Unjust Enrichment and Proprietary Restitution

By Aisha Shah

Introduction

This article seeks to answer the question of when an unjust enrichment leads to a proprietary response in the form of a resulting trust. Whether a proprietary response is available in response to unjust enrichment is significant for a number of reasons. One of the main advantages of proprietary restitution is that it gives a claimant priority at insolvency against other creditors, but there are a number of other important advantages as well. For example, the claimant can make use of equity's more advantageous tracing rules, recover his property and assert personal claims against third party recipients, and also take the benefit of increases in value of property that represents the traceable proceeds of his property. However, the question of when and why an unjust enrichment leads to proprietary restitution remains to be answered.[1]

This article argues that the principle of autonomy governs when an unjust enrichment gives rise to a proprietary response. The original contribution of this article is that it develops a framework for identifying when autonomy protection justifies proprietary restitution, by introducing the novel concept of impossibility. It is submitted that if the defendant is unjustly enriched at the claimant's expense in circumstances where the purpose of the transfer is initially impossible, a trust arises to protect the

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[1] *Angove's Pty Ltd v Bailey* [2016] UKSC 47, [2016] 1 W.L.R. 3179 at [30]; D. Salmons, "The Availability of Proprietary Restitution in Cases of Mistaken Payments" (2015) 74 C.L.J. 534.

claimant's autonomy. The reason is that when there is no opportunity for the claimant's purpose to be fulfilled, autonomy would be undermined if the claimant did not retain a property interest. Conversely, if from the outset the transfer is capable of fulfilling its intended purpose, there is no justification for reversing the transfer in equity. Proprietary restitution is therefore not available. Once it is accepted that the foundations of proprietary restitution are based on the notion of impossibility, one can adequately reconcile the case law.

The approach proposed in this article may at first appear to be closely aligned to the view of the late Professor Birks who argued that all initial unjust enrichments lead to a trust.[2] However, the problem with Birks' analysis is that it failed to explain cases such as *Re Goldcorp Exchange Ltd*,[3] which contrary to his claim illustrates that a trust is not available for all initial failures. In contrast to Birks' initial failures of basis approach, but in line with the case law, this article advocates that not all spontaneous and induced mistaken payments, all of which are instances of initial failures, give rise to proprietary restitution.[4] This position is supported by demonstrating that the availability of the proprietary response is contingent on the impossibility of the purpose of the transfer at the moment of the defendant's receipt, rather than an enrichment which is initially unjust.

The need for the unjust enrichment analysis

This section will demonstrate the need for a new analysis, by exploring the difficulties with some of the more established approaches to proprietary restitution. It will accept that Professors Birks and Burrows have rightly recognised that the trust arising for mistaken payments is a response to the event of unjust enrichment, and takes the form of a resulting trust. However, it is argued that Birks' absence of basis theory and Burrows' risk analysis do not reconcile the case law. Neither do they provide a strong normative basis for proprietary restitution.

[2] P. Birks, *Unjust Enrichment*, 2nd edn (Oxford, 2005), p.192.
[3] [1995] 1 A.C. 74.
[4] *Infra* text to notes 23-30.

Professor Burrows' risk of insolvency approach

Burrows argues that an unjust enrichment can give rise to proprietary restitution.[5] In his view, when a claimant's intentions are vitiated by mistake, the claimant is normally "analogous to a secured creditor". The reason is that "he has not taken the risk of the creditor's insolvency because he did not mean the defendant to be enriched at all".[6] This justifies a proprietary restitutionary response. In contrast, a claimant who is, or is analogous to, an unsecured creditor should never be entitled to proprietary restitution.[7]

However, there are some problems with Burrows' risk reasoning. For example, comparing a payment made under a mistaken obligation with money given on credit without security, Lord Millett concludes that:

> "justice does not demand that my claim should rank in priority to theirs… They gave you credit, thinking that you were good for the money and voluntarily took the risk of insolvency… I did not intend to give you credit; but I did intend you to have the money. I too took the risk that if for any reason you came under an obligation to repay it, you might be unable to do so".[8]

Therefore, it could be suggested that in *Chase Manhattan v British-Israeli National Bank*[9] the mistaken payer had taken the risk of the defendant's insolvency.[10] In *Chase Manhattan*, in order to discharge an obligation the claimant bank transferred a sum of $2 million to the defendant. However, the payment was made by mistake; the claimant had already discharged the obligation earlier that day. Before the claimant bank could recover the money paid in error, the defendant entered liquidation. But

[5] A. Burrows, *The Law of Restitution*, 3rd edn (Oxford, 2011), pp.176-179.
[6] A. Burrows, "Proprietary Restitution: Unmasking Unjust Enrichment" (2001) 117 L.Q.R. 412, 426.
[7] *Ibid* 425-427; Arguably Birks takes a similar view, see P. Birks, *Unjust Enrichment*, 2nd edn (Oxford, 2005), pp.194-195.
[8] P. Millett, "Proprietary Restitution" in S. Degeling and J. Edelman (eds), *Equity in Commercial Law* (Sydney, 2005), p.322.
[9] [1981] Ch. 105.
[10] See *Re Pinkroccade Educational Services Ltd* (2003) MSCLC 97630 (HCA) at [22] per Lee Seiu Kin JC.

