land on the basis that he would be allowed to use council land as an alternative means of access. According to Lord Neuberger in *Yeoman's Row*, this was 'an act so unequivocal that it led to Mr Crabb irretrievably altering his position.'⁹⁷ A more recent example is the Opinion of the Privy Council in *Henry v Mitchell*,⁹⁸ which confirms the relevance of this approach in cases where the claimant is already in control of the property. The Opinion of the Board was delivered by Sir Jonathan Parker, who stated that on the facts detriment and reliance were inextricably linked.⁹⁹ Furthermore, the claimant could establish an estoppel on the basis that he had 'opted for a hard life, in which he has had to struggle to make ends meet and to provide for his family, in circumstances where more attractive prospects beckoned elsewhere.'¹⁰⁰ This was even more recently confirmed by Rimer LJ in *Malik v Kaylan* where he upheld the decision of a trial judge who had concluded that occupation outweighed any benefits of rent-free accommodation.¹⁰¹ Accordingly, '[t]he judge knew perfectly well that he had paid no rent and knew also that he had always occupied the house: the latter point was at the heart of his thinking. I regard the judge's evaluation of how the equity should be satisfied as rational and understandable and well within the range

⁹⁶ [1976] Ch 179 (CA).

⁹⁷ [2008] UKHL 55; [2008] 1 WLR 1752 at 1785.

⁹⁸ [2010] UKPC 3.

⁹⁹ *Ibid* at [55].

¹⁰⁰ *Ibid* at [62]. This also echoes the earlier decision in *Gillett v Holt* [2001] Ch 210 (CA) at 235, where Robert Walker LJ, despite stating that 'detriment' was essential for proprietary estoppel, concluded that it was sufficient that the claimants had 'deprived themselves of the opportunity of trying to better themselves in other ways.'

¹⁰¹ [2010] EWCA Civ 113.

of decisions properly open to him.’¹⁰² The extent of any detriment will be helpful in showing that the parties had committed to a long term arrangement, but it cannot be the exclusive justification. As we have seen, in this context it must be clear that the occupier has made a long-term commitment to the land in reliance on something which was communicated by the title-holder. This is what creates the overlap with property, as it demonstrates the extent to which the claimant controls the land.

Causation

The causal requirement only comes into the picture at this stage; once it has been shown that there has been (i) a representation which was communicated and a (ii) a long-term commitment, it is then necessary to show that it was the representation that led to the long-term commitment. As noted by Cooke,¹⁰³ this requirement is demonstrated by *Taylor Fashions v Liverpool Victoria Trustees Co. Ltd.*¹⁰⁴ The case involved an option to renew a lease provided the occupier installed a lift, which turned out to be void. The first claimant had installed this lift, but it was concluded by Oliver J that this would have been done anyway, even without any representation as it was necessary for the operation of the lease.¹⁰⁵ On this basis, there was no reliance and the claim failed. In contrast, the second claimant had in fact relied on the validity of the option to renew the lease, and this had been caused by the representations made

¹⁰² *Malik v Kaylan* [2010] EWCA Civ 113 at [32].

¹⁰³ E Cooke, *The Modern Law of Estoppel* (OUP 2000) at 48.

¹⁰⁴ [1982] QB 133 (Ch).

¹⁰⁵ [1982] QB 133 (Ch) at 156. Another recent example is *Clarke v Swaby* [2007] UKPC 1, [2007] 2 P & CR 2. Although the occupier spent money on the land, this was not the result of any assurances or promises which had been communicated. Lord Walker (at [19]) doubted that the proprietary estoppel claim should have succeeded and that the claimant was ‘fortunate’ to be awarded a sum of money which reflected his expenditure.

by the defendant. In contrast to the first claimant, the second claim succeeded. The decision demonstrates that causation is an integral part of the reliance inquiry, but only when communication has been established. This is important; if we were to take any other approach we would end up in the same area as the acquiescence cases. This requirement distinguishes reliance-based claims from acquiescence claims and paves the way for a successful claim.

Justifying Occupation from a Realist Perspective

Generally, the nature of the occupation will determine the award which will be made by the court. The stronger the commitment to the land is, the stronger the award made by the court will also be.¹⁰⁶ In most cases, this is either the transfer of the freehold or a licence to remain on the land for the rest of the claimant's life. There are some cases where the courts will provide a much weaker remedy, which reflects the nature of the occupation. The case law supports the proposition that this would not lead to an interest over the entire estate. For example, where the occupation is merely for the purposes of running music lessons from the building¹⁰⁷ this will clearly lead to a lower award than where the claimant has lived on the land as his home.¹⁰⁸ Similarly, if the commitment to the land wanes, and the claimant has subsequently found alternative accommodation, it is unlikely that any reliance-based claim will

¹⁰⁶ For example *Greasley v Cooke* [1980] 1 WLR 1306 (CA).

¹⁰⁷ *Powell v Benney* [2007] EWCA Civ 1283. *Powell* is also relevant in showing that the courts recognise at least two forms of reliance-based claim, as Sir Peter Gibson stated the case was 'not at all like that typical case in the bargain category' (at [23]).

¹⁰⁸ *Henry v Mitchell* [2010] UKPC 3.

succeed.¹⁰⁹ Since control is also important in establishing this claim, the induced party will usually only be able to claim the parts of the estate which they are in control of. Waddams gives the example of a gratuitous promise to give the other party some land, which leads to the promisee erecting a small building on the property.¹¹⁰ It would be misleading to suggest that any current approach can accurately predict the amount which is awarded in reliance-based land claims, *but* we can determine the patterns. We argue here that the overlapping analysis helps in this regard as it identifies the most important *facts* which seem to be influencing the courts at present.

This is not simply an attempt to identify a coherent doctrine of reliance in place of the uncertainty created by the current orthodoxy of ‘unconscionability.’ From a realist perspective, we have identified that control is relevant in property, and it will also be relevant where someone seeks to make a reliance-based land claim. Bright and McFarlane point out that ‘the fact that [the induced party] is occupying the property will often be a strong indication that a property right is necessary.’¹¹¹ This is because one of the important consequences of the claimant’s presence on the land is that it reduces the possible disadvantages to third parties. As McFarlane points out, section 116 of the Land Registration Act 2002 resolved a long debate about whether the interest of a claimant under a proprietary estoppel claim would be binding on third

¹⁰⁹ *Sledmore v Dalby* (1996) 72 P & CR 196 (CA).

¹¹⁰ S Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (CUP 2003) at 66.

¹¹¹ S Bright and B McFarlane, ‘Proprietary Estoppel and Property Rights’ (2005) 64 CLJ 449 at 469. It should be noted that ‘property right’ is used differently here in this thesis, as for Bright and McFarlane it appears to be being used to indicate an interest which can bind third parties, whereas a much narrower version of property has been presented in this thesis.

parties.¹¹² Nonetheless, this provision does not provide a blanket protection for all proprietary estoppel claims.¹¹³ Although it preceded the implementation of section 116, the Court of Appeal decision in *Lloyd v Dugdale* demonstrates that occupation is an essential requirement when a claimant seeks to enforce any interests against third parties.¹¹⁴ According to the explanatory notes which accompanied the Land Registration Act 2002, apart from cases of actual occupation, the only other way for a proprietary estoppel claim to bind third parties is where the claimant first registers their interest as a notice on the land registry,¹¹⁵ which in practice is unlikely to have occurred.¹¹⁶ In contrast, as Dixon points out, under Schedules 1 and 3 of the 2002 Act, actual occupation also forms an overriding interest which need not be registered.¹¹⁷ Therefore, the strongest protection will be provided to those cases ‘where the claimant is in actual occupation’ which ‘is automatically protected without the need for registration.’¹¹⁸ From a realist perspective, the overlap between reliance, land and occupation is an indispensable conceptual tool which identifies the way in which the courts will treat the claim.

¹¹² B McFarlane, ‘Proprietary Estoppel and Third Parties after the Land Registration Act 2002’ (2003) 62 CLJ 661.

¹¹³ M Thompson, ‘Estoppel: Reliance, Remedy and Priority’ [2003] *The Conveyancer and Property Lawyer* 157.

¹¹⁴ [2001] EWCA Civ 1754, [2002] 2 P & CR 13.

¹¹⁵ Explanatory Notes to the Land Registration Act 2002, para 185; ‘This means that it can be protected by entry of notice in the register, or, where the claimant is in actual occupation of the affected land, as an interest whose priority is automatically protected without the need for registration.’ Available online <<http://www.legislation.gov.uk/ukpga/2002/9/notes/division/4/12/1/2>> accessed 18/01/2011.

¹¹⁶ S Bright and B McFarlane, ‘Personal Liability in Proprietary Estoppel’ [2005] *The Conveyancer and Property Lawyer* 14 at n 60.

¹¹⁷ M Dixon, ‘The Reform of Property Law and the Land Registration Act 2002: A Risk Assessment’ [2003] *The Conveyancer and Property Lawyer* 136 at 155.

¹¹⁸ See M Dixon, ‘Proprietary Estoppel and Formalities in Land Law and the Land Registration Act 2002’ in E Cooke (ed), *Modern Studies in Property Law* (vol 2, Hart 2003) at n 4. More recently, the Board in *Henry v Mitchell* [2010] UKPC 3 acknowledged that where the claimant was in possession of land, it represented an ‘overriding interest’ at least under the law of St. Lucia.

3. The Overlap of Reliance, Property and Contract

This second overlap shares much similarity with claims for non-contractual services, however, since the claim involves land, it raises special concerns which do not apply to claims for non-contractual services (these cases are looked at further on in this chapter.) We avoid calling this a complete overlap with contract, the reason being the same as our rejection of ‘unilateral’ contracts. There may be agreement, but it does not ‘lock in’ until the induced party has completed their side of the bargain. Therefore, there could be no such thing as an executory reliance-based land claim. The overlap arises due to the presence of the bargain element.

The argument presented here is that if the claimant is not in occupation of the land, it will be necessary to show that the landowner has indicated that the induced party will have the land in return for providing a substantial benefit. This analysis has its roots in Walker LJ’s ‘bargain-category’ from *Jennings v Rice*.¹¹⁹ What was much more significant in *Jennings v Rice* was the fact that the claimant had taken time to look after and care for the landowner, who had made assurances that the property would be left to him. Accordingly, this is an example of a bargain; the representor communicates that the land will be left to the induced party, if the induced party provides valuable services. Although the ‘bargain’ approach of Walker LJ has been

¹¹⁹ *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 FCR 501.

criticised by Gardner, and more recently by Mee, it will be argued that the criticisms made by these academics are resolved by the overlapping concepts analysis.¹²⁰

Criticisms of the Bargain Approach

The bargain-approach was most strongly criticised by Gardner, who sought to demonstrate that there is no clear dividing line between bargain and non-bargain cases.¹²¹ Lord Walker himself has now conceded this point.¹²² Yet, we must approach this issue by keeping in mind what has been already established in the above section. The first reason is that, unlike Walker LJ's 'categorisation' in *Jennings v Rice*, we have little interest in creating 'categories' at all. Rather, we are developing a much more flexible conceptual analysis. Therefore, Gardner's criticism holds less weight once we have acknowledged that we are looking at *concepts* which cannot and should not be placed in discrete *categories*. Secondly, we have already argued that the strongest reliance-based claims for land arise where the claimant is committed on a long-term basis, but additionally that it could very well be the case that the induced party occupies the land whilst performing his or her side of a 'bargain.' In short, there are two types of *reliance* based proprietary estoppel claims, but they can and often do overlap.¹²³ Secondly, the other cases referred to Gardner are those where the 'bargain' does not appear to be the condition for the gift of the land, 'often, although the defendant does not require the claimant's acts, he is benefited by them, and freely

¹²⁰ S Gardner, 'The Remedial Discretion in Proprietary Estoppel – Again' (2006) 122 LQR 492; J Mee, 'The Limits of Proprietary Estoppel: *Thorner v Major*' (2009) 21 Child & Family Law Quarterly 367.

¹²¹ S Gardner, 'The Remedial Discretion in Proprietary Estoppel – Again' (2006) 122 LQR 492 at 495.

¹²² R Walker, 'Which Side Ought to Win - Discretion and Certainty in Property Law' [2008] Singapore Journal of Legal Studies 229 at 239.

¹²³ One such example is *Gillett v Holt* [2001] Ch 210 (CA).

accepts them, and makes his promise expressly or impliedly in recognition of the claimant's having performed them and continuing to perform them.’¹²⁴ As will be explained further on, there is no need to accommodate these cases within the bargain cases, as they do not in fact fall under reliance in the first place. The more sensible analysis is to recognise that these cases are better understood in the context of informal arrangements for cohabitation, which is explained further on.¹²⁵

Communication

Returning to the ‘bargain’ cases, the first requirement is that the landowner has communicated that the land will be given to the induced party in return for some act. In some cases it is obvious that the transfer of land is the purpose of a bargain, as in *Yaxley v Gotts*,¹²⁶ where the landowner, using his father as his agent, requested the claimant to develop a block of flats, informally agreeing that the induced party would be given the ground floor flats. In most of the bargain cases, however, it is usually the case that the landowner will want the claimant to perform services for little or no pay, and that upon the death of the landowner the property will be left to the claimant. For example in *Walton v Walton*,¹²⁷ the landowner told her son, who had been complaining about his pay, that ‘[y]ou can't have more money and a farm one day.’¹²⁸ Similar examples are to be found in *Re Basham*,¹²⁹ *Gillett v Holt*¹³⁰ and *Jennings v*

¹²⁴ S Gardner, ‘The Remedial Discretion in Proprietary Estoppel – Again’ (2006) 122 LQR 492 at 496.

¹²⁵ See n 146 in this Chapter.

¹²⁶ *Yaxley v Gotts* [2000] Ch 162 (CA).

¹²⁷ (CA, 14 April 1994).

¹²⁸ As noted by Hoffmann LJ, at [1]. Also, *Clarke v Meadus* [2010] EWHC 3117 (Ch).

¹²⁹ [1986] 1 WLR 1498 (Ch).

Rice.¹³¹ In cases such as these, the statements made are reassurances which indicate that, so long as the current arrangement continues, the land will be left to the induced party. Although the induced party may already be performing the ‘bargain’, the claimants in these cases have shown that the *continued* provision of their assistance was heavily influenced by the assurances made by the landowner. Just because these services have been provided in the past does not mean they will be provided in the future. Therefore, it is still necessary to show that the induced party was questioning their position at some point.

The most recent example is the House of Lords decision in *Thorner v Major*, where the assurance between two ‘taciturn and undemonstrative’ men was demonstrated when the landowner handed the induced party an insurance policy stating that it was for his death duties.¹³² In the context of the situation, this indicated that the farm was to be left to the induced party, who had been considering other opportunities. One of the important consequences of the *Thorner v Major* decision was that it clarified a point of confusion which had been produced by an earlier House of Lords decision in *Yeoman’s Rowe v Cobbe*.¹³³ In Lord Scott’s speech in *Yeoman’s Rowe v Cobbe*, his Lordship indicated that proprietary estoppel could only be established where the claimant believes that the defendant has made a clear and unequivocal assurance about the property.¹³⁴ As McFarlane and Robertson point out, no assurance was present in *Thorner v Major*, and this conflicts with the case law on the types of

¹³⁰ [2001] Ch 210 (CA).

¹³¹ *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 FCR 501.

¹³² *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776.

¹³³ *Yeoman’s Row v Cobbe* [2008] UKHL 55, [2008] 1 WLR 1752.

¹³⁴ *Yeoman’s Row v Cobbe* [2008] UKHL 55, [2008] 1 WLR 1752 at 1763.

assurance that are sufficient to ground a proprietary estoppel.¹³⁵ The communication need not be clear or unequivocal, but it must indicate that the land will be left to the claimant if he begins to provide a benefit (as in *Yaxley*) or carries on providing an intended benefit (as in *Gillett v Holt* or *Thorner v Major*.) Again we see that this is reliance based, as communication is a necessary, as well as factual, requirement which needs to be shown. Without such communication, the claim will fail, as pointed out by Lord Walker.¹³⁶ As an example, Lord Walker refers to *Lissimore v Downing*,¹³⁷ where statements were made that the claimant would generally be looked after, but nothing was communicated about the ownership of the land. Therefore, the same pattern of reliance is required, even though the context is different.

Bargain

As it is not sufficient merely to have communication, the bargain element must be present. This can be broken down into two elements; one, that the bargain must be completed and, two, that the induced party is providing a benefit to the claimant.

Complete Performance

The first requirement is that the claimant has performed all of the required acts. Gardner has argued that this is not necessary, and that part performance is

¹³⁵ B McFarlane and A Robertson, 'Apocalypse Averted: Proprietary Estoppel in the House of Lords', (2009) 125 LQR 535 at 537-538.

¹³⁶ R Walker, 'Which Side Ought to Win - Discretion and Certainty in Property Law' [2008] Singapore Journal of Legal Studies 229 at 234.

¹³⁷ *Lissimore v Downing* [2003] EWHC B1 (Ch), [2003] 2 FLR 308.

sufficient.¹³⁸ However, the only authority for this is *Ottey v Grundy*,¹³⁹ a case which arguably involved no reliance element at all.¹⁴⁰ The rest of the cases in this area support the requirement that all of the beneficial acts need to be completed. This also explains why the claim in *Yeoman's Row v Cobbe* failed. Unfortunately, this was not the reason cited by the court in *Yeoman's Row* as the main justification for the failure of the claim was that both parties had commercial experience and knew that the deal was not a legally binding agreement. However, nearly all 'bargain' cases are not legally binding; in *Yaxley v Gotts* there would have been no claim if the agreement had not been acted upon, and in the cases where land is to be left under a will, it is only when the landowner dies that anything becomes legally binding. This explanation is not convincing. The explanation provided by the court seems strikingly similar to the one made by the defendants that the agreement should not be enforced as it was 'subject-to contract'. Writing extra-judicially, Lord Neuberger has described the 'subject-to contract' argument as 'abracadabra law',¹⁴¹ but it is hard to see why the same criticism does not apply to the explanations provided by Lord Scott and Lord Walker in *Yeoman's Row*.

It is, therefore, submitted that the more accurate account of *Yeoman's Row* is that the claimant must fulfil all required acts to succeed in the bargain-reliance claim. So, in the case of *Yeoman's Row*, the planning permission was only part of a wider development plan. First, and quite obvious, was the requirement that the claimant pay

¹³⁸ S Gardner, 'The Remedial Discretion in Proprietary Estoppel – Again' (2006) 122 LQR 492 at 495-496.

¹³⁹ *Ottey v Grundy* [2003] EWCA Civ 1176, [2003] WTLR 1253.

¹⁴⁰ [2003] EWCA Civ 1176, [2003] WTLR 1253 (CA).

¹⁴¹ Lord Neuberger, 'The Stuffing of Minerva's Owl? Taxonomy and Taxidermy in Equity' (2009) 68 CLJ 537 at 541.

the landowner the purchase price of the land. Secondly, the claimant would have needed to actually build the properties which had been approved, subject to a charge over the property for the benefit of the owner. Admittedly, the claimant appeared willing to perform his side of the bargain at all times, but it must always be placed in the context of a land dispute. Everyone agrees that a simple contract is not sufficient to transfer interests in land, so in this situation the bargain must be completed. Again, note that there are numerous statutory provisions which inhibit the sale of land. The conclusion is supported by the comparison made by Lord Scott with *Holiday Inns Inc v Broadhead*.¹⁴² The case appears similar to *Yeoman's Row*, as a developer obtained planning permission and, as businessmen, they knew that the contract was not legally binding. The important distinction was that when the agreement was made, the defendant had not yet obtained the land.¹⁴³ The 'title' issue was therefore not in play, and there was no requirement that the claimant performs all of the required acts. The patterns are there, but they can only be seen by adopting an overlapping conceptual analysis to the case law. If the representor already has title to the land, then full performance is necessary. This is because the landowner's title is stronger than the claimant's bargain interest when the bargain is incomplete.

