

UNJUST FACTORS IN THREE-PARTY CASES

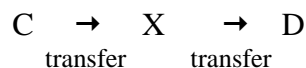
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Claims in unjust enrichment have succeeded against “innocent” defendants in cases where a third party besides the claimant and the defendant was involved in the mechanism by which the defendant was enriched, and/or in the reasons why the defendant’s enrichment was unjust. The article examines the different conclusions that can be drawn from such cases about the content and purposes of unjust factors based on defects in the claimant’s intention to confer a benefit, particularly those which are often said to concern defendant fault or knowledge as well. The article rejects the view that the cases make it impossible to think that defendant fault or knowledge is an element of such unjust factors.

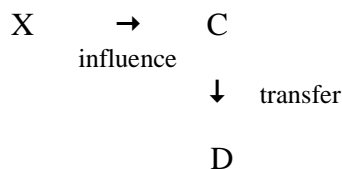
A. INTRODUCTION

Simple cases in unjust enrichment concern two parties. The claimant transfers a benefit directly to the defendant, e.g. by paying him cash. The defendant’s enrichment is unjust for reasons that concern the claimant and the defendant alone, for example because the claimant spontaneously made a mistake, was unduly influenced by the defendant, or had a shared understanding with him that his enrichment was conditional on the happening of an event which does not happen. No third party is involved in the mechanism by which the defendant is enriched or in the reasons why the defendant’s enrichment is unjust, also known as “unjust factors”.¹

More complex cases concern three parties.² A third party besides the claimant and the defendant may be involved because the claimant transfers a benefit to the third party who then transfers it to a defendant, so that the defendant is a “remote” or “indirect” recipient, rather than an “immediate” or “direct” recipient, of the benefit which emanated from the claimant. Here, the third party is involved in the mechanism by which the defendant is enriched.



Alternatively, a third party may be involved because the reason why a defendant’s enrichment is unjust arises out of dealings between a claimant and the third party: for example, because the claimant was induced to benefit the defendant by the third party’s undue influence.

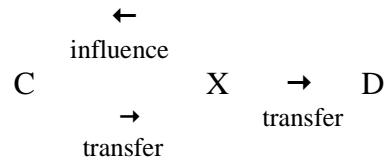


* Professor of Law, University College London. An earlier version of this article was discussed at a staff seminar at the University of Hong Kong, and I thank the participants for their helpful comments, particularly Peter Chau and Lusina Ho. My thanks also go to Ajay Ratan and Fred Wilmot-Smith for their insightful feedback.

¹ Terminology used in e.g. *Test Claimants in the FII Group Litigation v HMRC (No 1)* [2012] UKSC 19; [2012] 2 AC 337 [81]; *Menelaou v Bank of Cyprus UK Ltd* [2015] UKSC 66; [2016] AC 176 [21].

² Or more than three, but to keep things simple the discussion will consider three-party cases only.

One can also have a combination of these two types of case, where the third party is involved both because the benefit received by the defendant passes through the third party's hands and because the third party is implicated in the reasons why the defendant's enrichment is unjust: for example, where the third party unduly influences the claimant to transfer a benefit to him, which he then transfers to the defendant.



Cases where a third party has induced a claimant to benefit a defendant have a long history.³ So do cases where recovery has been ordered against remote recipients.⁴ The Supreme Court has recently held that claimants are generally limited to recovery from direct recipients but that claims will lie against remote recipients in exceptional cases.⁵ It seems likely that there will be further litigation to test the limits of these exceptions, and particularly Lord Reed's finding that claims will lie where "a set of co-ordinated transactions" involving multiple parties should be treated "as forming a single scheme or transaction" between claimant and defendant.⁶ In the event of such litigation it is also likely that the courts will have to reconsider the way that certain unjust factors work in this context.

If we set policy-based unjust factors to one side, and focus our attention on unjust factors which turn on the quality of the claimant's intention to benefit the defendant, we find that some of these are generally thought to be concerned exclusively with the claimant's state of mind (lack of consent, mistake) while others are widely believed to concern the defendant's conduct or knowledge as well (duress, undue influence, failure of basis). Thus, it has often been said that duress entails the application of illegitimate pressure by the defendant,⁷ that undue influence entails unconscientious conduct by the defendant⁸ (though the opposite view has also been taken⁹), and that failure of basis requires the defendant to have shared an understanding with the claimant that the defendant's enrichment is conditional.¹⁰ The question therefore arises, whether the defendant in a three-party case can escape liability by pleading in response to a claim based on any of these unjust factors that he did not participate in, and knew nothing of, the dealings which led the claimant to transfer the relevant benefit? And once the answers

³ *Bridgeman v Green* (1757) Wilm 56; 97 ER 22 (undue influence); *Huguenin v Baseley* (1807) 14 Ves Jun 273; 33 ER 526 (undue influence); *RE Jones Ltd v Waring & Gillow Ltd* [1926] AC 670 (induced mistake).

⁴ *Marsh v Keating* (1834) 2 Cl & Fin 250; 6 ER 1149; *Banque Belge pour l'Etranger v Hambrouck* [1921] 1 KB 321.

⁵ *Investment Trust Companies (in liq) v HMRC* [2017] UKSC 29; [2017] 2 WLR 1200.

⁶ *Ibid* [48] and [61]-[66], identifying as examples *Banque Financière de la Cité SA v Parc (Battersea) Ltd* [1999] 1 AC 221 and *Menelaou v Bank of Cyprus UK Ltd* [2015] UKSC 66; [2016] AC 176. Another case which seems to belong to this category is *Relfo Ltd (in liq) v Varsani* [2012] EWHC 2168 (Ch); affirmed [2014] EWCA Civ 360; [2015] 1 BCLC 14. But at [48] Lord Reed assigned it to a separate category of case where "an intervening transaction" is a "sham" created to conceal the connection between the claimant and the defendant.

⁷ e.g. *Dimskal Shipping Company SA v International Transport Workers Federation* [1992] 2 AC 152, 165; D Sheehan, 'Defendant-Sided Unjust Factors' (2016) 36 LS 415, 423-5.

⁸ e.g. *Royal Bank of Scotland Plc v Etridge* [2001] UKHL 44; [2002] 2 AC 773 [6]-[7] and [103]; R Bigwood, 'Contracts by Unfair Advantage: From Exploitation to Transactional Neglect' (2005) 25 OJLS 65.

⁹ e.g. *Pesticcio v Huet* [2004] EWCA Civ 372 [20]; P Birks and Chin NY, "On the Nature of Undue Influence", ch 3 in J Beatson and D Friedmann (eds), *Good Faith and Fault in Contract Law* (Oxford, Clarendon Press, 1995).

¹⁰ e.g. *Burgess v Rawnsley* [1975] 1 Ch 429, 442; *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* [2005] NSWCA 83; (2005) 63 NSWLR 203 [239]; J Edelman and E Bant, *Unjust Enrichment* 2nd edn (Oxford, Hart, 2016) 253-4.

to this question are known, the further question arises, whether they enable us to draw any clear conclusions about the content and purposes of these unjust factors?