despite the claimant having taken a risk,[11] there was a proprietary response and the defendant held the money it received on trust for the claimant. Risk-reasoning is also incapable of explaining why a trust arose in *Neste Oy v Lloyds Bank Plc*,[12] but not in *Westdeutsche Landesbank v Islington London Borough Council* which is discussed later in this article.[13] In both cases the claimants were engaged in commercial transactions governed by either a contract or purported contract. Parties to a contract have the opportunity to obtain security. By not negotiating security, a payer takes an insolvency risk. This can be illustrated by the case of *Neste Oy*. In *Neste Oy*, the claimant principal paid its agent. However, the claimant shipowner's belief, that when money was paid to the agent the agent was capable of extinguishing the claimant's liabilities to third parties, was mistaken.[14] This is because the payment was received by the agent at a time when it had already decided to cease trading and appoint a receiver. Bingham J held that this payment was held on trust for the transferor principal. But applying Burrows' analysis, it can be argued that by not negotiating security, the claimant principal took the risk that the agent's ability to pass the money on to third parties might be frustrated by the agent's insolvency.[15] Yet, despite the claimants in both cases entering into commercial transactions and making payments without obtaining security, Burrows believes that *Neste Oy* and *Westdeutsche*[16] were both correctly decided, on the basis that the claimant in the former did not take a risk[17] and the claimant in the latter did.[18]

When an enrichment is subsequently unjust and the claimant has not taken out security, Burrows argues that under his risk analysis a trust cannot arise.[19] However, Burrows does recognise one instance where a subsequent failure can give rise to a trust. He states that the claimant's position is:

[11] But see A. Burrows, "Proprietary Restitution: Unmasking Unjust Enrichment" (2001) 117 L.Q.R. 412, 425n.65, 426, 426n.68; A. Burrows, "Lord Bingham and Three Continuing Remedial Controversies" in M. Adenas and D. Fairgrieve (eds), *Tom Bingham and the Transformation of the Law* (Oxford, 2009), p.593.
[12] [1983] 2 Lloyd's Rep 658; *Halley v Law Society* [2003] EWCA Civ 97, [2003] WTLR 845; *Re Crown Holdings (London) Ltd* [2015] EWHC 1876 (Ch); R. Chambers, *Resulting Trusts* (Oxford, 2007), pp.171-184; P. Birks, "Property and Unjust Enrichment: Categorical Truths" [1997] N.Z.L. Rev. 623, 637-638 and 641.
[13] [1996] A.C. 669, *infra* text to notes 43-60.
[14] P. Birks, *Unjust Enrichment*, 2nd edn (Oxford, 2005), p.187.
[15] See P. Watts, "Restitution" [1990] N.Z.R. L.R. 330, 341.
[16] *Westdeutsche* is discussed later in this article, *infra* text to notes 43-60.
[17] A. Burrows, "Lord Bingham and Three Continuing Remedial Controversies" in M. Adenas and D. Fairgrieve (eds), *Tom Bingham and the Transformation of the Law* (Oxford, 2009), p.593.
[18] A. Burrows, "Proprietary Restitution: Unmasking Unjust Enrichment" (2001) 117 L.Q.R. 412, 426, 426n.67, 427, 427n.69.
[19] *Ibid* 426.

> "different if security for the claimant had been created or purportedly created in the 'contract'. One could not then say that the claimant was--or was analogous to--an unsecured creditor who had taken the risk of the defendant's insolvency. Rather he is, or is analogous to, a secured creditor".[20]

Nevertheless, this reasoning does not explain the outcome in *Re Goldcorp*. In this case, due to the defendant's misrepresentation the claimants believed that the contracts had created a security interest in their favour, in the form of ownership of the gold bullion in the company's vaults.[21] But no security interest had been created. After the purchase price was paid, but before the goods were delivered, the defendant went into receivership. As the claimants had bargained for security, they had arguably not taken a risk and should have been regarded as analogous to secured creditors. Therefore, Burrows' explanation for the lack of a proprietary response in *Goldcorp*, which is that the claimants were "unsecured creditors" and had taken the risk of the defendant's insolvency,[22] undermines his risk approach.

Professor Birks' absence of basis approach

An alternative approach is presented by Birks in his later works. Birks argued that, where there is no explanatory basis for the defendant's receipt, the defendant is unjustly enriched at the claimant's expense.[23] Furthermore, he argued that the resulting trust also arises when "the transferee is enriched *sine causa*"[24] if additionally it is shown that the enrichment was never freely at the disposition of the recipient before the claimant's right to restitution arose.[25] An example illustrating this is *Chase Manhattan*, where the payment was made to discharge an obligation. As the obligation did not exist,