The harsh consequences of this requirement are ameliorated by the fact that the claimant can succeed on an alternative reliance basis, namely an agreement for non-contractual services. Thus, in *Yeoman's Row*, the claimant received a sum of money to reflect the work and skill he had used to obtain the planning permission. Obviously

¹⁴² (1974) 232 EG 951.

¹⁴³ 'It is also very important to note that *Holiday Inns* was not a case in which Mr Broadhead was bringing land of his own into a joint venture.' Lord Scott in *Yeoman's Row v Cobbe* [2008] UKHL 55, [2008] 1 WLR 1752 at 1784.

this does not accord with the law of contract, but there is no need for the replication of contract rules in this context. Further support is provided by Mee,¹⁴⁴ who points out that with many bargain-reliance claims, the landowner may not have anticipated events which would alter the decision to transfer the land. This can also be seen in cases involving non-commercial parties, such as *Gillett v Holt*, where the landowner had told the claimant the land would be his inheritance, but then attempted to exclude the claimant from his will after they had fallen out.¹⁴⁵ The claimant believed he would receive the whole of the property, but what he in fact received was an order which allowed him to stay on the plot of land where he had set up home, and an award that reflected the value of the services he had provided. On the analysis presented here, the claimant in fact *lost* his bargain claim, but succeeded on the basis of occupation-reliance, and additionally an agreement for non-contractual services. This explains why he did not receive an award which reflected the full extent of his detriment or his expectations.¹⁴⁶ Therefore, the requirement of complete performance is not simply an issue concerning commercial parties, but applies in other situations as well.

Valuable Bargain

Although the overlap between contract and property results in a unique approach in this context, one similarity with the bargain element in contract is that the claimant

¹⁴⁴ J Mee, 'The Limits of Proprietary Estoppel: *Thorner v Major*' (2009) 21 *Child & Family Law Quarterly* 367.

¹⁴⁵ [2001] Ch 210 (CA).

¹⁴⁶ *Uglov v Uglov* [2004] EWCA Civ 987, [2004] WTLR 1183. In this case, the landowner requested that his great-nephew came to work on his farm, telling the nephew that the land would be left to him, going on to form an informal partnership. The relationship soon collapsed and it was concluded that there was an 'implicit link' between the promise and the requirement that the farm would be ran as a partnership, which did not happen.

must show that they have provided something valuable in exchange for the interest in the land. This analysis is undoubtedly controversial, as the traditional understanding is that proprietary estoppel requires *detriment*, not the passing of a benefit. However, again this is an error caused by over-generalisation. It needs to be kept in mind that we have separated cases of long-term occupation, which form most of the case-law and where detriment is often satisfied by the element of long-term commitment. In the context of the bargain scenario, it is never enough to show that the claimant has suffered a general detriment. As with consideration in contract, it must be something which is valuable to the landowner, whether that is improving the value of the land (*Yaxley v Gotts*), helping with the business (*Thorner v Major*) or taking care of the landowner (*Jennings v Rice*.) Support for this bargain approach to proprietary estoppel can be found in *Powell v Benney*.¹⁴⁷ Here, Sir Peter Gibson rejected the argument made by the claimants that their case was an example of a bargain, as the acts in question were done for the claimant's benefit and not for the defendant.¹⁴⁸ Another example is the recent Privy Council Opinion in *Capron v Government of Turks & Caicos Islands & Anor (Turks and Caicos Islands)*.¹⁴⁹ The claimants had been promised a plot of land for development, and reassurances were made which led to the expenditure of money in valuing and surveying the land. The claim failed, and Lord Kerr explained that this was due to the fact that no land had been identified for this development. In doing so, reference was made to Lord Scott in *Yeoman's Row v Cobbe*. However, as we have seen, this explanation runs against the decided cases and

¹⁴⁷ [2007] EWCA Civ 1283.

¹⁴⁸ Sir Peter Gibson (*ibid*) at [23]: 'Mr Hobday may have known about the detrimental acts but doing them was a matter for Mr and Mrs Powell'.

¹⁴⁹ [2010] UKPC 2.

was doubted by the court in *Thorner v Major*.¹⁵⁰ The only sensible analysis is that the claim fails because the acts done by the claimants were not done for the benefit of the landowner, as they provided no tangible benefit to the land or to the landowner. This again supports the overlapping analysis; detriment is too wide and unwieldy to achieve this result. It is instead the overlap with contract, through the element of bargain, which explains these cases.

Causation

For there to be a reliance-based claim, it must be shown that the communication led to the performance of the bargain. At this point, it will be useful to deal with the cases mentioned by Gardner, but which it has been suggested earlier on in this chapter do not involve any element of reliance. The cases all involve co-habitation between claimant and landowner, where the landowner promised to leave land to the claimant, but it had no impact on the claimant's actions. *Wayling v Jones* is one such example, where the claimant would apparently have lived with and helped his partner whether or not any assurances had been made in the first place. The courts justified the decision to recognise 'proprietary estoppel' on the basis of 'reliance.' The courts adopted a fictional account of reliance by concluding that the 'burden of proof' is on the representor to show that the promise was not relied on. Similar reasoning was applied in *Campbell v Griffin* and *Otley v Grundy*.¹⁵¹ This 'presumption' was applied in all of the three cases mentioned above. The problem is that this is not an

¹⁵⁰ *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776.

¹⁵¹ *Campbell v Griffin* [2001] EWCA Civ 990, [2001] WTLR 981; *Otley v Grundy* [2003] EWCA Civ 1176, [2003] WTLR 1253.

evidentiary presumption. This is for the simple reason that the most obvious inference is that the performance has been provided out of love and affection for the friend or partner. Although he makes this point in a different context, Swadling correctly explains that when we shift the burden of proof in this way it creates merely a ‘false’ presumption.¹⁵² Presumptions are perfectly acceptable when they identify the most likely inference from the facts. But in the context of these cases it is fictional, and so another explanation must be provided.

McFarlane has attempted to explain this conclusion by arguing that, in many of these cases, benefits are being provided after the claimant has questioned what they are getting out of the relationship.¹⁵³ This can indicate reliance, as we saw in *Thorner v Major*. To support his analysis, McFarlane cites the claimant’s affidavit in *Wayling v Jones*, where it was stated that if the landowner’s promise to leave a hotel to him had been reneged, he would have left.¹⁵⁴ However, this selectively ignores the fact that the claimant also suggested that he would have remained and carried on working for the landowner whether or not the assurances were made in the first place. There was no moment of *doubt* where the past behaviour was jeopardised by what was or was not promised by the landowner. Similarly, it fails to explain *Campbell v Griffin* and *Ottey v Grundy* where, in both cases, the ‘acts of reliance’ were already being provided and there was no evidence at all that the claimant would have stopped ‘performing’ their side of the bargain if the promise had been reneged. If this had been the case then we could say that there has been reliance.

¹⁵² W Swadling, ‘Explaining *Resulting* Trusts’ (2008) 124 LQR 72 at 75-78.

¹⁵³ B McFarlane, *The Structure of Property Law* (Hart 2008) at 454.

¹⁵⁴ (1995) 69 P & CR 170 at 173 (Balcombe LJ).

The problem with the above debate is the very fact that we are even trying to accommodate the cases within *reliance* in the first place. As commented by Lawson, '[the requirement of reliance] does not appear to reflect accurately the dynamics of intimate sexual relationships' and that in *Wayling v Jones* the courts are 'creating convenient fictions'.¹⁵⁵ Even before we get to the question whether these decisions can be described as bargain cases, it is questionable whether they should even be regarded as reliance-based claims at all. Lawson is correct that any search for reliance is unhelpful in these cases.¹⁵⁶ The requirement of reliance would provide an unnecessary stumbling block in cases of co-habitation for two reasons. One, it will be difficult to identify a point in time when an assurance is made in some cases. In fact, in each of the three cases mentioned above, the landowner was deceased and the only evidence available about any conversations came from the claimants in these cases. Furthermore, according to Thompson, in most situations involving married or unmarried couples, it will be difficult to identify reliance, as any actions by the claimant will often simply constitute 'behaviour which is an integral part of the relationship.'¹⁵⁷ The point has also been made by Hopkins, who recognises that *Campbell v Griffin* and *Ottey v Grundy* are difficult for the courts as they involve 'care provided in the context of a quasi-familial relationship.'¹⁵⁸ Hopkins goes on to argue that in these decisions, the courts are looking for co-habitation and evidence of

¹⁵⁵ A Lawson, 'The Things We Do for Love: Detrimental Reliance in the Family Home' (1996) 16 *Legal Studies* 218 at 230.

¹⁵⁶ A Lawson, 'The Things We Do for Love: Detrimental Reliance in the Family Home' (1996) 16 *Legal Studies* 218.

¹⁵⁷ M Thompson, 'Estoppel: Reliance, Remedy and Priority' [2003] *The Conveyancer and Property Lawyer* 157 at 161.

¹⁵⁸ N Hopkins, 'Unconscionability, Constructive Trusts and Proprietary Estoppel,' in M Bryan (ed), *Private Law in Theory and Practice* (Routledge 2007) at 224-225.

behaviour which goes beyond that expected of people in the claimant's position. This shares more *factual* resemblances with the approach under the 'common intention constructive trust'. Yet, the courts have unhelpfully adopted 'proprietary estoppel' as the description of the claim. This can be easily explained. The reason for this becomes quite clear when we consider the criteria which were set out by Lord Bridge in *Lloyds Bank v Rosset*.¹⁵⁹ His Lordship concluded that, for there to be a 'common intention constructive trust', there must be either an express agreement to share the land, or a direct financial contribution to the purchase of the land. In *Wayling, Campbell and Ottey*, the indication was that property would be transferred *after* the death of the landowner, which precludes any declaration to share the land. Also, in none of these cases had there been any financial contribution to the purchase of the land. Therefore, the Court of Appeal simply used an alternative label of 'proprietary estoppel' to justify awarding the claimant an interest in these cases. We return to this in Chapter 7, where we consider the classification of these cases. It will be argued that they show very little overlap with our core concepts.

At this point, the bargain cases become much clearer, but also much narrower too. Again, it demonstrates how the overlapping approach to concepts allows us to identify clearer guidelines, while requiring us to find an alternative analysis for those cases that do not 'fit.' We are not saying that *Wayling v Jones, Campbell v Griffin* or *Ottey v Grundy* are wrongly decided; they illustrate that the criteria for a 'common intention constructive trust' in *Lloyds Bank v Rosset* are in fact too narrow, a conclusion which

¹⁵⁹ *Lloyds Bank v Rosset* [1991] 1 AC 107 (HL).

has strongly been indicated in the House of Lords and the Privy Council.¹⁶⁰ The need to use ‘proprietary estoppel’ to reach this conclusion should be removed with the indications that non-financial contributions can and should be relevant in determining the interests of cohabiting couples. This argument will be picked up in the next chapter.

Justifying the Role of Bargain from a Realist Perspective

The nature of the bargain provides an important role in guiding how the court will respond to the reliance claim. Since this is not the same as a ‘contract’, there must be proportionality between what has been provided and the interest in the land which is being sought.¹⁶¹ In other words, the bargain must be a strong one which reflects the value of the interest being claimed. Although this has been stated to be of general application, it seems quite clear that it does not apply to *all* proprietary reliance cases.¹⁶² In other words, we have already seen that the occupation cases are determined on the basis of the commitment made by the induced party to the land, and a long-term commitment may lead to a full transfer of the land even if the value of the land far outweighs the ‘detriment’ suffered in that context. In the bargain cases, it is clearer that the extent of the interest reflects the value of the services. This is exemplified by *Jennings v Rice*, where the claimant had looked after the landowner

¹⁶⁰ *Stack v Dowden* [2007] 2 AC 432 (HL) at 455; *Abbott v Abbott* [2007] UKPC 53; [2008] 1 FLR 1451.

¹⁶¹ B McFarlane, ‘Proprietary Estoppel and Failed Contractual Negotiations’ [2005] *The Conveyancer and Property Lawyer* 501 at 508.

¹⁶² Although it was stated by Sir Jonathan Parker at [65] that this guide did apply in *Henry v Mitchell* [2010] UKPC 3, which was an occupation case, it seems to be more readily satisfied in cases of long-term occupation than in the bargain cases. The decision itself in *Henry v Mitchell* demonstrates this.

for many years, but it was felt that this benefit did not match the full value of the land and her assets. Another example is *McGuane v Welch*,¹⁶³ where it was recognised that there was a bargain between the parties, but the court refused to fulfil it as the deal represented ‘a substantial undervalue and in respect of which the transferor had received no independent advice.’¹⁶⁴ So the courts will try to enforce the bargain, but since we have stepped outside the conceptual boundary of contract, the courts are not enforcing the full expectations of the induced party. Again, recognising that the operation of standard contract rules are ‘diluted’ when the subject of the bargain is land, is invaluable to our understanding of these cases.

Summary of the Overlaps in Reliance-Based Claims

What we have seen within this section is that it would be nonsensical to try to group together *all* claims which the courts have referred to as examples of ‘proprietary estoppel.’ The cases become much clearer when we define the requirement of communication and also define the requirement of reliance. Furthermore, reliance itself is not a sufficient explanation of any of the cases, which illustrates why, in the absence of a more detailed and realistic account of the case law, the law is currently regarded as discretionary and difficult to predict. By breaking the cases down into two types of overlaps which focus on either occupation, bargain, or in some circumstances both, a clearer picture emerges. Although it is not always easy to predict the precise awards in the cases, it is much easier than using any wider argument based purely on

¹⁶³ [2008] EWCA Civ 785.

¹⁶⁴ *Ibid* at [44].

contract or unconscionability. Only by looking for *facts* will the patterns begin to emerge. This shows that occupation still lies at the heart of reliance-based estoppel claims, particularly as it is the most compelling reason for interfering with the competing title of the landowner. The narrower application of the bargain cases is explained by the requirement of full performance and that a benefit has been received by the landowner. As stated above, this may appear to provide harsh consequences, but in bargain cases the claimant can usually make an alternative claim for the value of any services provided. Thus, in both circumstances, the level of award reflects the nature of the reliance; for occupation it is the type of occupation and level of commitment that determines the response, and for the bargain situation it is the nature of the bargain and how whether it provides a proportionate value to that of the land. These are not absolute rules, simply patterns that can be observed in predicting the behaviour of the courts. They cannot be understood, and certainly cannot be classified, without recognising the operation of overlaps.

4. Reliance and Claims for Non-Contractual Services

In regards to our next reliance overlap, we now have a mechanism to explain the majority of claims involving non-contractual services. These are cases where a claimant asks to be paid for work done in the absence of a contract. To restate the point from Chapter 4; our definition of a contract is an agreement to exchange. Sometimes, as Hedley has argued,¹⁶⁵ the situations in these ‘non-contractual’ situations are often very similar to contract. For this reason, Hedley seeks to place

¹⁶⁵ S Hedley, *Restitution: Its Division and Ordering* (Sweet and Maxwell 2001) at ch 3.

them within the concept of contract. However, in contrast to Hedley's 'contractual analysis', it is argued here that there is little to be gained by stretching contract to cover these situations. The explanation provided here is that the claimant is liable in circumstances which may be similar to 'contract', but where the important element is reliance. As we have already seen, reliance means that the defendant must have communicated something to the claimant which has a causal effect on the claimant's behaviour. In this context, it is a desire to receive the conferral of the services in the first place. If the services were going to be provided anyway, there will be no claim. The similarity with contract lies in the fact that the services must have been provided under an agreement. This provides, once again, an important overlap. This time the overlap is with contract, without any overlaps with property.

The issue of non-contractual services has been raised in a number of recent cases, such as *Blue Haven v Tully*,¹⁶⁶ and *Chief Constable of Greater Manchester v Wigan Athletic AFC Ltd.*¹⁶⁷ These decisions confirm that the defendant must communicate an intention to receive the conferral of the services. This is a reliance-based claim. A similar argument has also been made by McBride in 'A Fifth Common Law Obligation',¹⁶⁸ where the author concludes that this type of claim is not tortious, contractual or enrichment based.¹⁶⁹ McBride identifies detrimental reliance at the core of these claims, an approach which reflects that taken in Australia after *Walton Stores Interstate Ltd. v Maher*,¹⁷⁰ and also reflects the analysis that is primarily used in

¹⁶⁶ [2006] UKPC 17.

¹⁶⁷ [2008] EWCA Civ 1449, [2009] 1 WLR 1580.

¹⁶⁸ (1994) 14 Legal Studies 35.

¹⁶⁹ *Ibid* at 35-50.

¹⁷⁰ [1988] 164 CLR 387 (HCA).

America.¹⁷¹ Just as we saw in reliance-based land claims, we do not need to look for *detrimental* reliance. Reliance can be satisfied by showing that the acts done by the claimant are attributable to the inducement, which is part of a wider agreement between the parties. It is this element which provides the important overlap with contract. It may sound odd, but the bargain element is *not* required. This is for the simple reason that we do not need to show that the recipient of the services is giving anything in return. Before proceeding to set out this reliance-based agreement claim in more detail, we will deal with the two competing theories which have attempted to explain this area of law; unjust enrichment and contract.

Unjust Enrichment Explanation

As we saw in the last chapter, unjust enrichment, as it is currently understood in English law, is said to consist of enrichment at the expense of the claimant, where there is a recognised unjust factor,¹⁷² without any available defence.¹⁷³ There are two reasons for rejecting the unjust enrichment analysis in the context of non-contractual services; the first being that there are no cases which indicate that the paradigm ‘unjust factor’ has any application in cases of non-contractual services. Secondly, the requirement of enrichment is simply not reflected in the case law. We will deal with these issues in turn.

¹⁷¹ C Saiman, ‘Restitution in America: Why the US Refuses to Join the Global Restitution Party’ (2008) 28 OJLS 99.

¹⁷² As we saw in Chapter 5, Birks argued for an absence of basis approach; P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) at 108-114; *Deutsche Morgan Grenfell v IRC* [2006] UKHL 49, [2007] 1 AC 558.

¹⁷³ *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL); *Deutsche Morgan Grenfell v IRC* [2006] UKHL 49, [2007] 1 AC 558.

The Unjust Factor

The first concern with unjust enrichment is that the paradigm unjust factor of mistake is seemingly precluded in any claim for non-contractual services. Liability can only be established where the defendant has made an agreement to receive these services. A more explicit rejection of mistake as an unjust factor for non-contractual services can be found in the judgment of Smith LJ in *Chief Constable of Greater Manchester v Wigan Athletic AFC Ltd.*¹⁷⁴ The case involved a disagreement between the Chief Constable and a football club about the necessary level of policing for games at the club's home ground. The Chief Constable believed that a higher number of police officers were required than had been the case in previous years, whilst the club contended that there was no need to increase the numbers of officers at home games. According to Smith LJ, the chief constable was 'labouring under a misapprehension as to the level of [Special Police Services] requested' and therefore had 'made a mistake as to their position, a mistake which the club had done nothing to lead them into. I do not see why the club should have to make good the [Greater Manchester Police's] mistake. I do not see why the club should pay for services which it did not ask for and which the police provided of their own volition.'¹⁷⁵ Similar objections to the application of a unilateral mistake as the basis of a claim for non-contractual services can be found in *Rowe v Vale of White Horse*¹⁷⁶ and *Benedetti v Sawiris*.¹⁷⁷ Space precludes going into the debate about whether 'free acceptance' should be

¹⁷⁴ [2008] EWCA Civ 1449, [2009] 1 WLR 1580.