There are several findings that a court could make in a three-party case where an “innocent” defendant makes an argument of this kind. It could hold that the claim fails because it is a necessary ingredient of the cause of action that the defendant must himself have behaved unconscientiously towards the claimant or must at least have known about the reasons why the claimant’s consent was defective. Or it could hold that that the claim succeeds because although it is a necessary ingredient of the cause of action that *someone* must have behaved unconscientiously towards the claimant or must have had relevant knowledge, this is true of the third party and this is enough for the purposes of the claim. Or it could hold that the claim succeeds because the claimant did not fully and unconditionally intend to transfer the relevant benefit, and the claimant does not need to show anything else to establish a cause of action. The court cannot know which finding to make unless it knows the elements of the unjust factor on which the claimant relies. It may be possible to discover these from previous case law; otherwise, the court will have to decide what they are from first principles.

Relevant authorities to which the court might refer include both two- and three-party cases where the unjust factor has previously been considered, and one might have thought that the most relevant of all would be three-party cases where claims have been brought against “innocent” defendants. However, when we look at these we find that the courts have often awarded restitution without saying which of the possible reasons for allowing recovery they believe to be correct. For example, restitution has been awarded in various cases to claimants who were unduly influenced by third parties to benefit “innocent” defendants. One inference which could be drawn from these cases is that undue influence is a wholly “claimant-sided” unjust factor, for the purposes of which it only matters that the claimant’s intention was impaired and it does not matter whether the defendant personally caused the impairment, or knew of it. However, this is not the only possible explanation of the cases, and this reading of them is inconsistent with the basis on which other cases have been expressly decided. Another possible explanation is that the law seeks to deter the abuse of influence by reversing all transfers made by an influenced party (other than those to bona fide purchasers) and that to bring himself within this rule a claimant only needs to show that the defendant’s enrichment was procured by someone abusing his influence over the claimant, i.e. the rule applies whether the claimant was unduly influenced by the defendant or by a third party. It follows that a court deciding a similar case in the future can award restitution on the authority of previous cases, but can choose between possible reasons for making such an award and cannot rationally make a choice unless it knows the content and purposes of the undue influence doctrine.

Before discussing this further, a complicating issue must be cleared out of the way. Rolled-up claims are often made which ask both for the rescission of a contract and for the restitution of benefits transferred under the contract. However, the rules governing rescission of a contract differ in important respects from the rules governing the restitution of an unjust enrichment. There are good reasons for these differences, but it is easy to overlook them, and make the incorrect assumption that the rules governing the rescission of contracts also govern the restitution of unjust enrichment where the parties never had a contract. For example, contracts procured by a third party’s undue influence can generally be rescinded only if the defendant knew of the undue influence, but it does not follow that the restitution of benefits procured by a third party’s undue influence can therefore be ordered only if the recipient had such knowledge. This is discussed in Part B.

In Part C various three-party cases are identified where restitution has been awarded against “innocent” defendants on the grounds of lack of consent and want of authority, mistake, duress, undue influence or failure of basis. Several possible models for liability in these cases are then examined in Part D, where it is noted that these models do not all require one to think

that the unjust factors invoked in the cases must have been exclusively “claimant-sided”. Finally, it is discussed in Part E whether there are reasons in principle why it might be desirable for defendant fault or knowledge to be included among the elements of various claims founded on defective consent.

B. RESCISSION OF CONTRACTS PROCURED BY THIRD PARTIES

Daniel Friedmann has argued that there is a difference between the approach taken by the law of unjust enrichment to claims for restitution founded on defective consent, which asks whether the claimant subjectively intended to benefit the defendant, and the approach taken by contract law to claims for rescission founded on defective consent, which asks whether the claimant’s words and conduct, objectively interpreted, mean that he intended to enter the contract, whether or not he subjectively intended to do this.¹¹ Contract law takes an objective approach in order to protect the reasonable expectations of contracting parties and preserve transactional security, considerations with which the law of unjust enrichment is not generally concerned.

Friedmann notes that a claimant’s defective consent is not generally understood to be a sufficient ground to rescind a contract for duress, undue influence or mistake.¹² More is needed. In two-party cases the extra ingredient is typically the defendant’s unconscientious conduct or knowledge of the claimant’s defective consent. For this reason, the rules on mistake as a ground for rescission have been almost completely swallowed up by the rules on misrepresentation. In three-party cases where the claimant’s entry into the contract was procured by a third party’s duress, undue influence or misrepresentation, the defendant must either have been implicated in the third party’s actions because the third party acted as his agent, or he must have known about these actions. So, while the law protects the justified reliance of a contracting party on another party’s words or conduct, reliance by a contracting party who misled another party or otherwise induced him to enter the contract is unjustified, and reliance on externals is also unjustified where a contracting party “knows that the other party’s real intention does not correspond to the objective interpretation of his words or conduct.”¹³

This account of contract law principles is well supported by authority. For instance, in *Royal Bank of Scotland Plc v Etridge*, Lord Scott said that:¹⁴

“It is, in general, the objective manifestation of contractual consent that is critical. Deficiencies in the quality of consent to a contract by a contracting party, brought about by undue influence or misrepresentation by a third party, do not in general, allow the victim to avoid the contract. But if the other contracting party had actual knowledge of the undue influence or misrepresentation the victim would not, in my opinion, be held to the contract.”

Etridge itself introduced rather different rules for non-commercial contracts of guarantee, where the borrowing is secured on a family home shared by the surety and principal debtor. Outside that situation, however, and outside the situation where the third party who procures the claimant’s entry into the contract is the defendant’s agent,¹⁵ the three-party cases clearly

¹¹ D Friedmann, “The Objective Principle and Mistake and Involuntariness in Contract and Restitution” (2003) 119 LQR 68, 68.

¹² In extreme cases the non est factum doctrine may allow the claimant to say this unless he acted negligently: *Saunders v Anglia Building Soc* [1971] AC 1004; *Avon Finance Co v Bridger* [1985] 2 All ER 281.

¹³ Friedmann (n 11) 78. Cf *Fairbanks v Snow* 13 NE 596, 598 (1887): “A party to a contract has no concern with the motives of the other party for making it, if he neither knows them nor is responsible for their existence.”

¹⁴ [2001] UKHL 44; [2002] 2 AC 773 [144].