[20] *Ibid*.
[21] [1995] 1 A.C. 74 at 87-89, 102.
[22] A. Burrows, "Proprietary Restitution: Unmasking Unjust Enrichment" (2001) 117 L.Q.R. 412, 426, 426n.66.
[23] P. Birks, *Unjust Enrichment*, 2nd edn (Oxford, 2005), ch 6.
[24] P. Birks, "Restitution and Resulting Trusts" in S. Goldstein (ed), *Equity and Contemporary Legal Developments* (Jerusalem, 1992); P. Birks, *Unjust Enrichment*, 2nd edn (Oxford, 2005), p.306.
[25] P. Birks, *Unjust Enrichment*, 2nd edn (Oxford, 2005), p.194.

the basis of the payment failed from the outset. Moreover, as the right to restitution arose on receipt, the enrichment was never at the defendant's free disposal. Therefore, a trust arose.[26]

Under this analysis, the combination of absence of basis and the defendant not having the enrichment at his free disposal should always give rise to a resulting trust.[27] However, Birks' reasoning presents a problem. This is because in some cases that satisfy the requirements of an absence of basis and restricted beneficial ownership, Birks concluded that a trust could not arise. For example, in *Re Goldcorp*, the claimants were induced to enter into sale contracts with the defendant company on the basis of fraudulent misrepresentations. The Privy Council held that no trust of the claimants' purchase monies arose. But in his book *Unjust Enrichment* Birks stated that when a claimant's intentions to enter into a contract are deficient, due to misrepresentation for example, this renders the contract voidable. The effect of the voidability is that when any benefits are transferred pursuant to this voidable contract, the claimant has an unjust enrichment claim against the defendant from the outset.[28] If one utilises this reasoning, the contracts between the claimants and defendant in *Goldcorp* were voidable because of the defendant's misrepresentations. As there was no basis for the payments the defendant was unjustly enriched as soon as it received the money, and so did not receive the enrichment freely. Consequently, under Birks' approach to proprietary restitution a trust should have arisen immediately at the moment of the defendant's receipt of the contractual payments. Nevertheless, Birks explains the outcome in *Goldcorp* by saying that the basis of the payments failed after receipt. It was therefore a subsequent rather than initial failure of basis. Since there was a period of time where the money was at the recipient's free disposal, this precluded a trust.[29] Therefore not only does Birks' absence of basis analysis fail to explain why a trust did not arise in response to the initial failure in *Goldcorp*,[30] his application of the approach is inconsistent with the principle underlying absence of basis. For these reasons, Birks' approach must be rejected. Having said this, there is no need to reject an unjust enrichment analysis for proprietary restitution. This is explained in the next section which develops the

[26] *Ibid* pp.186-187.
[27] *Ibid* pp.185-198.
[28] *Ibid* pp.126-127, 135-136, 173-174.
[29] *Ibid* pp.195-196; P. Birks, "Retrieving Tied Money" in W. Swadling (ed), *The Quistclose Trust: Critical Essays* (Hart, 2004), p.131; P. Birks, "Establishing a Proprietary Base (*Re Goldcorp*)" [1994] R.L.R. 83.
[30] *Re Goldcorp* [1995] 1 A.C. 74 is explored later in this article, *infra* text to notes 78-85.

argument that an unjust enrichment approach that focuses on impossibility, as opposed to failure of basis, better explains the case law.

Impossibility

Even amongst unjust enrichment scholars, it is broadly recognised that the recipient's unjust enrichment by itself is not sufficient for a proprietary restitutionary response; something more is needed. The new contribution that this article makes to the current literature is it argues that equity intervenes, in the form of the trust device, to protect the claimant's autonomy when his decision to make the transfer is nullified by an initial impossibility. This occurs if, at the moment the defendant receives the enrichment there is no possibility of the claimant's conditions for transferring his property being fulfilled. It is submitted that only an impossibility justifies proprietary restitution.[31] The reason is that, when there is no opportunity for the claimant's central purpose for the transfer to be fulfilled, autonomy would be undermined if the claimant did not retain a property interest. Whereas if an element of the transfer fails at the outset, but the failure does not defeat the claimant's condition for transferring the property, the claimant's purpose is possible initially.[32] In these circumstances, there is no need to protect the claimant's autonomy. As a result, the defendant receives unrestricted beneficial ownership of the enrichment and proprietary restitution is thus not available. This analysis reconciles the case law and sheds light on when and why an unjust enrichment is held on trust for the payer.

Admittedly, Birks too argued that for there to be a proprietary response, the defendant must be unjustly enriched and cannot have unrestricted beneficial ownership of the enrichment. However, Birks' account presented too wide an approach towards equitable proprietary claims. In contrast, the analysis presented here is more restrictive than the stance adopted by Birks, and explains why not all mistaken payments, which are all instances of initial failures, give rise to proprietary restitution. As discussed later in the article, this impossibility reasoning is capable of explaining why in *Re Goldcorp* there was

[31] A similar approach to "proprietary restitution" is taken by G. Virgo, *The Principles of the Law of Restitution*, 3rd edn (Oxford, 2015), p.170.
[32] This will be illustrated using case law later in this article, *infra* text to notes 40-41, 83-84.

a mistake and hence an initial failure of basis under Birks' approach yet the claimants were only entitled to personal restitution.[33]