¹⁷⁵ [2009] 1 WLR 1580 (CA) at 1599-1600.

¹⁷⁶ [2003] EWHC 388 (Admin), [2003] 1 Lloyd's Rep 418.

¹⁷⁷ [2010] EWCA Civ 1427 at [116].

another unjust ground,¹⁷⁸ but this larger debate simply reinforces the reality that this situation is clearly different from the example of a mistaken payment. Admittedly, our conclusion that we should distinguish between different types of enrichment was described by Birks as being ‘plainly nonsense.’¹⁷⁹ However, as noted by Dietrich, the lack of any case law to support the unified approach provided by unjust enrichment makes our conclusion unavoidable.¹⁸⁰ The Opinion of the Privy Council in *Blue Haven v Tully* is another very clear example of this.¹⁸¹ Despite finding that a mistaken improver of land had ‘enriched’ the defendant, no reference was made to the ‘unjust factor’ of mistake. Instead, Lord Scott stated that the principles which govern this claim were the same as those which govern reliance-based claims in ‘proprietary estoppel.’ This very much supports the overlapping analysis of this Chapter. Lord Scott’s judgment in *Blue Haven*, is one of the clearest examples of the overlapping approach being explicitly used by the courts. The reliance element is the same in both reliance-based land claims and in claims for non-contractual services. From a realist perspective, this indicates that we are looking at a very different concept from that seen in cases of mistaken payments, and therefore requires a different analysis. The benefit of our overlapping approach is that we have the mechanism to explain the requirements of this claim.

¹⁷⁸ A Burrows, ‘Free Acceptance and the Law of Restitution’, (1988) 104 LQR 576 at 580. P Birks also concedes the point in P Birks, *Unjust Enrichment* (2nd edn, OUP 2005) at 42.

¹⁷⁹ P Birks, *Restitution: The Future* (Federation Press 1992) at 86.

¹⁸⁰ J Dietrich, *Restitution: A New Perspective* (Federation Press 1998) at 46.

¹⁸¹ D Salmons, ‘Claims for Non-Monetary Benefits: Unjust Enrichment or Estoppel’ [2008] *The Conveyancer and Property Lawyer* 173.

Recognising this issue, Burrows has adopted ‘failure of consideration’ as the reasoning which explains claims for non-contractual services.¹⁸² Nonetheless, Burrows fails to explain why mistake is precluded in most cases.¹⁸³ If we look past the mistake issue, the identification of ‘failure of consideration’ is, to a degree, similar approach to the one adopted here. Nonetheless there is one important difference; as we saw in Chapter 5, ‘failure of consideration’ hides the importance of recognising that the purpose for the services is shared by the defendant as well as the claimant. To avoid confusion, the agreement element needs to be brought to the forefront.

The Enrichment Issue

For most unjust enrichment lawyers, in principle, there is no distinction between money transfers and non-contractual services.¹⁸⁴ It has recently been argued by Edelman that where the defendant has received a benefit in the form of non-contractual services, the unjust enrichment analysis is the appropriate analysis for the liability of the defendant.¹⁸⁵ One significant problem with the unjust enrichment analysis is that, as McBride notes, enrichment is *not* an essential ingredient in a claim for the conferral of non-contractual services.¹⁸⁶ For example, there are many claims

¹⁸² A Burrows, ‘Free Acceptance and the Law of Restitution’, (1988) 104 LQR 576.

¹⁸³ That he concludes that mistake is an available ‘unjust factor’ is evident by A Burrows, ‘Free Acceptance and the Law of Restitution’ (1988) 104 LQR at 578.

¹⁸⁴ Eg P Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) at 86-87; G Virgo, *Principles of the Law of Restitution* (2nd edn, OUP 2006) at 125: ‘There is no reason why the application of any of the grounds of restitution should depend on the nature of the enrichment which the defendant has received.’ For criticism, see S Hedley, ‘Unjust Enrichment’ (1995) 54 CLJ 578 at 588.

¹⁸⁵ J Edelman, ‘The Meaning of Loss and Enrichment’, in R Chambers et al (ed) *Philosophical Foundations of The Law of Unjust Enrichment* (OUP 2009).

¹⁸⁶ NJ McBride ‘A Fifth Common Law Obligation’ (1994) 14 Legal Studies 35 at 40-43.

for non-contractual services where there is no identifiable benefit.¹⁸⁷ One such example is *Pullbrook v Lawes*,¹⁸⁸ where the claimant had entered into an oral agreement for the lease of a house, on the condition that specified improvements were made. The claimant contributed to the improvements, which were made with the consent of the defendant. Although it was stated by Blackburn J that the claimant's improvements were of no benefit to the house, his claim for the value of the services was successful. If this claim was concerned with unjust enrichment, the award would have reflected the actual benefit to the recipient, rather than the reasonable value of the services provided. A similar problem arises in the case of *Planché v Colbourn*,¹⁸⁹ where the defendant had contracted with the claimant to write a book aimed at youngsters. Before the claimant submitted his work, the defendant decided to abandon the publication. The claimant succeeded in his claim for quantum meruit, without being required to submit the work which he had already completed. With some artificiality one could argue that the benefit received by the defendant was that the claimant's treatise would be available in the event that the publication was continued.¹⁹⁰ However, this did not appear to be relevant in the court's decision in *Planché*, as the main justification for the award in the judgment was that the claimant had done that which he had been asked to do.¹⁹¹

¹⁸⁷ P Watts, 'Restitution - a Property Principle and a Services Principle' [1995] RLR 49 at 72-73; NJ McBride 'A Fifth Common Law Obligation' (1994) 14 Legal Studies 35 at 40-43; M Garner, 'The Role of Subjective Benefit in the Law of Unjust Enrichment' (1990) 20 OJLS 42.

¹⁸⁸ (1876) 1 QBD 284.

¹⁸⁹ (1831) 8 Bing 14, 131 ER 305.

¹⁹⁰ The point is made by Burrows, '(the defendant) may be indifferent to the cleaning of his windows. Free acceptance cannot therefore be regarded as establishing the defendant's enrichment.' In A Burrows, 'Free Acceptance and the Law of Restitution' (1988) 104 LQR 576 at 580. Birks also concedes the point in P Birks, 'In Defence of Free Acceptance' in A Burrows (ed), *Essays on the Law of Restitution* (Clarendon Press 1991) at 141. Also in *Clay v Yates* (1856) 1 Hurl & N 73, 156 ER 1123.

¹⁹¹ *Planché v Colbourn* (1831) 8 Bing 14 at 16; 131 ER 305 at 306.

Additionally, it is highly fictional to regard mere acceptance as evidence of a benefit.¹⁹² For example, my next door neighbour, who is a budding musician, asks me whether I enjoy his compositions. If I say yes, this encouragement does not necessarily mean that I value his efforts as a benefit, as I might just be saying this so as not to offend him. It would make little sense if he could then turn around and ask me to pay him for the value of his services. Indeed there is a consensus amongst academics that the issue of enrichment for non-contractual services is more complicated than when the enrichment is in the form of a money transfer.¹⁹³ Primarily these complications arise because the defendant may not value the enrichment, and an order to make restitution might limit his freedom of choice. Likewise if I see someone who is mistakenly cleaning my windows, I might not say anything simply because I think that it will teach the cleaner not to make silly mistakes.¹⁹⁴ The requirement of acceptance or acquiescence is, therefore, a distinct issue from the question of whether the defendant values the enrichment. One may be enriched by the services provided by the claimant and at the same time have good reasons for not wanting to pay for these services.¹⁹⁵ Take, for example, this scenario (which is a slightly modified example of the one given by Birks in *An Introduction to the Law of Restitution*): A tells B that he would like to have his house painted but he cannot afford to do so, because he has more pressing financial concerns.¹⁹⁶ B mishears A, and thinks that A

¹⁹² M McInnes, 'Enrichment Revisited' in J Neyers, M McInnes and S Pitel (eds), *Understanding Unjust Enrichment* (Hart 2004) at 175-177.

¹⁹³ Although Birks adopted the same approach he did note that there was a 'critical distinction' between money and other forms of benefits; P Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) at 109.

¹⁹⁴ The example of the mistaken (or misguided) window cleaner has been 'liberally' adapted from P Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) at 665.

¹⁹⁵ M McInnes, 'Enrichment Revisited' in J Neyers, M McInnes and S Pitel (eds), *Understanding Unjust Enrichment* (Hart 2004) at 175-177.

¹⁹⁶ P Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) at 265.

will be able to pay for the work. A may very well be enriched if B goes ahead and paints his house while he is away on holiday. Nonetheless, the obligation cannot simply be forced upon A simply due to the fact that B mistakenly believed that A would pay for this, and A is now enriched.¹⁹⁷ The case law refutes *any* such proposition.¹⁹⁸ Importantly, it also conceals the reliance element which is present in these claims. For example, the claimant may provide the defendant with something valuable, but if it was going to be provided anyway no claim will lie.¹⁹⁹

A more convincing explanation for these claims is provided by Beatson, who argues that the claim for non-contractual services, at least where it does not produce a tangible benefit for the defendant, is based on the principle of injurious reliance.²⁰⁰ This is not an attempt to argue that the concept of unjust enrichment is irrelevant in claims for non-contractual services, as the unjust enrichment analysis may be helpful in cases where the benefit is readily returnable, such as in the *Greenwood v Bennett* situation.²⁰¹ Even so, the application of this rule only appears to be relevant as a partial defence to pre-existing claims. In the majority of claims for non-contractual services, the unjust enrichment analysis only serves to obscure the true nature of the claim.

Expanding our concept of Contract

¹⁹⁷ A Burrows, 'Free Acceptance and the Law of Restitution' (1988) 104 LQR 576 at 580.

¹⁹⁸ *Gray's Truck Centre Ltd v Olaf L Johnson Ltd* (CA, 25 January 1990).

¹⁹⁹ *E.N.E. Kos v Petroleo Brasileiro SA* [2009] EWHC 1843 [49-51].

²⁰⁰ J Beatson, *The Use and Abuse of Unjust Enrichment: Essays on the Law of Restitution* (Clarendon Press 1991) at 21-44.

²⁰¹ *Greenwood v Bennett* [1973] QB 195 (CA). Also *Munro v Willmott* [1949] 1 KB 295 (KB).

An alternative approach that has been proposed is that claims for services should simply be incorporated into a wider conception of contract. Hedley, for example, argues that these claims are contractual in nature, and that they are not concerned with reversing unjust enrichment.²⁰² It is certainly true that contractual terms can come into force even when the parties have not expressly agreed to them. As stated by Waller LJ in *Furmans Electrical Contractors v Elecref Ltd*, a court will be unwilling to find that there is no contract simply because there is no agreed price.²⁰³ Even when the courts do not apply the term ‘contract’, a prior contract is also often a good indicator of how the court will deal with the claim. An example is *ERDC Group Ltd v Brunel University*,²⁰⁴ where the value of the services was the same under the initial contract and also in the period after the agreement had expired. In *ERDC*, even though the contract had expired, the court concluded that the terms under that agreement still determined the conditions under which the work was being provided.

Hedley has argued that it would not be going too far to use the language of contract to explain claims for non-contractual services. Hedley utilises a wide version of contract to achieve this aim. In fact, his version is so wide that he has on one occasion indicated that he sees little distinction between contract and other areas of the law such as tort.²⁰⁵ For Hedley, contract is based on ‘a factual premise – that commercial parties confer benefits in the expectation of receiving payment’.²⁰⁶ That may be the case, but the issue in most contracts is that the expectations of A and B are sometimes

²⁰² S Hedley, *Restitution: Its Division and Ordering* (Sweet and Maxwell 2001) at ch 1.

²⁰³ [2009] EWCA Civ 170 at [32].

²⁰⁴ [2006] EWHC 687 (TCC), [2006] BLR 255.

²⁰⁵ S Hedley, *Restitution: Its Division and Its Ordering* (Sweet and Maxwell 2001) at 63-66.

²⁰⁶ S Hedley, ‘Work done in anticipation of a contract which does not materialise - A Response’ in WR Cornish et al (eds), *Restitution Past, Present and Future: Essays in Honour of Gareth Jones* (Hart 1998) at 197.

very different. The courts invariably side with the recipient of the services, even if the provider has a reasonable expectation to be paid.²⁰⁷ McKendrick is surely correct that stretching contract to cover cases where there is no agreement to pay for the actual services provided only serves to undermine the concept of contract.²⁰⁸ There is also a difference in the measures applied, as under contract we would see expectation damages, but as McKendrick points out, claims for non-contractual services reflect what would generally be regarded as ‘reliance’ based damages.²⁰⁹ The final, very important, difference is that the claim only arises after performance. A simple agreement does not provide any possible claim in the non-contractual services cases. It is only when performance has begun that the claim has any chance of success.

Another approach has been taken by Jaffey,²¹⁰ who suggests that this claim is a ‘device for effecting exchanges where agreement is impossible or impracticable.’²¹¹ However, this overlooks the fact that the claim for non-contractual services can occur even when negotiation is possible and practical. Moreover, it would seem to undermine the entire premise of the concept of contract by enforcing exchanges where no agreement has been reached. The ‘contract’ explanation must be abandoned for the reason that it would require the expansion of contract, when this is not at all necessary. Certainly there are striking similarities between claims for non-contractual

²⁰⁷ *Bookmakers' Afternoon Greyhound Services Ltd v Wilf Gilbert (Staffordshire) Ltd* [1994] FSR 723 (Ch).

²⁰⁸ E McKendrick, ‘Work done in anticipation of a contract which does not materialise’ in WR Cornish et al (eds), *Restitution Past, Present and Future: Essays in Honour of Gareth Jones* (Hart 1998) at 169.

²⁰⁹ E McKendrick, ‘Work done in anticipation of a contract which does not materialise’ in WR Cornish et al (eds), *Restitution Past, Present and Future: Essays in Honour of Gareth Jones* (Hart 1998) at 170.

²¹⁰ P Jaffey, *Private Law and Property Claims* (Hart 2007) at 215-216.

²¹¹ *Ibid* at 216.

services and contract, but at the same time there are important distinctions. Applying the overlapping concepts analysis once again will provide the best explanation for the co-existence of the two types of claim.

The Reliance Approach

The approach which is adopted in this chapter is reliance-based, but as has been repeatedly stated reliance itself will not explain the case law. For the purposes of this section, the additional element is agreement; but we do not mean that the parties have necessarily agreed to the payment for the services. Instead, we are arguing that the claimant *relies* on the agreement which has been communicated between him and the defendant. Unlike the analysis with the bargain type reliance-based land claims, it is not necessary to show that this is beneficial to the claimant. As we have pointed out, this runs against the current unjust enrichment approach which would place enrichment at the centre of the claim.

This is justified on three counts. The first is that we have already seen that there are many cases where the defendant receives no tangible benefits whatsoever from the performance of the services. Secondly, we do not need to contend with a competing title in land, as the claimant is asking to be paid for their services, not for an interest in land. The reallocation of wealth is something which the courts are more ready to do when they are not faced with competing claims to land. This is because there is no property issue in play in these cases except for the defendant's title to his pre-existing wealth. Thirdly, unlike in bargain cases, there is absolutely no need for the claimant to provide complete performance in return for payment. This is why agreement is

relevant; if the defendant agrees to receive the services, it is the reliance of the claimant on the wider agreement which best describes the claim. This regularly happens in cases of pre-contractual liability, which covers benefits provided where both parties expect a contract to materialise, but where the contract is never formalised. If the services are provided for any other reason there will be no reliance and thus no claim.

Agreement

The reliance approach asks whether there was an agreement to provide the non-contractual services. A recent example is the case which we mentioned earlier of *Yeoman's Row v Cobbe*.²¹² The agreement there was for the claimant to obtain planning permission for the demolition of an existing block of flats and then to develop houses. However, no formal contract was ever agreed and the defendant withdrew from the negotiations. It should be remembered that the defendant failed to establish his claim in 'proprietary estoppel.' The claim instead succeeded on the basis of the value of the services that the claimant had provided which secured the planning permission for the land. Lord Scott referred to three different justifications for this claim; 'unjust enrichment,' 'quantum meruit' and 'failure of consideration.' As for the unjust enrichment explanation, his Lordship did not refer to any particular unjust factor, but it appears that he was referring to 'failure of consideration.' As for the second, quantum meruit is simply a reference to the award based on the value of the

²¹² [2008] UKHL 55, [2008] 1 WLR 1752.

services, so it does not explain why the claim succeeded in the first place.²¹³ The essence of the claim seems, therefore, to lie in the meaning of ‘consideration which has wholly failed.’

Despite the use of the phrase ‘failure of consideration’, this has not introduced a new basis for the claims involving non-contractual services. Writing in 1997, Spence had already identified four English decisions where similar facts had arisen and the claims were successful.²¹⁴ Importantly, he also viewed all these cases as being examples of reliance-based claims.²¹⁵ For example, the facts of *Yeoman’s Row v Cobbe* are very similar to *William Lacey v Davis*,²¹⁶ where the claimant had been approached by the defendant for the prospective development of land, with the defendant also leading the claimant to believe that a full contract would eventually be completed. Spence has analysed the decision in *William Lacey v Davis* in terms of reliance, and it is also possible to apply the same analysis to *Yeoman’s Row v Cobbe*. The claimants in neither case would have undertaken the time and effort to do the work that they did, unless they had been led to believe that a contract would be concluded. Similarly, the defendant would not have been liable if he had not agreed to receive the services. This was recognised in *Yeoman’s Row v Cobbe*, where Lord Scott stated that ‘[w]here an agreement is reached under which an individual provides money and services in return for a legal but unenforceable promise which the promisor, after the money has been paid and the services provided, refuses to carry out, the individual would be

²¹³ Goff J in *British Steel Corp v. Cleveland Bridge and Engineering Ltd* [1984] 1 All ER 504 (QB) at 509; ‘the mere framing of a claim as a quantum meruit claim, or a claim for a reasonable sum, does not assist in classifying the claim as contractual or quasi contractual.’

²¹⁴ M Spence, *Protecting Reliance: the Emergent Doctrine of Equitable Estoppel* (Hart 1999) at 87.

²¹⁵ M Spence, *Protecting Reliance: the Emergent Doctrine of Equitable Estoppel* (Hart 1999) at 98-106.

²¹⁶ [1957] 1 WLR 932 (QB).

entitled, in my opinion, to a restitutionary remedy.²¹⁷ Although we do not agree that this is ‘restitutionary’, this is an accurate statement of a reliance-based claim where the induced party acts on the basis of a wider agreement. In essence, the claim requires an agreement, and the services are provided to facilitate this agreement. It should also be noted that if the terms of the agreement exclude any award for non-contractual services then it will also prevent any claim. For example, if gratuitous services are provided under an agreement, the claimant clearly cannot rely on the agreement to assist in any claim for the value of these services. At present, this agreement element is hidden beneath the language of unjust enrichment. Using our analysis, it is much easier to identify this overlap with contract.

Communication

As in all reliance claims, the claim for the value of services provided will not succeed unless the defendant has communicated that the claimant should provide the services. In *BP Exploration Co.(Libya) Ltd v Hunt (No. 2)*²¹⁸ Goff J noted that claims for non-requested services are ‘rare in restitution’.²¹⁹ The simple explanation for this is that if there is no agreement for the provision of the services, there can be no claim in the first place. In the absence of communication, there can be no inducement. In *Blue Haven v Tully*,²²⁰ the defendant witnessed the development of a coffee plantation on his estate, and informed one of the employees of the claimant that the development

²¹⁷ [2008] 1 WLR 1752 (HL) at 1774.