¹⁵ For which see e.g. *Lynde v Anglo-Italian Hemp Spinning Co* [1896] 1 Ch 178, 182-3; *Goldrei, Foucard & Son v Sinclair* [1918] 1 KB 180; *Kings North Trust Ltd v Bell* [1986] 1 WLR 119, 123-4; *First Energy UK Ltd v*

show that “nothing less than actual knowledge of the [third party’s] wrongdoing affecting the consent of the complainant will suffice to deprive the innocent contracting party of his contractual rights.”¹⁶

Friedmann goes on to argue that the policy reasons underlying the rules relating to defective consent in contract formation differ from those underlying the rules which govern the reversal of enrichments by reason of the claimant’s defective consent. Contract law seeks to identify the circumstances in which a party should acquire a right to another party’s performance, while the law of unjust enrichment seeks to identify the circumstances in which a party should acquire a right to restitution of a benefit which he was not legally bound to confer and which he did not truly intend to confer. It follows that the focus in unjust enrichment cases should be exclusively on the question whether the claimant’s subjective intention was defective, and it should make no difference whether the defect was induced by the defendant’s actions or whether the defendant knew of it.¹⁷ Consistently with this principle, the rules on misrepresentation as a ground for restitution have been completely swallowed up by the rules on mistake: “misrepresentation is merely a potential source of the payor’s mistake, but the source of the mistake is of no moment.”¹⁸ And in cases of duress and undue influence, restitution follows from the fact that the claimant’s intention to benefit the defendant was vitiated by unlawful pressure or influence and “the mere fact that the recipient was neither responsible for [this] nor aware of it is no defence.”¹⁹

Friedmann is surely right to say that the reason why contract law makes an objective assessment of a claimant’s intention to be legally bound does not also require the law of unjust enrichment to make an objective assessment of a claimant’s intention to confer a benefit. It is also true that a primary concern of the law of unjust enrichment is to reverse enrichments which were not subjectively intended by a claimant. However, this is not the law’s *only* concern: even in cases where the claimant’s intention was defective, other policies may be in play that make it desirable for the conduct and knowledge of other parties to be taken into account as well. This is discussed further in Part E. First, though, we shall identify some three-party cases which are at least consistent with Friedmann’s account, where restitution has been awarded against “innocent” defendants on the ground that the claimant’s consent was vitiated by mistake, duress or undue influence. We shall also identify some other cases which lie beyond the scope of his discussion, but which might also be thought consistent with it, where restitution has been ordered against “innocent” defendants on the grounds of absent or qualified intention.

C. RESTITUTION OF BENEFITS IN THREE-PARTY CASES

There are many mistake cases. They include *Charter v Trevelyan*,²⁰ where the innocent heirs of a land agent who fraudulently bought land from his employer at an undervalue were ordered

Hungarian International Bank Ltd [1993] 2 Lloyd’s Rep 194, 204; *Spice Girls Ltd v Aprilia World Service BV* [2002] EWCA Civ 15; [2002] EMLR 27 [57].

¹⁶ *Darjan Estate Co plc v Hurley* [2012] EWHC 189 (Ch); [2012] 1 WLR 1782 [34]. See also *Sturge v Starr* (1833) 2 My & K 195, 196; 39 ER 918, 919; *Cobbett v Brock* (1855) 20 Beav 524, 528 and 531; 52 ER 706, 707 and 708; *Kempson v Ashbee* (1874) LR 10 Ch App 15, 21; *Bainbrigge v Browne* (1881) 18 Ch D 188, 197; *Kesarmal s/o Letchman Das v Valliappa Chettiar (NKV) s/o Nagappa Chettiar* [1954] 1 WLR 380; *O’Sullivan v Management Agency and Music Ltd* [1985] QB 428, 464; *Chancery Client Partners Ltd v MRC 957 Ltd* [2016] EWHC 2142 (Ch); [2016] Lloyd’s Rep FC 578 [22]. Cf *Bumgardner v Corey*, 21 SE 2d 360 (1942); *Leeper v Beltrami*, 347 P 2d 12 (1959); *Bedree v Bedree*, 528 NE 2d 1128 (1988); and earlier US cases in Anon, “Duress of a Third Person as Grounds for Rescission of a Legal Transaction” (1930) Columbia LR 714, 717, n 18.

¹⁷ He notes that the defendant’s conduct and knowledge might affect the availability of defences, but rightly stresses that we are concerned here with the content of unjust factors: Friedmann (n 11) 89, n 113 and text.

¹⁸ Friedmann (n 11) 88.

¹⁹ Friedmann (n 11) 91.

²⁰ (1844) 11 Cl & Fin 714; 8 ER 1273.

to return the property. Again, in *Scholefield v Templer*,²¹ a principal debtor fraudulently induced a creditor to release a surety (and thereby enrich him) by misrepresenting the existence of a mortgage which the principal debtor purported to offer as substitute security. Although the surety was in good faith he could not take advantage of the release and was liable to pay the creditor on the debtor's default, Lord Campbell LC stating that:²²

“a person cannot avail himself of what has been obtained by the fraud of another, unless he not only is innocent of the fraud, but has given some valuable consideration.”

In *Vane v Vane*,²³ property was held on strict settlement. The life tenant joined his son in barring the entail and resettling the property, but they were not entitled to do this because the son was illegitimate. Many years later, after both father and son had died, and a further resettlement had taken place in favour of the son's eldest son, the original life tenant's next son, who was legitimate, discovered that his brother had been illegitimate and successfully sued to recover the remaining property from his nephew. According to James LJ:²⁴

“this Court will wrest property fraudulently acquired, not only from the perpetrator of the fraud, but ... from his children and his children's children.”

In *Filby v Mortgage Express Ltd (No 2)*,²⁵ the claimant lent money against the security of property that the borrower jointly owned with his wife. The wife did not agree to this and the husband forged her signature on the documents. She therefore owed the claimant no contractual liability. However, part of the money was used to pay off an overdraft on a joint account which she operated with her husband, and the claimant was entitled to recover the amount of her discharged debt to the bank (via subrogation), although she had had no knowledge of her husband's fraud. May LJ held it to be a “principled ground for granting a restitutionary remedy” that the claimant had mistakenly believed that its advance was to be secured by a first legal charge and “would not otherwise have proceeded.”²⁶ Finally, *Niru Battery Manufacturing Co v Milestone Trading Ltd (No 1)*²⁷ concerned a bank which followed its customer's instructions to pay a letter of credit on presentation of a false bill of lading, and then debited the customer's account. The customer recovered the amount of the bank's payment from the payee on the ground of mistake.

There are a few American duress cases where a third party has illegitimately pressured a claimant into benefiting a defendant directly, including *Ogle v Freeman*,²⁸ where a third party's threat of criminal prosecution induced the claimant to convey property to the defendant donees, and the conveyance was set aside. There is also English authority which holds that a claim will lie against a principal to recover money procured from a claimant by duress exerted

²¹ (1859) 4 De G & J 429; 45 ER 166.

²² *Ibid* 4 De G & J 433-4; 45 ER 168.

²³ (1872-73) LR 8 Ch App 383. Cf *Kennell v Abbott* (1799) 4 Ves Jun 802, 808-9; 31 ER 416, 419 (if a testator is fraudulently told by a child's mother that the child is his, and he leaves the child a legacy, the child might still be entitled to it if the father was motivated by personal affection, i.e. if his mistake did not cause him to benefit the child on a but-for basis).

²⁴ *Ibid* 397.

²⁵ [2004] EWCA Civ 759. See too *Castle Phillips Finance Ltd v Piddington* (1995) 70 P & CR 592.

²⁶ *Ibid* [48].

