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RESTITUTION IN ENGLISH AND FRENCH CONTRACTS: A COMPARATIVE STUDY OF UNJUST AND UNJUSTIFIED ENRICHMENT

Abstract

On the face of it, the law of restitution is an integral part of both English and French law, based on the law of obligations and 'alternative' remedies for breach. However, the terminology if not the substance is surprisingly though subtly different. The English terminology pre-supposes a more objective analysis as to whether any enrichment sanctioned by restitution is 'unjust' whereas its French counterpart seems to take a more subjective approach to analyse each instance of 'unjustified' enrichment. This paper will seek to illustrate the legal framework as to restitution in English and French law, but also to deconstruct this semantic differentiation.

Keywords

restitution; unjust enrichment; comparative study; obligations; remedies; civil law; contract law

Introduction

This paper seeks to compare and contrast the law of restitution in England and France. This topic sparks interest, and with these two geographically proximate jurisdictions in particular, as the law of restitution has

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incrementally developed in recent years to sit at the heart of the remedial regime of both countries' legal systems. This paper will dissect and analyse the differences between the two 'neighbours', especially in relation to the more objective English approach compared to the more subjective French alternative. As any legal practitioner is aware, semantics can make all the difference to a legal doctrine and it is partly this semantic differentiation which formed the genesis of this paper's hypothesis.

There is a very well-known story known as the 'Dean's Dog'. As explained, the story of the Dean's dog is something of an Oxford University institution. The Dean of the college owned a springer spaniel, of whom he was very fond. The college rules, however, prohibited anyone from bringing dogs into the college. To avoid the problem, the Dean described the spaniel as a 'quasi-cat'; there were no rules relating to cats, whether *quasi* or otherwise, and the Dean happily took the spaniel into college with him.[1] Farnhill compares restitution to the Dean's dog, calling it a *quasi contract*, with no simple clarity as to what it is and which rules apply. However, over the last two decades, restitution in English law has emerged as a distinct part of commercial law whose role and parameters have become more clearly defined, though it is still a little uncertain as to when one can assert a restitution claim. It can be said that restitution is a "(…) remedy which can operate alongside or distinct from contractual or tortious claims, and which can be available in a claim which arises either as a matter of law or in equity".[2] It can also be said however that restitution restores the claimant to the position it was in before the defendant had been unjustly enriched at its expense. As the authors suggest, for a claim in restitution to succeed, the claimant must show that: the defendant has been enriched. This could be in terms of money, but can also be other benefits, whether direct or indirect, and includes saving from expense and discharging obligations; the enrichment was at the claimant's expense; and the enrichment was unjust. There may be one or more of several reasons why enrichment may

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[1] R. Farnhill, *Restitution Claims*: *Getting your own back*, Allen & Overy, 2011, https://www.allenovery.com/en-gb/global/news-and-insights/publications/restitution-claims--getting-your-own-back [last accessed 10.9.2024].

[2] L. Oakdene, L. Norbury-Robinson, *Restitution*: *A remedy when a contract falls short?*, Walker Morris, 2019, www.walkermorris.co.uk/in-brief/restitution-a-remedy-when-a-contract-falls-short/ [last accessed 10.8.2024].

be unjust, including (non-exhaustively) mistake, duress, undue influence, failure to provide consideration for a benefit, illegality, and so on.[3] In English law this in itself is a complex equation, requiring legal acrobatics at times in order to successfully make such a claim. In French law, the semantically similar, but legally quite different terminology of 'unjustified' enrichment is another matter entirely. This paper will seek to compare and contrast 'unjust' enrichment in English law and its French counterpart of 'unjustified' enrichment and seek to draw conclusions as to these two different approaches which sit only 21 miles apart across the English Channel.

I. What is the Remedy of Restitution?

The concept of restitution can be traced to early theological debates, and as such is far from being a 21st century notion. According to Zollner, "Restitution in moral theology and soteriology signifies an act of commutative justice by which exact reparation as far as possible is made for an injury that has been done to another".[4]

It is when restitution is applied to the theory of crime and punishment that a more 'modern' yet still theological definition can be identified. Writing from a United States perspective, Lollar[5] explains that rather than just confiscating a defendant's wrongfully acquired gains, criminal restitution looks to impose punishment for the act itself, rather than just to rebalance the consequences of the wrong. As Harland argues, also from a United States perspective, "(…) Rationales for the use of restitution include its convenience for compensating crime victims, its rehabilitation value, and as an alternative to prison (…)"[6] and as such

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[3] *Ibid*.

[4] J.E. Zollner, *The Pulpit Orator*: *Containing*, *for Each Sunday of the Year*, *Seven Elaborate Skeleton Sermons*, Augustine Wirth, 1883, p. 322.

[5] C. Lollar, "What Is Criminal Restitution?", *Iowa Law Review*, 1993, Vol. 100, p. 93–94, https://ilr.law.uiowa.edu/sites/ilr.law.uiowa.edu/files/2023-02/ILR-100-1-Lollar_0.pdf [last accessed 248.2024].

[6] A.T. Harland, *Restitution in Criminal Law*, U.S. Department of Justice, 1980, https://www.ojp.gov/ncjrs/virtual-library/abstracts/restitution-criminal-law [last accessed 15.8.2024].

is regarded as a remedy rather than a process. Virgo counters that the law of restitution is too much focused on awarded remedies using very generic legal operations which prevent the defendant making a winning a gain, however that rarely is translated into compensation tto cover the claimant for their loss.[7] Put simply, restitution is concerned with reversing one party's unfair or unjust benefit obtained at the expense of another party.[8]

As Howard argues however, the concept is far from straightforward when understanding the balance and boundaries of claims from both contracted remedies and non-contracted remedies permitted to remedy restitution due to unjust enrichment.[9] Howard explains that where there is no valid contract on which the claimant can base its claims, and one party has been unjustly enriched at the expense of the other, "(…) restitution for unjust enrichment may provide a distinct basis for claims to be raised against the party which has been unjustly enriched".[10] Maudsley[11] states that prior to World War I, unjust enrichment was avoided by judges and writers, as it was not well explored or understood. It was not until the early 1990's that the law of restitution, traditionally interchangeably referred to as the law of unjust enrichment, was officially recognised by the highest court in the United Kingdom.[12]

It was the work of Professors Birks and Burrows which was influential in the identification and clarification of the principles of this new branch of law. Their theoretical work in this area has been frequently cited in English courts and has shaped many decisions made in this ar-

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[7] G. Virgo, "The Essence of Restitution", in G. Virgo, *The Principles of the Law of Restitution*, Oxford, 2006, online ed., Oxford Academic, 2010, 2nd ed., https://doi.org/10.1093/acprof:oso/9780199298501.003.0001 [last accessed 23.6.2024].

