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At the Expense of": Linking Claimant and Defendant in the Law of Unjust Enrichment

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Abstract:

This paper argues that, accepting the division of unjust enrichment claims into enrichment by rights and by value, attribution mechanisms in proprietary restitutionary (eg rescission) and personal restitutionary claims are based on failure to realise exchange potential either of the value of a thing or rights to the thing. It suggests both can therefore be based on corrective justice as corrective justice is concerned with intentional transactions in which the defendant receives value or rights the exchange potential of which are not properly realised or realisable for the claimant's benefit. It further argues that recent case law in the Supreme Court supports this view by requiring intentional transactional links between claimant and defendant and that case law in both proprietary (tracing) and personal cases is coalescing around this understanding. The view therefore that a but-for link between claimant and defendant suffices in unjust enrichment claims is therefore wrong.

Key Words:

Unjust enrichment; at the expense of; tracing; corrective justice; exchange potential

All unjust enrichment claims in English law must meet a number of probanda. The defendant must be enriched, must be enriched "at the expense of" the claimant, and there must be an

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unjust factor.[1] That establishes a claim, but it might be either a personal claim in unjust enrichment, one where the claimant receives no insolvency protection or a proprietary claim, where he does. The paper examines in depth the second of the probanda and attempts to answer the following question: What is the test in English law for attributing the defendant's gain to be "at the expense of" the claimant, and to what extent is that affected by whether the remedy sought is personal or proprietary? A caveat is needed here. The connection in services cases may be different. A request for the service to be done is often the link.[2] That does not seem to be the case in non-services cases. As explained later, we do not examine services in detail here.

Looking at this issue in depth is easily justified. "At the expense of" remains under-theorised, despite the recent publication of a – indeed the only - major book-length treatment of the subject by Eli Ball[3] in which he provides the best current theoretical account of why a corrective justice view of unjust enrichment requires a counterfactual account of "at the expense of." Yet, even so, the fact we still use such an ugly and inelegant name gives away the fact that it is so far little understood. The easy, but incomplete, explanation is that we are trying to attribute a link between an enrichment or gain in the hands of the defendant and a loss in the hands of the claimant; in places therefore we will also refer to the rules on "at the expense of" as the attribution rules. There was also until recently very little case law on the requirement.[4] Recently there has been a flurry of case law, including in the Supreme Court.[5]

Three interrelated questions arise. The first is whether and how the claimant and the defendant are linked at all. Some authors claim that a direct link must be established and

[1] There is some dispute about this, but there appears in the English courts little appetite to move across to a more Civilian absence of basis approach. See D Sheehan 'Unjust Factors or Restitution of Transfers Sine Causa' [2008] Oxford University Comparative Law Forum 1

[2] *Falcke v Scottish Imperial Insurance* (1886) 34 Ch D 234

[3] E. Ball *Enrichment at the Claimant's Expense* (Hart Oxford 2016)

[4] C. Mitchell, P. Mitchell and S. Watterson (eds), *Goff and Jones: The Law of Unjust Enrichment* (9th edn Sweet and Maxwell London 2016) para 6.02; See eg *Kleinwort Benson v Birmingham CC* [1997] QB 380, 400

[5] *Menelaou v Bank of Cyprus* [2015] UKSC 66; *Investment Trust Companies v HMRC* [2017] UKSC 29, [2018] AC 275; *Lowick Rose v Swynson Ltd* [2017] UKSC 32; *Prudential Assurance Co Ltd v HMRC* [2018] UKSC 39, [2018] 3 WLR 675

indirect enrichment cannot support an unjust enrichment claim, unless an exception applies; some authors claim any counterfactual link will do; so long as the recipient would not have received the enrichment but-for the payment by the claimant liability potentially exists. This raises the question as to how extensive relief should be and from a legal strategy point of view, each approach gets roughly the same outcome – either one begins with a restrictive general rule and then creates exceptions or one begins expansively and adds restrictions.[6] The second question is whether the enrichment or gain is too remote; after all it cannot be every gain in the hands of a qualifying recipient, however far removed which is recoverable.[7] The third question is whether the gain and loss must be equivalent, or whether it matters that the claimant has passed on the loss to a third party, which is itself linked to the question of the availability of passing on defences.[8]

The paper concentrates on the first question but the position is a complex one. Recently the Singapore Court of Appeal in *Wee Chiaw Sek Anna v NG Li-Ann Genevieve*[9] has confirmed that – at least in Singaporean law - transactional tracing links are enough to show that the "at the expense of" requirement has been satisfied. This is important. It might be thought to assume proprietary claims can be unjust enrichment claims, and controversy over that is another factor. There is particular controversy over the relationship between trusts and unjust enrichment and whether the beneficiary's rights against a third party are based in unjust enrichment,[10] although our argument does not turn on this; it will suffice if less (but not un-)controversially rescission[11] and subrogation claims are so based. Rescission after all responds to mistake, duress and undue influence which are accepted unjust factors. Unjust enrichment explanations therefore focus on

[6] A. Burrows, *The Law of Restitution* (3rd edn Oxford University Press Oxford 2011) 62
[7] D. Sheehan 'Subtractive and Wrongful Enrichment: Identifying Gain in the Law of Restitution' in C. Rickett (ed) *Justifying Private Law Remedies* (Oxford University Press Oxford 2008) 331
[8] On which see eg M. Rush, *The Passing On Defence* (Oxford University Press Oxford 2009)
[9] [2013] SGCA 36
[10] *Foskett v McKeown* [2001] AC 102 says not, but that high authority is not universally accepted as correct. Goff and Jones (n 4) paras 8.152-8.154.
[11] See *Whittaker v Campbell* [1984] QB 318

the critical issue why rescission or restitution is ordered against the defendant.[12] Yet the defendant makes restitution not of value but of a specific right in these cases and this engages the distinction between enrichment by value and enrichment by rights raised by Chambers and Lodder, which is a distinction, albeit controversial, we accept.[13] The paper also accepts the broad thrust of Eli Ball's reasoning as to why the interest unjust enrichment protects is freedom of exchange capacity, to choose to exchange or not to exchange and the link he posits with corrective justice. However, the paper suggests some changes to the theory to better fit current English law and argues that these, coupled with the division of enrichment by rights and by value, allow for a redevelopment of Ball's views to justify the inclusion of proprietary and tracing claims in unjust enrichment, which he himself rejected. This is because the division into enrichment by value and by rights allows us to see how exchange capacity is engaged in both cases and provides an argument in favour of treating both types of case within unjust enrichment.

There are three advantages to adopting the view taken here over the view that a counterfactual connection suffices – one practical and two theoretical. Practically it enables us to explain why incidental benefits do not attract relief[14] and where the line between recoverable and incidental benefits lies. This in turn allows us better, more easily and coherently to control the structuring of recovery to prevent parties' avoiding risks, such as insolvency risk, they have taken on. Authors, such as Ball, who rely on the sufficiency of a counterfactual link have greater difficulty in explaining non-recovery of incidental benefits. Ball at one stage rested non-recovery on the idea of the abandonment of such benefits.[15] This is implausible.

[12] E Bant and J Edelman *Unjust Enrichment* (2nd edn Hart Oxford 2016) 42

[13] R Chambers 'Two Kinds of Enrichment' in R Chambers, C Mitchell and J Penner (eds) *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press Oxford 2009) 242, 277; A Lodder *Enrichment in the Law of Unjust Enrichment and Restitution* (Hart Oxford 2014)

[14] Something that Rob Stevens argues is not done by current thinking. R Stevens 'The Unjust Enrichment Disaster' (2018) 134 Law Quarterly Review 574

[15] E Ball 'Abandonment and the Problem of Incidental Gains in the Law of Restitution of Unjust Enrichment' [2011] Restitution Law Review 49

Theoretically the view adopted here enables us to do two things. First, it enables us to more clearly link unjust enrichment claims with ideas of corrective justice, which are frequently, but not universally, held up as explaining or instantiating unjust enrichment. Indeed the Supreme Court itself in *Investment Trust Companies v HMRC* suggested that unjust enrichment was based on corrective justice.[16] Corrective justice provides for reasons to allocate back. It depends on that allocation back being the next-best thing to the mis-transfer never having happened. This is important; for corrective justice to be plausibly relevant to unjust enrichment, the attribution ("at the expense of") rules must reflect the linkage corrective justice requires.[17] Secondly, the view taken here, because of that link, and as noted, indicates important synergies between personal and proprietary claims. Proprietary claims can in fact, although this is not often acknowledged, be fitted into a corrective justice framework.