The Supreme Court's recent decision in *Angove's Pty Ltd v Bailey* illustrates that equity intervenes when the transferor's intentions, with regards to the property transferred, are frustrated by impossibility at the time of the defendant's receipt.[34] In *Angove's*, two customers paid the defendant agent after its authority to collect the sums had been terminated. Due to the termination of the defendant agent's authority, the payments to the defendant did not discharge the customers' debts to the claimant principal, Angove's Pty Ltd. As the customers' intentions could not be fulfilled, the defendant was unjustly enriched at the customers' expense and the customers were entitled to restitution. But the precise nature of the right to restitution, whether it was personal or proprietary, was not stated. However, it is implicit from the judgment that when Lord Sumption, with whom all the Lordships agreed, held that "the fund representing the proceeds of the invoices is payable to Angove's",[35] he was reverting to the resulting trust analysis of Judge Pelling QC.[36] It follows that the disputed fund, as decided at first instance, was held on a resulting trust for the customers and under a mandate the funds were to be paid to the claimant principal, Angove's. The resulting trust for the payers arose in response to the unjust enrichment of the purported agent.[37] This is because the customers' payments were entirely conditional on the existence of an obligation to pay the sums to the defendant. As the agency had been terminated, there was no such obligation and the purpose of the transfer was impossible. Therefore, the outcome in *Angove's* is consistent with the impossibility analysis of proprietary restitution. On this basis, it can be reconciled with *Neste Oy*. It is also possible to reconcile this decision with *Chase Manhattan*, where the claimant paid with the intention of discharging an obligation which had already been discharged. As in *Angove's*, the claimant's purpose was wholly defeated from the outset and a trust arose.

[33] *Infra* text to notes 78-85.
[34] [2016] UKSC 47, [2016] 1 W.L.R. 3179.
[35] *Ibid* [33].
[36] *Angove's Pty Ltd v Bailey* [2013] EWHC 215 (Ch) at [6], [43]-[44], [59].
[37] A. Shah, "Proprietary Restitution and Receipt by Insolvent Agents: *Angove's Pty Ltd v Bailey*" (2017) 31 T.L.I. 30.

Re Crown Holdings (London) Ltd is another instance of initial impossibility leading to proprietary restitution.[38] In this case, the object of the contracts was to provide foreign currency in exchange for English currency. For the customers' payments received by the insolvent Companies *after* Barclays Bank stopped all payments out of the Companies' accounts, thereby causing a cessation of trade, this could not be carried out at the time of their receipt. The cessation of trade rendered the purpose of these payments impossible to fulfil from the outset. Accordingly, this money was held on trust for the customers. But it was also held that the money received into the insolvent Companies' accounts *before* Barclays stopped outgoing account payments was not held on trust for the payers. This can be explained on the premise that, when this money was received by the Companies, the Companies were still trading and so the contracts could still be carried out. Consequently, for these earlier payments, when the purpose later failed it was too late for a trust to arise.[39]

In contrast, for the case of *Eldan Services Ltd v Chandag Motors Ltd*,[40] the impossibility analysis explains why, even if the variation of the contract had been set aside, the unjust enrichment could not give rise to proprietary restitution. The claimant had paid the defendant by means of a post-dated cheque for the purchase of a business and stock. Subsequently, the claimant alleged that the stock was not worth the amount payable under the contract, and that the cheque therefore represented an overpayment. Millett J, on the assumption that grounds existed for setting aside the variation, said that "the plaintiffs' claim is a personal claim only",[41] as opposed to a proprietary claim for a trust. This can be explained on the basis that the object of the payment, which in *Eldan Services* was to purchase business and stock, could be carried out at the time of its receipt.

Dealing with issues arising from the impossibility analysis

[38] [2015] EWHC 1876 (Ch).
[39] Similarly, see *Re Farepak Food and Gifts Ltd* [2006] EWHC 3272, [2008] BCC 22.
[40] [1990] 3 All E.R. 459.
[41] *Ibid* 462.

This section deals with some of the issues that arise from the impossibility approach for proprietary restitution. First, it will be explained whether a payment made under a void contract is held on trust for the transferor. Second, this section explores other forms of impossibility. In particular, it clarifies when a payment made under a voidable contract is held on trust for the payer, and why such a trust does not undermine the contract between the parties.

Payments made under void contracts

A payment made under a void contract does not always give rise to proprietary restitution. This is because a payer's purpose for the payment may be possible to fulfil despite the contract being void. A case which can be used to illustrate this is *Rover International Ltd v Cannon Film Sales Ltd*.[42] In *Rover*, the defendant's receipt of the payments was unjust from the outset. Yet it is submitted that if the defendant in *Rover* was insolvent and the claimant had argued for a trust, the initial failure could not give rise to a trust response. This is because the purpose the advance payments were made for was still possible to carry out at the time the payments were made.

The most contentious case involving a void contract, and where proprietary restitution was a live issue, is *Westdeutsche Landesbank v Islington London Borough Council*.[43] In *Westdeutsche v Islington LBC*, the claimant bank had entered into an interest rate swaps agreement with the defendant council. A few years after the swap was entered into, it was declared in *Hazell v Hammersmith and Fulham LBC* that swaps agreements were void as they were ultra vires the local authorities.[44] The *Hazell* decision retrospectively rendered the Westdeutsche swap void ab initio.[45] Consequently, the defendant local authority in *Westdeutsche* was unjustly enriched from the moment it received the payments, even though the parties had entered into the swap before the decision in *Hazell*.