[8] Lexis Nexis, *Restitution for wrongful acts*, 2024, https://www.lexisnexis.co.uk/legal/guidance/restitution-for-wrongful-acts [last accessed 20.8.2024].

[9] K. Howard, *Restitution for unjust enrichment in a contractual context*, Pinsent Masons, 2021, www.pinsentmasons.com/out-law/analysis/restitution-for-unjust-enrichment-in-a-contractual-context [last accessed 24.6.2024].

[10] *Ibid*.

[11] R.H. Maudsley, "Restitution in England", *Vanderbilt Law Review*, 1966, Vol. 19, p. 1123. Available at: https://scholarship.law.vanderbilt.edu/vlr/vol19/iss4/4 pp. 1123–1140 [last accessed 26.6.2024].

[12] *Lipkin Gorman v. Karpnale Ltd*, 1991, 2 A.C. 548.

ea.[13] This will be analysed in due course, but it is perhaps pertinent at this point to illustrate the fact that few 'modern' restitution scholars accept that unjust enrichment explains all instances of restitutionary liability and there is even a growing view that *Lipkin Gorman v. Karpnale Ltd* itself was not a case of unjust enrichment in the first place.[14] At this point however, it is prudent to begin with an analysis of the law of restitution in an English common law context.

II. Restitution in English Common Law: Contract and Tort

Maudesley finds it surprising that even in the home of Lord Mansfield there was reluctance to develop "quasi-contractual remedies", despite their use.[15] Part of this, he theorises, is due to the "formidable collection of authority" on the subject, which required examination and assessment as to whether it should be used to progress the law on the topic of restitution,[16] particularly prior to *Lipkin* in 1991. As Giglio explains, drawing on the work of Birks, "(…) The starting point of the present analysis is the definition of restitution as the response which consists in causing one person to give up to another an enrichment received at his expense, or its value in money".[17] As the author suggests, "(…) Ever since the decision of the House of Lords in *Lipkin Gorman v. Karpnale Ltd*, there is no doubt that the law of unjust enrichment has received judicial recognition as an area of English law and that it is based upon restitution".[18] However, Giglio is clear in his assertion, drawing on the

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[13] Oxford University, Faculty of Law, *Shaping the law of unjust enrichment*, 2024, www.law.ox.ac.uk/research-subject-groups/research-index/impact-index/shaping-law-unjust-enrichment [last accessed 27.6.2024].

[14] C. Webb, "What is Unjust Enrichment?", *Oxford Journal of Legal Studies*, 2009, Vol. 29, No. 2, p. 215–243, doi:10.1093/ojls/gqp008.

[15] See Maudsley, *supra* note 11.

[16] *Ibid*., p. 1124.

[17] F. Giglio, *Restitution for Wrongs*: *a Comparative Analysis*, Oxford University Comparative Law Forum, 2001, https://ouclf.law.ox.ac.uk/restitution-for-wrongs-a-comparative-analysis/ [last accessed 25.9.2024].

[18] *Ibid*.

work of Birks once again, that "(…) 'law of restitution' and the 'law of unjust/unjustified enrichment' are not synonyms. They do not even belong to comparable categories".[19]

As Farnhill[20] asserts, accurately in the view of this paper, restitution is regarded as the remedy *for* unjust enrichment, where a claimant asserts that there has been a breach of contract or a tort but, rather than seeking damages reflecting the loss that it has suffered, it seeks restitution reflecting the gain that the defendant has enjoyed owing to the breach. As Oakdene and Norbury-Robinson[21] explain, restitution in English law assists a claimant where other causes of action do not exist or would fail. Pointing to two key cases, *Barton v. Gwyn-Jones*[22] *and Quinn Infrastructure Services v. Sullivan & Ors*[23] the authors correctly suggest that these cases provide a more '21st century' deployment of the law of restitution whilst at the same time reinforcing the importance for commercial parties of a properly and comprehensively drafted written contract and highlighting the conceptual differences between unjust enrichment and quantum meruit claims, arguing that these two cases are potentially indicative of a growing trend towards claimants' advancing and litigating commercial disputes in increasingly inventive ways, including reliance on restitution.

It can be argued that any restitution claim necessarily involves the courts deciding what is just or fair, but the authors warn that whilst restitution can step in where there is no other cause of action or where, say, a contract falls short, relying on such a claim is rarely the ideal solution for any party. They go on to argue that case law demonstrates that restitution is not a stop gap to cover a lack of contract, and that English common law does not generally grant the right to payment where a contract has been permitted, and it cannot be assumed that restitution claims are guaranteed.[24]

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[19] P. Birks, *An Introduction to the Law of Restitution*, Oxford, revised ed., 1989, p. 16–22.

[20] Farnhill, *supra* note 1.

[21] Oakdene, Norbury-Robinson, *supra* note 2.

[22] 2019, EWCA Civ 1999.

[23] 2019, EWHC 2863 (Comm).

[24] Oakdene, Norbury-Robinson, *supra* note 2.

1. The Case Law

1.1. Barton v. Gwyn-Jones

In *Barton v. Gwyn-Jones*[25] the defendant had agreed to pay an introduction fee of £1.2 million if a property owned by it was sold for £6.5 million to a buyer introduced by the agent. The arrangement between the defendant and the agent was an informal, oral agreement, rather than a formal written contract. When the property sold to a buyer introduced by the agent for £6 million, the defendant refused to pay the (or any) introduction fee. The Court of Appeal held that, whilst unjust enrichment claims should not be permitted to undermine the express allocation of risk and obligations set out in a contract,[26] here there was no such express allocation – the contract was not comprehensive. It was simply silent on what would happen if a sale completed at below £6.5 million. There was therefore nothing to preclude a restitution claim.

The agent had formulated its claim on the basis of unjust enrichment. In fact, the Court of Appeal considered that the correct formulation was *quantum meruit*. The claim's focus was that the agent deserved to be paid a fee at a reasonable level, as the property had been sold to a party introduced by it, albeit at a price that had not been catered for in the informal oral agreement. On the facts of this particular case that distinction did not matter because the restitutionary remedy would be the same calculated on either basis. The Court of Appeal noted, however, that that would not necessarily be the case on different facts. The *Quinn*[27] case, also heard in 2019, is one such example.