²¹⁸ [1979] 1 WLR 783 (QB).

²¹⁹ [1979] 1 WLR 783 (QB) at 805.

²²⁰ [2006] UKPC 17 at [24].

was illegal. He was then told that this information had been passed to the claimant. He proceeded to visit the estate around three times a year for around five years, without making any further objections to the development. This was sufficient to preclude the claimant from establishing any agreement to carry out the work. Another recent example is the aforementioned *Chief Constable of Greater Manchester v Wigan Athletic AFC Ltd.*²²¹ Here, the claimant reluctantly accepted an increase in security for a football match, and then refused to pay the costs of the additional services which had been provided. There was a clear agreement to accept the basic level of security, but no agreement at all that the increased level of security should be provided. The defendant was only under an obligation to pay for the services to which it had agreed.

Services

Although most commentators adopt an unjust enrichment analysis, they also recognise that the value of the services is determined by the agreement itself. The agreement governs both the services to be provided and also the availability of any award. The obvious requirement is that the claimant must perform the services which were envisaged under the agreement. Since we are referring to agreement, it should be remembered that agreement is an objective fact. Accordingly, we do not consider the uncommunicated thoughts or expectations of either party. It is the agreement which determines the nature of the services to be provided. It may be that the claimant is given a specific task to do, as in *Pullbrook v Lawes*,²²² or it may, in some cases,

²²¹ [2008] EWCA Civ 1449, [2009] 1 WLR 1580.

²²² (1876) 1 QBD 284.

require the claimant to begin work on a larger project, as in *Planché v Colbourn*.²²³ It will also cover situations where there is an agreement that the claimant will achieve a specific goal which is also contingent on an event that is outside the control of the parties. For example, if A asks B to assist in the takeover of a company, the courts will ask whether B *caused* the eventual takeover. If A achieves it without B's assistance there will be no claim against A.²²⁴

Causation

The issue of causation is something which the unjust enrichment analysis cannot explain. If the claimant has not actually relied on the defendant's representation it seems that there will be no liability; this is demonstrated by *E.N.E. Kos v Petroleo Brasileiro S.A.*²²⁵ In *E.N.E. Kos*, Smith J ruled out any possible claim for requested services as '[t]he positions adopted by both parties demanded that the status quo be maintained during the exchanges. I consider it unrealistic to draw the inference that in the exchanges or their response to them the Owners were complying with any request of the Charterers.'²²⁶ Although part of this judgment was later reversed by the Court of Appeal, this part of Smith J's judgment was not criticised. In fact, Longmore LJ appeared to take the same line of reasoning in the Court of Appeal on this particular issue.²²⁷ The claimants performed these acts for a purpose which failed and it was

²²³ (1831) 8 Bingham 14, 131 ER 305.

²²⁴ *Vernon-Kell v Clinch* (Ch, 30 September 2002).

²²⁵ [2009] EWHC 1843 (Comm), [2008] 1 Lloyd's Rep 684 at [49-51].

²²⁶ *Ibid* at [49].

²²⁷ 'During that period the vessel was idle for the benefit of both parties in case a further agreement could be made. Expenses incurred during that time were not expenses incurred in taking care of the cargo let alone in preserving the cargo' [2010] EWCA Civ 772, [2010] 2 Lloyd's Rep 409 at [34].

clearly of benefit to the defendant. The absence of a causal link between what was said by the defendant, and the claimant's act, removes any possibility of reliance. This is, therefore, the better explanation of this case. That the case appears to run against the unjust enrichment analysis is supported by McMeel's statement that, in *Enos*, 'the court accordingly failed to grapple with important, difficult and financially significant issues concerning the nature and identification of the benefit (if any) received...'²²⁸ Our approach is that this argument rests on the premise that the law should conform to the abstract theory of unjust enrichment, when instead it should be the theory which conforms to the law.²²⁹ To put it in simpler terms, we cannot criticise a court for not applying a test which has never worked or properly explained that area of law. The claim makes perfect sense on a reliance analysis, and the over-generalities introduced by unjust enrichment have failed to introduce sufficient certainty in our understanding of non-contractual services.

Payment for Non-Contractual services

Undoubtedly, if the defendant has encouraged the claimant to confer a valuable benefit, then the value of the benefit received will have some relevance in the award made by the court. However, it is not the only issue that will be taken into account. In fact, in most claims for non-contractual services the detriment suffered by the

²²⁸G McMeel, 'Withdrawals Under Time Charters- Right to Claim for Post-Termination Services: Contract, Unjust enrichment or Bailment?' (2010) LMCLQ 226 at 227.

²²⁹The thesis began with the following *maxim* which demonstrates this point; '*Regula est, quae rem quae est breviter enarrat. Non ut ex regula jus sumatur, sed ex jure quod est regula fiat.* That is a rule which concisely states the actual doctrine of the case. The law is not taken from the rule, but the rule is made by the law.' Paulus D 50. 17. 1, as reproduced and translated in JG Phillimore, *Principles and Maxims of Jurisprudence* (John W Parker 1856) at 92.

claimant is just as important as the tangible benefits received by the defendant. This issue was recognised by Mr Nicholas Strauss, Q.C. in *Countrywide Communications Limited v ICL Pathway Ltd*,²³⁰ ‘[m]uch of the difficulty is caused by attempting to categorise [the claim for non-contractual services] as an unjust enrichment of the defendant, for which an action in restitution is available, what is really a loss unfairly sustained by the plaintiff.’²³¹ The unjust enrichment analysis, which we mentioned earlier, is unhelpful for judges as the benefit received is not the only relevant factor in determining the appropriate level of the award.²³² This is because, if the claim does not fit into contract, the unjust enrichment approach tries to fit it into a very distinct category. This ignores the reality that this claim clearly does overlap and the agreement element is important in determining the operation of this claim.

This is also demonstrated by the decision in *ERDC Group Ltd v Brunel University*.²³³ The claimants had constructed buildings on behalf of the defendant, with some of the work being done under a valid contract and some of the work being completed after this agreement had expired. There was apparently a disagreement about the appropriate *valuation* of the construction work, and subsequently the initial agreement expired. At this point, the parties could not agree on a price for the continuation of the project. Importantly, however, the parties both agreed that the claimant should continue to provide the services. Afterwards, it was contended by the claimant that the costs of the work had increased by the time that the letter of intent had expired. The claimant offered to carry on the work on the basis of quantum meruit, which would be

²³⁰ [2000] CLC 324 (QBD).

²³¹ *Ibid* at 349.

²³² A Burrows, *Understanding the Law of Obligations: Essays on Contract, Tort and Restitution* (Hart 1998), at 86, notes that it is difficult to regard the award in *Planché* as being restitutionary in nature.

²³³ [2006] EWHC 687 (TCC), [2006] BLR 255.

based on a costs plus profit basis. It was decided by Lloyd QC that the appropriate valuation of the work was that under the initial contract, not the quantum meruit basis that was being claimed by the defendant. At the same time, costs for unexpected delays were also taken into account when assessing the appropriate level of award. This reflected the loss suffered by the claimant rather than any specific gain received by the defendant. Another interesting issue in the decision was that some of the work was found to be substandard. The court, therefore, made a reduction to the award that was due to the defendant, which indicates that the court was weighing both the benefits received by the defendant and the losses suffered by the claimant.²³⁴ This can be explained on the basis that there was an agreement to perform the services, but not to an unsatisfactory standard. Therefore, the nature and terms of the agreement provide the best guidelines for the response of the court. In most cases, the best way of achieving this is the market value of the services, which is neither exclusively loss-based nor gain-based.²³⁵

Justifying this Approach

By adopting reliance, the inquiry takes into account the actions of the defendant and the effect that this has on the status of the claimant (he must place reasonable reliance on this encouragement.) Moreover, reliance-based claims deter defendants from refusing to pay for services which they have requested (which justifies making people liable to pay for benefits or losses, even when they hold no subjective value for the

²³⁴ Ibid at [127].

²³⁵ Hicks QC in *Serck Controls Limited v Drake & Scull Engineering Limited* [2000] 73 Con LR 100 (TCC) at [34].

defendant) and removes the financial incentive for non-contractual exchanges (the claimant does not have the opportunity to make a disproportionate gain from the reliance as he is restricted to the objective value of the work, while at the same time he also takes the risk that he will not be able to establish a reliance-based claim in the first place.)²³⁶ Clearly there will be an overlap of factual circumstances; as Waddams has pointed out reliance-based claims can include elements of consent (contract), loss (tort) and gain (unjust enrichment.)²³⁷ The approach offered here also allows us to protect the conceptual boundaries of the concept of contract, as well as the claims for monetary transfers which we established in the previous chapter, whilst removing any necessity to stretch these concepts beyond their factual boundaries. This is only possible by recognising the overlap between reliance and contract.

5. Reliance and Carelessness

At this point, we can further develop the idea of how reliance overlaps with other legal concepts. The overlap which we are concerned with here relates to situations where reliance is present in the form of inducement and the claimant's reliance-loss, coupled with carelessness. This is more commonly referred to as claims for pure economic loss. In Chapter 4, we adopted a narrow concept of negligence, which requires physical loss caused by a positive act of careless conduct. Just as intangible money is a weak version of property, so too do we have a weak version of tort; loss

²³⁶ S Scott, 'Mistaken Improvers and Unjust Enrichment' in C Rickett and R Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart 2008) at 253.

²³⁷ S Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (CUP 2003) at 60.

and carelessness are present, but the important element of physical loss is absent. The territory which we left out of our concept of tort does not need to be left unaccounted for. The argument which is presented is that in *most* cases of ‘pure economic loss’, reliance is an essential ingredient in the claim. It should, however, be noted that this is not an attempt to explain *all* cases of pure economic loss. Nonetheless, the requirement of reliance corresponds with the general reluctance to impose liability for omissions, as the communicated inducement makes the potential liability of the claimant a self-imposed one, at least to some extent. The established authority, which to this day is still good law, is the decision in *Hedley Byrne v Heller*²³⁸ (the *Hedley Byrne* principle.) In *Hedley Byrne*, the House of Lords recognised that a claim in negligence could succeed for inaccurate statements which are relied on by the claimant and result in financial losses.

The comparison with proprietary estoppel may sound odd, but the origins of the *Hedley Byrne* claim in fact can be traced to the earlier House of Lords decision in *Nocton v Lord Ashburton*.²³⁹ Lord Shaw explicitly stated that, whilst he was avoiding the term ‘estoppel’, the basis of liability for negligent statements was based on a similar principle.²⁴⁰ Although this is a wider form of estoppel, the essential requirement of reliance is the same as we have seen in the above section. There are

²³⁸ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL).

²³⁹ *Nocton v Lord Ashburton* [1914] AC 932 (HL).

²⁴⁰ *Nocton v Lord Ashburton* [1914] AC 932 (HL) at 972: ‘My Lords, I purposely avoid the term “estoppel,” but the principle to be found running through this branch of the law is, in my opinion, this: That once the relations of parties have been ascertained to be those in which a duty is laid upon one person of giving information or advice to another upon which that other is entitled to rely as the basis of a transaction, responsibility for error amounting to misrepresentation in any statement made will attach to the adviser or informer, although the information and advice have been given not fraudulently but in good faith.’ Lord Shaw also referred to estoppel, but deliberately stopped short of concluding that avoiding the term estoppel would be ‘the safer and less complicated method of viewing’ the case (at 968-969).

many other examples where the analogy with reliance-based estoppel was made in cases involving negligence for pure economic loss, as in *Low v Bouverie*²⁴¹ and *Seton, Laing & Co v Lafone*.²⁴² Thus the indications were that there were certainly some similarities with existing reliance-based claims. Using the overlapping approach developed in this thesis, it is possible to explain the similarities with *reliance-based* estoppel, whilst at the same time recognising that, due to the nature of the overlaps, they do not require a like-for-like approach. The overlap lies in reliance, coupled with carelessness and the control mechanism of *reasonable* reliance (this is in addition to the causal element required for reliance generally.) As will be discussed further on, the role of reliance correlates to the different concerns that arise with regards to physical harms and purely economic harms.

Rejecting Assumption of Responsibility

Assumption of responsibility is also problematic for a number of reasons. A competing analysis of the cases of pure economic loss is adopted by Stevens, who argues that the claim for pure economic loss arises simply on the defendant's assumption of responsibility.²⁴³ Assumption of responsibility was used by Lord Goff to justify the decisions in *White v Jones*, *Spring v Guardian* and *Henderson v Merrett*. Indeed, this is why Stevens argues that *all* cases can be explained on the basis of

²⁴¹ *Low v Bouverie* [1891] 3 Ch 82 (CA).

²⁴² *Seton, Laing, & Co v Lafone* (1887) LR 19 QBD 68 (CA) at 70: 'One ground of estoppel is where a man makes a fraudulent misrepresentation and another man acts upon it to his detriment. Another may be where a man makes a false statement negligently, though without fraud, and another person acts upon it' (Lord Esher MR).

²⁴³ R Stevens, *Torts and Rights* (OUP 2007) at 10-14.

assumption of responsibility.²⁴⁴ Both Whittaker and Murphy have criticised the assumption of responsibility approach for being too wide, as it seems to run entirely against the requirement of consideration in contract.²⁴⁵ If this was the basis of the claim in these cases, one would be liable simply for making a gratuitous promise, but we know *generally* this will not be sufficient to justify imposing liability. On its own, assumption of responsibility sets the conceptual boundaries too wide to be of any useful application. We already know this because we have identified a clear pattern which contradicts any such principle.

Reliance Does Not Explain All Cases of Pure Economic Loss

In particular, Barker, whilst recognising that the reliance-model could explain most of the cases of pure economic loss, concluded that ‘the law of negligence has already advanced beyond the ground which models of liability based upon specific reliance are capable of encompassing.’²⁴⁶ For example, there is the line of authority which began with *Anns v Merton LBC*.²⁴⁷ It was never possible to apply a reliance analysis to this line of authority. However, this line of authority has now ended with *Smith v Erich Bush*,²⁴⁸ which has more recently been followed by the Court of Appeal.²⁴⁹ Therefore, we can safely leave this to one side.

²⁴⁴ R Stevens, *Torts and Rights* (OUP 2007) at 10-14.

²⁴⁵ S Whittaker, ‘The Application of the Broad Principle in *Hedley Byrne* as between Parties to a Contract’ (1997) 17 *Legal Studies* 169 at 169; J Murphy, ‘Rights, Reductionism and Tort law’ (2008) 28 *OJLS* 393 at 403-404.

²⁴⁶ K Barker, ‘Unreliable Assumptions in the Modern Law of Negligence’ (1993) 109 *LQR* 461 at 479.

²⁴⁷ [1978] AC 728 (HL).

²⁴⁸ [1990] 1 AC 831 (HL) at 864-865 (Lord Griffiths). See also *Customs and Excise Commissioners v Barclays Bank Plc* [2006] UKHL 28; [2007] 1 AC 181, at 217. *Williams v Natural Health Foods*

The other line of authority, which came after Barker's article, can be traced to a trio of House of Lords decisions which were decided in the mid 1990s. These cases are *Henderson v Merrett Syndicates*,²⁵⁰ *White v Jones*²⁵¹ and *Spring v Guardian Assurance*.²⁵² All three cases involve elements of reliance, but not in the same way as most other cases of reliance. *Henderson* involved claims against sub-agents, where the courts held that a duty was owed to the claimants even in the absence any direct contractual relationship. In *White v Jones*, the defendant failed to carry out instructions to amend a testator's will, which resulted in the intended beneficiaries missing out on the inheritance that the testator wanted to leave for them.²⁵³ The beneficiaries were successful in their claim, despite the absence of reliance. As Waddams points out, it is certainly possible to identify an element of reliance in *White v Jones*, as the testator clearly relied on the solicitor to amend the will.²⁵⁴ The same can be said for *Henderson*, as the agents relied on the sub-agents to perform their jobs carefully on behalf of the claimants. It is not, however a clear example of a reliance-based claim as the lack of communication between defendant and claimant prevents there being any direct reliance in either situation. As Lord Browne-Wilkinson did in both *Henderson*²⁵⁵ and *White v Jones*,²⁵⁶ an analogy can be drawn with fiduciary duties of trustees, whereby the beneficiary need not have any communication with the

[1998] 1 WLR 830 (HL). *Lennon v Commissioner of Police of the Metropolis* [2004] EWCA Civ 130, [2004] 1 WLR 2594 .

²⁴⁹ *Robinson v PE Jones (Contractors) Ltd* [2011] EWCA Civ 9.

²⁵⁰ [1995] 2 AC 145 (HL).

²⁵¹ [1995] 2 AC 207 (HL).

²⁵² [1995] 2 AC 296 (HL).

²⁵³ [1995] 2 AC 207 (HL).

²⁵⁴ S Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (CUP 2003) at 54.

²⁵⁵ [1995] 2 AC 145 (HL) at 204-206.

²⁵⁶ [1995] 2 AC 207 (HL) at 271-272.

trustee, but nonetheless the trustee owes duties to that beneficiary. This is not simply an example of a ‘trust’, as there is no trust asset in these cases. It is thus an overlap between reliance and the trust mechanism, and it need not form part of our core concept of reliance. This analysis also explains *Marc Rich & Co AG v Bishop Rock Marine Co Ltd*,²⁵⁷ where the owner of cargo which was lost at sea tried to sue a classification society for negligently surveying the ship. The claim failed, and an obvious reason for this was that the defendant had made no indication that it would look after the interests of the cargo owners.

A modified form of this three-party reliance claim is also present in *Spring v Guardian*, as the other employer who requested the reference was clearly relying on the contents of the supplied reference. *Spring*, however, is slightly different from *Henderson* and *White* insofar as the defendant was not asked to look after the claimant’s interests, but rather to provide an accurate reference. Thus an additional fact was required, which was that this was an act done by an employer in regards to an employee. For Lord Cooke, this provides the best explanation of the decision in *Spring*, and brings into play the status of the defendant as an employee, which we have already identified as being relevant in negligence claims generally.²⁵⁸ Thus, in each case the reliance was between a third party and the defendant. The lack of any reliance also goes some way to explaining why there was no liability in *Customs & Excise v Barclays Bank*,²⁵⁹ where a bank ignored a freezing injunction imposed by a court and released funds which were owed to the customs commissioners. The court

²⁵⁷ [1996] AC 211 (HL).

²⁵⁸ Lord Cooke, ‘The Right of Spring’ in J Stapleton and P Cane (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (OUP 1998).

²⁵⁹ *Commissioners of Customs & Excise v Barclays Bank* [2006] UKHL 28, [2007] 1 AC 181.

was in no way relying on the bank, it made an order under its own volition. The reliance analysis, on its own, cannot provide a complete explanation of the cases without stretching our idea of reliance to the point of usefulness. This is because it would be over-inclusive and would remove the need for communication which is essential in the majority of the cases.²⁶⁰ An explanation which fits the non-reliance cases is that (i) the defendant has communicated to a third party that they will look after the interests of the claimant *or* that the defendant is an employer who is providing information about an employee (ii) the third party has relied on this and (iii) this causes loss to the claimant. Reliance is still central, but if the communication is made to another third party, then an additional element must come into play. We can leave to one side these cases, and move on to explore our primary overlap between negligence and reliance.