²⁷ [2002] EWHC 1425 (Comm); [2002] 2 All ER (Comm) 705 [145], affirmed [2003] EWCA Civ 1446; [2004] 1 Lloyd's Rep 344. See too *Agip (Africa) Ltd v Jackson* [1990] Ch 265, affirmed [1991] Ch 547.

²⁸ 96 P 2d 670 (1939). See too *Singer Manufacturing Co v Rook* 84 Pa 442, 445 (1877); *Bazemore v Freeman* 58 Ga 276, 277 and 278 (1877).

by an agent: in *Coulthurst v Sweet*,²⁹ the consignees of goods were illegitimately compelled by the defendant ship-owners' agent to pay more freight than was due, and the defendants were liable to make restitution of the excess.

There are a greater number of undue influence cases. In *Gould v Okeden*,³⁰ for example, a father unduly influenced his daughter and her husband to sell him property at an undervalue for £500, which property he left to his sons in his will. The House of Lords held that the sale should be treated as though it had only been a mortgage to secure repayment of the £500 and the sons were ordered to return the property subject to repayment of the money. *Bridgeman v Green*³¹ concerned a man of "weak understanding" who was unduly influenced by his servant, Green, to make gifts to Green, Green's wife and brother, and a lawyer on trust for Green's nephew. They were all ordered to make restitution and in answer to the argument that the brother and wife were not party to the undue influence, Lord Wilmot famously said that even if this were so they would not be permitted to keep the money:³²

"No: whoever receives it, must take it tainted and infected with the undue influence and imposition of the person procuring the gift; his partitioning and cantoning it out amongst his relations and friends, will not purify the gift, and protect it against the equity of the person imposed upon. Let the hand receiving it be ever so chaste, yet if it comes through a corrupt polluted channel, the obligation of restitution will follow it ..."

The same approach was taken in a series of cases culminating in *Bullock v Lloyds Bank Ltd*,³³ where the claimant was unduly influenced by her father to create a trust of property for herself and her spouse and issue, but on failure of these primary trusts, a trust of the income for her father and brother; the whole settlement was set aside.

Turning from cases where the claimant's intention was vitiated to cases where it was absent, we find several where restitution has been ordered against "innocent" defendants. In *Re Diplock*,³⁴ funds which should have been distributed out of a deceased person's estate to his next-of-kin were instead paid to charities which were liable to make restitution although they took the money in good faith. In *Lipkin Gorman (a firm) v Karpnale Ltd*,³⁵ a solicitor who was an authorised signatory on his firm's client account withdrew cash from the account and paid it to a casino, which took it in good faith but did not provide legally valid consideration in exchange. The casino was liable to make restitution, save to the extent that it had changed its position. In *Primlake Ltd (in liq) v Matthews Associates*,³⁶ restitution was ordered against an "innocent" defendant whose liability to a creditor was paid off with money misappropriated from the claimant by the defendant's husband.

²⁹ (1866) LR 1 CP 649.

³⁰ (1731) 4 Brown 198; 2 ER 135.

³¹ (1755) 2 Ves Sen 627, 28 ER 399; (1757) Wilm 56, 97 ER 22.

³² *Ibid* Wilm 64-5; 97 ER 25.

³³ [1955] Ch 317. See too *Huguenin v Baseley* (1807) 14 Ves Jun 273, 288-9; 33 ER 526, 532; *Cooke v Lamotte* (1851) 15 Beav 234, 250; 51 ER 527, 533; *Bainbrigg v Browne* (1881) 18 Ch D 188, 196-197; *Morley v Loughnan* (1893) 1 Ch 736, 757; *Barron v Willis* [1900] 2 Ch 121, 133. Cf *Nunes v De Faria* 238 P 2d 106 (1951); *Fritz v Mazurek* 244 A 2d 368 (1968); *Montoya v Torres* 823 P 2d 905 (1991).

³⁴ [1948] Ch 465; affirmed sub nom *Ministry of Health v Simpson* [1951] AC 251.

³⁵ [1991] 2 AC 548. See too *Clarke v Shee & Johnson* (1774) 1 Cowp 197; 98 ER 1041; *Marsh v Keating* (1834) 1 Bing NC 198; 131 ER 1094; *Calland v Loyd* (1841) 6 M & W 26; 151 ER 307; *Nelson v Larholt* [1948] 1 KB 339; *Relfo* (n 6).

³⁶ [2006] EWHC 1127 (Ch); [2007] 1 BCLC 666 [337]-[340]. See too *Gertsch v Atsas* [1999] NSWSC 898; (1999) 10 BPR 18,431.

For a case where a remote recipient's liability was expressly held to be founded on failure of basis we must go to Australia. *Spangaro v Corporate Investment Australia Funds Management Ltd*³⁷ concerned a managed investment scheme which never got off the ground. A custodian was appointed to hold money which investors would pay to participate in the scheme, on the shared understanding that the money would not be released to the manager of the scheme until after a minimum number of subscriptions had been collected. The claimant investor paid money to the custodian, which paid it to the manager although the minimum number of subscriptions had not been collected. According to the judge, the manager was liable to make restitution because the claimant's payment was conditional "on the establishment of the project [which] did not eventuate because minimum subscription was not reached."³⁸

In *Menelaou v Bank of Cyprus UK Ltd*,³⁹ the defendant's parents owed the claimant bank a debt secured by charges on their house. The bank agreed with the parents that it would release the charges to enable a sale of the house, on the understanding that the proceeds would be partly applied to reduction of the parents' debt, and partly applied to the purchase of a new house in the defendant's name, a third-party charge over which would be executed to secure the parents' outstanding debt. This seemed to have been done, but when the parents defaulted on the loan it emerged that the defendant's signature on the charging document had been forged and that the charge was void. The bank therefore sued her in unjust enrichment and the Supreme Court held that her house was impressed with a lien in the bank's favour by way of subrogation to the unpaid vendor's lien which had been extinguished when the vendor had been paid. Lord Clarke accepted that subrogation is typically awarded in cases where a lender has not received a bargained-for security either because the lender made a mistake or because the basis on which it lent the money failed.⁴⁰ However, this point was not discussed because the case was argued on the agreed basis that an unjust factor could be established on the facts. The parties may have thought that the basis for the bank's release of its charge on the parent's house had failed because this was done on the understanding, shared by the bank and the defendant's parents, that a valid third-party charge would be created over the defendant's house.⁴¹

This explanation of the case was favoured by Lord Sumption in *Swynson Ltd v Lowick Rose LLP (in liq)*.⁴² He said that the defendant's enrichment was unjust because "the bank's consent to the use of the proceeds of the family home to buy the daughter a house had been conditional on it obtaining a charge ... [and that] condition had failed"; and he added that although restitution for failure of basis "ordinarily requires that the expectation should be mutual", this is "not a requirement" in subrogation cases.⁴³ These he held to be exceptional because subrogation "does not restore the parties to their pre-transfer position" but "effectively operates to specifically enforce a defeated expectation".⁴⁴ These dicta are hard to understand. Lord Sumption's characterization of subrogation as a forward-looking "perfectionary" remedy

³⁷ [2003] FCA 1025; (2003) 47 ACSR 285. Cf *ANZ Banking Group v Londish* [2013] NSWSC 1243 (where the judge declined to strike out a claim for failure of basis against a remote recipient).