1.2. Quinn

In *Quinn*[28], a number of different parties and contractual arrangements were in play. Claims brought in contract and against the first, second,

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[25] EWCA, *supra* note 22.

[26] *Macdonald Dickens & Macklin v. Costello*, 2011, EWCA Civ 930.

[27] EWHC, *supra* note 23.

[28] *Ibid*.

and fourth defendants failed for various reasons, and it is the restitution claim against the third defendant that is of interest. A contract arose between the claimant and the third defendant as a result of conduct (namely, the provision of services and invoices by one party, and payment by another). There was no written contract to govern the arrangement between the parties. When, as part of the overall arrangements, the third defendant took payment from the claimant for BT software hosting services and did not account to the claimant for savings made on those services when lesser sums were actually paid to BT, there was no contractual provision on which the claimant could rely. The law of restitution stepped in, however, and a successful unjust enrichment claim saw the third defendant account to the claimant for hosting services savings in the sum of £76,000.

2. Restitution: a Limited Remedy?

As Bunn[29] explains, remedies for contractual disputes are traditionally compensatory in nature, with damages assessed based on the loss suffered by the claimant. On the other hand, restitutionary remedies focus on any unfair benefit ('unjust enrichment') to the defendant at the claimant's expense, with the aim of restoring that benefit to the claimant. Echoing the commentary earlier in this paper, Bunn argues that restitutionary remedies are therefore distinct from traditional remedies, but in some circumstances are essential in order to ensure that a client can obtain an appropriate remedy. Pointing to a key High Court case in 2010,[30] Bunn also explains accurately that restitutionary remedies are available in three circumstances: where the defendant has been unjustly enriched from, or by, an act of the claimant; where the defendant has acquired a benefit from a third party for which they must account to the claimant; and where the defendant has obtained a benefit from their own wrongdoing. The author also explains that the remedy is replete

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[29] C. Bunn, *Claim for restitution crashes in the High Court*, In House Lawyer, 2010, https://www.inhouselawyer.co.uk/legal-briefing/claim-for-restitution-crashes-in-the-high-court/ [last accessed 25.9.2024].

[30] *Giedo van der Garde BV v. Force India Formula One Team Ltd* (formerly Spyker F1 Team Ltd, England), 2010, EWHC 2373 (QB).

with certain bars which prevent a successful claim. The bars include where:

1. the benefit conferred on the defendant by the claimant was a valid gift or in pursuance of a valid common law, equitable, or statutory obligation;
2. the benefit conferred was by way of a compromise or settlement of an honest claim;
3. the claimant conferred the benefit while performing an obligation owed to a third party;
4. the claimant acted officiously or voluntarily;
5. the defendant cannot be restored to its original position (consequently money cannot be recovered unless there is a total failure of consideration) or is a bona fide purchaser; and
6. public policy precludes restitution.[31]

At trial in the *GVG*[32] case, Stadlen J. accepted the claim for restitution, though the judgment provides useful guidance on the practical application of restitutionary remedies. The analysis focused on the well-established principle that a party to a contract is entitled to restitution of the contractual price paid if there has been a total failure of consideration by the defendant.[33]

Jackman[34] however, questions as to whether a person should be held liable to a pecuniary remedy for conduct which has not caused the plaintiff any harm. This seems to lie at the heart of the law of restitution especially where the claimant can disgorge a benefit acquired by the defendant through the latter's wrongful act, even though the wrong has not actually caused him loss or injury. Jaffey[35] too points to the limitations of the remedy of restitution, especially given that its basis seems to be grounded in the theory of unjust enrichment. Jaffey argues that restitution is a remedy arising from the substantive law of unjust en-

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[31] EWHC, *supra* note 23.

[32] *Van der Garde v. Formula One*, *supra* note 30.

[33] *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd*, 1942, UKHL 4.

[34] I.M. Jackman, "Restitution for Wrongs", *The Cambridge Law Journal*, 1989, Vol. 48, Issue 2, p. 302–321, doi:10.1017/S000819730010532X.

[35] P. Jaffey, "Restitution", in D. Campbell, R. Halson (eds), *Research Handbook on Remedies in Private Law*, Edward Elgar, 2019, http://dx.doi.org/10.2139/ssrn.3800889 [last accessed 28.6.2024].

richment, and should be understood within the broader frameworks of property and contract law, rather than being treated solely through the lens of unjust enrichment. According to Jaffey, relying too heavily on the concept of unjust enrichment risks misrepresenting or distorting established principles in both property and contract law, and he is thus highly critical of the way in which the law of restitution and the law of unjust enrichment have been developed over recent years in English law.

Anana[36] follows the same critical deconstruction. The author argues that damages for 'breach of contract' function to preserve the stability of contractual dealings and the 'free market'. Normal contractual damages assessed in line with breach of condition[37] or breach of warranty,[38] and following the two-limb test set down in *Hadley,*[39] help to remedy the loss suffered from the breach, thus providing security for parties who enter into contractual bargains. The author suggests that within English contract law, "(…) remedies are meted out with a degree of impartiality, with an eye to redistributive justice (…)". Anana explains that restitution, unlike other aspects of 'damages', goes beyond simple compensation. Rather than compensate for what is lost, it aims to strip at least some of the unjustly acquired enrichment. Anana warns against restitution becoming a standard remedy for a breach of contract, providing the example of *Attorney General v. Blake*, where the original intent was distorted.[40]

The author argues, with some conviction, that "(…) restitution is analogous to property; it concerns wealth or advantage, which *ought* to be returned or transferred by the defendant to the claimant".[41] As such, Anana argues that restitution is more appropriate within the context of trusts or property law, "(…) since these rights survive against a broader class of people and are often proprietary in nature (…)".[42] It is also

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[36] N. Anana, *Restitutionary Damages for Breach of Contract*: *A Bad Precedent?*, https://blogs.kcl.ac.uk/kslrcommerciallawblog/2013/02/09/restitutionary-damages-for-breach-of-contract-a-false-precedent/ [last accessed 28.6.2024].

[37] *Poussard v. Spiers*, 1875, LR 1 QBD 410.

[38] *Bettini v. Gye*, 1876, 1 QBD 183.

[39] *Hadley v. Baxendale*, 1854, EWHC Exch J70 Courts of Exchequer.

[40] Anana, *supra* note 36.

[41] *Ibid*.