Why Reliance is to be Preferred

This approach means jettisoning unhelpful legal devices such as ‘special relationship’, ‘assumption of responsibility’ and ‘proximity,’ all of which have proven to be elusive terms. As Stapleton has concluded ‘[w]hat is needed is the unmasking of whatever specific factors in each individual case weighed with judges in their determination of duty. It is not acceptable merely for a judge baldly to assert that the plaintiff was proximate; or that a duty was justified because the parties were in a ‘special relationship’, or because the plaintiff had 'reasonably relied' on the defendant, or

²⁶⁰ Furthermore, in *Clerk & Lindsell*, the terms reliance and ‘dependence’ is used to describe the cases in pure economic loss, which indicate that there are two types of scenarios in pure economic loss cases. A Dugdale and M Jones (eds), *Clerk & Lindsell on Torts* (20th edn, Sweet & Maxwell 2010) at ch 8, s 2, ss (h).

merely because it was 'fair, just and reasonable'. Without more, these are just labels.'²⁶¹ The point was even made by Lord Bridge himself in *Caparo* who, after setting out his three-stage test for duty of care in negligence, concluded that the 'ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels.'²⁶²

The reliance element should not be underplayed simply because it does not provide a comprehensive account of claims for pure economic loss. Even Barker concedes that the vast majority of the case law is explained on this basis. When cases arise that do not fit into a reliance analysis, the answer is not to conclude that reliance is no longer useful and it certainly does not mean that the answer is to find an even wider principle to explain pure economic loss claims. Unfortunately, this is precisely what Barker does. The better analysis, surely, is to keep reliance so long as it predicts most of the case law, and identify the *facts* which underlie the cases which we cannot explain under reliance.

The Overlapping Element: Carelessness

As indicated, the significant overlap with claims for negligence is the requirement for 'carelessness,' however, it will be explained that at this point it is necessary to show

²⁶¹ J Stapleton, 'Duty of Care Factors: A Selection from the Judicial Menus' in J Stapleton and P Cane (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (OUP 1998) at 62.

²⁶² *Caparo v Dickman* [1990] 2 AC 605]at 618.

that not only has the defendant been careless, but also that the claimant himself was careful in relying on the defendant. A good example is *Caparo v Dickman*,²⁶³ where the claimant had relied on advice provided in an audit report. The claimant's own behaviour was careless when considering the alternative routes available to the investor for establishing this information.²⁶⁴ In contrast, in *Morgan Crucible v Hill Samuel Bank*,²⁶⁵ the case was distinguished as the claimants relied on information during the course of negotiations, and 'much of the information on which the accounts and profit forecast was based was presumably available to the defendants alone.'²⁶⁶ This indicates that the claimants were justified in relying on what was said. This is commonly referred to as the requirement of 'reasonable reliance'.²⁶⁷

This approach also helps to explain the role of disclaimers. In *Hedley Byrne v Heller*, it was concluded that the claimant had relied on the advice of the defendant, but liability was excluded by a disclaimer of liability.²⁶⁸ Subsequently, in *Smith v Eric Bush*, the House of Lords refused to enforce a disclaimer which was made by a surveyor in a report which was communicated to a prospective home buyer.²⁶⁹ This was justified on the basis of the Unfair Contract Terms Act 1977, and in particular section 13 which subjects disclaimers to a test of reasonableness. The disclaimer in *Smith* was regarded as unreasonable given the professional expertise of the defendant and the status of the purchaser. Thus, where a professional fails to perform his job

²⁶³ *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL).

²⁶⁴ *James McNaughton Papers Group Ltd v Hicks Anderson & Co (A Firm)* [1991] 2 QB 113 (CA) at 126.

²⁶⁵ [1991] Ch 295 (CA).

²⁶⁶ [1991] Ch 295 (CA) at 320 (Slade LJ).

²⁶⁷ Lord Steyn in *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830 (HL) at 836-837.

²⁶⁸ *Hedley Byrne v Heller* [1964] AC 465 (HL).

²⁶⁹ *Smith v Eric S Bush* [1990] 1 AC 831 (HL).

properly in valuing a house, and this is relied upon by a non-professional, the balance of carelessness goes in favour of the claimant. By balance of carelessness, we mean that this is one of the situations where the courts need a control mechanism for the issue of fairness. If the claimant's reliance is careless, then the claim is unlikely to succeed. This just simply reflects the pattern that we identified at the start, which shows that economic interests are not provided with full protection by the courts, when compared to physical loss.

Communication

As with our earlier discussion of reliance in the context of land disputes, here the claim requires the communication to the claimant some information which is subsequently relied upon. In short, the communication must be directed towards the claimant. This was the case in *Smith v Eric Bush*,²⁷⁰ where the surveyor passed the information to the bank, who then forwarded it to the claimant. In contrast, in *West Bromwich Albion FC v El-Safty*,²⁷¹ the medical opinion of a surgeon was communicated to a football player and not to the player's employer. A closer analysis of *Williams v Natural Life Health*²⁷² also demonstrates this point. The information provided by the defendant was given to his company, and not directed towards the claimant. Again, we see that the reliance mechanism is applied across a variety of situations, and is easily identifiable. This demonstrates its usefulness as a realist concept.

²⁷⁰ *Smith v Eric S Bush* [1990] 1 AC 831 (HL).

²⁷¹ *West Bromwich Albion FC v El-Safty* [2006] EWCA Civ 1299, (2007) PIQR P7.

²⁷² [1998] 1 WLR 830 (HL).

Loss

In contrast to reliance-based land claims, the factual element of the defendant's title is removed from the equation. Therefore, the claim can succeed merely on the basis of a financial detriment. This may mean that the claimant has lost money which he already owns, or money which he would have received.²⁷³ An example of the first instance is a failed investment. There are also cases of 'lost chances', where the careless act has deprived the claimant of a valuable investment.²⁷⁴ Detriment is sufficient as the factual elements of the claim are different from reliance-based land claims.

Causation

Finally, it is important to show that the communication and the loss suffered are causally connected. This requirement again demonstrates why the alternative 'assumption of responsibility' analysis is unhelpful. Even when the communication has been made and the claimant has suffered a loss, the claim will fail if the loss would have been suffered anyway. For example, in *Calvert v William Hill Credit Ltd*²⁷⁵ the claimant, a compulsive gambler, had made an arrangement with a bookmaker that the claimant would not be permitted to make bets over the telephone. The bookmaker failed to operate this exclusion, but it was not liable for the claimant's

²⁷³ A Tettenborn, 'What is a Loss?' in J Neyers, E Chamberlain and S Pitel (eds), *Emerging Issues in Tort Law* (Hart 2007) at 442.

²⁷⁴ *Normans Bay Ltd (formerly Illingworth Morris Ltd) v Coudert Bros* [2004] EWCA Civ 215, (2004) 101 (13) LSG 36.

²⁷⁵ [2008] EWCA Civ 1427, [2009] Ch 330. Also, *Galliford Try Infrastructure Ltd v Mott MacDonald Ltd* [2008] EWHC 1570 (TCC), 120 Con LR 1.

gambling losses as he would have gone elsewhere to make the same bets. Causation will, however, be shown where the defendant's information or advice reaffirms a position which the claimant was considering, as in *Levicom International Holdings BV v Linklaters*.²⁷⁶ This is entirely compatible with the reliance mechanism, as we saw the same pattern on the bargain type of reliance-based land claims.

Summary

As we have seen in the context of reliance-based land claims, it is not possible to define a free-standing reliance action. It is always necessary to include additional factual elements to bring a claim, particularly in reliance-based loss claims. Being able to identify the overlap with our core concept of tort provides the additional elements for this claim. The first unique element that we saw in this context was a requirement that the defendant has been careless, and that the claimant's reliance is itself not as careless. This reflects the general reluctance to impose liability for pure economic losses. Additionally, whereas detriment is not sufficient in reliance-based land claims, it will be in cases where the claimant does not have to contend with the claimant's competing title. What this allows us to do is then to locate the factual ingredients in a reliance-based claim. Most importantly, it is argued that by using an approach which looks at overlaps, the law becomes much clearer and predictable. This solution has been achieved by recognising that we cannot and need not explain all cases of pure economic loss. The current language of 'duty of care', proximity, assumption of responsibility, special relationships and reasonable reliance offer

²⁷⁶ [2010] EWCA Civ 494, [2010] PNLR 29.

nothing except confusion and unpredictability. They are only needed when we draw the boundaries of our concepts too wide; by breaking down the analysis, and recognising that concepts can overlap, a description of this area of law finally becomes an achievable goal.

6. Conclusion

The approach presented in this chapter is not an argument for an overextended principle of reliance that ignores the contextual circumstances in which the situations above will lead to liability. As we have seen, the context of the reliance is of particular relevance in assessing the requirements of any claim and also the response of the courts. In the first part, we identified the core elements of reliance by looking at proprietary estoppel. In doing this, we rejected the terminology of ‘unconscionability’, and also provided an alternative analysis for claims which are not based on reliance. We established that any claim involving land must account for the property element, which is the title of the landowner. This can be overcome in two ways, both of which reveal further overlaps. The first is another overlap with property, with the claimant showing control of the land. The second was an overlap with contract where the bargain element is present. Reliance is also relevant outside the context of land claims. The first was where reliance was provided under an agreement, allowing the claimant to claim the market value of any services. This is an overlap between reliance and contract. Secondly, we established that the core elements of the *Hedley Byrne v Heller* claim also fit into the reliance model. It is not

an exhaustive account of claims for pure economic loss, but it does describe the majority of the case law.

The overall benefit of our overlapping analysis is that, at present, these scenarios have posed problems for more well-established concepts in private law, such as contract, negligence and monetary transfers. There is a tendency to try to stretch the boundaries of those concepts to accommodate these cases, which in turn reduces their descriptive utility. This error in legal reasoning can be avoided by maintaining narrower concepts, and recognising the overlap of reliance to explain these situations. As it should always be remembered, we are concerned with prophecies of what the courts will in fact do, and any analysis which provides a more descriptive account of the law should be adopted.²⁷⁷ The identification of these claims as examples of negligence or unjust enrichment constitutes paper rules, not real rules.²⁷⁸ We have to invent duties of care in negligence and to invent enrichments to achieve this. Where the elements of reliance are present they will have a significant impact on the way in which the courts deal with the case. This provides a necessary and invaluable tool in classifying private law.

²⁷⁷ OW Holmes, 'The Path of Law' (1897) 10 Harvard L Rev 457 at 461.

²⁷⁸ K Llewellyn, 'A Realistic Jurisprudence – The Next Step' in K Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Univ of Chicago Press 1962) at 21-25.

CHAPTER 7: THE TRUST

1. Introduction

Arnold, who was one of the leading academics in the Legal Realist movement, once stated that '[a] conceptual approach [to the law of trusts] is a betrayal of its origin and purpose'¹ and, moreover, that '[the trust] is not the name of an organized philosophy; it is simply a bad piece of indexing.'² In this penultimate chapter we find yet another legal concept where there are very few recurrent factual elements and it is difficult to predict the judicial outcomes. A similar point was made by Megarry VC in *Tito v Waddell*, '[o]ne cannot seize upon the word "trust" and say that this shows that there must therefore be a true trust; the first question is the sense in which that protean word has been used.'³ Arnold's criticism, in essence, is that any attempt to incorporate *all* cases where the court identifies a 'trust' is an impossible task.⁴ Nolan appears to recognise this stating that '[a] unifying, defining characteristic is sought where none exists, nor ever can exist, given the flexibility of trusts in allocating and apportioning

¹ T Arnold, 'The Restatement of the Law of Trusts' (1931) 31 Columbia L Rev 800 at 823.

² T Arnold, 'The Restatement of the Law of Trusts' (1931) 31 Columbia L Rev 800 at 814.

³ [1977] Ch 106 (Ch) at 227.

⁴ Arnold (n 1) at 821: 'The result of this attitude is that if all sorts of things have been called "trusts," we are under a positive duty to define trusts so that our definition includes all of them'.

benefit from trust assets.’⁵ Therefore, the realist’s method of looking past the language and breaking the law into smaller concepts is to be preferred.

The starting point is to deal with attempts to provide comprehensive accounts for the trust mechanism, which have also tried to explain the basis of ‘resulting’ and ‘constructive trusts.’ It is concluded that it is not possible to establish a useful and predictable concept of the ‘trust’, which incorporates *all* of these claims. Next, a basic definition of the trust will be provided, with the ‘express trust’ forming the framework for this concept. We do not adopt a single definition of trust, but instead recognise a number of variations of the overlap between contract and property. At the end we consider the common intention constructive trust, and it is argued that there is very little overlap with any of our core concepts. The patterns are, therefore, unique to those cases.

Attempts to Unify the Law of ‘Trusts’

The trust is a concept which was developed in the courts of chancery, and it is still quite common to hear argument that ‘equity operates on the conscience of the owner of the legal interest.’⁶ In Australia, this has been defined more concretely as a concern to protect weaker or vulnerable parties from exploitation.⁷ As an explanation of the trust mechanism this may explain *some* types of trust, but not all. For example, it is

⁵ D Nolan, ‘Equitable Property’, (2006) 122 LQR 232 at 253.

⁶ Eg Lord Browne-Wilkinson, *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) at 705, M Halliwell, *Equity & Good Conscience* (2nd edn, Old Bailey Press 2004) 1.

⁷ J Dietrich, ‘What is “Lawyering”? The Challenge of Taxonomy’ (2006) 65 CLJ 549; Justice EW Thomas, ‘The Conscience of the Law’ (2000) 8 Waikato L Rev 1.

questionable how 'conscience' can explain a constructive trust that arises between two parties where they both have equal bargaining power.⁸ Moreover, it seems to be stretching the idea of conscience to say that a volunteer beneficiary, who has been granted an interest by the settlor/trustee, can claim that it would be unconscionable for the latter to refuse to look after his or her interests.⁹ It may be the case that the claimant in that particular situation is in a weak position. However, that would mean that trusts should arise more regularly in consumer, employment and family relationships. The 'weak party' element may be a useful guide, but it fails to provide a descriptive account of the general operation of the trust.

Another alternative is that by conscience, the courts are referring to either a subjective or objective standard of behaviour. It is no explanation to state that the courts are applying a subjective standard of conscience, i.e. what the trustee feels he or she should be bound to do, as otherwise there would often be little point asking the court to recognise the trust in the first place. As Birks noted, it would seem that by conscience, the courts are referring to an objective standard, at least as it is perceived by the judiciary.¹⁰ When used in this way, the term conscience appears simply to refer to the intuitive right or wrong of the situation.¹¹ As set out in Chapter 3, predictability is the objective of realism and, in turn, for classifying the law. By stretching the concept of 'conscience' to justify every trust, we have achieved only a façade of predictability. The argument is also made by Tang, who concludes that unconscionability does little to assist our understanding of the traditional express

⁸ *Don King Productions v Warren* [2000] Ch 291 (CA).

⁹ *Mallott v Wilson* [1903] 2 Ch 494.

¹⁰ P Birks, 'Equity, Conscience, and Unjust Enrichment' (1999) 23 Melbourne Univ L Rev 1.

¹¹ P Birks, 'Equity, Conscience, and Unjust Enrichment' (1999) 23 Melbourne Univ L Rev 1 at 20-22.

trust.¹² If we are to achieve the aim of achieving a descriptive account of the law, phrases such as conscience, equality and justice need to be left to one side for the time being. They may provide normative justifications for the court's actions, but they fail to describe what is going on. A more realistic analysis is needed to reveal the factors that influence the courts.

A Proprietary Right

Beneficial interests are usually described as proprietary rights,¹³ and the presence of some identifiable asset certainly makes the two situations similar.¹⁴ We dealt with the problems of defining 'trusts' as property in Chapter 4;¹⁵ a very important distinction is that whereas property requires a claimant to have control over an asset, these characteristics rarely apply to the beneficiary. More importantly, very different levels of protection are provided, with property interests usually binding even good faith purchasers, whereas trust interests will usually be defeated by a good faith purchaser. From a realist perspective, the distinction is reflected in the way in which the courts treat these situations. A similar approach does not mean the same approach.

The Trust as a 'Duty-Burdened Right'

¹² W Tang, 'Teaching Trust Law in the 21st Century' in E Bant and M Harding (eds), *Exploring Private Law* (CUP 2010) at 143.

¹³ *Westdeutsche Landesbank Girozentrale v Islington London BC* [1996] AC 669 (HL) at 705; R Wilson, 'Lord Browne-Wilkinson's Identifiable Trust Property Principle' (1998) 6 *Waikato L Rev* 87; J McGhee (ed), *Snell's Equity* (31st edn, Thomson Sweet & Maxwell 2005) 464-465.

¹⁴ *Knight v Knight* (1840) 3 Beav 148, 49 ER 58.

¹⁵ See text at n 85 in Chapter 4.

Another possibility is presented by McFarlane, who argues that a trust is a ‘duty-burdened right’,¹⁶ where the trustee ‘holds a particular right and is under a duty to [the beneficiary] in relation to that right.’¹⁷ The consequence of this analysis would mean that many interests that are not regarded as trusts should be reclassified as such. As Lord Browne-Wilkinson explained in *Westdeutsche v Islington London BC*,¹⁸ ‘[t]here are many cases where B enjoys rights which, in equity, are enforceable against the legal owner, A, without A being a trustee, e.g. an equitable right to redeem a mortgage, equitable easements, restrictive covenants, the right to rectification, an insurer’s right by subrogation to receive damages subsequently recovered by the assured...’¹⁹ Not only is the definition too wide, it lacks any concrete meaning.

Furthermore, it is only a useful definition for lawyers who are well versed in the law of trusts, as one must have a prior knowledge of the context of these legal duties and rights for this to make any sense. Using McFarlane’s analysis, one could use this formula to argue that a trust is present in most property scenarios. For example, a landowner holds a general right to make substantial changes to the land, but that duty is subject to planning permission, which needs to be authorised by the local council.²⁰ The arrangement does not mean that the council is also a beneficiary. To any lawyer this conclusion is absurd, but only because we know immediately that this situation is

¹⁶ B McFarlane, ‘The Centrality of Constructive and Resulting Trusts’ in C Mitchell (ed), *Constructive and Resulting Trusts* (Hart 2010) at 184.

¹⁷ B McFarlane, ‘The Centrality of Constructive and Resulting Trusts’ in C Mitchell (ed), *Constructive and Resulting Trusts* (Hart 2010) at 184.

¹⁸ *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) at 705.

¹⁹ *Ibid* at 706-707.

²⁰ *Guildford BC v Secretary of State for Communities and Local Government* [2009] EWHC 3531 (Admin).

far removed from any 'trust' situation.²¹ McFarlane is guilty of the criticism which Llewellyn made of applying 'terms too broad to be precise in application to the details of single disputes.'²² Therefore, McFarlane's analysis must be rejected as it would incorporate far too many situations which even now would not be regarded as 'trust' arrangements.

Separation of Legal and Equitable Title

A trust may simply be a description of any situation where there is a separation of legal and equitable title. Worthington has, in the past, referred to this definition,²³ and so too has Birks.²⁴ It is also the explanation which was seemingly adopted by Lord Millett.²⁵ According to Lord Millett, 'a trust exists whenever the legal title is in one party and the equitable title in another.'²⁶ The simplicity of this analysis is appealing but must be rejected as a *comprehensive* account of the 'trust.' Firstly, if there is a separation of legal and equitable title, this would seem to indicate that there must be a beneficiary who enjoys the equitable title. This would preclude discretionary trusts²⁷ and *Re Denley's*²⁸ type trusts from being regarded as 'true trusts.' After *Jerome v*

²¹ Equally, it could also apply to a defamation case; A has a right to freedom of speech, but B has a right to reputation. A's right to freedom of speech is subject to B's right not to be defamed. Therefore, A's right is a duty-burdened right and B's is a beneficial right under a trust.