In order to substantiate this argument, the paper is divided into two. The first part examines the purpose of the attribution rules and links this to corrective justice. It explains how corrective justice considerations should be seen as relevant in both personal and in proprietary claims. It does so by reference to the idea of a transaction, and debunks references to transfers of value as misguided, and argues that therefore a causal connection between the receipt of the defendant and the loss of the claimant is insufficient in theoretical terms. The second main section examines the case law and in particular some important recent Supreme Court decisions. It is those decisions, which drive the law towards the acceptance of the transactional view of "at the expense of," and the conclusion that the but-for causal connection is insufficient.

[16] [2017] UKSC 29, [42]
[17] Ball (n 3) 44

(I) "At the Expense of" and Corrective Justice

Any category of law, be it unjust enrichment or any other, requires that there exist a commonality between the instances it is said to comprise of that brings a cogency and coherence to the category.[18] This brings us to the law's underpinning normative rationale. In any area of law that cogency and coherence is likely to be found in the answer to the question: what is this area for? In the context of unjust enrichment therefore the rules and the principles underpinning the "at the expense" requirement must be consistent with what we are ultimately attempting to achieve and with its normative rationale.[19] The rules should not exclude cases which the rationale dictates be included; they should not be under-inclusive. Nor should they be over-inclusive and go further than the rationale dictates.

For many authors – although not all – corrective justice is an important part of the underpinning rationale for an unjust enrichment claim. As a formal structure of justice, corrective justice does not tell us what needs to be corrected. We still need to identify the interest that a given area of law protects. Corrective justice, however, refers to bilateral situations where the claimant seeks to correct something that has gone awry vis-à-vis the defendant, as opposed to distributive justice which is said to examine the appropriateness of the allocation of resources between multiple parties.[20] In fact this is a crude distinction. Distributive justice could in some cases be bilateral.[21] Still this gives a flavour of the distinction (corrective justice is not multilateral) and a link between unjust enrichment and corrective justice does seem plausible.[22] Something has gone wrong and should be corrected. Lionel Smith was one of the first authors to recognise explicitly that corrective justice is an important

[18] R. Sutton, 'Enigma and Coherence' [2009] Restitution Law Review 1
[19] S Watterson 'Direct Transfers in the Law of Unjust Enrichment' [2011] Current Legal Problems 425, 438
[20] D Miller 'Justice' in *Stanford Encyclopaedia of Philosophy* at https://plato.stanford.edu/entries/justice/#CorrVersDistJust (2017)
[21] See J Gardner 'Corrective Justice, Corrected' (2012) 12 Diritto e Questioni Pubbliche 9
[22] Ibid 34-35

part of the explanation for liability in unjust enrichment.[23] Controversy still exists. Smith also contended that proprietary claims are not unjust enrichment claims because they do not depend on a transfer of value;[24] consequently they do not depend on corrective justice. This section, however, argues that proprietary claims can be consistent with corrective justice. It is divided into two. In the first we examine the relationship between corrective justice and personal claims. In the second we examine the link between proprietary claims and corrective justice.

A. Personal Unjust Enrichment Claims, Enrichment by Value and Corrective Justice

Zoe Sinel[25] argues that corrective justice simply provides reasons for allocating back. For this to make sense as an intrinsic theory – a theory that explains private law by its own lights rather than via an external viewpoint (law and economics say) - the explanation for the remedies must lie in an understanding of those original obligations and their rationale.[26] In other words the reason why we provide the particular remedy must be related to the reason why we have the obligation in the first place and hence related to the substantive interest being protected. Essentially she argues the reasons for the original obligation – whatever they might have been - remain even after my failure to conform and dictate what I ought to do next – that being the next best thing to what I should have done in the first place.[27] If an allocation of resources back to the claimant is the next best thing to original conformity and if that allocation back is entailed by the original reasons for conforming in the first place, an intrinsic account of remedies entails that the allocation back is the appropriate remedy.[28] Further that allocation back is in

[23] See eg LD Smith, 'Restitution: The Heart of Corrective Justice' (2001) 79 Texas Law Review 2115
[24] LD Smith 'Property, Unjust Enrichment and the Structure of Trusts' (2000) 116 Law Quarterly Review 412, 419-420
[25] Z. Sinel, 'Concerns about Corrective Justice' (2013) 26 Canadian Journal of Law and Jurisprudence 137, 152
[26] Ibid 138, 148
[27] Ibid 153-154
[28] Ibid 153

accordance with reasons of corrective justice. Specifically therefore Sinel argues in the context of unjust enrichment that there has been a misallocation of value. To refuse to allocate the mis-transferred value back is to act against reasons of corrective justice.[29] This seems correct, not least because of the tight connection posited between the interest we seek to protect and the remedy by which we protect it. It does not, however, tell us either what counts as a **mis-**allocation or between which parties the value has been mis-**allocated,** or, more basically, what it means to **allocate** value at all.

In essence we need to understand what interest the law of unjust enrichment protects if we are to explain why "value" is allocated back. Two important books on respectively "at the expense of" and attribution discuss the idea that unjust enrichment can be said to protect an interest in free exchange:[30] the free decision to, or not to, exchange. This is a controversial claim and not one widely accepted by the literature. However, a number of points can be made. First a full and complete argument in favour of this position is beyond our scope. This article, as noted in the introduction, accepts the basic thrust of Eli Ball's reasons for identifying free exchange as the interest at stake in these claims. Without proving it categorically, we can though illustrate the importance of free decision-making by noting that mistake claims, duress claims and undue influence claims are all for example, albeit in differing ways, concerned with the claimant's free choices: to transfer or not, to exchange or not. Secondly, it is important to remember that exchange also requires a conception of value. The interest we are protecting in unjust enrichment is therefore that of exchange capacity – the capacity of a person by his free will to exchange X (or more precisely a right to X) for Y and by doing so realise the value of X, or choose not to.[31] An unjust enrichment claim is justified by the fact that there has been no

[29] Ibid 153
[30] Ball (n 3) 35-44; Lodder (n 13) 12-22
[31] Ball (n 3) 36-38 – a caveat to this exists below.

free exercise of exchange capacity by the claimant.[32] Even mistaken gifts therefore count. There was no intended exchange, but instead a defective exercise of the choice not to exchange.

Two difficulties. Firstly, what about bank transfers where no asset or right changes hands? To have money is to have a right in respect to the store of value it represents.[33] This is true whether we are concerned with the transfer of corporeal or incorporeal money. In the latter therefore the value of D's right is increased by C's action in paying. Further, exchange capacity engages the parties' intentions. Functionally the claimant's intentions are the same where he instructs the bank to make a transfer and where he passes notes and coins to the defendant and so the interest in free exchange is still engaged. The second difficulty concerns services; shoe cleaning has a market exchange value. We excluded services in the introduction in part because a request is frequently required to avoid the problem that if I clean your shoes what else can you do but put them on?[34] It may be possible to fit services into the framework, but there will be differences in the analysis and work would need to be done to justify the extra request requirement. For now we exclude services.