[42] *Attorney General v. Blake*, 2000, UKHL 45 per Lord Hobhouse.

argued that it is in the realms of property law that restitution has its proper place in redirecting wealth that has been unjustly appropriated. As an example, in the tort of trespass, the notion that a person who has used another person's property for his own purposes without the latter's permission, is liable to pay a fee for this use, even if no harm is done to the land.[43] It is argued that in the field of contract law restitution is one step too far. Anana, drawing on the work of Jackman, argues that "(…) in the context of restitution for wrongs, the injustice does not lie in causing harm or loss to the claimant, for the remedy is available without proof that the wrong has made him worse off".[44] Rather it lies in the defendant being enriched by unjust means, and at the expense of the claimant, and it is perhaps not necessary to punish the defendant for such actions beyond nominal damages. In the event of loss, perhaps the ordinary remedies of compensatory damages or equitable remedies are sufficient to deal with the impact of breach. As Lord Hobhouse's dissenting opinion suggests, contractual obligations are correctly understood as being the obligation to perform or pay damages for failing to do so.[45] It can be argued that this ought to be the full scope of liability in contracts, and as such further punitive measures such as restitution should therefore be avoided.[46]

However, recent case law such as *Barton*[47] and *Quinn*[48] have cemented the idea that restitution in English law is now a recognised, and almost distinct remedy that aims to restore to an innocent party the gains that someone else has obtained from them. Evidenced by the groundbreaking dicta in *Lipkin Gorman*[49] the House of Lords gave formal recognition to the law of restitution as being separate from any element of contract law – the law of restitution is not based upon implied contract; rather it is based upon the principle that unjust enrichments must be reversed. This independence of the law of restitution and its foundation in the principle that unjust enrichments must be reversed and the need

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[43] *Wrotham Park Estate Co. Ltd v. Parkside Homes Ltd*, 1974, 1 W.L.R. 798.
[44] Jackman, *supra* note 34, p. 302.
[45] *Attorney General*, *supra* note 42.
[46] Anana, *supra* note 36.
[47] EWCA, *supra* note 22.
[48] EWHC, *supra* note 23.
[49] *Lipkin Gorman*, *supra* note 12.

to distinguish clearly between the law of contract and the law of restitution seem to now be an accepted part of English law.[50]

III. Restitution: Resulting Trusts & Tracing: What's in a Name?

Resulting trusts and tracing.[51] This paper suggests that the law of restitution in English law is actually far more widespread than the current literature suggests, but is perhaps just a 'horse of a different colour'. English law seems to abhor the concept of punitive measures. In contract and tort law, punitive damages springing from a breach, especially in contract law, are seen as going against the fundamental principle that damages should not provide a 'profit' but rather simply reimburse for losses.[52] As such it is not surprising, especially given the emphasis English law places on specific terminology, that restitution as a concept has, until recently at least, been castigated by legal practitioners. It has often been suggested that it is a "(…) a laborious, case-specific and careful process requiring creativity" and as such not within the remit of the judiciary and its approach to calculating damages.[53] However, this paper can point to two key areas of English law where a restitutionary approach is by far the preferred option, and as such it may be that English law in more general terms could benefit from a wider application of its more 'equitable' principles. These two areas are the Resulting Trust and Tracing – both of which are key components of the study and practice of Equity.

1. Resulting Trusts

Perhaps one of the most ill-understood and even contentious decisions ever made in an English court of law is the 'infamous' decision held by

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[50] *Banque Financiere De La Cite v. Parc (Battersea) Ltd and Others*, 1998, UKHL 7.

[51] W. Shakespeare, *Romeo and Juliet*, 1597, Act II Scene II.

[52] *Payzu Ltd v. Saunders*, 1919, 2 KB 581.

[53] P. Warrington, S. Pridgeon, *Restitution in the UK: developments in law and practice*, International Bar Association, https://www.ibanet.org/restitution-in-the-UK-developments-in-law-and-practice [last accessed 10.7.2024].

Lord Denning in the so-called *Vandervell 2*[54] case. In short, Tony Vandervell was a Formula 1 racing driver back in the 1960s, and made a large fortune through his manufacturing company creating 'wall-bearings', a safety mechanism for cars which acted in a way similar to stabilisers on bicycles. He had been married a number of times, and fathered 6 children. In the late 1960s he became ill, and in contemplation of his impending death, he decided to set up a trust, primarily to fund a chair in pharmacology at the Royal College of Surgeons, but also to leave money from the trust fund to his children. He created a trustee company and instructed them to move funds to the RCS, but to retain some money to later hand over to his children. This 'disposition' should formally have been set down in writing[55] but the instruction was given verbally. As such the disposition was challenged as being invalid by Vandervell's widow, whom he married shortly before his death and was not the mother of any of his children. She argued that the money diverted through the trust to the children should revert to the estate and of course, her. Denning L had other ideas, however. He held that the disposition following the verbal instructions was not a disposition of an existing equitable interest at all, but rather a new "stop-gap resulting trust" which fell under the provisions of s53(2) LPA and as such avoided the need for written instrument. Critics pointed to the fact that there was no such creature as a 'stop-gap' resulting trust, but Denning later disclosed to an equity barrister at an Inns dinner that he simply "did not want the awful widow to get the money".[56] As such, Denning was ensuring that restitution was available to remedy the situation in favour of the children, to avoid what he judged to be the unjust enrichment of the widow.

In many other cases, in the more 'modern' judicial era, this 'Denningesque' approach to avoiding unjust enrichment has been employed without referring to the remedy as restitution and should be noted by the judiciary and academics alike as a 'creative' option to normalise restitution as the norm rather than the exception in similar cases. Following in Denning's imposing footsteps, Lady Justice Arden took a compa-

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[54] *Re Vandervell (No 2)*, 1974, EWCA Civ 7.

[55] Law of Property Act 1925, s53(1)(c).

[56] J. Hopkins, *Vandervell and the awful widow*, Lecture given at City University London, GDL, 2003.

rable approach in *Pennington*.[57] When the owner of a family business, Ada Crampton, attempted to create a trust of shares for her nephew Harold to enable him to become finance director, she failed to create the trust according to the relevant documentary formalities, and also failed to do all she could have done under the more equitable 'last act' doctrine in *Re Rose*.[58] However, in order to avoid Harold's losing the shares and as such his position as director, Lady Justice Arden applied the concept of unconscionability[59] and suggested that 'Equity has tempered the wind to the shorn lamb' to allow restitution in all but name and avoid what she deemed to be unconscionable unjust enrichment due to the shares vesting elsewhere. This approach, which followed that taken by Lord Browne-Wilkinson in the slightly earlier case of *Choitharam*,[60] was based on the 'on-trend' application of wide judicial discretionary 'unconscionability' but this paper suggests that this was actually restitutionary in all but name and could and perhaps should not be shied away from by 21st century judges.