³⁸ *Ibid* [51]. It formed no part of the judge's reasoning that the manager knew that the condition on which the money was payable had not been satisfied, although in fact it seems that the manager did know this and would therefore have been concurrently liable for knowing receipt if this had been pleaded: *ibid* [54]-[60].

³⁹ [2016] UKSC 66; [2016] AC 176.

⁴⁰ *Ibid* [20]-[21]. For cases which are consistent with the view that failure of basis can ground a subrogation award see *Cheltenham & Gloucester plc v Appleyard* [2004] EWCA Civ 291 [35]-[36]; *Nouri v Marvi* [2005] EWHC 2996 (Ch); [2006] 1 EGLR 71 [30]-[32]; *Kali Ltd v Chawla* [2007] EWHC 2357 (Ch); [2008] BPIR 415. Contrast

⁴¹ Alternatively, mistake might have been established on the facts because the bank had mistakenly believed that the defendant had known about her parents' arrangements and had intended to execute the third-party charge at the time when the money was lent. The judge at first instance described the bank as having been "mistaken": [2012] EWHC 1991 (Ch) [22].

⁴² [2017] UKSC 32; [2017] 2 WLR 1161.

⁴³ *Ibid* [30].

⁴⁴ *Ibid* [30].

is inconsistent with the finding in *Banque Financière de la Cité v Parc (Battersea) Ltd*,⁴⁵ that subrogation is a backward-looking restitutionary remedy designed to reverse unjust enrichment by enabling the claimant to recover the value of the benefit which he lost and by returning the defendant and the defendant's junior creditors to the positions which they formerly occupied. It is also mysterious why the failure of a claimant's expectation should entitle him to a "perfectionary" remedy of the kind which Lord Sumption believed subrogation to be – particularly if this expectation was not communicated to the defendant. The judge explained this by saying that the defendant would otherwise receive a "windfall",⁴⁶ but that merely begs the question of whether the remedy should be awarded.

D. MODELS OF LIABILITY

The point has been made already that three-party cases where "innocent" defendants are liable to make restitution can be interpreted in different ways. On one view, espoused by Daniel Friedmann in his study of the mistake, duress and undue influence cases, the law's only concern in such cases is to undo enrichments to which the claimant did not truly consent, and so it does not concern itself with any other party's behaviour. James Edelman and Elise Bant take the same view, arguing that where a claimant is induced to confer a benefit by battery, intimidation, unconscionable conduct, "wrongful abuse of influence" or misrepresentation, he may be given a compensatory claim by the law of tort or equitable wrongs, but that the three-party cases require us to think that any restitutionary claim the claimant is given by the law of unjust enrichment can arise only out of the "non-wrongful aspect" of the situation; so they contend that the law of unjust enrichment takes no interest in the defendant's conduct in such cases and only cares about "the effect of [this conduct] on the plaintiff's decision."⁴⁷ Similarly, they argue that the "underlying principle" of "ignorance" cases is that "the plaintiff had no intention to enter the transaction that enriched the defendant".⁴⁸ However they do not believe that claims for failure of basis can be explained in this way, for they stress that these are grounded on "an objective common basis",⁴⁹ and discount *Spangaro* as a case which conflated two claims, one by the claimant against the custodian "as a beneficiary of a trust" and one by the custodian against the manager "in unjust enrichment based on failure of consideration".⁵⁰ Hence there are limits to their "claimant-sided" explanation of unjust factors founded on defective consent: this takes in cases of absent and vitiated consent but excludes cases of qualified consent.

A second possible explanation of the cases described in Part C is that the law will not allow a donee from an intermediate recipient to occupy a better position vis-à-vis the claimant than the intermediate recipient himself. Hence restitution is awarded when an intermediate recipient's enrichment at the claimant's expense was unjust and the remote recipient gave no value in exchange for the benefit.⁵¹ Similar reasoning also explains why restitution should be awarded where a third party procures the direct transfer of a benefit from a claimant to a donee, in circumstances where the third party's enrichment would be unjust if the benefit had been transferred to him instead. Otherwise third parties and defendants could too easily work around the rules which apply to remote recipients by structuring tainted transactions as direct transfers.

⁴⁵ [1999] 1 AC 221.

⁴⁶ *Swynson* (n 42) [28], [29] and [30].

⁴⁷ Edelman and Bant (n 10) 250. See too A Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford, OUP, 2012) 81.

⁴⁸ *Ibid* 281.

⁴⁹ *Ibid* 253.

⁵⁰ *Ibid* 105.

⁵¹ Cf *Lipkin Gorman* (n 36) 560 (Lord Templeman): "a donee of stolen money cannot in good conscience rely on the bounty of the thief to deny restitution to the victim of the theft".

Proponents of this view include Pauline Ridge in her study of three-party undue influence cases, who has objected to Edelman and Bant's analysis of these cases that:⁵²

“[the defendant's] strict liability as the innocent recipient of a gift tainted by the actual or presumed undue influence of [a third party] takes, as given, the tainted nature of the gift; it does not explain why the law regards that gift as tainted in the first place.”

In other words, Ridge considers that the best way of analysing the three-party cases where a gift was procured by undue influence is to ask, first, whether the claimant was subjected to undue influence by the third party, and, second, whether the defendant received the gift as a result of the undue influence. Contrary to Edelman and Bant's view, it may be a relevant consideration when addressing the first question whether the third party exerting the influence behaved unconscientiously, even if it is an irrelevant consideration when addressing the second question whether the defendant behaved unconscientiously or knew of the undue influence.

A similar approach, generalised to every unjust factor founded on defective consent (and perhaps even more widely than that), was mooted by Peter Birks in a discussion of claims against remote recipients (written while he still held the view that unjust enrichment requires proof of an unjust factor). Birks argued that in such cases, the claimant need not show “an unjust factor in relation to the remote recipient” because the “ground rule allowing recovery from the remote recipient” is that:⁵³

“subject to bona fide purchase and change of position, an unjust enrichment in the immediate recipient is an unjust enrichment in one who received through the immediate recipient and because of his receipt.”

On this view, again, three-party cases where restitution is ordered against an “innocent” remote recipient do not require us to conclude that the unjust factor in play must have been wholly “claimant-sided”, since the question whether there was an unjust factor as between the claimant and the intermediate recipient may have turned on the latter party's fault or knowledge even though it is irrelevant to the question whether the remote recipient received a “tainted benefit” that he himself behaved unconscientiously or knew of the reasons why the claimant's intention to enter the relevant transaction was defective.