[42] [1989] 1 W.L.R 912.
[43] [1996] A.C. 669.
[44] [1992] 2 A.C. 1.
[45] On the retrospective nature of judicial decision-making, see *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 A.C. 349 at 357-362 per Lord Browne-Wilkinson, 377-380 per Lord Goff, 393-394 per Lord Lloyd, 399-401 per Lord Hoffmann, 410-411 per Lord Hope; *Deutsche Morgan Grenfell Group Plc v Inland Revenue Commissioners* [2006] UKHL 49, [2007] 1 A.C. 558 at [23] per Lord Hoffmann.

Not only was the defendant in *Westdeutsche* unjustly enriched from the outset by the payments, the claimant's purpose was also initially impossible.[46] The payments were made in pursuit of a gamble as both parties were taking a risk. The plan was that one of them would make a loss, but that the other party would profit from the arrangement. However, when the payments were made, there was no possibility of the claimant making a profit. Even if the parties had completely performed, regardless of the parties' wishes, the court was going to unwind the transaction due to policy reasons and not let either party retain any benefits from the swap.[47] This is evident from the closed swaps cases of *Guinness Mahon & Co. Ltd v Kensington and Chelsea Royal LBC*[48] and *Kleinwort Benson Ltd v Sandwell BC*[49] where, despite both parties having completely performed the swap, restitution was awarded.

Before going further, it must be conceded that the dicta of the House in *Westdeutsche* appears to be inconsistent with the impossibility analysis. Nevertheless, despite their Lordships' dicta to the contrary, it is submitted that the discussions of proprietary restitution in *Westdeutsche* were obiter and that the case can be reconciled with the analysis presented in this article. First, the claimant bank's money was paid into an account that "became overdrawn overnight on several dates".[50] Applying the rule in *James Roscoe Ltd v Winder*, the lowest intermediate balance in the account was zero.[51] Accordingly, the subsequent replenishment of the account after it became overdrawn did not represent the claimant's property. For this reason, the replenished account could not form the subject matter of a trust. Furthermore, the claimant's money was "used by the local authority for its general expenditure",[52] and so there were no identifiable assets representing the proceeds. Consequently, at the time of the claim, there was no property that the claimant bank's equitable right could attach to. The determination of whether a trust had arisen in response to the defendant's unjust enrichment was, therefore, only relevant for the purpose of establishing the appropriate level of interest.

[46] Birks also said that if there was a mistake of law in *Westdeutsche*, then a resulting trust should have arisen. See P. Birks, "Trusts Raised to Reverse Unjust Enrichment: The *Westdeutsche* Case" [1996] R.L.R. 3, 24.
[47] *Westdeutsche v Islington LBC* [1994] 1 W.L.R. 938 at 951 per Leggatt LJ.
[48] [1999] Q.B. 215.
[49] [1994] 4 All E.R. 890.
[50] *Westdeutsche v Islington LBC* [1996] A.C. 669 at 700 per Lord Browne-Wilkinson.
[51] [1915] 1 Ch. 62.
[52] *Westdeutsche v Islington LBC* [1996] A.C. 669 at 700 per Lord Browne-Wilkinson.

Second, the local authority in *Westdeutsche* appealed "only against the award of compound interest".[53] With regards to compound interest, Lord Browne-Wilkinson stated that:

> "it is common ground that in the absence of agreement or custom the court had no jurisdiction to award compound interest either at law or under section 35A of the Supreme Court Act 1981 … [54] [Moreover,] in the absence of fraud courts of equity have never awarded compound interest except against a trustee or other person owing fiduciary duties who is accountable for profits made from his position".[55]

As there was no fraud or breach of fiduciary duty in *Westdeutsche*, in order to obtain compound interest, first it had to be shown that a trust had arisen and, second, that the defendant local authority was accountable for profits made from a breach of trust. On the question of whether a trust had arisen, Lord Browne-Wilkinson stated that:

> "since the equitable jurisdiction to enforce trusts depends upon the conscience of the holder of the legal interest being affected, he cannot be a trustee of the property if and so long as he is ignorant of the facts alleged to affect his conscience".[56]

Applying Lord Browne-Wilkinson's analysis, from the moment a defendant's conscience is affected by knowledge of the mistake, a trust arises.[57] From this point onwards, the defendant must account to the beneficiaries for any profits that he receives from the trust.[58] Since at no point did the local authority have knowledge while the bank's money was still in its hands, a trust did not arise under Lord Browne-Wilkinson's analysis. As there was no trust, there could be no breach of trust. However, as argued by Lord Justice Millett, Lord Browne-Wilkinson erred in his belief that the recipient's conscience must be

[53] *Ibid* 700 per Lord Browne-Wilkinson.
[54] *Ibid* 700-701 per Lord Browne-Wilkinson.
[55] *Ibid* 701 per Lord Browne-Wilkinson.
[56] *Ibid* 705.
[57] *Ibid* 705-706.
[58] *Ibid* 706 per Lord Browne-Wilkinson.