2. Tracing

Yet another area of English law, which could also be held up as the zenith of restitutionary application, is the 'process' of tracing. As has often been cited, tracing has always been argued to be a process not a remedy *per se*,[61] especially in the view of senior members of the judiciary such as Lord Millett.[62] The process, as is well-cited, allows for the rightful beneficiaries of trust property to 'trace' the value of their rightful trust property notwithstanding the fact that the form may have changed and that money belonging to the trust may have been 'intermingled' with either the funds of the breaching trustee[63] or the funds

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[57] *Pennington v. Waine*, 2002, EWCA Civ 227.

[58] *Re Rose*, 1952, EWCA Civ 4.

[59] See below for more detail on this.

[60] *T. Choithram International SA v. Pagarani*, 2000, UKPC 46.

[61] W.N. Hohfeld, "The Relations between Equity and Law", *Michigan Law Review*, 1913, Vol. 11, Issue 8, p. 537–571, https://doi.org/10.2307/1275798 [last accessed 19.8.2024].

[62] *Boscawen v. Bajwa*, 1996, 1 W.L.R. 328.

[63] *Re Hallett's Estate*, 1880, 13 Ch D 69.

of 'innocent volunteers'.[64] Beneficiaries are able to trace the property or funds into the hands of an innocent third party, provided they are not a bona fide purchaser of the property for value without notice (equity's darling)[65] or they have a defence of either general unconscionability or change of position.[66] Beneficiaries are also able to trace into profit, providing it has been generated using trust money[67] and can even 'backwards' trace where there is a causal link.[68] It would seem *prima facie*, that the concept of tracing, with its basis firmly rooted in equitable doctrines, is the polar opposite of many of the 'stricter' common law rules, but there can be no doubt that the general principle underpinning tracing as a process is to pave the way for restitution to be available for the rightful beneficiaries and to avoid unjust enrichment, even where the parties are 'innocent' of any wrongdoing. Though judges such as Millett were often loathe to refer to this process as restitutionary, there is no doubt that this is the legal reality notwithstanding academic commentary which suggests that tracing "(…) is concerned with the vindication of property rights rather than the reversal of unjust enrichment"[69] and that tracing is "(…) the thorniest thicket into which a lawyer seeking a restitutionary remedy can tumble".[70] As such it would seem appropriate to suggest that lessons can be learned from both the operation of resulting trusts and tracing as although there is a reticence to refer directly to restitution, at least until relatively recently, the principles underpinning restitution seem to be the bedrock of much of English law and this paper suggests that a 'repositioning' may be of great benefit to English lawyers and judges.

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[64] *Clayton's Case*, *Devaynes v. Noble*, 1814-23, All ER Rep 1.

[65] *Re Diplock or Chichester Diocesan Fund and Board of Finance Inc v. Simpson*, 1944, AC 341.

[66] *Lipkin Gorman*, *supra* note 12.

[67] *Foskett v. McKeown*, 2000, UKHL 29.

[68] *Federal Republic of Brazil v. Durant International Corporation*, 2015, UKPC 35.

[69] M. Stone, A. McKeough, "Tracing in the Age of Restitution", *UNSW Law Journal*, 2003, Vol. 26, Issue 2, www.unswlawjournal.unsw.edu.au/wp-content/uploads/2017/09/26-2-7.pdf [last accessed 27.8.2024].

[70] L. Smith, "The Law of Tracing", *Alberta Law Review*, 1998, Vol. 36, Issue 3.

IV. Restitution in French Law: the Civil Code

Rather than having its legal basis underpinned by the common law as in England and Wales, it goes without saying that in France, law is governed and defined by the Civil Code based on Napoleonic law which was itself based on Roman Law.[71] As Lawson explains, French law is shaped by its reliance on codified legislation. Courts are required to ground their decisions in statutory provisions, which form the primary source of legal authority. This has important implications for restitution.[72] It should be noted therefore that in relation to restitution, it is stated that where restitution involves something other than money, it should be made in kind if possible, or otherwise in monetary value assessed by the Judge at the time the restitution is ordered[73] and equally for any enjoyment or additional benefits that would have been received,[74] particularly in cases involving "*Enrichissement Sans Cause*" the French equivalent of unjust enrichment, where restitution is guided by codified rules and judicial discretion.[75] Recent amendments to the French Civil Code (Obligations) set down that: "If a party is unjustifiably enriched (enriched party) without any legal ground, i) through performance by another, or ii) in any other manner, at the expense of another party (disadvantaged party), the enriched party is bound to render restitution to the disadvantaged party".[76]

There is however, one main exception cited as – "(…) No restitution in case of knowledge of illegality of performance. No one may claim restitution of what he has rendered to the other party while knowing the il-

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[71] F.H. Lawson, "The Approach to French Law", *Indiana Law Journal*, 1959, Vol. 34, Issue, 4, Art 2.

[72] *Ibid*., p. 538.

[73] French Civil Code, Article 1532, https://french-business-law.com/french-legislation-art/article-1352-of-the-french-civil-code/ [last accessed 22.8.2024].

[74] *Ibid*., Article 1532-3.

[75] S. Whittaker, "The Law of Obligations", in J. Bell, S. Boyron, S. Whittaker (eds), *Principles of French Law*, Oxford, 2008, online ed., Oxford Academic, 2012, 2nd ed., https://doi.org/10.1093/acprof:oso/9780199541393.003.0011 [last accessed 12.8.2024].

[76] Civile Code, The Law Of Contract, The General Regime of Obligations, and Proof of Obligations The New Provisions of the Civil Code created by Ordonnance n° 2016–131 of 10.2.2016, https://www.trans-lex.org/601101/_/french-civil-code-2016/#toc_0 [last accessed 12.8.2024].

legality of his performance [‘*nemo auditur turpitudinem suam allegans*’]”.[77] It can be explained that this Principle follows from the general principle of good faith. A party who positively knows that its performance is illegal may not later claim restitution of that performance. Doubts as to the illegality of the performance do not suffice unless the party who performs makes it clear that it assumes all risks arising out of that performance.[78]

This is clearly predicated on the principle of ‘unjustifiable enrichment’ which will be analysed in due course, but it is the definition of restitution itself, as in English law, which is more problematic. It has been argued that “(…) The first point to mention is that French law –like German law – holds strongly to the principle of primacy of restitution in kind. As Descheemaeker states, it is the very thing that was transferred, or shifted, without a “legitimate cause” which must be restored, returned, repeated, restituted”.[79]

An interesting case from 1998,[80] highlighted an additional example of conditions under which unjust enrichment is not permitted. In this context, the improverised person was deemed to be responsible, and therefore not entitled to restitution. The case dealt with a television engineer, who was approached by a customer for a quote for a repair. The engineer, began repair on the television, prior to having the quote accepted by the customer, then claimed payment, which was refused. Originally, the court held that the customer should pay the fee as he benefited from the work. However in appeal in cassation, it was held that the impoverished party, the engineer, was at fault for not complying with terms of engagement and proceeding to work on the device with no agreement in place with, or request from, the customer. Thus

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[77] *Ibid*., Chapter III, Article 1303.