Three other ways of explaining why claims can lie against “innocent” remote recipients can also be conceived. None can explain all the cases, but none requires us to adopt a wholly “claimant-sided” view of the unjust factors in play. One rests on agency reasoning: where an intermediate recipient is the remote recipient's agent, the remote recipient's actual state of mind is irrelevant because his agent's state of mind counts as his own for the purposes of the claim.⁵⁴ For example, one might explain the *Coulthurst* case on the basis that the ship-owners' agent put illegitimate pressure on the consignees and the owners were “responsible for his act”⁵⁵ (Willes J's words) in the sense that the agent's fault was deemed to be the owners' fault.

⁵² P Ridge, “Third Party Volunteers and Undue Influence” (2014) 130 LQR 112, 126-7.

⁵³ P Birks, “ ‘At the Expense of the Claimant’: Direct and Indirect Enrichment in English Law”, ch 18 of D Johnston and R Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge, CUP, 2002) 524.

⁵⁴ This is the corollary of the principle that an agent's state of mind can be deemed the principal's state of mind to enable the principal to claim against a remote recipient: *Stevenson v Mortimer* (1778) 2 Cowp 805, 806; 98 ER 1372, 1372; *Duke of Norfolk v Worthy* (1808) 1 Camp 337; 170 ER 977; *Taylor v Smith* (1926) 38 CLR 48, 62; *Rural Municipality of Storthoaks v Mobil Oil Canada Ltd* [1976] 2 SCR 147, 158. Millett J said the same in *Agip* (Ch) (n 27) 284-5, but the agent's mistake in that case went to the scope of his authority.

⁵⁵ *Coulthurst* (n 30) 655.

Another explanation builds on the rule that a trust can be imposed on property unjustly received by a defendant if he knows of the circumstances making his enrichment unjust.⁵⁶ If a knowing intermediate recipient therefore holds property on trust for the claimant, and commits a breach of this trust when he transfers the property to a remote recipient, the remote recipient is strictly liable either because he is thereby unjustly enriched at the claimant's expense⁵⁷ or because the claimant is entitled to a remedy which "vindicates" his "subsisting" rights in the traceable proceeds of his property.⁵⁸ The *Menelaou* case could conceivably have been analysed as a case of the first sort (although not of the second⁵⁹) if the parents had known from the outset that the defendant was not willing to consent to the creation of a charge over her new house. A trust of the money in the client account could then have been imposed to reverse the parents' unjust enrichment at the expense of the claimant,⁶⁰ and the claimant's right to subrogation could then have followed from the fact that the defendant was unjustly enriched at its expense when money to which it was beneficially entitled was paid to the vendor of her house.⁶¹

A final explanation also envisages that there are two claims, but says that if the facts disclose an unjust factor that would ground recovery by the claimant from the intermediate party, and also disclose an unjust factor that would ground recovery by the intermediate party from the remote recipient, then the claimant can acquire the intermediate party's right of action against the remote recipient by subrogation and enforce this right for his own benefit. Moore-Bick J may have had something like this in his mind when he said in the *Niru* case that where a bank makes a mistaken payment and then debits the customer's account, the only person to suffer a loss is the customer, and so the customer "is entitled to make a claim ... in restitution [against the recipient of the bank's payment], although it might [be] necessary for it to join [the bank] as an additional defendant if [the bank is not otherwise] a party to the proceedings".⁶² This echoed Lord Goff's observation in *The Esso Bernicia*,⁶³ that a claimant who is entitled to acquire and enforce rights for his own benefit via subrogated proceedings can sue the original right-holder if he will not lend his name to these proceedings, and force him to do so. That case concerned the acquisition of rights against a defendant via subrogation which had not been extinguished by the claimant's payment.⁶⁴ These were also the facts of *Niru*, where the customer effectively "paid" the bank when its account was debited, and where the effect of this "payment" was not to extinguish the bank's right to recover its mistaken payment from the defendant even though it was left no worse off as a result of making the payment once it had debited the customer's account.

⁵⁶ For which see *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 714-5, considering *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105.

⁵⁷ For the reasons why such a claim should be available in principle, see P Birks, "Property, Unjust Enrichment and Tracing" (2001) 54 CLP 231; R Chambers, "Tracing and Unjust Enrichment" ch 11 of J Neyers et al (eds), *Understanding Unjust Enrichment* (Oxford, Hart, 2004) 294-6.

⁵⁸ Following *Foskett v McKeown* [2000] 1 AC 102.

⁵⁹ Contrary to Graham Virgo's view of the case, the claimant's right to subrogation could not be explained by "vindication" reasoning, because its entitlement to the remedy was predicated on the fact that its money went into the discharge of a debt and therefore did not go into any right in which the claimant's beneficial interest can have "subsisted". Cf G Virgo, "Restitution and Unjust Enrichment in the Supreme Court: Reflections on *Bank of Cyprus UK Ltd v Menelaou*"; online at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2724024.

⁶⁰ The claimant might have had to rely on mistake rather than failure of basis as the reason why it was entitled to such a trust, given Lord Sumption's comments in *Re D&D Wines International Ltd* [2016] UKSC 47; [2016] 1 WLR 3179 [30], where he says that claimants whose actions are founded on failure of basis can never be entitled to a trust, even against knowing defendants.

⁶¹ Cf *McCullough v Marsden* (1919) 45 DLR 645; *Boscawen v Bajwa* [1996] 1 WLR 328.

⁶² *Niru* (Comm) (n 27) [145], not considered on appeal.

⁶³ [1989] AC 643, 663.

⁶⁴ See too *London Assurance Co v Johnson* (1737) West T Hard 266; 25 ER 930; *Procinsky v McDermott* [1955] 4 DLR 606, 610; *Yorkshire Insurance Co Ltd v Nisbet Shipping Co Ltd* [1962] 2 QB 330, 339.

The point of identifying these possible models of liability in this part has not been to argue that one model is conceptually superior to the others, or more closely conforms to the courts' reasoning. It may be that some are a better "fit" with the cases than others, or provide a simpler and more transparent explanation of liability. However, the point of identifying them all here has simply been to show that there are various ways in which one *could* explain why restitution is awarded against "innocent" defendants in the cases, and that these explanations do not all require one to think that the law's reasons for reversing transfers in defective consent cases are exclusively "claimant-sided". It follows that if there are good reasons to include defendant fault or knowledge among the elements of a claim based on defective consent, the law would not necessarily be caught in self-contradiction if it adopted a rule to this effect but also permitted claims against "innocent" defendants in three-party cases.