affected for a trust to arise.[59] If one accepts that a trust can arise before the defendant has knowledge, then contrary to Lord Browne-Wilkinson's belief, a trustee is not under a duty to account from the moment the trust comes into existence. This is because as was stated by Lord Justice Walker in the Court of Appeal in *Allan v Nolan*, a trustee of a resulting trust is only personally liable for breach if he has knowledge of the trust at the time that he commits the breach.[60] Although the impossibility analysis indicates that a trust arose from the outset in *Westdeutsche*, the defendant local authority could not be held accountable. The local authority did not commit a breach of trust; since it dissipated the trust property without the authorisation of the beneficiary bank before it knew of the trust's existence. It follows that as the property was no longer in the hands of the local authority, and neither did the local authority commit a breach, the House of Lords' discussions on the availability of a proprietary claim were unnecessary and therefore obiter.

Other forms of impossibility

When a contractual payment is made in circumstances in which the recipient is unjustly enriched from the moment of receipt, it is nonetheless possible that a trust might arise immediately even under the voidable contract.[61] Although the immediate trust model was rejected by the House of Lords in *Westdeutsche Landesbank*,[62] and later fell out of favour with Birks,[63] it is submitted that it should be the preferred analysis for proprietary restitution involving contractual payments. There are two reasons for this. First, as Swadling has explained, the principle of abstraction dictates that "the passing of title is independent of the validity of the contract, and its non-existence or subsequent rescission can

[59] P.J. Millett, "Restitution and Constructive Trusts" (1998) 114 L.Q.R. 399, 401, 412-413; Also see A. Burrows, *The Law of Restitution*, 3rd edn (Oxford, 2011), p.180.
[60] [2002] EWCA Civ 85; [2002] Pens L.R. 169.
[61] *Neste Oy v Lloyds Bank Plc* [1983] 2 Lloyd's Rep 658; *Halley v Law Society* [2003] EWCA Civ 97, [2003] WTLR 845; *Re Crown Holdings (London) Ltd* [2015] EWHC 1876 (Ch); R. Chambers, *Resulting Trusts* (Oxford, 2007), pp.171-184; P. Birks, "Property and Unjust Enrichment: Categorical Truths" [1997] N.Z.L. Rev. 623, 637-638 and 641.
[62] *Westdeutsche v Islington LBC* [1996] A.C. 669.
[63] P. Birks, *Unjust Enrichment*, 2nd edn (Oxford, 2005), pp.299-300.

therefore have no bearing on third parties."[64] It follows that as rescission cannot have the effect of revesting title in the transferor either in law or in equity,[65] rescinding the contract should not be a requirement for proprietary restitution. This is supported by *Re Goldcorp Exchange Ltd*, where the Privy Council stated that even if the customers had rescinded their contracts with the defendant before the bank's floating charge crystallised, this would not give the customers property rights in the purchase monies paid to the defendant.[66] The case of *Shalson v Russo* further illustrates the fictionality of rescission.[67] In *Shalson*, it was said that a fraudulently induced contract did not have to be expressly rescinded before a trust can arise.[68] Rather, implied rescission was sufficient, arguably rendering the rescission requirement meaningless.[69] Second, and more importantly, the immediate trust model irons out the inconsistencies between spontaneous mistakes, which give rise to an immediate trust,[70] and fraudulently induced mistaken payments which are said to require the setting aside of the transaction before a trust can arise.[71] This ironing out is imperative for the reason that it is "slightly odd to be forced to the conclusion that equity's proprietary response to mistake is structurally different from its response to misrepresentation (induced mistake)."[72]

Since contracts protect autonomy by upholding parties' intentions,[73] one may be concerned that an immediate trust of a contractual payment arising in the claimant's favour is inconsistent with the obligation-based relationship created by the contract. It could therefore be seen to undermine the parties' contractual autonomy. Nevertheless, it is submitted that an immediate trust is justified in the contractual context. This is because when an enrichment is transferred under a contract which is impossible to perform from the outset, as there is no possibility of contractual performance, there is no reason for the

[64] W. Swadling, 'Rescission, Property, and the Common Law' (2005) 121 L.Q.R. 123, 123.
[65] *Ibid*.
[66] [1995] 1 AC 71 (PC) at 102-103.
[67] (2003) EWHC 1637 (Ch), [2005] Ch 281.
[68] *Ibid* [119].
[69] *Shalson v Russo* (2003) EWHC 1637 (Ch), [2005] Ch 28 at [117], [120], [124] and [127].
[70] E.g. *Chase Manhattan v British-Israeli National Bank* [1981] Ch. 105.
[71] *El-Ajou v Dollar Land Holdings Plc (No.1)* [1993] 3 All E.R. 717 at 734 per Millett J; *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch. 281 at [122] per Rimer J; *London Allied Holdings Ltd v Lee* [2007] EWHC 2061 (Ch) at [276] per Etherton J.
[72] P. Birks, "Property and Unjust Enrichment: Categorical Truths" [1997] N.Z.L. Rev. 623, 641.
[73] See *Tailby v Official Receiver* (1888) 13 App. Cas. 523 at 545 per Lord Macnaghten; L. Fuller, "Consideration and Form" (1941) 41 Colum. L.R. 799, 806-809; L. Fuller, "Freedom- A Suggested Analysis" (1954) 68 Harv. L.R. 1305, 1312-1315; Also see G.W.F. Hegel, *Philosophy of Right* (SW Dyde tr, London, 1896), para. 71.