²² K Llewellyn, *The Bramble Bush: The Classic lectures on the Law and Law School* (New York 1930) at 83.

²³ S Worthington, *Proprietary Interests in Commercial Transactions* (Clarendon Press 1996) at xvi.

²⁴ P Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 *Univ of West Austl L Rev* 1, at 31 at n 71. 'It will be safer to define a trust in terms of (i)', which he had earlier defined as 'a proprietary relation such that legal title is in one person and equitable title in another.'

²⁵ PJ Millett, 'Restitution and Constructive Trusts' (1998) 114 *LQR* 399 at 403.

²⁶ PJ Millett, 'Restitution and Constructive Trusts' (1998) 114 *LQR* 399 at 403.

²⁷ *McPhail v Doulton* [1971] AC 424 (HL).

²⁸ [1969] 1 Ch 373.

Kelly,²⁹ we would also have to exclude constructive trusts that arise under a specifically enforceable contract for the sale of land, as neither the seller nor the buyer has a ‘beneficial interest.’

Secondly, the reasoning is, once more, circular. As Swadling has noted, ‘having an equitable right is the consequence of there being a trust, not the reason why one arises.’³⁰ The separation of title approach leads to the circular logic that we can only identify the trust by the presence of an equitable title, and the only apparatus we have to identify the trust is the presence of an equitable title. An alternative analysis which might provide a more concrete meaning for beneficial interest is presented by Schenkel.³¹ Accordingly, by referring to the separation of legal and equitable title, we are simply referring to any situation where the benefit of an asset is held for another party.³² This analysis was considered and rejected the recent decision of the Court of Appeal in *Clarence House v National Westminster Bank*.³³ In this case, the court recognised a new type of interest whereby the owner of an estate can make a ‘virtual assignment’ of the property. This means that the profits of the property and the burdens of looking after the property are assigned under a contractual agreement to an assignee, but the legal title remains with the owner.³⁴ The Court of Appeal concluded that the assignee was not a beneficiary, but was actually an agent of the owner. The decision demonstrates that we cannot define the trust merely by asking who is to benefit under the trust, as benefit in that context is a special legal term that does not

²⁹ [2004] UKHL 25; [2004] 1 WLR 1409, at 1419-1420.

³⁰ W Swadling, ‘Explaining Resulting Trusts’ (1998) 124 LQR 72 at 100.

³¹ K Schenkel, ‘Trust Law and the Title-Split: A Beneficial Perspective’ (2009) 78 UMKC L Rev 181.

³² K Schenkel, ‘Trust Law and the Title-Split: A Beneficial Perspective’ (2009) 78 UMKC L Rev 181.

³³ [2009] EWCA Civ 1311, [2010] 1 WLR 1216.

³⁴ PG Turner, ‘*Clarence House v National Westminster Bank plc*: A New Type of Conveyance – The Virtual Assignment’ [2010] The Conveyancer and Property Lawyer 99.

simply mean financial benefits. We are not rejecting the relevance of the benefit issue, as it is important for our own definition. We are instead pointing out that it cannot be the unifying element for all types of ‘trusts.’

It is not possible to define ‘trusts’

The main argument presented here is that the trust concept need not accommodate all of those instances which are described as ‘trust.’ What, instead, we can do is recognise that most trusts are overlaps between property and contract. Each of these overlaps involves different combinations of property and contract; we define these as agreement, control and bargain trusts. This correlates, for the most part, with ‘express trusts’, ‘resulting trusts’ and ‘*Quistclose* trusts’. Each of these is a special type of overlap between contract and property. In adopting this overlapping approach we reject Birks’ classification of the trust as responses to consents, wrongs and unjust enrichment.³⁵ It is no solution to criticise the law of trusts for being too wide and lacking any concrete meaning, and then suggest that an even wider concept of ‘consents’, ‘wrongs’ and ‘unjust enrichment’ can explain the law.

2. Overlap 1; The Agreement Trust

The preferred approach under a realist methodology is to adopt a narrower form of the trust. It is unsurprising that attempts have been made to find a level of generality

³⁵ P Birks, ‘Property and Unjust Enrichment: Categorical Truths’ [1997] New Zealand L Rev 623.

which can encompass all of the situations where the ‘trust’ remedy is at play. However, all we do is create confusion when we look for patterns of judicial responses alone. As has been said before in this thesis, Holmes taught us that to identify the law, we have to look at the facts as well as the consequences.³⁶ It is never sufficient to purely focus on responses.

The agreement trust can be a valuable and useful conceptual tool, but this does not correlate precisely with the express trust. For us the overlap is quite clear between contract and property; elements of both are in play when we look at an agreement trust. The reality of the overlap is that factual elements of both are present. We make no apologies for focusing on the paradigm trust scenario of A giving an asset to B to look after C. It is, after all, the most common trust situation. Nonetheless, we must properly explain why we see agreement as the most important element in this trust. To do so, we must explain self-declarations of trusts. As McFarlane notes, the contract comparison is very difficult to make where someone makes a self-declaration of trust.³⁷ However, we argue that it is not possible or sensible to treat self-declarations of trust in the same way as agreements where the assets are controlled for another person. Our argument is that, by lacking the agreement element, this is a ‘weak’ trust in the same way that a deed is a ‘weak’ contract due to the lack of consideration and the reluctance of the courts to enforce promises without clear proof and written evidence. We take the same view as Langbein that self-declarations are non-trusts.³⁸

³⁶ OW Holmes, *The Common Law*, (Little, Brown and Company 1881) at 289.

³⁷ B McFarlane, ‘The Centrality of Constructive and Resulting Trusts’ in C Mitchell (ed), *Constructive and Resulting Trusts* (Hart 2010) at 184.

³⁸ J Langbein, ‘The Contractarian Basis of the Law of Trusts’ (1995) 105 YLJ 625 at 672.

Why we are not Including Declarations of ‘Trust’

In his article on the relationship between trust and contract, Langbein relegated declarations of trust to his appendix.³⁹ It is argued here that he had very good reasons for doing so. As noted above, the few cases of self-declaration usually have much more obvious reasons for enforcement. The current orthodoxy is that a settlor can set up a trust by a simple declaration, so long as it is certain that he intends to do so. Parkinson has argued that, particularly in cases of declaration; ‘[d]ifferences of context go some way to explaining the differences of result and provide a certain order and coherence.’⁴⁰ We should not be led to believe that the express declaration of trust is by any means a common or well established rule. According to Alexander, it was not until 1811 that the courts began to recognise self-declarations of trusts in the absence of consideration as being effective.⁴¹ Even then, the prevailing view that one can make a simple oral declaration of trust is a mere paper rule and not a real one. There is surprisingly little authority to support oral declarations of trust, and even those cases where it is applied are easily explained on a different basis.

Cases Where the Settlor is Deceased

³⁹ J Langbein, ‘The Contractarian Basis of the Law of Trusts’ (1995) 105 YLJ 625 at 672.

⁴⁰ P Parkinson, P, ‘Chaos in the Law of Trusts’ (1991) 13 Sydney L Rev 227 at 234.

⁴¹ GS Alexander, ‘The Transformation of Trusts as a Legal Category’ (1987) 5 Law and History Rev 303 at 328-329.

In Langbein's appraisal of self-declarations of trust he came to the conclusion that these were better regarded as 'non-trusts.'⁴² Most of the 'non-trust' involved gifts which were made during the lifetime of the settlor, and disputed after his death.⁴³ On this point, there is no need to stretch the concept of a trust to cover cases where the courts were simply trying to avoid the consequences of the Wills Act.⁴⁴ Most of the 'oddities' in the law of trusts involve cases about gifts made by deceased settlors, as we see in the cases of secret trusts and the rule in *Strong v Bird*.⁴⁵ Refusing to recognise the relevance of the status of the settlor leads to absolute confusion and uncertainty. For example, in *T Choithram v Pagarani*, Lord Browne-Wilkinson stated that the courts 'will not strive officiously to defeat a gift'.⁴⁶ But in *Shah v Shah*, Arden LJ recognised that there was a benevolent construction in some cases *against* enforcing a gift.⁴⁷ Without taking an external perspective of these cases, and looking at facts rather than the words being used by the judges, this makes little sense. By focusing on the facts we can see that the two cases were very different as, in the first case, the declaration was made by a now deceased settlor, and, in the second case, the settlor was still alive.

⁴² J Langbein, 'The Contractarian Basis of the Law of Trusts' (1995) 105 YLJ 625 at 672.

⁴³ J Langbein, 'The Contractarian Basis of the Law of Trusts' (1995) 105 YLJ 625 at 672.

⁴⁴ Wills Act 1837. Also note that a special concern in the early days of the trust was that undisposed assets of the testator would go to the executor of the estate. According to Chambers, '[a]t one time, the executor was entitled to keep the residue of any personal property undisposed of by the will, except where the testator intended otherwise, in which case it went to the next of kin' in R Chambers, *Resulting Trusts* (Clarendon Press 1997) at 46.

⁴⁵ (1874) LR 18 Esq 315.

⁴⁶ *T Choithram International SA v Pagarani* [2001] 1 WLR 1 (PC) at 11.

⁴⁷ *Shah v Shah* [2010] EWCA Civ 1408. The case involved a declaration of trust by a written document. Arden LJ recognised that sometimes the courts were more willing to recognise a declaration when compared to other cases. She stated though that 'this is not a case of a declaration of trust or no declaration of trust, but the question of a gift or a declaration of trust.' The distinction cannot be hidden in this way; we need to recognise that the benevolent construction operates to enforce the intention of a deceased settlor, while the benevolent construction operates to prevent the settlor from making an immediate declaration of trust.

Cases Involving Written Documents, Bargain or Reliance

If we leave to one side gifts made by deceased settlors, it leaves *very* few cases of self-declared trusts where there has not either been reliance by another, or the trust has been set out in a clear written document.⁴⁸ This is important for our purposes. We have been using the overlapping approach to identify legally significant facts. Attempts to make a self-declaration of trust appear to be a promise, and in Chapter 4 we concluded that promises alone have very little normative force in English law. We always need to find additional facts to support the promise; in contract that is shown by a bargain, in cases of a deed it is a specified and considered written declaration of intent, and in the previous Chapter we saw that promises can have effect when they are relied upon by others. Outside of the context of gifts by deceased settlors, most of the cases involve the enforcement of a bargain, written trusts, or reliance. Take, for example, the well known rule that one cannot enforce a trust for assets which the settlor does not yet have.⁴⁹ Yet even when applying this supposed general rule, the courts acknowledge that they *would* enforce the trust if it was part of a bargain.⁵⁰ The rule is not absolute, and is merely another mechanism for preventing general

⁴⁸ The few examples of oral declarations of trust nearly always arise when companies give instructions to their bank to set up a separate fund for money provided by customers when facing possible insolvency. Space precludes a full discussion of these types of cases, but it seems clear that declarations of trust are primarily enforced to protect consumers. See Megarry J's comment when he stated that: '[d]ifferent considerations may perhaps arise in relation to trade creditors; but here I am concerned only with members of the public, some of whom can ill afford to exchange their money for a claim to a dividend in the liquidation, and all of whom are likely to be anxious to avoid this.' *Re Kayford* [1975] 1 WLR 279 (Ch) at 282. This was applied in *OT Computers Ltd (In Administration) v First National Tricity Finance Ltd* [2003] EWHC 1010 (Ch); [2007] WTLR 165, where two declarations of trust were made, one for customers, the other general creditors. Only the declarations for the customers were held to be enforceable.

⁴⁹ *Re Ellenborough* [1903] 1 Ch 697.

⁵⁰ *Re Ellenborough* [1903] 1 Ch 697.

declarations of trust.⁵¹ Therefore, we can see in these situations that the inclination of the courts is *against* enforcing a declaration of trust. This is best explained by a statement of Arden LJ in *Pennington v Waine*;⁵² ‘[t]he objectives of the rule obviously include ensuring that donors do not by acting voluntarily act unwisely in a way that they may subsequently regret. This is a paternalistic objective, which can outweigh the respect to be given to the donor's original intention as gifts are often held by the courts to be incompletely constituted despite the clearest intention of the donor to make the gift.’⁵³ She also added that this principle would protect creditors of the settlor.⁵⁴ Indeed, in *Midland Bank v Wyatt*,⁵⁵ the court refused to enforce a ‘sham’ trust, which had been set up by the owner to keep his assets out of the hands of creditors by declaring trusts for family members.⁵⁶

The Clarity Achieved by Excluding Declarations

The exclusion of the self-declared trust is not just an effort to make a purer concept of the trust. The failure to distinguish between trusts created by transfer and those created by declaration has led to an even greater confusion when it comes to trusts over land. The Law of Property Act 1925 s 53(1)(a) prevents oral declarations of trust

⁵¹ *Re Ellenborough* [1903] 1 Ch 697 (Ch) at 700. D Matheson, ‘The Enforceability of a Covenant to Create a Trust’ (1966) 29 MLR 397.

⁵² This was itself a case which itself involved reliance upon a promise to transfer shares *Pennington v Waine* [2002] EWCA Civ 227; [2002] 1 WLR 2075.

⁵³ [2002] EWCA Civ 227; [2002] 1 WLR 2075 at 2090.

⁵⁴ ‘Another valid objective would be to safeguard the position of the donor: suppose, for instance, that (contrary to the fact) it had been discovered after Ada's death that her estate was insolvent, the court would be concerned to ensure that the gift did not defeat the rights of creditors.’ Arden LJ (ibid) at 2090.

⁵⁵ *Midland Bank v Wyatt* [1995] 1 FLR 697 (Ch).

⁵⁶ Similarly, see *Minwalla v Minwalla* [2004] EWHC 2823 (Fam), [2005] 1 FLR 771.

over land. The obvious benefit is to protect third party purchasers, as well as providing another mechanism to prevent a self-declaration of trust. When applied to *transfers* of land, however, the courts have regularly ignored this provision. Swadling has noted that there are several attempts to explain why the provision is ignored when land is transferred and an oral declaration of trust is made beforehand.⁵⁷ For Swadling, and for our purposes, where there is a transfer from settlor to trustee, it is a clear trust scenario. The Statute, however, seems designed to cover declarations of trust. The whole law of trusts would be much clearer, therefore, if we recognise that a declaration is a weaker form of trust. Using our overlapping analysis, we can see that it *lacks* the element of agreement which is integral to the trust. It is no more a trust, than a trust of a tangible thing is property. Just as a trust of a tangible thing lacks the element of control, cases of self declaration lack the agreement element.

The Agreement Trust: An Overlap between Contract and Property

We can more fully explain our core concept of trust, and demonstrate how this mechanism involves an overlap with contract and property. In fact, this overlap is so clear that we can deal with it even more briefly than we dealt with the above discussion of declarations of trust. The simple arrangement in a trust is that the settlor (the existing title-holder) *transfers* an asset to another person, under an *agreement* that the asset will be *controlled* on behalf of someone else. This creates the separation of control and title which is characteristic of the trust mechanism. It is also the reason for

⁵⁷ W Swadling, 'The Nature of the Trust in *Rochefoucauld v Boustead*' in C Mitchell (ed), *Constructive and Resulting Trusts* (Hart 2010).

the personal obligations of the trustee, as it is the agreement which provides the legally significant event which indicates that the various rules on investment and acting in good faith will be applied.

Explaining the Factual Requirements of the Agreement Trust

We can deal with this briefly, as the *facts* have been touched upon already at various points in the thesis. As with our concept of money transfers, we look for the transfer of an asset, which is an observable fact. The asset itself can be identified by looking for both tangible and intangible assets. It, therefore, includes shares, money, land and goods.⁵⁸ As noted, the trustee must accept the position of responsibility.⁵⁹ We need not look for reliance here (as there may not be any causal link between the trustee's acceptance and the settlor's decision to appoint), but it does fit within an agreement model. There is a communication between the parties (even when the instruction is made under a will), and as Langbein pointed out it is very much within the same framework as agreement in contract.⁶⁰ Unlike Langbein, we need not conclude that this is in fact a *contract*, as our overlapping analysis allows us to recognise a partial overlap of facts.

⁵⁸ Lord Shaw in *Lord Strathcona Steamship Co. Ltd. v. Dominion Coal Co. Ltd.*; 'The scope of the trusts recognised in equity is unlimited. There can be a trust of a chattel or of a chose in action, or of a right or obligation under an ordinary legal contract, just as much as a trust of land'. [1926] AC 108, at 124 (PC). Also, T Arnold, 'The Restatement of the Law of Trusts' (1931) 31 Columbia L Rev 800 at 817; '[o]ur conclusions would be that there are very few limitations on the kind of property which can be intentionally disposed of by the trust device, and that there is some recognized rule of policy other than definition of property which makes most of these limitations understandable.'

⁵⁹ *Robertson v Pett* (1734) 3 Peere Williams 249 at 251, 24 ER 1049 at 1051; Lord Chancellor Talbot 'The defendant's renouncing the executorship is not material, because he is still at liberty, whenever he pleases, to accept of the executorship'

⁶⁰ J Langbein, 'The Contractarian Basis of the Law of Trusts' (1995) 105 YLJ 625 at 628.

The requirement of acceptance seems to underpin Lord Browne-Wilkinson's judgment in *Westdeutsche v Islington London BC*.⁶¹ His Lordship concluded that resulting trustees would not be personally liable for deeds done before they discovered the circumstances that have given rise to the trust.⁶² His Lordship went on to make an even stronger statement that an individual could not be regarded as a trustee until he or she became aware of the fact that the owner did not intend to transfer the full benefit of the asset.⁶³ Admittedly, this has not been universally accepted. The controversy really rests on how one defines the trust. Millett LJ, who we saw earlier would adopt a wider definition of trust than the one seen here,⁶⁴ clearly agreed with Lord Browne-Wilkinson that generally the personal duties of a trustee will not be imposed in cases of non-express trusts.⁶⁵

The Protection Afforded to Trust Assets

The fact that the beneficiary has title without control indicates why beneficial interests are not as strong as full property interests. The beneficiary has an interest in the asset, and can call for the trustee to transfer the asset and bring the trust to an end.⁶⁶ The beneficiary can also trace the assets if the trustee breaches the arrangement and attempts to abscond with the assets. This operates in a similar way to specific

⁶¹ *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) at 705.

⁶² Cases cited to support this proposition included; *Birch v Blagrave* (1755) Amb 264, 27 ER 176; *Childers v Childers* (1857) 1 De G & J 482, 44 ER 810; *In Re Vinogradoff* [1935] WN 68.

⁶³ *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) at 707.

⁶⁴ P 300.

⁶⁵ This is shown by his conclusion that not all trustees will be fiduciaries and that '[a]n implied trust, whether constructive or resulting, is a true trust.' PJ Millett, 'Restitution and Constructive Trusts' (1998) 114 LQR 399 at 404, 406.

⁶⁶ *Saunders v Vautier* (1841) 4 Beav 115, 49 ER 282.

restitution. It is also possible to set aside a transaction for mistake, in much the very same way as we saw in Chapter 5.⁶⁷ Another important element of the trust, is that once the trust has come into existence, we also see that the trustee will be subject to personal obligations.

Why this Combination of Facts is Legally Significant

The personal obligations of the agreement trustee distinguish this concept from other 'trust' like situations. It is a point made by Hayton, who argues that in looking at *all* types of 'trust', we can overlook these very important rules.⁶⁸ The rules are not simply concerned with small family trusts, they have been relevant in developing the rules on management duties in general.⁶⁹ We do not have the space here to give a full account of fiduciary duties, but the control element provides a significant factor in determining the full range of remedies which are provided by the courts. As far as the trust is concerned, the personal obligations of trusteeship (including avoiding conflicts of interest,⁷⁰ duties and powers of investment⁷¹ and personal liability for failing to protect the trust assets⁷²) are present in the agreement trust, but not in the absence of agreement.⁷³ Once we exclude the latter from our concept of trust, the personal duties of the trustee will only be present in express situations.