E. REASONS FOR FAULT-BASED LIABILITY

Let us turn, then, to the question whether there are any good reasons to include defendant fault or knowledge among the elements of claims based on defective consent. It is often said that liability in unjust enrichment is generally "strict", meaning that "the grounds for relief normally proceed without reference to the [defendant's] participation, acquiescence or knowledge."⁶⁵ The view is also widely held that the imposition of strict liability in cases of defective consent is justifiable because the absence, impairment or qualification of the claimant's intention to benefit the defendant is sufficient reason to award restitution.⁶⁶ However, those who take this view usually add that "the rationale of the unjust enrichment principle is not to make the defendant worse off, but to relocate an extant gain",⁶⁷ i.e. they consider that restitution should not be awarded if this would harm a good faith defendant by putting him in a worse position than the one he occupied prior to receipt of the benefit.⁶⁸

A crude way for the law to prevent this, and to strike a balance between the claimant's interest in restitution and the defendant's interest in security of receipts, would be to place more or less arbitrary restrictions on the circumstances in which unjust factors founded on defective consent can be pleaded: the mistake of law bar and the rule that failures of basis must be total might be seen as examples of this phenomenon.⁶⁹ So might other limits on recovery for mistake which have been suggested over the years: for example, rules that a claimant must have made a "liability" mistake,⁷⁰ that a claimant and defendant must have made the same mistake,⁷¹ and that a claimant payer's mistake must have been "connected to the relationship between payer

⁶⁵ M McInnes, "Enrichment Revisited" ch 4 in JW Neyers et al (eds), *Understanding Unjust Enrichment* (Oxford, Hart, 2004) 207.

⁶⁶ See e.g. P Birks, "The Role of Fault in the Law of Unjust Enrichment" ch 11 in W Swadling and G Jones (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (Oxford, OUP, 1999) 237-247.

⁶⁷ G Virgo, "The Role of Fault in the Law of Restitution" ch 5 in *Mapping the Law* (n 8) 85.

⁶⁸ For a searching critique of this "no harm" thesis, which rests on the premise that the status quo ante is the baseline against which the defendant's situation should be measured, see F Wilmot Smith, "Should the Payee Pay?" (2017) 37 OJLS 000.

⁶⁹ P Birks, *The Foundations of Unjust Enrichment: Six Centennial Lectures* (Wellington, Victoria University Press, 2002) 135-6. Arguments of principle supporting the mistake of law bar were rejected in *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349; arguments of principle supporting the total failure rule have been widely doubted: e.g. *Giedo van der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373 [367]; *Burrows* (n 000) 88-9; but for a contrary view, see F Wilmot-Smith, "Reconsidering 'Total' Failure" (2013) 72 CLJ 414.

⁷⁰ Stated by Bramwell B in *Aiken v Short* (1856) 1 H & N 210, 215, but overtaken by *Kleinwort, Sons & Co v Dunlop Rubber Co* (1907) 97 LT 263 and *Kerrison v Glyn, Mills, Currie & Co* (1911) 81 LJKB 465.

⁷¹ Adopted by Pollock MR in *RE Jones Ltd v Waring & Gillow Ltd* [1925] 2 KB 612, 631-2, but rejected on appeal: [1926] AC 670. Cf *Khan v Permayer* [2001] BPIR 95 [40].

and payee”.⁷² A second way to protect both parties’ interests would be to impose strict liability but allow defences – the strategy expressly adopted by Lord Goff when he introduced the change of position defence in *Lipkin Gorman*.⁷³ A third strategy would be to include defendant fault or knowledge among the ingredients of a claim.

The law could conceivably pursue the third strategy in every case of defective consent if it thought that defects in the claimant’s intention were never capable of justifying recovery when taken alone. This seems to have been La Forest J’s view in *Citadel General Assurance Co v Lloyds Bank Canada*.⁷⁴ That case concerned a claim for knowing receipt of funds misapplied in a breach of fiduciary duty. Characterizing this as a claim in unjust enrichment,⁷⁵ the judge said that all such claims are fault-based because proof of defective consent:⁷⁶

“may establish an unjust deprivation, but not an unjust enrichment. It is recalled that a plaintiff is entitled to a restitutionary remedy not because he or she has been unjustly deprived but, rather, because the defendant has been unjustly enriched, at the plaintiff’s expense. To show that the defendant’s enrichment is unjustified, one must necessarily focus on the defendant’s state of mind not the plaintiff’s knowledge, or lack thereof.”

Liability in unjust enrichment is certainly easier to justify where the defendant as well as the claimant is implicated in the reasons for restitution, as Fred Wilmot-Smith has shown in his study of failure of basis (which he calls “failure of condition”). He observes that if recovery on this ground is permissible only where the claimant and the defendant had an objective shared understanding that the defendant’s enrichment was conditional, then the defendant can have no legitimate interest in the security of his receipts which he can set in the balance against the claimant’s interest in recovery.⁷⁷ However, it is one thing to say that recovery is more easily justified when a defendant’s conduct or knowledge is included among the elements of a claim, and another to say that this is required in every case because defects in the claimant’s intention can never justify restitution on their own. And it appears that other courts do not subscribe to the latter view, since they have often awarded restitution in cases where claimants have made mistakes, and where property has been taken from them without their knowledge and consent, without requiring the claimants to prove defendant fault or knowledge.⁷⁸

⁷² Mooted by Neuberger J in *Nurdin & Peacock plc v DB Ramsden & Co Ltd* [1999] 1 WLR 1249, 1271; but contradicted by cases allowing recovery of money paid to a defendant in the mistaken belief that a third party authorised the payment: e.g. *Colonial Bank v Exchange Bank of Yarmouth, Nova Scotia* (1885) 11 App Cas 84; *National Westminster Bank Ltd v Barclays Bank International Ltd* [1975] QB 654.

⁷³ *Lipkin Gorman* (n 36) 580.

⁷⁴ [1997] 3 SCR 805.

⁷⁵ English law does not accept that liability for knowing receipt is a liability for unjust enrichment: *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437, 455-6. It is seen a wrong-based liability for which compensatory remedies are awarded that differ from the restitutionary remedies awarded to claimants in unjust enrichment: C Mitchell and S Watterson, “Remedies for Knowing Receipt” ch 4 in C Mitchell (ed), *Constructive and Resulting Trusts* (Oxford, Hart, 2010).

⁷⁶ *Citadel* (n 70) [51]. Whether Australian law was set on a similar course by findings in the High Court that restitutionary liability is triggered by the “unconscionable retention” of benefits depends on the meaning attached to this term. See *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68; (2001) 208 CLR 516 [23]-[24] and [104]; *Lumbers v W Cook Builders Pty Ltd (in liq)* [2008] HCA 27; (2008) 232 CLR 635 [75]; *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* [2014] HCA 14; (2014) 253 CLR 560 [65].

⁷⁷ F Wilmot-Smith, *Failure of Condition* (unpublished Oxford DPhil thesis, 2013) 156-161. See also 24 where he notes that if his argument is correct, then failure of basis is a more easily justifiable reason for restitution than mistake, contrary to Birks’s view that a case of mistaken payment is the “core case”: P Birks, *Unjust Enrichment* 2nd edn (Oxford, OUP, 2005) 3.