defendant to retain the claimant's property.[74] And consequently, there appears to be no justification to strictly enforce the law of property and bind the claimant to the transfer.[75] The defendant accordingly holds the money he has received on trust for the payer. This trust protects the claimant's autonomy by putting the payer back in control of his property via the imposition of a trust. Equity therefore works in harmony with the law of contract, by supplementing the law of contract in protecting autonomy.

Support for the proposition, that when the contract is not possible to perform an act of rescission by the claimant is not necessary for proprietary restitution, has been advocated by Salmons. He explains that:

> "the appropriate solution to this issue can be found in the significance of the contract and the circumstances surrounding the transfer. Whilst the contract is capable of being performed, there is no possibility of proprietary restitution. This reflects what could be labelled the 'subsidiarity' of claims for restitution… One can demonstrate this by comparing *Re Goldcorp* to cases such as *Halley v Law Society* and *Campden Hill Ltd. v Chakrani*, where the contracts were never capable of being performed. In the latter two cases, proprietary restitution was available before the claimants attempted to terminate the contracts".[76]

This thesis can be supported by the decision in *Neste Oy*,[77] where proprietary restitution was available for an unjust enrichment transferred under a contract. In *Neste Oy*, when the agent received the money, it had already decided to cease trading and appoint a receiver. So the entire purpose of the contractual

[74] Similarly, see C. Webb, *Reason and Restitution: A Theory of Unjust Enrichment* (Oxford, 2016), pp.166-167.
[75] Brudner, though discussing autonomy and property in the context of personal restitution, also argues that the courts "suspend property when effectuating it would subvert the plaintiff's autonomy." See A. Brudner, *The Unity of the Common Law*, 2nd edn (Oxford, 2013), p.241.
[76] D. Salmons, "The Availability of Proprietary Restitution in Cases of Mistaken Payments" (2015) 74 C.L.J. 534, 545; Also see discussion by P. Birks, *Unjust Enrichment*, 2nd edn (Oxford, 2005), p.184; P. Birks, "Property and Unjust Enrichment: Categorical Truths" [1997] N.Z.L. Rev. 623, 638 and 641; R. Chambers, *Resulting Trusts* (Oxford, 2007), p.171.
[77] Cf obiter comments in *Angove's Pty Ltd v Bailey* [2016] UKSC 47, [2016] 1 W.L.R. 3179 at [30]-[31]. This misunderstanding has unfortunately led some commentators to erroneously believe that *Angove's* overruled *Neste Oy*. See H. Wong, "Proprietary Restitution and Constructive Trusts in the Supreme Court" (2016) 6 Conv. 480; P. Watts, "The Insolvency of Agents" (2017) 133 L.Q.R. 11, 13.

payment, which was for the agent to discharge the claimant's debts to third-party service providers, was defeated as the company was no longer trading.

In contrast to Bingham J's decision in *Neste Oy*, in *Re Goldcorp* the availability of proprietary restitution was rejected on the facts. The defendant company had fraudulently misrepresented to its customers that sufficient stocks of gold would always be held in its vaults, and that the customers had title to the non-allocated metal.[78] On the basis of the representations, the claimants entered into sale contracts with the defendant company for the purchase of gold bullion and paid the purchase price. Subsequently, due to the commencement of the receivership, the defendant was unable to carry out delivery. The claimants argued that a vitiating factor was present at the moment the purchase price was paid, and that a proprietary restitutionary interest in the form of a trust of the purchase moneys had arisen.[79] Although the claimants' intentions in *Goldcorp* were vitiated by the defendant's fraudulently induced mistake,[80] and hence under Birks' approach there was an initial failure of basis which should give rise to a trust,[81] the impossibility analysis explains why there could be no proprietary response. As Lord Mustill stated:

> "[Until the time] when delivery was demanded and not made… the claimants had the benefit of what they had bargained for, a contract for the sale of unascertained goods."[82]

Lord Mustill's dicta indicates that the condition of payment was to obtain delivery of gold at a later date. The company's promise to retain a separate stock sufficient to cover all orders, and which the customers would obtain title to, was ancillary to the transaction. This is because the terms of the agreement did not make this sufficiently central to the contract. Hence Lord Mustill described it as a "collateral promise".[83] So even though the defendant company failed to abide by its promise to maintain a separate stock, this did not completely defeat the claimants' purpose from the outset. Rather, when

[78] *Re Goldcorp Exchange Ltd* [1995] 1 A.C. 74 at 87-89, 102.
[79] *Ibid* 101-104.
[80] *Ibid* 103.
[81] *Supra* text to notes 27-30.
[82] *Re Goldcorp* [1995] 1 A.C. 74 at 103.
[83] *Ibid* 89, 102.