In contrast to this position – that exchange capacity is the key - unjust enrichment is frequently described as responding to a transfer of value. Weinrib does so.[35] The Supreme Court has done so.[36] This is wrong. Value, or more precisely relational value, only makes sense in the context of exchange. It is an abstract standard for the comparison of qualitatively different things in quantitatively equivalent ways. Relational value is quite different from what Ball calls idiosyncratic value. That might include things like aesthetic value, the pleasure a person might derive from a picture on the wall,[37] or the value of friendship. We are not

[32] D Sheehan 'Mistake, Failure of Consideration and the Planning Theory of Intention' (2015) 28 Canadian Journal of Law and Jurisprudence 155, 165
[33] Ball (n 3) 100
[34] Based on a famous dictum of Bowen LJ in *Falcke v Scottish Imperial Insurance Co* (1886) 34 Ch D 234
[35] E Weinrib, 'The Normative Structure of Unjust Enrichment' in C. Rickett and R. Grantham (eds), *Structure and Justification in Private Law* (Oxford University Press Oxford 2008) 21, 28
[36] *ITC v HMRC* [2017] UKSC 29
[37] Ball (n 3) 26-27

concerned with that and so we refer simply to value instead of relational value. We realise such value by exchange. Without the ability to exchange, value cannot be realised. It does not exist as a separate thing, apart from its capacity to be realised. We do not own the value of a car separately from the car itself.[38]

In setting out his theoretical defence of a counterfactual rule, Ball here makes a wrong turning. Having accepted a position close to ours, he then argues that the defendant's enrichment is the saving to the defendant of the money which ought to have been paid to the claimant in an exchange, and the loss to the claimant is the correlative inability to exchange.[39] Gain and loss are consequently logically linked together. From this he concludes that a counterfactual test is all that is needed.[40] Ball does concede that this leads to potentially indeterminate liability, but argues that scope of liability is different from attribution.[41] Put differently, attribution of gain and loss is necessary for a claim, but other factors might intervene to bar an actual claim.

Ball is right that attribution rules can be wider than actual liability, but intuitively it is difficult to understand why very remote parties should be connected at all. The objection is not merely intuitive though. Exchange is inherently bilateral. We cannot exchange something with someone else (or choose not to do so) without any consciousness of that someone else. Exchange must in that sense be deliberate and intentional and this is likely what Andrew Burrows is getting at in his description of "at the expense of" as "conferral of a benefit".[42] We have already in fact seen the importance of intention as justifying the inclusion of bank payments. What this means is that the precise interest unjust enrichment protects is simply not

[38] J Penner 'Value, Property and Unjust Enrichment: Trusts of Traceable Proceeds' in R Chambers et al (eds) *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press Oxford 2009) 306, 311-312; D Sheehan 'The Property Principle and the Structure of Unjust Enrichment' [2011] Restitution Law Review 138, 156-157
[39] Ball (n 3) 140-141
[40] Ibid 141-142
[41] Ibid 181-182
[42] AS Burrows 'At the Expense of: A Fresh Look' [2017] Restitution Law Review 167, 170

engaged when we drop money down a drain. There is no bilaterality. It is not engaged when the claimant is ignorant of the enrichment as where a tin of money is left in a chimney and forgotten, as it was in *Moffatt v Kazana,*[43] or where the asset is stolen. The claimant had no opportunity at the time of the defendant's alleged enrichment to exercise his exchange capacity and the interest protected in *Moffatt v Kazana* or theft cases is prior to that protected in unjust enrichment. One might of course argue that the thief has interfered with the claimant's right to decide to exchange or not. Yet this justifies a wrongs claim not an unjust enrichment claim. That said, Rob Stevens makes the perfectly reasonable point that even if strict logic denies an unjust enrichment claim here a defendant faced with a restitution claim cannot defend himself without proving a different claim. "I am not unjustly enriched because it's yours" is not much of a defence.[44]

These intentionality and bilaterality requirements have been linked to the idea of performance.[45] Performance is a Civil law idea and a performance claim is one where the claimant intended the payment, for example, to the defendant to have a particular purpose – eg to discharge a debt. Stevens begins his explanation of why performance is necessary by positing his stamp example. The defendant has a rare stamp of which there is only one other example in the world. The claimant mistakenly destroys his stamp, and the defendant's triples in value.[46] There is no claim because there is no performance, no intentional transfer of the stamp for a putative purpose. Stevens does insist that the defendant have accepted the basis of the claimant's action and hence that no claim can morally be based on the claimant's mistake alone.[47] That is controversial, but we need not definitively take a view here; whether Stevens

[43] [1969] 2 QB 152
[44] R Stevens 'Three Enrichment Issues' in AS Burrows and A Rodger (eds) *Mapping the Law* (OUP Oxford 2006) 49, 63-64
[45] Burrows (n 42) 170; Stevens (n 14) 581; See also LD Smith 'Defences and the Disunity of Unjust Enrichment' in A Dyson et al (eds) *Defences in Unjust Enrichment* (Hart Oxford 2016) ch 2
[46] Stevens (n 14) 578-579
[47] Ibid 575

is right has greater importance to the analysis of the cause of action. Lionel Smith has argued for a requirement of the acceptance of the receipt of the enrichment.[48] All this means is that rather than the defendant having to accept that the claimant has transferred the money (say) on the basis of a given expected reciprocation from the former, the defendant is liable (subject to other preconditions being met) if he accepts the benefit – ie he has a genuine possibility of refusing it and does not do so, impossible in the stamp example. What is critical though is that without intentionality the enrichment is purely incidental and cannot be recovered. Another example: D1 and D2 are identical twins. C intends to pay D1, but being unable to tell them apart pays D2. There is an intentional transactional link. Despite C's intention "with which" he paid (to discharge a debt) being flawed, intentionality was present; he paid intentionally and this distinguishes the twins' case from both the stamp and the drain examples.[49] Two further points: first, the claimant's mistake must be linked to the transaction. If the transaction is between A and B, it is no good arguing that A made a mistake about the effect on C. That would be to deny the importance of transactions, because there is none between A and C; C's benefit is unintentional and incidental. Secondly, recognition of the role of party intention in constructing a transaction implies that intermediate steps with no aim but to aid in enriching the defendant can be ignored. The intention is for A to transfer the right or make the payment to B.

A **mis-**allocation of value, or transaction, such as attracts an unjust enrichment response, consistently with corrective justice, is therefore an intentional act by the claimant (or connected series of such) by which the defendant acquires rights (or an increase in the value of rights to incorporeal money) in circumstances where there is no free choice made regarding the

[48] LD Smith 'Restitution: A New Start' in P Devonshire and R Havelock (eds) *The Impact of Equity and Restitution in Commerce* (Hart Oxford 2018) 91, 112

[49] I discuss the distinction between "future intention" I intend to X tomorrow: "intention with which" I pay with the intention to X and intentionality "I X intentionally" in Sheehan (n 32) 157-160

claimant's exchange of that for value with the defendant and the defendant has accepted the enrichment.

B. Proprietary Unjust Enrichment Claims, Enrichment by Rights and Corrective Justice

Personal unjust enrichment claims are based on the unrealised exchange value in the hands of the defendant. Proprietary claims are based on something similar – the presence of a specific right in the hands of the defendant. This is distinct from what we discussed in the previous subsection. What is important in this subsection is that the claimant seeks the specific right back, not any market exchange value it may have. It is not necessary for our purposes to get into the detail of which claims do, or should, or might, support proprietary restitution,[50] but such restitution may include resulting trusts, rescission and rectification.[51] All of these involve a defective transfer of specific rights by the claimant. Lodder also includes subrogation and equitable liens[52] and Nair suggests that an unauthorised exchange of rights by a trustee gives rise to a claim, but does not explicitly label this unjust enrichment.[53] Some of this is controversial, but the analysis in terms of exchange transactions provides support for including some of these claims – eg rescission claims where the defendant obtains rights to money or property as a result of a defective choice to exchange.