[78] See Commentary to Trans-Lex Principle, https://www.trans-lex.org/960000, https://www.trans-lex.org/960000/highlight_restitution/no-restitution-in-case-of-knowledge-of-illegality-of-performance/ [last accessed 12.8.2024].

[79] E. Descheemaeker, “The New French Law of Unjustified Enrichment”, *Restitution Law Review*, 2018, Vol. 25, ww.pure.ed.ac.uk/ws/portalfiles/portal/37264670/DescheemaekerRLR2017TheNewFrenchLaw.pdf [last accessed 25.6.2024].

[80] Cass. fr. 15.12.1998, *Enrichissement Sans Cause*, also see E. Dacoronia *et al*., “Cass. fr. 15.12.1998, Enrichissement Sans Cause”, *European Review of Private Law*, 2000, Vol. 8, Issue 4, p. 613.

the error was on the part of the impoverished and he could not claim restitution.

Similarly to English law, ujustified enrichment cannot be used as a stop gap. In an appeal case of 2024,[81] the claimant declared that prior to their divorce she had loaned her husband €80000 and wanted it repaid. As there was not sufficient proof of the loan provided, the court rejected the claim. In appeal, the claimant brought a subsidiary claim under Article 1371 (French Civil Code) that as the loan was not proved, she claimed unjust enrichment, based on its being unfair for her husband to keep the money with her gaining nothing in return, even if the loan was not formal. The appeal court refused, explaining that unjust enrichment was only available when no other legal remedy existed. In this case she had a legal claim, but had failed to provide sufficient evidence.

Clarity is provided to a certain extent by way of reference to Chapter V and Articles 1352-1 to 1352-9.[82] The rules on restitution are set down as follows.

1. The Rules of Restitution – Chapter V

Firstly, set down at Article 1352 it states that "(…) Restitution of a thing other than a sum of money takes place in kind or, where this is impossible, by value assessed at the date of the restitution". This clearly set out a definitional parameter as to the meaning of Restitution in French law. Also, as to when restitution is applicable, Article 1352-1 states that "(…) A person who makes restitution of a thing is responsible for any degradations or deteriorations which have reduced its value unless he was in good faith and these were not due to his fault". Other rules within the Civil Code include that a person who sells a thing which he received in good faith must make restitution only of the sale price.[83] Also "(…) Restitution includes its fruits and the value of the enjoyment to which the thing has given rise. The value of the enjoyment is to be assessed by the court as at the date of its decision".[84] The Code goes on to

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[81] Cass. 1ère civ. n°22–10.278 10/01/2024.

[82] Civil Code, 2016, *supra* note 76.

[83] *Ibid.,* Article 1352-2.

[84] *Ibid*., Article 1352-3.

say that in terms of quantum, "(…) the amount of restitution is fixed taking into account for the party who owes restitution any necessary expenses incurred in the maintenance of the thing, and expenses which have increased its value, limited to the increase in value assessed at the date of restitution".[85] In relation to the addition of interest, "(…) Restitution of a sum of money includes interest at the rate set by legislation and any taxes paid to the person who received it (…)"[86] and that "(…) A party in receipt in bad faith owes interest, the fruits he has taken and the value of enjoyment from the moment of receipt of satisfaction. A party in receipt in good faith owes these only from the date when they are claimed".[87]

This seems to be aligned with the UNIDROIT principles which set down the framework for international contracts where at Article 7.3.6, on termination of a contract restitution may be claimed, or if not possible then a monetary allowance can be made if reasonable to do so.[88] As Gallo explains however, the law of restitution, both in Civil and Common Law systems, is not built around a single unifying principle. Instead, it consists of a collection of specific cases where relief is granted, although a broader conceptual understanding of restitution may still be possible.[89] In comparing Civil Law systems to English law, Gallo highlights that the foundations of modern restitution law differ significantly from the Roman quasi-contractual remedies – such as *condictio*, *negotiorum gestio*, and *actio de in rem verso* – from which Civil Law draws. In contrast, the English law of quasi-contract developed from common law actions like *quantum meruit*, *quantum valebat*, and money had and received. These were essentially extensions of the contractual action of *assumpsit*, used when a contract was void due to a missing essential element, such

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[85] *Ibid*., Article 1352-5.

[86] *Ibid*., Article 1352-6.

[87] *Ibid*., Article 1352-7.

[88] UNIDROIT, Principles of International Commercial Contracts, 2016, Article 7.3.6, https://www.trans-lex.org/400120/highlight_restitution/unidroit-principles-of-international-commercial-contracts-2016/#head_154 [last accessed 22.8.2024].

[89] P. Gallo, "Unjust Enrichment: A Comparative Analysis", *The American Journal of Comparative Law*, 1992, Vol. 40, Issue 2, p. 431 *et seq*., www.trans-lex.org/123200/highlight_restitution/gallo-paolo-unjust-enrichment:-a-comparative-analysis-40-amjcompl-1992-at-431-et-seq/ [last accessed 12.8.2024].

as full agreement on consideration.[90] In classical Roman law, only specific remedies were permitted under strictly defined conditions. This evolved into more of a more flexible, generalised approach, particularly in the area of restitution.[91] This eventually developed further into the remedy of *action en nullité* – whenever a voidable contract is performed, it is possible to obtain the restitution at least of the value of what have been delivered by means of remedies of quasi contractual nature (*action en nulltité*, *quantum valebat*, *condictio*).[92] However, this was firmly based in the principles of Unjust Enrichment.

V. Unjust Enrichment in English Law

MacDonald[93] suggests that unjust enrichments occupies an uncertain position across legal systems, describing it as a "lost child" and as such results in great diversity across various jurisidictions of private law, whilst in common law jurisdictions the law of unjust enrichment has mostly been unified. In contrast, French law, rooted in Roman law, approaches the law via a collection of distinct claims, each addressing a particular context and circumstance.[94] The author makes the assertion that unjust enrichment can be aligned with English equitable principles especially as the law of unjust enrichment "(…) has a mission of fixing what would otherwise be unjust (…)" and as such "(…) it is perhaps not surprising that the law of unjust enrichment finds itself torn between being a collection of single instances and being a unified body of law, which steps in whenever there is an unjustified transfer of wealth from one to another".[95] David adds that under French law, the requirement

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[90] *Ibid*.