the purchase price was paid, as delivery was possible the substance of the contracts were still capable of being fulfilled. In equity, the defendant was therefore entitled to the payment and no trust could arise.[84]

Contrary to Lord Browne-Wilkinson's assertion in *Westdeutsche* that property obtained by fraud is always held on trust,[85] *Goldcorp* exemplifies that equity does not always impose a trust for fraud. The dictum of Ferris J in *Box v Barclays Bank Plc* is consistent with the view that not all fraudulently induced mistakes lead to a trust response.[86] In *Box*, Ferris J said that even if the claimants in the case before him had been fraudulently induced to part with their money, this would not render the recipient a trustee. This is because when the claimants' money was received, even if the recipient had been trading fraudulently or fraudulently represented that it was carrying on a lawful deposit-taking business, the money could still be invested on the money market and the claimants paid the more advantageous rates of interest in accordance with the contracts. As Ferris J stated, the case was "not one where the suggested specific purpose (namely investment in the Bank on the money market) cannot be fulfilled".[87] This demonstrates that when a fraudulently induced contract is capable of being performed at the time a claimant makes payments pursuant to it, the claimant will not be able to take advantage of the fraud. The reason being that the claimant has been misled on an issue which is not central to the contract.

In contrast, in *Halley v Law Society* the payer's mistake was fraudulently induced by the recipient.[88] There was an immediate trust, in the payer's favour, of the money paid under the contract.[89] This is because the money was paid in order to obtain bank instruments. These would enable the payer to access

[84] See *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 A.C. 164 at [74] per Lord Millett; R. Chambers, *Resulting Trusts* (Oxford, 2007), p.162; P. Birks, *Unjust Enrichment*, 2nd edn (Oxford, 2005), pp.191, 194-198; P. Birks, "Establishing a Proprietary Base (*Re Goldcorp*)" [1994] R.L.R. 83; A. Burrows, "Proprietary Restitution: Unmasking Unjust Enrichment" (2001) 117 L.Q.R. 412, 426n.66.
[85] *Westdeutsche v Islington LBC* [1996] A.C. 669 at 716.
[86] (Ch, 30 April 1998); Also see *Papamichael v National Westminster Bank (No.2)* [2003] EWHC 164 (Comm) at [232]-[237] per Judge Chambers QC; *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch. 281 at [111] per Rimer J.
[87] *Box v Barclays Bank Plc* (Ch, 30 April 1998); Also see e.g. *Nolan v Minerva Trust Company Ltd* [2014] JRC 078A (Jersey Royal Court) and W. Redgrave, "*Nolan v Minerva*- a Jersey Perspective on Dishonest Assistance" [2015] P.C.B. 8, 9-10, 14-15.
[88] [2003] EWCA Civ 97, [2003] WTLR 845.
[89] Also see *Papamichael v National Westminster Bank (No.2)* [2003] EWHC 164 (Comm) at [221]-[245]. Though note that the trust is a resulting trust, as opposed to a constructive trust, see *El-Ajou v Dollar Land Holdings Plc (No.1)* [1993] 3 All E.R. 717, 734 and *Halley v Law Society* [2003] EWCA Civ 97, [2003] WTLR 845 at [105] per Mummery LJ.

the funds of the Account Holder; funds which could then hopefully be used to make profits in investment programmes.[90] However, the contract was an "instrument of fraud, and nothing else",[91] as it was not possible for the funds to be released by delivery of the bank instruments. As Lloyd J explained in the High Court,

> "[the fraudsters] knew that it had never happened before in any case of which either of them was aware and that there were such obstacles to it happening in future that it could be ruled out as a practical possibility. The representation was therefore dishonest and fraudulent. There was and could be no point for the Applicant in entering into the agreement, which was no more than a vehicle for obtaining money from him by false pretences".[92]

Therefore, unlike in *Box* and *Goldcorp*, as the payer's purpose for the transfer was impossible from the outset,[93] the recipient was not entitled to the payment in equity from the moment of receipt.

Conclusion

To conclude, this article has argued that an unjust enrichment can give rise to proprietary restitution. The contribution that sets this article apart from the current literature is it proposes that the availability of proprietary restitution can be explained using the concept of impossibility. It argues that first, the claimant must establish that the defendant has been unjustly enriched. Second, it must be shown that when the defendant received the enrichment it was not possible for the claimant's conditions for transferring his property to be fulfilled. Once both elements have been established, to protect the claimant's autonomy a resulting trust arises.

[90] *Halley v Law Society* [2002] EWHC 139 (Ch) at [75].
[91] *Halley v Law Society* [2003] EWCA Civ 97, [2003] WTLR 845 at [47].
[92] *Halley v Law Society* [2002] EWHC 139 (Ch) at [119].
[93] See D. Salmons, "The Availability of Proprietary Restitution in Cases of Mistaken Payments" (2015) 74 C.L.J. 534, 545, 545n.86.

The benefit of adopting the impossibility analysis is that it explains why not all mistaken payments are held on trust for the payer. Moreover, it enables one to resolve the difficult issue of when a contractual payment, made in circumstances in which the recipient is unjustly enriched from the moment of receipt, gives rise to a proprietary response.