⁶⁷ *Abacus Trust v Barr* [2003] EWHC 114 (Ch); [2003] Ch 409.

⁶⁸ D Hayton, 'Unique Rules for the Unique Institution, the Trust' in S Degeling and J Edelman, *Equity in Commercial Law* (Sydney Thomson 2005)

⁶⁹ PJ Millett, 'Equity's Place in the Law of Commerce' (1998) 114 LQR 214.

⁷⁰ *Keech v Sandford* (1726) Sel Case Ch 61, 22 ER 629.

⁷¹ Trustee Act 2000

⁷² *Speight v Gaunt* (1883) 9 App Cas 1.

⁷³ Millett LJ in *Lonrho plc v Fayed (No 2)* [1992] 1 WLR 1 (Ch) at 12.

Summary of the Agreement Trust

The conclusion must be that there is very little to be achieved by classifying all trusts without considering the nature of the overlap; the circumstances in which a trust can and the personal obligations of the trustee are very much dependent on this overlap with contract. This shows the problem with Goode's statement that all legal systems distinguish 'property rights from mere personal rights to the delivery or transfer of an asset. I *own* property; I am *owed* performance of a transfer obligation.'⁷⁴ In the context of the trust these elements can exist hand in hand, and this is because this arrangement represents a combination of title, control and agreement. It also solves the issue presented by Worthington who concluded that the divide between property and obligation was disappearing.⁷⁵ If we focus on contract rather than obligation, it can be seen that there never was, and never could be any *divide* between the two areas of law. Contract and property can stand on their own as concepts, but they often interact and overlap as we have demonstrated at various points in the thesis. The only possible way to understand the trust, and to keep our understanding of property, contract, and additionally the law governing monetary transfers, is to apply the overlapping analysis. Discrete categories collapse and soon break down, but the classification presented here explains and accommodates these overlapping areas of law.

⁷⁴ R Goode, *Ownership and Obligation in Commercial Transactions*, (1987) 103 LQR433 at 433.

⁷⁵ S Worthington, 'Disappearing Divide between Property and Obligation: The Impact of Aligning Legal Analysis and Commercial Expectation' (2007) 42 *Tex Intl LJ* 917.

3. Overlap 2; Control Trusts

Control trusts are commonly referred to as ‘resulting trusts.’ According to Megarry J, there are two types of ‘resulting trust’, the first is where a settlor attempts to establish an ‘express’ (agreement) trust which fails, and secondly where there is a transfer which is not made under trust. Using our overlapping concept analysis, we can see that both ‘resulting trusts’ appear to lack the necessary agreement element that we saw in our previous overlap. However, again, the answer to the classification of the resulting trust, it will be argued, can be found in our overlapping analysis. The argument is that this ‘trust’ merely constitutes a *different* combination of facts from our core concepts of contract and property. The important element is that of control, which remains with the transferor. First we look at two different approaches to resulting trusts which have both garnered support. Then we will explain how the overlapping approach assists in providing the better explanation of the ‘resulting trust’, and its relationship with the agreement trust.

Swadling’s Analysis

First, we will deal with the argument that resulting trusts do enforce the intention of the owner, through a presumption of fact. One of the earliest proponents of this was approach was Costigan,⁷⁶ who argued that in ‘resulting trust’ cases the courts presume

⁷⁶ G Costigan, ‘The Classification of Trusts as Express, Resulting, and Constructive’ (1914) 27 Harvard L Rev 437. See GS Alexander, ‘The Transformation of Trusts as a Legal Category’ (1987) 5 Law and History Rev 303 at 344-345.

that the transferor has an unexpressed desire to keep his interest in the money.⁷⁷ A modern supporter of this view is Swadling, who adopts this analysis in discussing the role of resulting trusts, looking for a presumed intention to create a trust, and concludes that resulting trusts that cannot be classified as such defy 'legal analysis.'⁷⁸ Penner has taken the view that if Swadling is correct, a 'resulting trust' is merely an express trust without clear evidence of a declaration.⁷⁹

An example of how these presumptions operate is the decision by the Court of Appeal in *Seldon v Davidson*.⁸⁰ Here, there was a gratuitous transfer between two strangers. The court found that, in the absence of any evidence that a gift was intended, the money was to be held under resulting trust for the transferor. For Swadling, the decision can be reinterpreted as a presumption that, since one does not make gifts to strangers, the transfer gives rise to a presumption that there had been an express declaration of trust.⁸¹

The approach adopted in this chapter is one that is not compatible with Swadling's analysis. It would be contradictory if the law recognised the silent actions of the settlor as providing intention, when we have seen that it is so difficult to establish declarations in express trusts. The immediate riposte to that point is that the scenario is different here; in self- declarations of trust, the rules generally prevent the settlor from losing title to the asset, and 'resulting' trusts achieve the same goal, but in a

⁷⁷ G Costigan, 'The Classification of Trusts as Express, Resulting, and Constructive' (1914) 27 *Harvard L Rev* 437 at 448.

⁷⁸ W Swadling, 'Explaining Resulting Trusts' (1998) 124 *LQR* 72 at 102.

⁷⁹ J Penner, 'Resulting Trusts and Unjust Enrichment: Three Controversies' in C Mitchell (ed), *Constructive and Resulting Trusts* (Hart 2010) at 238.

⁸⁰ [1968] 1 *WLR* 1083 (CA).

⁸¹ W Swadling, 'Explaining Resulting Trusts' (1998) *LQR* at 86-89.

different way. But that is in fact a very good reason for rejecting Swadling's analysis. It fails to tell us that this pattern exists, and merely confounds the confusion we saw earlier on when considering the various ways in which the courts adopt 'benevolent constructions' of the settlor's intentions. Piska has recently criticised the reasoning behind this presumption of express trust.⁸² As Piska points out in many cases, it is not just a case of having to deal with the lack of evidence of what the parties intended. There are many resulting trust cases where 'the presumed resulting trust arises [even though] there exists sufficient evidence to prove that there was no declaration of trust.'⁸³ The presumed resulting trust seems to require a fictional element which we should be keen to avoid under a realist approach.

Chambers' Unjust Enrichment Analysis

Another approach is presented by Chambers who argues that a resulting trust arises in the absence of any intention to benefit the recipient.⁸⁴ Even this analysis is problematic, as we are still looking for an intention which cannot be seen. As Penner explains, in many cases there is no evidence to show an intention *not* to benefit, but nonetheless a resulting 'trust' can still arise.⁸⁵ Chambers attempts to avoid this issue by arguing that there is a presumption against gifts.⁸⁶ This is surely incorrect; people

⁸² N Piska, 'Two Recent Reflections on the Resulting Trust' [2008] *The Conveyancer and Property Lawyer* 441.

⁸³ N Piska, 'Two Recent Reflections on the Resulting Trust' [2008] *The Conveyancer and Property Lawyer* 441 at 449. See for example, *Re Vinogradoff* [1935] WN 68.

⁸⁴ R Chambers, *Resulting Trusts* (OUP 1997) at 3.

⁸⁵ J Penner, 'Resulting Trusts and Unjust Enrichment: Three Controversies' in C Mitchell (ed), *Constructive and Resulting Trusts* (Hart 2010) at 238-241.

⁸⁶ R Chambers, *Resulting Trusts* (OUP 1997) at 11.

do not need to justify their gifts, as the Court of Appeal made clear in *Ogilvie v Littleboy*.⁸⁷

Even if we look past this fictional account of intention, Chambers also fails to explain why the ‘trust’ arises here when it does not arise for other types of ‘unjust enrichments’, including failed conditions. He focuses on an intention which relates to whether or not the parties intended the recipient to have the full benefits of ownership. It is similar to our control explanation; but our explanation does not require belief in a principle of unjust enrichment nor does it require us to invent intention. Intention merely obscures our view. There are many cases where resulting trusts do arise even though there was a clear intent to benefit, as for example *Re Abbott Fund Trusts* where money was collected for two elderly women, and the remaining amount was held under ‘resulting trust’ for the benefactors.⁸⁸

The Overlapping Explanation

Unfortunately, the search for principle has served to confuse this area of law. This is because academics and judges are only looking at intention when the real issue, it is contended, is the claimant’s control of the assets. It is, therefore, argued that resulting trusts are another example of the overlap between property and contract. In these cases, the factual elements are; title, transfer and under an agreement that the money or assets are to be used for a purpose. Although agreement is also required here, for

⁸⁷ *Ogilvie v Littleboy* (1897) 13 TLR 399 (CA).

⁸⁸ [1900] 2 Ch 326 (Ch).

the purposes of distinction we adopt the phrase control to describe this combination of contract and property. By making a transfer for a purpose, the control element remains with the transferor. This can be explained on the basis of what we learnt in Chapter 4. All titles derive from control, and in particular the first- in time approach. In a control trust, the claimant is the first in time, and when they transfer an asset to be used for a particular purpose, they retain partial control of the asset. By maintaining control when the transfer is made, the transferor shows that he still has title.

All of this makes sense once we realise that control and title are legally significant events. When they both lie in the hands of the claimant, the court will side with the claimant and not a recipient in the absence of any clear evidence of the actual nature of the transaction. The necessity of such a mechanism has already been witnessed in our discussion of self-declarations of trust. The courts are keen to ensure that those making such gifts have properly contemplated the consequences of this decision. Although it may simply be a case of coming at the same issue, but from different perspectives, the view presented here is that the courts are protecting title and control in these cases, and it is about preventing the transfer of these two with which we are concerned. It also explains cases such as *Vandervell v IRC*,⁸⁹ where clearly the claimant intended to make a full transfer to the recipient, with all the benefits that it entailed in that case. By including an option to repurchase the shares, he was not altering that *very* clear intention at all. He simply retained control over the assets, and additionally his title was the first in time.

⁸⁹ [1971] AC 912 (HL).

The same facts can explain some forms of ‘constructive trust’ as well. One such example is the case of an agent who mixes a principal’s money with his own, or siphons money away from his principal.⁹⁰ The principal will have given the money for a purpose, hence retaining control over the fund. The ‘trust’ is imposed even without any evidence that the principal has stated that the money is to be held under ‘trust’. We do not need to show any such intention; the consequence of prior title and continuing control gives rise to a continuing interest in the asset. This also obviously explains the correlation between ‘resulting trusts’ and gifts without any need to look for fictional intentions. An unfettered gift cannot be a resulting trust, unless the transferor has said that the money is to be used for a purpose. In this, we share Chambers’ conclusion that we have to look at what control has been placed on the received assets.⁹¹ Where we differ is that this analysis should be expanded to other payments including ‘mistaken’ transfers.⁹² As we saw in the previous Chapter, the added factor of carelessness weakens any claim for restitution, limiting the transferor to a simple debt claim. At this point, we can change sides and agree with Swadling that the element of control changes hands in a mistaken payment. It simply precludes any possibility of a ‘resulting trust’. This is why we used the very different term of specific restitution in Chapter 5, as a ‘trust’ like remedy for mistaken payments requires an act of appropriation by the defendant. It cannot be a control trust.

4. Overlap 3; the Bargain Trust

⁹⁰ *Henry v Hammond* [1913] 2 KB 515.

⁹¹ R Chambers, *Resulting Trusts* (OUP 1997) 148.

⁹² R Chambers, *Resulting Trusts* (OUP 1997) 130-131.

A similar type of trust, which again involves an overlap with property and contract, is the *Quistclose* trust.⁹³ This arises where money is transferred under a specific purpose; it recreates the control element, but also requires a clear agreement and bargain between the parties. The nature of this trust has been long debated, but our overlapping analysis provides a simple solution. Swadling, for example, has interpreted this trust as an express trust,⁹⁴ but he recognises that this interpretation is problematic since in many cases the purpose of the trust can be an abstract one. This is because the loan need not be made for the benefit of any individual. As Chambers notes, the prevailing view⁹⁵ is the one presented by Lord Millett in *Twinsectra v Yardley*.⁹⁶ When the money is paid over, the specific purpose restricts the use of the money meaning that the beneficial interest is never received by the borrower. This is part of a wider principle of ‘absence of intention’, meaning that full title was not intended to be in the hands of the recipient. In this context, this is slightly problematic as it presents the justification as a claimant-orientated reason for specific restitution. This hides the relevance of the initial agreement between the parties in the same way as ‘failure of consideration’ does. Yet the terms of the agreement are clearly relevant. Evidence of this is to be found in Lord Millett’s explanation that the *Quistclose* trust has a fiduciary character, which indicates that the other party must agree to the arrangement.⁹⁷ It is a bilateral arrangement, not one which is created merely by the specificity of the transferor’s purpose.

⁹³ *Barclays Bank v Quistclose Investments* [1970] AC 567 (HL).

⁹⁴ W Swadling, ‘Orthodoxy’ in W Swadling (ed), *The Quistclose Trust: Critical Essays* (Hart 2004).

⁹⁵ R Chambers, ‘Resulting Trusts’ in A Burrows and Lord Rodger (eds) *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006) at 248.

⁹⁶ [2002] UKHL 12, [2002] 2 AC 164.

⁹⁷ *Twinsectra v Yardley* [2002] UKHL 12, [2002] 2 AC 164 at 186. His Lordship’s view that fiduciary duties are accepted is evidenced in PJ Millett, ‘Restitution and Constructive Trusts’ (1998) 114 LQR 399 at 404-405; ‘every fiduciary relationship is a voluntary relationship. No one can be compelled to

It is not just the agreement element which alters the nature of the control trust. The fact that the arrangement is also made as part of a bargain between transferor and recipient adds a further element to the contract and property overlap.⁹⁸ The bargain element gives the recipient of the fund a *much* stronger interest in it than where it is received gratuitously. This can be important; as Birks explains, there are no examples where the transferor has been able to ask for the return of the money before the purpose fails depends on the terms of the contract.⁹⁹ This restriction was also recognised by Lord Millett who noted that ‘whether the lender can countermand the borrower's mandate while it is still capable of being carried out, must depend on the circumstances of the particular case.’¹⁰⁰ If this was an agreement trust or normal control trust, the transferor would presumably be able to request the repayment of the money even before the purpose can be carried out.¹⁰¹ Another factor, which indicates that this is distinct from overlaps which involve agreement but not bargain, is that the trust is not for the benefit of anyone in particular. If the purpose is to transfer the

enter into a fiduciary relationship or to accept fiduciary obligations, any more than he can be compelled to enter into a contract or to accept contractual obligations.’

⁹⁸ In *Twinsectra v Yardley*, Lord Millett indicated that a *Quistclose* trust would arise even in gratuitous transfers, [2002] UKHL 12, [2002] 2 AC 164 at 187. The only authority for this is an Australian decision, *Rose v Rose* (1986) 7 NSWLR 679, which on the analysis in this Chapter would be an express trust in any event. There are no English examples of *Quistclose* trusts where there has not been a bargain element.

⁹⁹ P Birks, ‘Retrieving Tied Money’ in W Swadling (ed), *The Quistclose Trust: Critical Essays* (Hart 2004) at 126. Also R Chambers, *Resulting Trusts* (OUP 1997) at 148.

¹⁰⁰ *Twinsectra v Yardley* [2002] UKHL 12, [2002] 2 AC 164 at 193.

¹⁰¹ This is due to the rule in *Saunders v Vautier*, (1841) 4 Beav 115, 49 ER 282, which permits a beneficiary to ask for the money when he has complete beneficial ownership. The absence of the power to bring the trust to an early end was one of the reasons for Ward LJ refusing to recognise the arrangement in *Clarence House Ltd v National Westminster Bank plc* [2009] EWCA Civ 1311; [2010] 1 WLR 1216 at 1233. An example of resulting trusts working in this way is *Nevill v Boddam* (1860) 28 Beavan 554.

money to a third party, such as the shareholders in *Quistclose*, they do not obtain a beneficial interest in the money.¹⁰²

Although we do not have sufficient space to discuss the issue, the role of agreement and bargain also explains a number of ‘constructive trusts’ which arise even where the beneficiary is *not* the person with the strongest title (the first-in time.) The commonest is the trust which arises under a specifically performable contract. This is a long recognised overlap between contract and property, fully supporting the arguments made in this section. This shows the importance of identifying the bargain element; it alters the dynamics of the contract and property overlap.¹⁰³ So, although the main elements of the trust are established, the additional facts of the agreement and bargain elements alter the way in which the courts treat the case. It is contended that this is entirely predictable after we consider the nature of these overlaps.

Summary on these Overlaps

Hopefully, the benefits of the overlapping analysis are fully apparent when considering the trust mechanism. We do not focus on legal principles or theory; we focus on facts. Facts are the all important element, and they are revealed by realist concepts. We have now reached a stage where we have identified most of the legally significant elements in private law. The overlaps of property and contract would be

¹⁰² Lord Millett in *Twinsectra v Yardley* [2002] UKHL 12, [2002] 2 AC 164 at 188-193.

¹⁰³ Lord Walker in *Jerome v Kelly* [2004] UKHL 25; [2004] 1 WLR 1409, at 1419-1420; ‘[i]t would therefore be wrong to treat an uncompleted contract for the sale of land as equivalent to an immediate, irrevocable declaration of trust (or assignment of beneficial interest) in the land. Neither the seller nor the buyer has unqualified beneficial ownership.’

difficult to deal with unless we understand that each concept represents a collection of facts. We have seen throughout that different combinations of facts lead to different outcomes; the agreement trust, control trust and *Quistclose* trust should not be regarded as the same because they all involve overlaps with contract and property. It should be remembered that we are looking at the factual matrix; it is the facts that determine the overlap and not the general concepts themselves. To use an analogy, facts are like cooking ingredients, and similar ingredients can be mixed in different ways to make different types of food. Thus all of these trusts represent different formulations of the contract and property overlap.

5. Constructive Trusts

Finally, we will consider one particular type of ‘constructive trust’. There is insufficient space to give a full account of all ‘constructive trusts’, but the argument presented here is that it would be unwise to assume that there is any single principle which can explain all of these cases. Those cases which can fall into the contract and property overlap can be regarded as different variations of the trust, but many others have very little to do with these core concepts. To illustrate this point, we will conclude by looking at the ‘common intention constructive trust.’ Our conclusion will be that there are simply some claims which do not really touch on *any* of our core concepts. Claims involving co-habitees involve many facts which are particular to those cases, and it should be remembered that this is why we did not consider them in our reliance-based land claims. In short, although our core concepts cover most of private law, they do not provide an exhaustive account of all legally significant facts.

Unjust Enrichment Analysis

The relationship between ‘constructive trust’ and unjust enrichment is one that has long been recognised in the United States.¹⁰⁴ The unjust enrichment analysis regards this ‘trust’ as a response rather than a substantive source of rights. According to Krull, for example; ‘[the c]onstructive trust is a metaphorical, shorthand description of a set of remedial possibilities.’¹⁰⁵ The unjust enrichment approach favoured by academics such as Birks,¹⁰⁶ Chambers¹⁰⁷ and Smith¹⁰⁸ contends that the ‘constructive trust’ is, in some cases, used as a mechanism for preventing unjust enrichment. Birks argued that trusts could be imposed to prevent unjust enrichment, as in cases of mistake or failed conditions.¹⁰⁹ We dealt with the main thrust of these arguments in Chapter 5.¹¹⁰ Although Etherton has attempted to explain claims involving co-habiting couples on the basis of unjust enrichment, few unjust enrichment scholars would agree with this analysis.¹¹¹ A very simple reason for this is that if this was the basis of the claim, the ‘resulting trust’ analysis would be more appropriate as unjust enrichment fails to explain why a claimant can have a stake in the family home which is greater than any benefits received by their partner. The more significant problem is that in cases such

¹⁰⁴ JB Ames, *Lectures on Legal History* (Harvard UP 1913); A Kull, *James Barr Ames and the Early Modern History of Unjust Enrichment* (2005) 25 OJLS 297 at 301-302.