To make our argument that corrective justice is reflected by proprietary claims as well we must show how exchange capacity is as important here as in personal claims. To talk about exchange capacity in this context suggests rights have value. Indeed they can do. If they had

[50] Questions of whether mistake should give rise to proprietary relief or whether in such cases the defendant receives a right unjustly – see eg *Chase Manhattan v Israel-British Bank* [1981] Ch 110 – do not therefore arise.
[51] R Chambers 'Two Kinds of Enrichment' in R Chambers et al (eds) *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press Oxford 2009) 242
[52] Lodder (n 13) ch 5
[53] A Nair *Claims to Traceable Proceeds* (Oxford University Press Oxford 2017) para 6.42

no value the previous subsection would make no sense. If I mistakenly transfer a picture to you, I am mistakenly transferring rights to the picture and to the extent the painting has a market value so do those rights. This though is not what we are concerned with in this subsection. Value is irrelevant in specific enrichment cases[54] in the sense that there is no valuation exercise where we seek restitution of the specific right and if there were, it would not matter if we deemed the right valueless.[55] An example of this is that in *Blacklocks v JB Developments (Godalming) Ltd*[56] to recover the land all the seller needed to do is show his title had been transferred; whether it was transferred for nothing or for full value is irrelevant. We can put this differently. It is just the fact of exchangeability which engages unjust enrichment. As Cutts puts it, when A acquires one right (R2) with another (R), A exploits the exchange potential inherent in R.[57]

All this brings us to an important point about the incidence of proprietary claims. Many authors, like Andrew Burrows, suggest that determining whether a claim can be proprietary is an add-on; it is a separate remedial issue. By that we mean that we decide whether an unjust enrichment claim exists and then, having decided that, ask ourselves a set of different questions in deciding if the claim is proprietary: for example we might ask whether the claimant took the risk of the defendant's insolvency.[58] Only if the claimant did not accept the insolvency risk can a proprietary claim be countenanced. On the view accepted here, that is wrong. If the defendant is enriched by the receipt of rights, a proprietary claim is appropriate if the law allows for that claim.[59] That formulation seems unhelpful, but Lodder suggests a proprietary claim may be available when it is the right itself that is unjustly acquired by the defendant. What matters on Lodder's view is that the law recognises the defective intention of the claimant with regard to

[54] Lodder (n 13) 113-114
[55] Chambers (n 51) 258-261, although in a personal claim that definitely would matter.
[56] [1982] Ch 183
[57] T Cutts 'Dummy Asset Tracing' (2019) 135 Law Quarterly Review 140, 142
[58] Burrows (n 42) 179
[59] Lodder (n 13) 218

a specific right.[60] That formula is compatible with differing ideas as to the scope of specific restitution and so which causes of action allow proprietary relief and when does not matter for our purposes.[61] It is, though, important for present purposes that when the law allows a claim in this context it seems always to allow it in the form of a power in rem to vest title.[62] In common law rescission legal title to the asset is re-vested upon the claimant's election to rescind; in equity arguably another step is required first – a court order - and a trust is then created. In both cases, however, as Nair argues, a power of this nature has a distinct transactional character.[63]

This then allows us to see the link between proprietary claims and corrective justice. The analysis is identical; in both cases the enrichment, whether construed as value or the specific rights, lies in the hands of the defendant because of a defective choice with regard to the claimant's exercise of his exchange capacity. Indeed the very fact that in personal claims to value what we are really looking at is the exchange potential of rights to money or property demonstrates that the same framework can apply to both cases. Recovery of assets via rescission of contracts can be explained through corrective justice,[64] as the next best option to the contract never having been executed and the rights to money or property never having been transferred in the first place. The allocation back to the claimant of rights lost via the defective contract is entailed by the original obligatory reasons not to engage in the transaction. As such the allocation back is an instantiation of corrective justice.

[60] Ibid 218-219
[61] Ibid 59
[62] Ibid 57; B Häcker 'Proprietary Restitution in Impaired Consent Transfers: A Generalised Power Model' [2009] CLJ 324
[63] Nair (n 53) para 6.73
[64] Sinel (n 25) 154; Lodder (n 13) 131-134

(II) Attributive Links: The Doctrinal Position

In this section we move to considering the doctrinal position. We have demonstrated so far that a view of corrective justice requiring reversal of the failed transaction as the next best thing to its never having been entered in the first place can support both personal and proprietary claims. Here we demonstrate that the doctrinal position is consistent with this theoretical argument. It is English law that transactional exchange links are required in unjust enrichment and also that those linkages are required both for personal and proprietary claims. The difference is twofold. First, in the former it is enrichment by value, but in the latter enrichment by rights. Secondly, sequential exchanges support relief only in proprietary claims.

The first subsection examines attributive links in value claims; it is concerned with personal claims. It examines whether the direct enrichment only rule has been adopted into English law. While a direct enrichment only rule is problematic and ill-defined, the causal or counterfactual test is not clearly established in English law. A rule based on transactions or schemes of transactions is, however, in place, and we see how that developed. This supports, and is supported by, the argument above from corrective justice. The second section looks at proprietary claims.

A. "At the Expense of" in Personal Unjust Enrichment Claims: Enrichment by Value

First, this section establishes the arguments and the case law in favour of the test that the transfer or enrichment must be direct. The early case law is sketchy and it seems to have been assumed without argument or comment that a direct transfer was required.[65] Exceptions were, however, required and we outline some of those exceptions. The second part reinterprets the

[65] eg *Kleinwort Benson v Birmingham City Council* [1996] QB 380 (CA) 400

"economic reality" test as a test relating to composite transactions. The third subsection takes the reinterpreted economic reality test and contrasts it with cases of incidental benefits, allowing us to draw a line between recoverable and incidental benefits.

1. Direct Enrichment Test vs Causation Test pre-ITC

The approach of this subsection is to compare these two tests and the authority cited in their favour. We will start by looking at the justifications for the direct enrichment test, but before we do it can be simply put. The defendant must, according to Burrows, normally be the direct or immediate recipient of the enrichment from the claimant for an unjust enrichment claim to lie.[66] For Burrows, it is important to keep the "at the expense of" test relatively narrow.[67] The direct provider only test is an attempt also to capture the instinctive sense that if I pay you, the money is at my expense, but somehow the more stages it goes through the less intuitively happy we are with saying the enrichment is at the claimant's expense.

One justification which seems to stand, in part at least, behind the current English position in favour of a transaction or composite transaction test is Tettenborn's point that the indirect recipient can say that there was no defect in the intermediate recipient's transfer and no proprietary right in the claimant.[68] The restriction that indirect enrichees can only be reached by a proprietary claim prevents restitutionary relief getting out of hand and preserves the freedom of the intermediary to do as he will with the property.[69] This point has attracted judicial support, most recently from *ITC v HMRC.*[70] The other justifications are maybe less convincing. These include the need to avoid double recovery. The claimant C cannot be allowed to recover

[66] Burrows (n 6) 69-71; Burrows reaffirms this position in (n 42) 171 where he links it to the civil law idea of performance. See also PBH Birks *Unjust Enrichment* (2nd edn Clarendon Press Oxford 2005) ch 5
[67] Burrows (n 42) 168
[68] A. Tettenborn, 'Lawful Receipt-A Justifying Factor' [1997] Restitution Law Review 1, 5
[69] Ibid 7
[70] [2017] UKSC 29, [51]; *Agip (Africa) Ltd v Jackson* 1990] Ch. 265, 287 (Millett J)

from both D and X. Yet this simply requires the parties to be treated as if they were jointly and severally liable.[71] Watterson argues for an approach similar to that precluding double recovery. The two claimants must simply argue their entitlements between themselves.[72]

Authority in favour of the direct provider rule is said to be furnished[73] by *McDonald Dickens & Macklin v Costello*[74] and *Uren v First National Bank.*[75] It is not obvious that the cases require the rule, although the cases are consistent with the direct provider only view and suggest that an important policy consideration also lies behind the rule. These two cases provide that if the parties have chosen to deal with party X, the law will not allow them to pretend X is really Y in contradiction to the normal rules of legal personality. To do so would be to allow the parties to evade risks, particularly insolvency risks, that they have knowingly taken on. We can see this quite clearly in *Costello.* The claimant builders had agreed to develop a plot of land owned by the Costellos, but in fact the builders entered a contract with Oakwood Residential Ltd, which was wholly owned by Mr and Mrs Costello. Ultimately Oakwood refused to pay the builders who sued to recover the sums owing to them. The Court of Appeal decided that, although the Costellos were enriched because the work had been done on their property, the contract had been with Oakwood. The claimant was not able to leapfrog over Oakwood (even though the Costellos were the sole shareholders and the work was done on their land not Oakwood's) to recover from Mr and Mrs Costello. Likewise in *Uren* Uren was one of many buyers intending to purchase a flat in a development in Spain called "Santa Barbara." The plot was being developed by a company called Arrish Ltd to which Uren had paid approximately 50,000 pesetas. Arrish became insolvent and another company, Pitchcott Ltd, owned by the bank, acquired the development. To get the flats completed Uren (and other

[71] *Trustor AB v Smallbone* [2000] EWCA Civ 150, [62-65]; Watterson (n 19) 454-455
[72] Watterson (n 19) 455-456
[73] eg GJ Virgo, *The Principles of the Law of Restitution* (3rd edn Oxford University Press Oxford 2015) 105
[74] [2011] EWCA Civ 930, [2012] QB 244
[75] [2005] EWHC 2529

buyers) paid further sums. Pitchcott was later sold to Santa Barbara Ltd, again owned by the defendant bank. When the flats were finished the bank called in its loans and sold off the flats. Uren sued the bank in unjust enrichment and failed. Mann J said that there was no direct enrichment,[76] but in reality all this meant was that Uren could not leapfrog Pitchcott or Santa Barbara to reach the bank because this would circumvent the distribution of risk and the separate corporate legal personalities involved.