[91] *Ibid*.

[92] J. Ghestin, *Le Contrat*, LGDJ, Paris, 1980, p. 798; A. Weill, F. Terre, *Droit civil. Les obligations*, Dalloz, Paris, 1986, p. 344; E. Poisson-Drocourt, "Les restitutions entre les parties consécutives a l'annullation d'un contrat", *Dalloz. Chronique*, 1983, p. 85; A. Bouziges, *Les restitutions après annullation ou resolution d'un contrat*, 1982; P. Malaurie, *Le droit civil des restitutions. Cours de droit civil approfond (1974-75)* cited in Gallo, *supra* note 89.

[93] W.C. Macdonald, "Unjust Enrichment", *McGill Law Journal*, 2020, Vol. 66, Issue 1, p. 165.

[94] *Ibid*.

[95] *Ibid*.

for an 'unjustified' transfer means more than simply recognising a shift in wealth between parties. The law does not intervene solely because one person has benefited at another's expense; rather, restitution is only warranted where the enrichment is clearly without legal justification and leads to the impoverishment of another, giving rise to an obligation to make restitution based on principles of natural justice.[96] This raises a broader comparative question: why does French law emphasise 'unjustified' enrichment, while English law refers more generally to 'unjust' enrichment?

VI. Unjust (Unjustified) Enrichment in French Law: the Civil Code

Dickson observes that one of the main challenges in comparing unjust enrichment in common and civil law systems stems from the fact that the principle plays a different role in each.[97] Dickson points out that, echoing the assertions made earlier in this paper, unjust enrichment developed incrementally, yet at a rather steady pace in common law 'Anglo-American' systems, at least until the 'Restatement' in the publication by the American Law Institute of its Restatement of the Law on Restitution in 1937, where s1 asserted that "(…) a person who has been unjustly enriched at the expense of another is required to make restitution to the other".[98] In relation to civil law jurisdictions however, unjust enrichment, as a pathway to restitution, has a far longer shared history. Dickson explains that "(…) The starting point (…) is the well-known adage of Pomponius: ['*Jure naturae aequum est neminem cum alterius detrimentoet iniuria fieri locupletiorem*']"[99] which gave rise to an undisputed principle in most civil law systems. In France however, the overarching principles of unjust enrichment were largely superseded by the need for

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[96] R.J.A. David, "The Doctrine of Unjustified Enrichment: II. Unjustified Enrichment in French law", *The Cambridge Law Journal*, 1934, Vol. 5, Issue 2, p. 205.

[97] B. Dickson, "Unjust Enrichment Claims: A Comparative Overview", *The Cambridge Law Journal*, 1995, Vol. 54, Issue 1, p. 100–126, http://www.jstor.org/stable/4508037 [last accessed 25.7.2024].

[98] *Ibid*., p. 102.

[99] *Ibid*., p. 112.

specific application. Drawing on the work of Dawson, Dickson explains that in French law, unjust enrichment was arguably negated by the commentator and jurist Pothier, an 18th century magistrate and professor of law at the University of Orleans,[100] whom Dawson rather harshly describes as "a man of inferior talent, with a gift for simplification", and accuses him of "reducing the scope of unjust enrichment remedies to much less than was known in classical Rome and of treating Pomponius's adage as nothing more than a general moral rule".[101] A review of Dawson's work also suggested that Pothier's arguments as to the efficacy of unjust enrichment in civil law systems managed to "(…) reveal its secrets only to those both initiated in the problems of restitution and at least generally acquainted with Roman law in its classical form and in its later historical development".[102] However, owing in no small part to the French Revolution, there developed a "(…) radical impetus necessary for the reform of French law to occur. The Constitution of 1791 explicitly called for the preparation of a civil code"[103] and this resulted in the French Civil (Napoleonic) Code being enacted in March 1804 which attempted to codify and harmonise the law, including expressly, restitution due to unjust enrichment. This is now modified and included as Article IX.1 as illustrated earlier.[104]

However, commentators have suggested, echoing Dickson's and Dawson's criticism of Pothier, that the 'reforming' *ordonnance* adds little to any meaningful clarity as to unjust enrichment in French law, mainly owing to the assertion that "(…) or the law of quasi-contracts, of which enrichment is typically regarded as a component part".[105] The au-

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[100] T.D. Musgrave, "Comparative Contractual Remedies' University of Wollongong", *UWA Law Review*, 2009, Vol. 34, Issue 2, https://classic.austlii.edu.au/au/journals/UWALawRw/2009/6.pdf [last accessed 15.9.2024].

[101] J.P. Dawson, *Unjust Enrichment: A Comparative Analysis*, Little, Brown & Co., Boston, 1951, p. 9, https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=3626&context=law_lawreview [last accessed 26.6.2024].

[102] S.L. Kimball, "Review of "Unjust Enrichment: A Comparative Analysis" By John P. Dawson", *Washington University Law Review*, 1952, Vol. 1952, Issue 1, p. 159. Available at: https://openscholarship.wustl.edu/law_lawreview/vol1952/iss1/13 [last accessed 15.9.2024].

[103] *Ibid*.

[104] *Re Hallett's Estate*, *supra* note 63.

[105] Descheemaeker, *supra* note 79.

thor goes on to explain that originally accepted as "enrichment without ground" or in French '*enrichissement sans cause*', is to be known, after the 2016 Reform, as "unjustified enrichment" or *enrichissement injustifié*.[106] And, as explained earlier, this refers to one of three nominate quasi-contracts regulated in the Code. Restitution of undue payment is another, *negotiorum gestio* being the third.[107]

1. Unjustified or Unjust? A Semantic Interpretation?

The French Civil Code states that "(…) Enrichment is *unjustified* where it arises neither from the fulfilment of an obligation by the impoverished person nor from his liberal intention".[108] This is translated from the French '*L'enrichissement est injustifié* (...)' whereas English law, as explained above, has historically developed and is phrased simply 'unjust' and as such the question is whether this is substantively or just semantically diverse. As such 'unjustified' seems at least a little more subjective based as it is on specific wrongs and their related remedies. French law, based on the three specific examples cited in the Code, requires an analysis and application of whether the transfer of property was subjectively *unjustified* given the facts of that transfer.