⁷⁸ Mistake: *Banque Financière de la Cité SA v Parc (Battersea) Ltd* [1999] 1 AC 221, 223 (Lord Steyn); “restitution is not a fault-based remedy”; *Pitt v Holt* [2013] UKSC 26; [2013] 2 AC 108 [114] (Lord Walker):

A more nuanced approach, which is also a better “fit” with some of the English cases, would be to say that claims based on defective consent are permitted for different reasons in different circumstances, that in some contexts it makes sense for the law to focus exclusively on the quality of the claimant’s consent, but that in others the law’s purposes are better served by taking account of the defendant’s conduct and/or knowledge as well. Three examples will be offered to illustrate this point.⁷⁹

First, there are cases where a claimant is pressured by a defendant into paying him money by the threat or initiation of legal proceedings, although the claimant owes the defendant no legal liability. These authorities distinguish between bad faith defendants whose actions constitute duress with the result that restitution is awarded⁸⁰ and good faith defendants whose actions do not constitute duress with the result that restitution is not awarded.⁸¹ There are good reasons for the law to make this distinction. Whether one party has legal rights against another may be uncertain and may need to be tested in litigation before the answer can be known. However, this can be expensive and time-consuming and parties should not be deterred from settling uncertain claims, which result might follow if money could always be recovered where it has been paid under the threat of legal process to recipients who have no valid cause of action against the payors. However, there is a risk that unmeritorious parties with no real belief in their legal rights would take advantage of a rule denying recovery to extort benefits from others, and to prevent this the courts should examine a defendant’s beliefs and motives to distinguish cases where recovery is permitted and cases where it is not.

Secondly, Mindy Chen-Wishart has argued that undue influence is an unjust factor that turns on the quality of the claimant’s decision-making within the context of his relationships with other people.⁸² She rejects exclusively “claimant-sided” versions of the undue influence doctrine which take an “on/off” view of consent premised on an idea of claimants as “super-detached” actors whose decision-making takes place in social isolation. Instead, she says, the law should recognise that claimants are social beings whose trusting relationships are a normal feature of the human experience that supports their self-actualisation. To protect the social value of trusting relationships, the law should therefore recognise that it can be positively desirable for claimants’ decision-making to be influenced by other people, but it must also guard against the risk that the people whom they trust will take unfair advantage of them. Hence the courts should examine what both parties to the relationship have said and done when deciding whether transactions entered by claimants should be reversed.

Thirdly, the courts have held that a claimant cannot usually recover a benefit conferred in the mistaken belief that a future event will take place, endorsing Peter Birks’s view that such a claimant knows that his belief may be falsified (because the future is unknowable) and should therefore be deemed to have intended the defendant’s enrichment even when he turns out to be wrong.⁸³ It may be doubted that the premise of this argument holds good for all claimants,

“the mistake [need not] be known to (still less induced by) the person or persons taking a benefit under the disposition”. Absence of consent: *Criterion Properties Plc v Stratford UK Properties Ltd* [2004] UKHL 28; [2004] 1 WLR 1846 [3]-[4] (Lord Nicholls): the defendant’s “personal accountability will not be dependent upon proof of fraud or ‘unconscionable’ conduct on his part”; *Relfo* (Ch) (n 6) [89] (Sales J): “Liability in unjust enrichment ... does not depend upon knowledge of the recipient that the receipt is improper in some way”.

⁷⁹ Note, too, that the availability of proprietary (as opposed to merely personal) relief might also be made to turn on the quality of the defendant’s conduct and knowledge, as discussed in B Häcker, “Proprietary Restitution after Impaired Consent Transfers: A Generalised Power Model” [2009] CLJ 324, 354-7.

⁸⁰ *Duke de Cadaval v Collins* (1836) 4 Ad & El 858, 864; 111 ER 1006, 1010; *Scott v Sebright* (1866) 12 PD 21.

⁸¹ *Hamlet v Richardson* (1833) 9 Bing 644; 131 ER 756; *Powell v Hoyland* (1851) 6 Exch 67, 71; 155 ER 456, 459; *William Whiteley Ltd v R* (1910) 101 LT 741, 745.

⁸² M Chen-Wishart, “Undue Influence: Vindicating Relationships of Influence” (2006) 59 CLP 231.

⁸³ *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193 [29], endorsing P Birks, *An Introduction to the Law of Restitution* (Oxford, Clarendon Press, 1985) 147. See too *Pitt v Holt* [2013] UKSC 26; [2013] 2 AC 108 [109].

some of whose mistaken beliefs about the future are only tacit, i.e. their decisions are premised on assumptions about the future but they do not consciously recognise this and so the case is weaker for treating them as having consented to the defendant's enrichment when their assumptions turn out to be wrong. More fundamentally, while some claimants may actually intend to enrich a defendant whether or not their predictions are correct, others may actually have no intention to enrich a defendant in the event that their predictions are falsified, and so the question arises why they should be deemed to have intended this. The answer may be that no one expects to make decisions on the basis of perfect information. Some information can never be known (the future) and other information is knowable but not worth knowing because the costs of discovering and processing it are excessive (no one wants to know *everything* before deciding what to do). So claimants must choose whether to make decisions although they know that there exists information which they do not know and which might affect their decision-making. If they go ahead but then regret their decision when a "known unknown" becomes a "known known", that is a price which they may legitimately be regarded as having decided to pay for the ability to make decisions about their lives and move on. However, there is an escape route for a claimant confronted by a "known unknown". If he tells the defendant that his intention to benefit the defendant is conditional on the happening of a future event, and the event then does not happen, the law allows him to recover on the ground of failure of basis. This rule effectively permits the claimant to externalise the cost of his ability to make a decision in the presence of a "known unknown" by agreement with the defendant.

A final, rather different, point remains to be made. It is widely assumed that it is not the business of the law of unjust enrichment to deter and punish bad behaviour by defendants, such as fraudulent misrepresentation, deliberate abuse of trust and confidence, unlawful detention of goods, or threats of physical harm. Many would share Edelman and Bant's view, which has already been noted, that even if these can be legitimate objectives for the law of civil wrongs (and do not fall within the exclusive purview of the criminal law), the law of unjust enrichment should not concern itself with such goals. Another argument is that there is no good reason to insist that one part of our private law should pursue such objectives and not another – and if it were accepted that the law of unjust enrichment, like the law of torts, is a legitimate vehicle for their pursuit, then this might conceivably justify the adoption of rules which would allow restitution against "bad" defendants in cases where defects in the claimant's intention to benefit the defendant would otherwise be thought insufficiently serious to justify recovery. Whether restitutionary awards would work effectively as deterrent or punitive mechanisms might be doubted, however, given that they merely return defendants to the status quo ante and do not make them worse off than they were before.

F. CONCLUSION

This paper has identified various three-party cases where restitution has been awarded against "innocent" defendants who have neither participated in the dealings which led the claimants to confer the relevant benefits, nor had any knowledge of these dealings. Some scholars have relied on these cases to argue that the unjust factors invoked by the claimants in these cases must therefore be exclusively "claimant-sided". However, the cases cannot bear this weight because they are also susceptible to explanations which admit the possibility that the relevant unjust factors might include defendant fault or knowledge among their elements. There are, moreover, reasons for thinking that some unjust factors would be easier to understand and better justified if it were recognized that they are "defendant-" as well as "claimant-sided". The courts therefore have some important choices to make, about the goals which should be pursued by different parts of the law of unjust enrichment. Making these choices may additionally require them to decide how much work should be allocated to different parts of our private law.