As we have suggested, just as the causal or counterfactual test requires to be cut down to be manageable, so the direct transfer only test must be expanded. Henderson J in *Investment Trust Companies v HMRC*[77] set out some exceptions.[78] He also pointed to the need for a close causal connection between the payment by the claimant and the enrichment of the indirect recipient.[79] One of his exceptions, discussed in the next subsection, was the underlying "economic reality" of the situation.[80]

Agip (Africa) Ltd v Jackson[81] illustrates another exception. An employee forged payment orders in favour of Baker Oil. Agip's bank debited Agip's account; it probably was not entitled to do so, but nonetheless it did. This debit permitted Agip to sue the recipient, despite Millett J saying that on reaching an indirect enrichee, the claim took on a proprietary aspect.[82] For Bant and Edelman, cases like *Agip* simply reflect a desire to avoid circuity of action.[83] There would be no point in Agip suing the bank which immediately sued Baker. *Harrison v Pryce*[84] is another example of this. In that case, Edward Harrison, who had paid the South Sea Company for stock, sued (a different) Edward Harrison's estate for profits made by selling the stock which the SSC had transferred to the latter by mistake. Some control is needed

[76] Ibid [23]
[77] [2012] EWHC 458
[78] Ibid [67]
[79] Ibid [68]
[80] Ibid [72]; it is difficult to see "reality" as an exception to anything though.
[81] [1990] Ch. 265
[82] Ibid 287
[83] Bant and Edelman (n 12) 98-99
[84] (1740) Barn Ch 324, 27 ER 664

and Bant and Edelman argue this approach only occurs where there is a clear claim against the intermediate party, and his defences are solely concerned with his own position and not broader policy decisions.[85] In *Khan v Permayer*[86] it was additionally required that the unjust factor between A and B and B and C were the same; Eaves agreed with Khan to take over a lease to property the freehold to which was held by Permayer. Permayer made it a condition of the agreement that an unrelated (and it turned out non-existent) debt owing to him be paid. Eaves agreed to pay Permayer and did so. Khan agreed in turn to reimburse him. All parties suffered under the same mistake. Essentially Khan paid the debt, and was allowed to recover directly from Permayer.

There is case law, albeit now superseded by that in the Supreme Court, said to support explicitly the position that so long as the enrichment is caused by the claimant's loss an action should lie. In *Relfo v Varsani*[87] the liquidator of Relfo sought to recover monies diverted by Gorecia, a director of the company, to one of the shareholders, Varsani. The way in which the money arrived with Varsani was complex involving a series of intermediate trades and payments. Ball argues that an unjust enrichment claim is established[88] by a counterfactual connection between the first payment and end receipt. Ball concludes that this is the only way to explain *Relfo* because there Sales J said unjust enrichment liability arose regardless of any tracing link;[89] the exceptions, Ball also suggests, have grown so much that they have consumed the rule that only a direct transfer suffices. It is possible, however, as we see later, to create a transactional link in *Relfo* in that the parties intended the intermediate steps as merely the method by which Gorecia would pay Intertrade. The case never definitively proved the

[85] Bant and Edelman (n 12) 98
[86] [2001] BPIR 95
[87] [2014] EWCA Civ 360; R. Nolan, 'Civil Recovery after Fraud' (2015) 131 Law Quarterly Review 8; S. Watterson, 'Recovering Misapplied Corporate Assets from Remoter Recipients' [2014] Cambridge Law Journal 496
[88] Ball (n 3) 167-168
[89] Ibid 168; [2012] EWHC 2168, [88]

sufficiency of causation alone. Writing prior to the decision, however, Watterson had also argued in favour of a causation-only rule, suggesting that the policy considerations outlined at the start of this subsection do not require a direct transfer. Indeed his argument is that, from a legal strategy point of view, starting expansively is better because direct transfer has no agreed meaning and so cannot be used as a workable restrictor,[90] an objection to which this paper's view is not susceptible.

2. *The Composite Transaction Test*

There are a significant number of cases therefore in which unjust enrichment lies beyond the limited situation of a single, direct, or immediate connection. One question, as suggested, which we need to ask is whether the exceptions swallow the rule and render the test merely a counterfactual test or something narrower. Expressing that narrower link has proven difficult. Cases have sometimes expressed it in terms of "economic reality".[91] What in fact this means is that the claimant must show that a transaction – or scheme of transactions – was intended to act as a payment mechanism from himself to the defendant.

Our starting point is *Investment Trust Companies v HMRC*.[92] The facts were that the claimants received services from different fund management companies. They mistakenly believed that VAT was due and were charged and paid accordingly. The managers accounted to HMRC for the money paid to them as output tax. Output tax is the VAT charged by the HMRC on the services provided by the fund management companies. The managers deducted sums payable on supplies made to themselves as input tax. Input tax is the VAT charged by HMRC or goods and services received by the fund management companies – it is the tax paid

[90] Watterson (n 19) 442, 448
[91] Goff and Jones (n 4) para 6.38; *ITC v HMRC* [2012] EWHC 458 being one example
[92] [2017] UKSC 29

on what they bought in. The managers paid over the balance. That balance represents the tax on the value added by the managers and ensured that HMRC did not receive VAT twice.

It was the output tax that was invalidly demanded by the Revenue because of the incorrect transposition of the relevant EU Directive. The managers were able to recover part of the sums paid to HMRC, and those recoveries were paid to the claimants. The fund managers had been unable to recover all the money paid over and the claimants sued HMRC for that irrecoverable money. To make the facts easier they posited a hypothetical scenario in which the investment trust paid £100 to the managers as output tax from which the managers deducted £25 input tax credit and paid over the balance. It was the £25 input tax credit that the claimants sought, except with regard to the so-called dead periods where they sought payment of the £75 as well. There were therefore two claims.

As regards the claim to £25 the difficulty was not of "at the expense of" but one of enrichment. We can therefore deal with it quickly. The issue was created by section 80(2A) VAT Act. The managers had made a net cash payment to the Revenue of £75, but the claimants had in fact paid £100. The managers had subtracted £25 as their allowance for input tax, which had been paid to HMRC as output tax by their own suppliers. The Act does not allow for recovery of the deducted input tax, nor does it allow the consumer a direct action against HMRC for recovery of undue tax.[93] The £25 was paid by ITC to the managers, and it was the managers who were enriched. ITC had in effect paid the tax due to the manager's suppliers and should have recovered it from the managers not HMRC. That was the judgment arrived at by the Supreme Court.[94]

As regards the claim to £75, the Supreme Court held that HMRC was not enriched at the expense of ITC, although it was rescued by the operation of sections 80, 80A VAT Act

[93] C. Mitchell, 'Claims by Indirect Taxpayers' in C. Mitchell, B. Haecker and S. Elliott (eds), *Restitution of Overpaid Tax* (Oxford University Press Oxford 2013) 111, 115-116
[94] [2017] UKSC 29, [30]