David[109] suggests that "(…) *Equité* is a term of French law which cannot be translated into English, though 'natural justice' is an expression which comes very near it. It must not be confused with the English term Equity (…)" and as such this may be one argument as to why French law is more comfortable with a narrower more specific need to analyse 'unjustified' actions rather than a wider more nebulous English interpretation of what is simply 'unjust' or 'inequitable'. It is well-established in English law that enrichment at the claimant's expense must be *unjust*[110] and perhaps the equitable process of *tracing* provides an insightful il-

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[106] *Ibid*., p 2.

[107] *Ibid*.

[108] Article 1303-1.

[109] Gallo, *supra* note 89, p. 205.

[110] C. Mitchell, "Unjust Enrichment", in Andrew Burrows (ed.), *English Private Law*, Oxford, 2013, online ed., Oxford Academic, 2013, 3rd ed., https://doi.org/10.1093/acprof:oso/9780199661770.003.0018 [last accessed 26.6.2024].

lustration of how this is more endemic in English than in French law. As Lord Millett held,[111] where property, which was destined for a particular beneficiary or beneficiaries, finds its way into the hands of an 'innocent volunteer' following a breach of trust, it would be 'unjust' to allow the recipient to retain the benefit of the trust property, especially as they provided no consideration.[112] Other than a defence of change of position, as was argued in *Lipkin*,[113] it should be noted that there is also a more general defence for the innocent recipient of 'inequitability' where a more general question will be asked as to whether in broader terms, the recipient will be more negatively affected by the removal of the property from their hands than the rightful beneficiary in not receiving the property. As has been widely applied, but widely criticised in English law since the year 2000 in particular,[114] a general appraisal of what may be seen more objectively as 'unconscionable' now seems to be *de rigueur* in cases where equitable principles are to be applied. As such 'unjust' enrichment in English law seems to be more aligned with such an objective appraisal of what is simply 'conscionable' rather than the seemingly deliberate terminology employed in the French Code of any transfer being 'unjustified'.

As Giglio explains, the law of enrichment addresses situations of misplacing wealth. "(…) It is not clear in English law whether the restitutionary claim in enrichment requires an 'unjust' or an 'unjustified' transfer of wealth (…)" and the author argues that the two adjectives indicate the existence of *two claims*, which differ in their structures and aims. He argues that 'unjust' and 'unjustified' misplacements "(…) account for two different legal principles (…). 'Unjustified' enrichments trigger a legal response based on the lack of justification of the transfer".[115] This is echoed by Juentgen who asserts that "(…) The term 'unjust enrichment', for example, is taken to refer to a doctrine which is believed to operate on general considerations of fairness and thus is criticised for being

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[111] *Foskett*, *supra* note 67.

[112] *Lipkin Gorman v. Karpnale Ltd*, 1988, UKHL 12.

[113] *Ibid*., as per Lord Goff.

[114] *Pennington*, *supra* note 57.

[115] F. Giglio, "A Systematic Approach to 'Unjust' and 'Unjustified' Enrichment", *Oxford Journal of Legal Studies*, 2003, Vol. 23, Issue 3, p. 455.

open-ended (…)".[116] The author goes on to suggest that the broader principle of 'unjust' is mired in the "(…) opaque fog of equity and general considerations of fairness, rather than being a comprehensible legal concept within the law of obligations" citing a New Zealand case where the Judge stated that he struggled:

> (…) being asked to apply a supposed rule of equity which is not only vague in its outline but which must disqualify itself from acceptance as a valid principle of jurisprudence by its total uncertainty of application and result. It cannot be sufficient to say that wide and varying notions of fairness and conscience shall be the legal determinant. No stable system of jurisprudence could permit a litigant's claim to justice to be consigned to the formless void of individual moral opinion.[117]

It has also been argued that the seemingly semantic difference between 'unjust' and 'unjustified' and as such the difference between the common law and civil approaches "(…) is largely one of technique, not substance, and that they tend to yield very similar results, albeit via different intellectual routes. The civil technique is more abstract and can therefore appear simpler, but the semblance of simplicity probably just hides its inherent complexities, while the common law wears them on its face".[118] As Giglio suggests, "(…) 'Fairness' and 'justice'do not fit easily into the sort of analytical constructions which characterize civil law reasoning, as they are too general concepts. Civil law systems prefer the concept of 'justification', for it is associated with a concrete legal requirement the absence of which gives rise to a claim".[119] The author categorically states that: "Linked as they are to different concepts, 'unjust' and 'unjustified' enrichments cannot be regarded as identical legal institutions characterized by a merely semantic distinction". This paper

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[116] A. Juentgen, "Unjustified enrichment in German and New Zealand law", *Canterbury Law Review*, 2002, Vol. 12, Issue 8, p. 505, www.austlii.edu.au/nz/journals/CanterLawRw/2002/12.html [last accessed 27.6.2024].

[117] *Carly v. Farrelly*, 1975, 1 NZLR 356, 367.

[118] B. Hëcker, "Unjust factors versus absence of juristic reason (causa) ", in E. Bant, K. Barker, S. Degeling (eds), *Research Handbook on Unjust Enrichment and Restitution*, Elgar Online, 2020, www.elgaronline.com/edcollchap/edcoll/9781788114257/9781788114257.00024.xml [last accessed 10.9.2024].

[119] Kimball, *supra* note 102, p. 456.

would suggest that the difference is one of substance and reflects a distinct split in the types of claims. The more traditional claim is grounded in the absence of legal justification for a transfer. The other, arises and is granted when the transfer does not align with standard "principles of fairness, or justice". By distinguishing an enrichment claim as 'unjust' or 'unjustified', the legal system recognises two discret claims, both part of the law of enrichment.[120]

Conclusions

Simply, English common law focuses on identifiable unjust factors, such as mistakes or duress, that cause an enrichment to be unjust. Opposingly, French civil law focuses on principles and the absence of a legal cause (*absence de cause*) for the enrichment and whether the enrichment lacks a lawful basis, as per Article 1303-1 of the Civil Code.

This paper would agree with Giglio's assertion – restitution certainly now plays a major role in both English and French law, but the approach taken as to 'unjust' and 'unjustified' enrichment respectively are two different sides of, still arguably, the same coin. Similarly, this paper suggests that English law practitioners relish the concept of restitution, and follow the now-established principles underpinning equitable rules such as those found in resulting trusts and tracing, in order to embrace the concept of restitution as a broad remedy to avoid unjust enrichment.

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[120] *Ibid*., p. 456.