¹⁰⁵ A Kull, ‘Deconstructing the Constructive Trust’ (2004) 40 Can Bus LJ 358 at 360.

¹⁰⁶ P Birks, ‘Overview: Tracing, Claiming and Defences’ in P Birks (ed), *Laundering and Tracing* (OUP 1995) at 317.

¹⁰⁷ R Chambers, *Resulting Trusts* (Clarendon Press 1997) at 107.

¹⁰⁸ L Smith, *The Law of Tracing*, (Clarendon Press 1997) at 300.

¹⁰⁹ P Birks, *An Introduction to the Law of Restitution* (rev edn, Clarendon Press 1989) at 379 and 225-226.

¹¹⁰ See text at n 73 in Chapter 5.

¹¹¹ T Etherton, ‘Constructive Trusts: a New Model for Equity and Unjust Enrichment’ (2008) 67 CLJ 265 at 277. M McInnes ‘Unjust Enrichment and Constructive Trusts in the Supreme Court of Canada’ (1998) 25 Manitoba LJ 513 at [39].

as *Eves v Eves*,¹¹² the landowner receives no benefits at all under the arrangement. Another analysis is required.

Common Intention

The ‘common intention constructive trust’ (CICT), is concerned with the rights of co-habiting couples.¹¹³ Unlike any of the above situations, the principle does not require any transfer of assets, neither does it require any declaration or bargain. Applying a factual analysis, we can see that the core concept consists of co-habitation and a long-term commitment to land, with one of three additional factual elements required; either an express declaration to share the land, direct financial contributions, or (as it was argued in the previous Chapter) the provision of valuable services.¹¹⁴ Apart from the fact that the claim involves an ‘asset’ in the form of the house, there is very little overlap with the trust mechanism. We have gone so far from our overlap with contract and property that we are left with an altogether different beast which does not appear to be a trust at all. At present, the orthodoxy is that the CICT is created when two parties are co-habiting. There are two routes to achieving this claim.¹¹⁵ Firstly, there is the express variety, where an ‘intention’ to share the property is demonstrated through either a shared title to the land or by an oral declaration. In the absence of this, it is necessary for there to be a direct financial contribution to the purchase of the property.

¹¹² [1975] 1 WLR 1338 (CA).

¹¹³ S Greer and M Pawlowski, ‘Constructive Trusts and the Homemaker’ (2010) 22 Denning LJ 35.

¹¹⁴ See text at n 147 in Chapter 6.

¹¹⁵ *Lloyds Bank v Rosset* [1991] 1 AC 107 (HL) at 133.

If there is any area of law which demonstrates the problems with a formalist and doctrinal approach it is the CICT. The very nomenclature of this claim suggests an intention that simply does not exist. The Law Commission has already concluded as such; '[i]t is widely accepted that the present law is unduly complex, arbitrary and uncertain in application. It is ill-suited to determining the property rights of those who, because of the informal nature of their relationship, may not have considered their respective entitlements.'¹¹⁶ Fox has also noted that the rules have been developed to protect the sanctity of the family home. Essentially, this is an issue of social policy, and thus raises political issues such as whether the courts should protect unmarried couples in the same way as married couples.¹¹⁷ The trust concept, and 'intention', do little to assist in describing these cases. In particular, in the dissenting judgment of Lord Neuberger in *Stack v Dowden*,¹¹⁸ he criticised the majority for 'imputing' intention and not restricting their analysis to 'inferring' intention when it came to quantifying the interests of the parties. The accusation of 'imputing' intention seems unconvincing in the light of the Law Commission's view.¹¹⁹ The courts have, arguably, been 'imputing' intentions in this area from the very beginning. A more realistic analysis is desperately needed. Further, McFarlane's suggestion that we adopt 'proprietary estoppel' to explain these cases would either require a narrower approach for claims of co-habitation, or would require us to stretch 'proprietary estoppel' to the

¹¹⁶ Law Commission, *The Law Commission Eight Programme of Law Reform* (Law Com No 274, 2001) at 7.

¹¹⁷ L Fox, 'Creditors and the concept of "family home": a functional analysis' (2005) 25 *Legal Studies* 210.

¹¹⁸ [2007] UKHL 17, [2007] 2 AC 432 (HL).

¹¹⁹ [2007] UKHL 17, [2007] 2 AC 432 (HL) at 472.

point where we would undermine the developing body of predictable decisions which are slowly being built up by the courts.¹²⁰

Expressions of Sharing

The starting point for the CICT is set out by Lord Bridge in *Lloyds Bank v. Rosset*.¹²¹ There were, accordingly, two ways of establishing this interest; express or inferred ‘intention.’ This ‘express’ declaration is very different from that required for normal trusts, as once it is proved that the statement is made it is sufficient and it is not necessary for the words to be repeated as we saw in *Paul v Constance*.¹²² For example, in *Eves v Eves*¹²³ the husband had made the statement that the house was to be shared, but the subjective intention was to avoid registering the property in the name of his partner. Similarly, in *Grant v Edwards*,¹²⁴ the trustee had refused to have both names on the title deeds using the excuse that it could jeopardise the other parties’ divorce proceedings. This was approved of as a perfect example of an express common intention by the House of Lords in *Lloyds Bank v. Rosset*.¹²⁵ Clearly this was not the owner’s actual intent, and we are dealing with declarations in an entirely different way than they are dealt with outside of this particular context.¹²⁶ It is another example of a ‘benevolent construction’. The real ‘fact’ appears to be the occurrence of a statement by the landowner that the property is to be shared.

¹²⁰ B McFarlane, *The Structure of Property Law* (Hart 2008) at 774-782.

¹²¹ [1991] 1 AC 107 (HL).

¹²² [1977] 1 WLR 527 (CA).

¹²³ [1975] 1 WLR 1338 (CA).

¹²⁴ [1986] Ch 638 (CA).

¹²⁵ [1991] 1 AC 107 (HL).

¹²⁶ The express common intention is actually quite rare, although one recent example is *Parris v Williams* [2008] EWCA Civ 1147.

Financial Contribution

The alternative path to a CICT is inferred intention, which is purportedly established through the conduct of the parties. Once again there is no observable criterion that reflects intention; the parties have rarely even contemplated whether the property will be shared. Financial contributions to the purchase of the property will usually be enough to infer the mutual intention to share the property.¹²⁷ This is very similar to the approach of the courts in relation to control (resulting) trusts, and indeed in the past the two approaches were thought to be interchangeable.¹²⁸ The distinction lies in the fact that under a CICT, the interest is not specified by the amount which has been contributed, but under a control trust the amount is determined by the levels of contribution. This merely demonstrates, even further, that the patterns we saw in relation to the contract and property overlaps do not apply in the context of co-habiting couples.

Providing a Valuable Contribution to the Family Unit

Finally, after the last chapter, we can add the third route to the CICT, which has not been explicitly recognised at the moment, but which explains the cases we saw in the

¹²⁷ Lord Bridge; ‘direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage instalments, will readily justify the inference necessary to the creation of a constructive trust. But, as I read the authorities, it is at least extremely doubtful whether anything less will do.’ *Lloyds Bank v Rosset* [1991] 1 AC 107 (HL) at 133.

¹²⁸ In fact in *Stack v Dowden*, Lord Neuberger preferred the application of a resulting trust analysis.

previous chapter. This is where the claimant has not made a financial contribution, but has made a valuable contribution to the family unit by giving up time and effort in either helping in a business or looking after the landowner.¹²⁹ Thus, we see a concept which has its own factual elements, but also overlaps with the requirement of co-habitation which is required for the orthodox CICT. Support for the proposition that the provision of valuable services should also be sufficient is indicated by the judgment of the Privy Council in *Abbott v Abbott*,¹³⁰ where Baroness Hale delivered the judgment of the Board. The confusion arises from the fact that Baroness Hale first referred to Lord Walker's obiter comments in *Stack v Dowden*¹³¹ that the court *should* acknowledge that indirect contributions can establish the requisite intention. Sir Terence Etherton has commented on this decision and concluded that *Abbott v Abbott* confirms this part of Lord Walker's judgment.¹³² Baroness Hale also made reference to an excerpt from her own judgment in *Stack v Dowden*, which was only concerned with the quantification of the interest; '[t]he law has indeed moved on in response to changing social and economic conditions. The search is to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it.'¹³³ Thus it seems that the 'holistic approach' advocated for quantifying the interests of the parties may also be relevant in establishing a beneficial interest.¹³⁴

¹²⁹ Eg *Wayling v Jones* (1995) 69 P & CR 170 (CA).

¹³⁰ [2007] UKPC 53.

¹³¹ [2007] UKHL 17, [2007] 2 AC 432.

¹³² T Etherton, 'Constructive Trusts: a New Model for Equity and Unjust Enrichment' (2008) 67 CLJ 265 at 277.

¹³³ *Stack v Dowden* [2007] 2 AC 432 (HL) at 455.

¹³⁴ R Lee, '*Stack v Dowden*: A Sequel' (2008) 124 LQR 209 at 211.

Given the tentative proposals to extend the law in this area, coupled with our analysis of *Wayling v Jones*,¹³⁵ *Ottey v Grundy*¹³⁶ and *Campbell v Griffin*,¹³⁷ the sensible analysis is that the courts have already taken this step, but that it will primarily be available where the claimant has provided something valuable either to a business or in looking after the landowner. As noted by Dixon the possibility for legislative intervention appears remote.¹³⁸ Whatever the merits of any new changes in this area, our project is about describing the law. For the law as it stands, this analysis holds the most descriptive account. Things may certainly change after the Supreme Court hears *Kernott v Jones*¹³⁹ as it is likely that the Supreme Court will take the opportunity to clarify this area of law.¹⁴⁰ It is, therefore, *predicted* that the grounds for the CICT will be extended to include valuable non-financial contributions to the family unit. The decision of the Supreme Court may be a good test to see how successful this thesis has been in predicting the development of this altogether distinct, yet very important, concept. One should, however, always remember the point made at the end of chapter 2; the law is unpredictable, but we can simply do our best to predict it by looking at what has been decided in the past.

6. Conclusion

¹³⁵ *Wayling v Jones* (1995) 69 P & CR 170 (CA).

¹³⁶ *Ottey v Grundy* [2003] EWCA Civ 1176, [2003] WTLR 1253.

¹³⁷ *Campbell v Griffin* [2001] EWCA Civ 990, [2001] WTLR 981.

¹³⁸ M Dixon, 'Editor's notebook (March/April)' [2011] *The Conveyancer and Property Lawyer* 87 at 87.

¹³⁹ [2010] EWCA Civ 578.

¹⁴⁰ M Dixon, 'Editor's notebook (March/April)' [2011] *Conveyancer and Property Lawyer* 87 at 87.

The trust raises many issues when it comes to classifying the private law. For our analysis most 'trusts' are simply different combinations of the overlap between property and contract. Nonetheless, the different combinations lead to different results, and it is the *facts* of the cases which determine the nature of these overlaps. Attempts to explain the basis of *all* 'trusts' have proven unsuccessful and misguided. Breaking down the law of trusts is the only way to achieve any descriptive account of the law. We did this by setting out three main types of overlaps; the agreement trust, the control trust and the bargain trust. These correlate somewhat broadly to the existing types of trust; agreement trusts correlate with most 'express trusts', control trusts correlate with 'resulting trusts', and the Quistclose trust correlates with the bargain trust. By doing so, the overlaps between property and contract emerge. The agreement trust is exemplified by a transfer of an asset to a trustee who agrees to control it for someone else. A control trust uses the same ingredients, but places control in the hands of the transferor. The nature of the control trust only changes when the further element of bargain comes into play, and brings us closer to contract in our overlapping scheme. The search for a basis for constructive trusts takes us far from our core concept of trust. It is questionable whether anything other than confusion is created by the use of the word 'trust' in this context. Only by doing this can we begin to classify the trust in a useful and descriptive way, and in turn begin to analyse the cases of 'constructive trusts'. If we fail to do this, we will simply continue to hide the true function and application of the trust in the search for a coherent principle that simply cannot be found.

CHAPTER 8: CONCLUSION

At the start of the thesis it was stated that there were two primary aims which we were seeking to accomplish. First, our aim was to show that legal analysis must be rooted in reality, and that this can only be achieved through description and not prescription. Secondly, the attempt has been made to construct a conceptual approach which allows us to be as accurately descriptive as possible. We should not fool ourselves in thinking that any description of the complex and relatively unstructured system of private law claims will provide us with a neat and small number of discrete categories. Any attempt to construct a system of classification which presents a small number of discrete categories will lose the flavour, nuances and important facts which characterise English private law.

The overlapping of legal concepts is seen by many to undermine any system of classification. Classification is regarded as a process of systemisation: claims have to fit into one category, or another. Categories are exclusive, and they do not sit well with overlaps. In Chapter 1 we argued that there is little justification for such an inflexible approach. There are concerns about restricting the development of private law, and indeed its inherent dynamism. *Categorisation* is simply another method of repeating these problems. However, classification need not mean categorisation. A *conceptual* approach recognises that concepts are merely collections of legally

significant facts. Those facts are not exclusive to any particular concept, and different formulations of these facts lead to different outcomes.

In Chapter 2, we moved on to look at the importance of methodology in classifying private law. In particular, our concern was with the integration of descriptive, prescriptive and interpretative accounts of the law. It was concluded that classification must be a process of description, which can then allow an open debate about the prescriptive elements of the legal system. It was argued that we should avoid attempts to reduce private law into single 'causative events'. Claims can arise because of a number of different facts, and simply because two claims involve the *fact* of consent can mean that they overlap, but it does not mean that they can or should be grouped together. The express trust is one particular example of a concept which does not neatly fit into contract or property, and we would lose the essence of this concept if we overlook this. The thesis, as it should be apparent, was inspired by the debate which was triggered by Birks' attempt to classify private law. Although it should also be apparent that the thesis is diametrically opposed to the methods applied by Birks, this is in no way meant to undermine his contribution to our understanding of private law. Without Birks' work it is doubtful that this project would have been felt necessary. Chapter 2 set out why this thesis has adopted a very different methodology to that of Birks. It was argued that it is not possible to construct a system of classification which is intended to provide coherence and consistency. Unless we are actually going to change the substance of the law, providing broad generalities does more harm than good. We conceal the complexities, and make law even less

accessible to those who are not versed in the world of ‘lawyering’.¹ The answer to doctrines such as unconscionability is not to reject them in favour of technical legal principles,² but to take a closer look at the facts of each decision. One of the biggest impediments to this is the idea that law is ‘internal’ and that only a limited range of facts are relevant in the identification of legal principles. Thus, unjust enrichment lawyers tell us that we can only look for enrichment, at the expense of the claimant and consequent upon one of the specific unjust factors. The types of interests at play (whether that is property, money, services or trust interests) fall outside of this narrow definition of what is or is not law and, therefore, become treated as though they are irrelevant facts. The relevance of these facts is demonstrated by a close analysis of the case law. That is why the overlapping approach is to be preferred, as it allows us to tailor our general concepts when other significant facts arise.

This led to our adoption of a realist approach in Chapter 3. Realism, in the tradition of Llewellyn, can be reconciled with a conceptual approach so long as we adopt the appropriate methodology. It is, therefore, necessary to adopt concepts that identify socially observable facts, which provide guidelines for the decisions of the courts. This was only possible by rejecting the fact-sceptic form of realism and adopting the rule-sceptic form of this approach to legal reasoning. The concern highlighted towards the end of the chapter was that we cannot just focus on critiquing the classification of others, especially if we think that classification is at all a worthwhile exercise. Since, in our view, classification can be useful if used in the right way, it was then argued

¹ J Dietrich, ‘What is “Lawyering”? The Challenge of Taxonomy’ (2006) 65 CLJ 549 at 575.

² To accept, without further articulation, that the change of position defence is simply a matter of whether the change means that it is inequitable or unconscionable or unjust to deny restitution would be to take us back to the dark ages of the subject.

that an attempt to construct an overlapping approach would avoid the errors of Birks and develop a means for predicting the facts and patterns of English private law.

To establish an overlap, it is necessary to have the framework within which these overlaps occur. Taking the lead from Llewellyn and our Roman forefathers, it was concluded that this framework could be established through three core concepts. This was achieved through the redefinition and refinement of the concepts of property, contract and tort. This leaves several gaps in our private law. Those gaps can then be filled with our overlapping concepts. Therefore, it is possible to adopt additional concepts to explain those areas of the law that are not caught by the core concepts of property, contract and tort.

In Chapters 5-7, those concepts were monetary transfers, estoppel and express trusts. They share similarities with our core concepts; however, they play two important roles. For our core concepts to be descriptive concepts, they must be kept as narrow as possible. The remaining parts of our private law must still be accounted for: which is why it is important to develop overlapping concepts. The first main overlap was with money, which formed a weaker form of property due to the fact that most transfers involve intangible interests, and money is also, itself, legally significant. However, the Chapter also showed that it was not possible to construct any general rules which could apply to different types of money claims. This complexity is concealed by most approaches, and it was argued that the overlapping analysis makes the topic manageable whilst also providing the key element of predictability. Similarly, we provided a framework for reliance-based claims which recognised the need to tailor this claim depending on the nature of the overlap. So different types of reliance-based

claim can be seen when it overlaps with property, contract and tort. Finally, we saw the trust mechanism, which stands between property and contract. The main examples of trusts are different formulations of this overlap. The last issue we looked at was co-habitation claims, which have up until now been classified as ‘constructive trusts’. It was argued that these claims do not fit within the property and contract overlap. The benefit of this analysis is in recognising that we cannot treat these claims in the same way that we treat other private law claims. The overlapping analysis provides insights into these various branches of law, but it also begins to identify the patterns of private law. On that basis, an overlapping approach assists in classifying private law.

This is why a conceptual approach has been adopted in this thesis. There are no simple guides or rules for private law. Private law is inherently complex, and there are numerous facts which determine the outcome of cases. It is impossible to bring together and capture every single fact which may or may not be relevant in any given case. This is only a problem for classification if we are under the misapprehension that classifying the law will provide the solution to even the most complex of cases. So instead our goals must be tempered with some realism. All that we can do is look for the core rules in our legal system, and try to identify patterns of behaviour. What we see in this conceptual approach is that legal concepts are expository devices that contain a number of important facts that are important in determining private law liabilities. Different combinations of these facts will likely lead to distinct liabilities, and, therefore, we must adopt separate conceptual approaches for these claims. We must move away from reductivist accounts of private law, as they only serve to hide and obfuscate the various elements that constitute our private law system.

To conclude, it should never be assumed that any classification of private law can be expected to answer the difficult questions posed by some of the more complex cases which are dealt with by the courts. The thesis of the overlapping of legal concepts approach is that classification merely assists in identifying facts and patterns. Those patterns are the best starting point in identifying what decisions the courts will make. A system of classification does no more than that. To quote Pound once more; ‘I doubt whether a classification is possible that will do anything more than classify.’³

³ R Pound, ‘Classification of Law’ (1924) 37 Harvard L Rev 933 at 938.

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