1994 and the VAT Regulations 1995. The Supreme Court argued that there was a transfer of value in the form of £100 to the managers, which was defective. Another of £75 was made between the managers and HMRC.[95] The transfers were not, the Supreme Court held, a sham, nor were they a single scheme of transactions. The Supreme Court saw two separate payments and two separate mistakes, one about a contract and the other about a statutory obligation.[96] While the Supreme Court did not deny that in economic terms it was clear that HMRC was enriched at the expense of the claimants, they insisted that was insufficient to found the claim.[97] To justify this result, building on the principles of corrective justice, the Supreme Court argued that there had to be a single transfer of value, [98] which on the facts of the case was not present. The Court gave three reasons. First, the managers did not act as the claimants' agents in paying HMRC; secondly, we cannot say that but for the first payment the second payment would not have been made. Thirdly, there was no tracing link possible between the two payments. The payments by the claimants simply went into the general assets of the managers and so were untraceable.[99]

To talk in terms of transfers of value is not helpful; value is not a thing capable of transfer. However, the Court's reasoning is still essentially correct. The claimant companies made an intentional payment to the managers to discharge a putative contractual obligation. There was a putative exchange made, albeit a mistaken one. That mistake meant that the money was paid for nothing (there was no such obligation) and no exchange was made. The fund managers, who chose to pass on the burden of the tax (they did not have to), made an intentional payment to discharge a tax obligation, which was non-existent. Consequently there too the payment was for nothing and no exchange was made. The claimants engaged in no transaction

[95] Ibid [71]
[96] Ibid [71]
[97] Ibid [32]
[98] Ibid [42-43]
[99] Ibid [72]

with HMRC, a requirement for HMRC's liability to them if the corrective justice analysis were engaged. Further let us imagine the managers were insolvent. From a policy perspective the claimants should not be able to avoid the risk of their contracting party's bankruptcy.

The Court said that to describe English law in terms of a direct provider rule was consistent with a composite transaction test ("economic reality" test) where a number of coordinated transactions are involved.[100] The Supreme Court considered at length cases which had been decided by reference to "economic reality." They were clear that this was by itself not a test. Simply saying that in commercial terms X was the effective source of funds in Y's hands is insufficient, and they pointed to the passing on decisions[101] in competition law and tax law as showing the difficulties of such an approach.

It is important therefore to examine several prior decisions relied on in *ITC v HMRC,* where a link was established, to flesh out what we mean by a "composite transactional link". *Menelaou v Bank of Cyprus*[102] is one such case. However, there is one important preliminary point prior to examining the "at the expense of" link found in the decision. It is a proprietary claim. The plurality simply referred to the normal rules on "at the expense" and gave no indication even at the remedial stage of further limits on proprietary relief.[103] The facts were that the bank had two charges over Rush Green Hall to secure debts owed by the Menelaou parents. The parents wanted to downsize and, since the sale of Rush Green would not produce a sum great enough to pay off the debts, the bank agreed to release the charges on condition that it would be granted a charge on Great Oak Court, which was to be purchased by the parents for Melissa Menelaou, their daughter, who was unaware of the charge. That charge was registered, but turned out to be invalid. The bank claimed that, since the lien, which had arisen in favour of the vendors of Great Oak Court when contracts had been exchanged, had been

[100] Ibid [50]
[101] Eg *Courage v Crehan* [2001] ECR-I 6297
[102] [2015] UKSC 66
[103] Goff and Jones (n 4) paras 7.06-7.08

extinguished when the purchase money was paid, it was entitled to be subrogated to that lien. It succeeded.

In the Supreme Court in *Menelaou* the issue of whether enrichment should have to be direct was largely sidestepped. The Justices make general references to rather vague tests,[104] but do not even make it clear whether they believe the test a causal one or a direct enrichment one. Lord Clarke for example argued that what matters is "whether there is a sufficient causal connection, in the sense of a sufficient nexus or link, between the loss to the Bank and the benefit received by the defendant,"[105] and declined to say whether a direct enrichment only rule with exceptions was preferable to an indirect enrichment generally permitted rule.[106] "A sufficient causal connection" test is too wide; as Stevens has pointed out it means there is a claim in the stamp example above.[107] By contrast Lord Neuberger argued that the link between the bank and Melissa was direct and did so by re-characterising what had happened as one composite transaction.

> It is fair to say that there was a tripartite relationship in this case, in the sense that not merely Melissa and the Bank, but also the Menelaou parents, were parties to the arrangements which gave rise to the alleged unjust enrichment. However, as already explained above, there was in reality a single transaction, and it was from that transaction that Melissa directly benefitted.[108]

Lord Neuberger also sat on the panel in *Investment Trust Companies v HMRC* where the composite transaction explanation[109] he raised in *Menelaou* was confirmed. The combination of *ITC v HMRC* and *Menelaou* suggests that for the Supreme Court "reality" can refer to a set of coordinated or related transactions designed as a single scheme. If such a scheme exists and the parties intended the scheme to be used as a payment mechanism, the original payor can recover as against the ultimate payee.[110] Caution is needed. As Watterson

[104] As pointed out by the Supreme Court itself in *ITC v HMRC* [2017] UKSC 29, [37]
[105] [2015] UKSC 66, [23]
[106] Ibid [23-24]
[107] Stevens (n 14) 599
[108] [2015] UKSC 66, [72]
[109] Ibid [63-66]; see also *Lowick Rose LLP v Swynson Ltd* [2017] UKSC 32; Burrows (n 42) 180
[110] Burrows (n 42) 180

points out, no real specifics were given as to the meaning of transaction in *Menelaou*, apart from a need to examine "substance and reality."[111] Essentially, however, in *Menelaou* the intention of the parties meant that it was possible to attribute the benefit of the purchase of the house to the loss suffered by the bank. This must be the easiest explanation of the connection in *Menelaou,* although there is a snag. The snag is that the view Lord Neuberger takes of the tripartite nature of the transaction flies in the face of the initial conclusion that Melissa was not privy to the agreement.[112] The bank did know it was dealing with Melissa's parents, however. As Lord Reed said it intentionally, albeit mistakenly, authorised the use of the funds to purchase the second property in Melissa's name instead of requiring its use to discharge the debt owed to itself.[113] The proceeds of the sale of the house were not at Melissa's parents' free disposal. The exchange that never happened was "charge on new house for charge on old." Unlike in *ITC v HMRC* there is a causal connection between the bank's actions and Melissa's enrichment. Indeed, as is clear from Lord Carnwath's judgment,[114] there was also a tracing link between the parties.

Lord Reed also saw *BFC v Parc (Battersea) Ltd*[115] as supporting the general argument in favour of a composite transaction or scheme of transactions test. The general manager of the Omni group, Herzig, refinanced some of Parc's debt (Parc being a member of the group). For reasons to do with the Swiss regulatory system, Herzig was interposed as an intermediate borrower. BFC, which provided the refinance, was always intended to be an unsecured creditor, but they intended to seek a postponement to the effect that companies in the Omni group, such as OOL would not seek repayment of their debts until the refinance loan had been paid. Lord

[111] S. Watterson, 'Subrogation as a Remedy for Unjust Enrichment in the Supreme Court' [2016] Cambridge Law Journal 219
[112] T Cutts 'Modern Money Had and Received' (2018) 38 Oxford Journal of Legal Studies 1, 23
[113] [2017] UKSC 29, [65]
[114] [2015] UKSC 66, [140]
[115] [1999] 1 AC 221

Steyn said OOL was enriched by the money paid by BFC via Herzig to Parc[116] once the postponement proved ineffective; OOL was higher up the priority list than it would otherwise be and, claiming mistake, BFC sought subrogation. Analysed in terms of transactions, the argument is that there was a single scheme where all parties intended the money transfer from BFC to Parc (via Herzig) on the basis of (in exchange for) the postponement.[117]

Day argues that the improved value of OOL's security was an unintended benefit,[118] or as Stevens puts it, there was no performance.[119] The bank had not intended OOL to be enriched and no money to which the bank was entitled was used to discharge any debt; Herzig had free use of the money under the unsecured loan. This was in contrast to *Menelaou* where the parents did not have such free use. Lord Reed in *ITC v HMRC* does not help in explaining the link, reaching for "reality" as an explanation for the decision in *BFC*.[120] We might seek to support the result, however, on the basis that the intention of the bank in seeking the postponement was specifically that OOL not have this priority. This though runs into problems. The postponement letter was collateral to the loan and not a condition of the loan. If so, we might say that the mistake was not in fact a cause of OOL's enrichment, as the loan would have been made anyway, and was not in any case linked to the transaction at hand. There is no denying that *BFC v Parc (Battersea) Ltd* is at best a much less clear candidate for a transactional link than *Menelaou.* It looks more akin to *Lowick Rose LLP v Swynson Ltd,* discussed below.[121]

[116] Ibid 227
[117] *Menelaou v Bank of Cyprus* [2015] UKSC 66, [2016] AC 176, 227
[118] W Day '"At the Expense of" in Unjust Enrichment: Causal, Direct or Intentional Transfers of Value?' [2017] Lloyd's Maritime and Commercial Law Quarterly 588, 600; this is also the position in Germany where there would here be no performance claim. See H Siber *Schuldrecht* (1931) 421-422; the decision has been doubted by *Bofinger v Kingsway Group* [2009] HCA 44, (2009) 239 CLR 269
[119] Stevens (n 14) 593
[120] [2017] UKSC 29, [62]
[121] [2017] UKSC 32

3. Incidental Benefits

If unjust enrichment claims are concerned with exchange failure and the putative exchange or transfer must be intended, incidental benefits are excluded as unintentional, or as Burrows calls them, secondary.[122] This makes unnecessary some of the more tortured explanations of non-recovery, such as Birks' suggestion of a grudging gift.[123] That was in the context of his example, itself drawn from *Edinburgh Tramways v Courtenay,*[124] of rising heat reducing the heating bills of the flat upstairs. Intentionality is hard to map, but Knobe has demonstrated that in situations where the side effect is positive or neutral (as with heat rising, or more generally a third party benefit) most people do not consider the side effect intentional.[125] As importantly the heating is a service and, as indicated earlier, services frequently require a request.

In contrast to the decisions discussed in the previous subsection where "expense" was satisfied and proven, the claim failed in *Lowick Rose LLP v Swynson Ltd* on the grounds of its being merely an incidental benefit. Hunt, via his investment company Swynson, lent EMSL £15m over a 12 month period in 2006 on the strength of negligent due diligence undertaken by Lowick Rose (or HMT as it was then called). Another was made in 2007 and ultimately, deciding that there was no point in Swynson having two large non-performing debts, Hunt made a personal loan to EMSL of £18.7m which was used to pay Swynson. What this did was negate any loss that Swynson had suffered as a result of Lowick Rose's negligence. Lord Mance referred to the need for a single or composite transaction,[126] and noted that the deliberately structured transfers from Hunt to EMSL and EMSL to Swynson had unforeseen effects on the relation with Lowick Rose.[127] Lord Mance argues that a "but for connection"

[122] Burrows (n 6) 172-173
[123] Birks (n 66) 158
[124] 1909 SC 99
[125] J Knobe 'Intentional Action and Side Effects in Ordinary Language' (2003) 63 Analysis 190
[126] [2017] UKSC 32, [58]
[127] Ibid [68]

was insufficient, relying on *ITC v HMRC.* Any enrichment of Lowick Rose by discharge of its liability was indirect – ie there was no transactional linkage - and there was no appropriate unjust factor.[128] We might say either that Lowick Rose's enrichment was an entirely unintentional side effect and falls alongside the heat rising example or that Hunt's mistake in making the loan was insufficiently connected to the transaction itself.[129] It was, if anything, a complaint in a transaction between A and B that A made a mistake about the effect on C.

There is no transactional link in *Prudential Assurance Co v HMRC*[130] either. That case involved a claim that HMRC had been unjustly enriched by the ability to use unlawfully levied tax and the taxpayer was entitled to compound interest. Overruling *Sempra Metals v HMRC*[131] on this point, the Supreme Court held that when a mistaken payment is made from A to B there is no additional "transfer of value" in the form of an ability to use the funds received.[132] There is but one "transfer of value", which is the initial payment. To stress, talk of transfers of value does not help, but the analysis stacks up in terms of exchange. When a taxpayer – as in *Prudential* or *ITC* – pays HMRC it does so in exchange for a discharge. Where the tax is paid mistakenly, where it is not owed, that exchange does not occur. There is no additional exchange of use value and no separate mistake with respect to the use value.

TFL Management Services Ltd v Lloyds TSB[133] can now be easily dealt with and cannot now be seen as good law. The stylised way the facts are described is like this. A spends money to recover debt from B, but debt is in fact owed by B to C, which comes out in the course of the action; C recovers, saving money on legal fees. Floyd LJ said, "If a claimant confers a benefit on a defendant in circumstances where he is acting in his own self-interest, but labouring under a mistake so he is actually conferring a benefit on someone else, I do not see

[128] Ibid [89]
[129] Cutts' suggested distinction – Cutts (n 112) 24; see also Burrows (n 42) 181
[130] [2018] UKSC 39, [2018] 3 WLR 652
[131] [2007] UKHL 34, [2008] 1 AC 561
[132] Ibid [72]
[133] [2013] EWCA Civ 1415

why a court should deny a remedy."[134] He also upheld Henderson J's dicta from *ITC v HMRC*;[135] it seems that Floyd LJ saw little difference therefore between the characterisation of the test in terms of "economic reality" and Henderson J's test of direct enrichment with exceptions. On its face the gain to party C appears entirely unintentional and incidental. Floyd LJ appears, however, not to have any problem with accepting any causally linked incidental benefit as potentially counting.[136] The Supreme Court in *ITC v HMRC,*[137] however, characterised the scenario in *TFL* as being purely incidental and correctly disapproved Floyd LJ's dicta.

B. "At the Expense of" in Proprietary Unjust Enrichment Claims: Enrichment by Rights

Up until now we have concentrated on enrichment by value. Here we move to proprietary claims and enrichment by rights. As we have seen earlier, rights have exchange potential which should be realised appropriately for the claimant's benefit.[138] The common feature that exists in both proprietary and personal claims is therefore that the claimant has been unable to appropriately choose or not to choose to exchange rights to a thing (or increase in value of D's existing rights to incorporeal money), leading either to a value claim or one to the specific right. In this section we seek to do two things. First, having argued previously that rescission claims can be seen as part of unjust enrichment, we seek to show the relevance of tracing to rescission. Secondly, we demonstrate ways in which the attribution rules in tracing and personal claims

[134] Ibid [45]
[135] Ibid [55]
[136] Burrows (n 42) 177-178
[137] [2017] UKSC 29, [56-57]; see also *Lowick Rose v Swynsons Ltd* [2017] UKSC 32, [63] (Lord Mance); Burrows (n 41) 177-180
[138] Nair (n 53) para 6.35

are coalescing,[139] as indeed we would expect if the theoretical analysis of how exchanges (or mis-exchanges) can respond to corrective justice in both personal and proprietary cases were correct.

Before we go any further a cautionary note is needed. Tracing is tricky. It is highly contested and Goff and Jones have argued that there should be no need to link unjust enrichment to the difficult law on tracing and proprietary claims. They suggest therefore that if C pays X who pays D, C might be able to establish a personal claim against D.[140] *ITC v HMRC* has shown this to be wrong; it is the proprietary link that (normally) defeats D's ability to say he should not be liable. We may have no choice but to engage with the tricky area. With that in mind, support for the proposition that tracing is relevant to rescission cases can be found in *Bainbridge v Bainbridge.*[141] Master Matthews commented that rescission founded claims to property other than that initially transferred.[142] The claimant can also trace into the hands of third party donees.[143] Some transferees with notice are also vulnerable.[144] In saying this Matthews relied on *ITC v HMRC.* Lord Reed saw a link between tracing and unjust enrichment, arguing, "The 'at the expense of" nexus could be proven where the defendant "receives property from a third party into which the claimant can trace an interest."[145] It is controversial whether an unjust enrichment, as opposed to property,[146] claim can reach third parties, but even if the claim against third parties is not unjust enrichment, the claim against the original transferee could still be.

[139] Cutts (n 57) 161-162
[140] Goff and Jones (n 4) paras 6.66-6.70
[141] [2016] EWHC 898
[142] Ibid [24-32]; see also D O'Sullivan, S Elliott and R Zakrzewski (eds) *The Law of Rescission* (2nd edn OUP Oxford 2014) paras 21-04-21.05
[143] Ibid [24-32]; *Load v Green* (1846) 15 M & W 216, 153 ER 828
[144] O'Sullivan, Elliott, Zakrzewski (n 142) paras 21.08-21.21.
[145] [2017] UKSC 29, [48]; *CMOC Sales and Marketing v Persons Unknown* [2018] EWHC 2230 (Comm) [146].
[146] O'Sullivan, Elliott and Zakrzewski describe it as simply a sui generis application of the nemo dat principle. The original right in the hands of the original transferee was defeasible and that is all the second transferee can get (n 142) para 21.29.

Relying on the decision in *Shalson v Russo,*[147] Master Matthews also argued that, even if third party rights intervene so that no claim can be made vis-à-vis them, there is no reason not to use the tracing rules to find substitute assets in the hands of the original transferee against which the claimant's rights can be asserted.[148] O'Sullivan, Elliott and Zakrzewski assert that rescission at common law is probably capable of transferring a right to assert legal title to traceable substitutes.[149] It is hard to see why this should not also be so of all equitable rescission claims, although the authority seems only to support the proposition that such a right to trace on exists in fraud cases only.[150] So long therefore the assets are acquired by the defendant prior to the claimant's rescinding the transaction substitute assets should be traceable[151] as part of a rescission claim.

Having seen that rescission claims against the original transferee and claims against third parties engage tracing, let us see four examples of how the attribution rules in tracing and personal claims are coalescing. First, in *Menelaou v Bank of Cyprus* the fact that the claim was proprietary made no difference to how the Supreme Court treated the attribution rules,[152] which suggests the Supreme Court thought the same types of consideration relevant in both personal claims and proprietary subrogation claims. This is not conclusive. The Supreme Court may have seen the "at the expense of" requirements as going to an underlying personal claim to which the security to which the bank was subrogated was accessory.

Secondly, in *Relfo v Varsani*[153] both analyses – the tracing analysis and the personal unjust enrichment claim analysis - can be seen side by side. Money was transferred inappropriately by Gorecia from the company's accounts ultimately to Intertrade. Those

[147] [2003] EWHC 1637; [2005] Ch 281
[148] *Bainbridge v Bainbridge* [2016] EWHC 898, [30]; *NCA v Robb* [2014] EWHC 4384; *Gladstone v Hadwen* (1813) 1 M&S 517, 105 ER 193; *Beverley v Pearce* [2013] EWHC 2627
[149] O'Sullivan, Elliott and Zakrzewski (n 140) para 16.11
[150] *Shalson v Russo* [2003] EWHC 1637
[151] Nair (n 53) paras 7.27-7.28
[152] Goff and Jones (n 4) paras 7.07-7.08
[153] [2014] EWCA Civ 360

payments went first to accounts held by Mirren Ltd and then onto Intertrade. The Court of Appeal accepted that the payments by Gorecia were the source of the payments to Varsani. At first instance, Sales J had thought these were sham transactions.[154] In the Court of Appeal Floyd LJ refers to the "economic reality" of the situation and suggested that the "meaningless" intermediate steps did not render the payments insufficiently "proximate".[155] This entails that in attributing the value links intermediate steps never intended to have any particular purpose can be skipped. While Goff and Jones[156] have noted that such intermediate steps may have remedial consequences,[157] they also argue that "economic reality" simply prompted a re-characterisation of the series of payments by the panel as one composite transaction[158] and both Gloster and Floyd LJJ refer to the payment as equivalent to a direct payment.[159] The real position therefore was that the intention of the parties that the series of transactions be used as a means to pay Intertrade is respected and they are construed as one transaction on that basis. The same analysis is in essence adopted for tracing. Sales J may have denied that a tracing link was strictly necessary for an unjust enrichment claim,[160] but he did accept that there was a tracing link and both he and the Court of Appeal brought the parties' intention that the transactions be connected into account in making that tracing link.[161] That tracing link can be shown to concern exchange. Mirren had control over a bank account held for Relfo and misused that control over a right solely exchangeable or usable for Relfo's benefit.[162] Cutts correctly argues that the analysis fits neatly within Lord Reed's categories of "at the expense of" in *ITC v HMRC*.[163]

[154] [2012] EWHC 2168, [59]; *ITC v HMRC* [2017] UKSC 29, [48]
[155] [2014] EWCA Civ 360 [110]
[156] Goff and Jones (n 4) para 6.39
[157] Ibid para 6.41
[158] Ibid para 6.39
[159] [2014] EWCA Civ 360, [103] (Gloster LJ), [115] (Floyd LJ); See *CMOC Sales and Marketing v Persons Unknown* [2018] EWHC 2230 (Comm) [147-151]
[160] [2012] EWHC 2168, [88]
[161] Ibid [77]; [2014] EWCA Civ 360, [56-63] (Arden LJ)
[162] Nair (n 53) para 4.33
[163] Cutts (n 57) 161-162

Thirdly, in *Federal Republic of Brazil v Durant*[164] Maluf, the Mayor of Sao Paolo, was alleged to have received $10.5m in bribes regarding a road building project, paid into an account controlled by his son, Maluf Jnr. The defendants were held by the Royal Court in Jersey to be constructive trustees of that money, but argued amongst other things that three payments into the so-called Chanani account under Maluf Jr's control occurred after the final payment to an account held by themselves. The question then was whether the final Chanani payments could be "backwards-traced" to Durant. The Privy Council held in short if the parties intended that the debt be incurred to buy the asset and the debt would be paid off from a particular source, that source can be treated as the source of a payment to the original creditor. The test according to the Privy Council is whether there is a close "causal and transactional link"[165] between the two payments. In practice that appears to mean that the parties intended the connection. Lastly, the same is true of tracing through clearing systems; the courts see the whole set of transactions as mere mechanics to make what is – and intended to be - in substance a single payment.[166]

Cutts argues, however, that the proprietary response in bank account cases be rejected as "dummy asset" tracing. X receives no asset recoverable in specie. That must be admitted. No actual right or thing gets transmitted. All that occurs is that contractual entitlements are adjusted. However, the parties' intentions in both scenarios are functionally the same.[167] Just as in personal claims, a transactional link should be accepted. The tracing rules are not pre-ordained; policy choices need be made including some that might expand the scope of the law,[168] but are faithful to the rationale based on intentionality.

[164] [2015] UKPC 35
[165] Ibid [34-40] (Lord Toulson)
[166] D Sheehan 'Property in a Fund, Tracing and Unjust Enrichment' (2010) 4 Journal of Equity 225, 238
[167] C Webb *Reason and Restitution* (Oxford University Press Oxford 2016) 98-99
[168] Goff and Jones (n 4) para 7.31

(III) Conclusion

This essay has attempted to explore the current position with regards to the at the expense of requirement in English law. There are two main points to draw from the article. The first is that English law currently has a narrower view of "at the expense of" than the counterfactual test championed by Ball and others, although he did not have the benefit of the Supreme Court's decision in *ITC v HMRC*, which definitively turned away from the counterfactual test. In enrichment by value cases what is required is that there be a transaction or series of transactions by which the claimant and the defendant are intentionally linked. This allows us to more fully understand the boundary between recoverable benefits and irrecoverable incidental benefits. This in turn allows us to structure commercial transactions so parties cannot avoid risks they have taken on.

The second point is that there seem to be sufficient commonalities between tracing and other attributive mechanisms to, at least, make it more difficult to say tracing is not a means of attribution in unjust enrichment. From a theoretical standpoint in cases both of enrichment by value and of enrichment by rights English law relies on the idea of an intentional transaction. Both exchange potential and corrective justice are relevant to the underlying rationale of the unjust enrichment by value claim and the unjust enrichment by rights claim, which gives rise to specific restitution. This is illustrated by the rescission and subrogation cases. *Menelaou,* despite being a proprietary case and a subrogation case, is reasoned in the same way as a personal enrichment by value case. The transactional language of "at the expense of" cases and tracing cases are converging; the importance of tracing in rescission cases and support in the Supreme Court for the idea that tracing can prove the link required for unjust enrichment also suggest that these two attributive techniques are simply different, but related ways of showing the same thing.