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*Contract, Unjustified Enrichment
And Concurrent Liability:
A Scots Perspective*

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When in 1985 Peter Birks published the article which represents the beginning of the modern study of the Scots law of unjustified enrichment,¹ his first concern was to distinguish the subject from the law of contract. He was prompted to do so by the appearance of the second edition of David Walker’s *Law of Contracts and Related Obligations in Scotland*, the last chapter of which dealt with unjustified enrichment.² Although, as Birks noted, Walker’s treatment did not suggest that enrichment liabilities were contractual ones, and justified dealing with them in a contract book on grounds of practical and functional rather than analytical or conceptual overlap, nevertheless the conjunction of two

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¹ ‘Six questions in search of a subject: unjust enrichment in a crisis of identity’ 1985 *JR* 227.

² 2ed (1985), ch 35. A 3ed was published in 1995.

analytically distinct branches of the law of obligations risked dangerous confusion. The risk was that contractual notions would enter, possibly delimit, and distort enrichment law. It was a risk which had befallen English law, but from which Scots law ought to be safe if it looked to its inheritance from the past. The institutional writer Stair had made clear in the seventeenth century the distinction between voluntary or conventional obligations such as contract, created by the will of the parties, and involuntary or “obediential” obligations imposed by law, such as arose in the law of delict and unjustified enrichment. He had rejected the potentially confusing Roman term of “quasi-contract” to denote the latter subject. This had been the analytic base for Scots law ever since, and while there was in addition a doctrine of implied contract, that had not swallowed up or restricted the independence of enrichment law.³

By and large, it remains true that Scots law distinguishes contract and unjustified enrichment, and modern work in the two fields continues to reflect this. Although the third edition of Professor Walker’s work on contract (1995) retains its final chapter on “obligations arising from unjust enrichment”, the editors of the tenth edition (also 1995) of *Gloag & Henderson*, the standard introductory work on Scots law, have retitled as “Unjustified Enrichment” the chapter known in previous editions as “Quasi-Contract”, and it has been moved from its previous position within the treatment of the general law of contract to a much later and completely separate treatment alongside salvage. William Stewart’s *Law of Restitution in Scotland* (1992), the first book-length treatment of the subject, scrupulously leaves contract law out of consideration. Volume 15 of the *Stair Memorial Encyclopedia*, which deals with the Scots law of obligations and was published in 1996, distinguishes the voluntary obligations of contract and promise from obligations imposed by force of law and obligations arising from a wrongful act, and includes unjustified enrichment and *negotiorum gestio* in the second category.

³ For the foregoing see Birks (n 1) 227-33.

I. INSTRUMENTAL REASONS FOR CALLING ENRICHMENT QUESTIONS CONTRACTUAL

(1) Prescription

There are few instrumental reasons in Scots law for calling enrichment contractual. For example, the law of prescription makes explicit reference to obligations “based on redress of unjustified enrichment”, those “arising from *negotiorum gestio*” and those “arising from, or by reason of any breach of, a contract or promise”.⁴ For all of these, and also for obligations of reparation under the law of delict, the prescriptive period of five years begins to run from the date upon which the obligation becomes enforceable. There is therefore no advantage for prescription purposes to be gained from calling an obligation delictual rather than contractual, one of the reasons which Andrew Burrows has recently given for favouring concurrent contractual and tortious liability under English law.⁵ An interesting case on the interface between contract and enrichment for the purposes of prescription may suggest that there is also no particular advantage to be gained by switching from contract to enrichment. In *NV Devos Gebroeder v Sunderland Sportswear Ltd*⁶ a seller of goods claimed recompense in circumstances where, because a part of the goods supplied had been defective, it had been held unable to claim the contract price in respect of the goods which were not defective. The supply had

⁴ Prescription and Limitation (Scotland) Act 1973, Sched 1, para 1(b), (c) and (g). For the comparative position, see I Englard, ‘Restitution of benefits conferred without obligation’, in *International Encyclopedia of Comparative Law*, vol 10, ch 5.309-5.317 (1988).

⁵ A Burrows ‘Solving the problem of concurrent liability’ (1995) 48(2) *CLP* 103 at 114-24; a surprisingly pragmatic conclusion from an author who elsewhere in the same article favours “the discipline of clarity and rationality imposed by categorisation” (104). But Scots law reaches the same conclusion: *Robertson v Bannigan* 1965 SC 20.

⁶ 1990 SC 291.

taken place in or before December 1982, and the judicial decision that the price was irrecoverable occurred in 1986. It was only in 1988 that the recompense claim was mounted. It was held to be defeated by prescription. The seller had argued that it had no enforceable enrichment claim until the decision in 1986 that the contract price was not payable. The court held that the contract ceased to be a basis for the seller's claim, not on the judicial decision of 1986, but on their material breach before December 1982. The proper approach for the seller would have been to make a case on recompense from the outset as an alternative pleading to the claim based on contract, or to have introduced an amendment to the pleading before the expiry of the prescriptive period.

Another interesting aspect of the *Devos* case is its application of the rule that if a “relevant claim” is made by the creditor under an obligation that interrupts the running of prescription, putting the clock back to the beginning and in effect giving the creditor a further five years' grace. In *Devos* the seller argued that the unsuccessful claim for the contract price was a relevant claim preventing prescription running against him in respect of an action of recompense based on the same facts. The court rejected this argument by a majority, holding that the contractual obligation to pay was distinct from that of recompense. Under the prescription statute a relevant claim is “a claim made by or on behalf of the creditor for implement or part-implement of the obligation”. Lord President Hope commented:⁷

In my opinion there is no doubt that an obligation to pay the price due under a contract and an obligation to make recompense are based upon different principles of law. The obligation to pay the price is constituted by agreement, that is to say, by the agreement of the parties to the contract which they have entered into. The obligation of recompense is a remedy which is independent of contract, so much so that it is excluded if the matter in question is the subject of a contract which can still be enforced. ... [T]he legal basis for these two obligations is separate and distinct. ... [T]he quantification of the sum to be paid in order to discharge the obligation is different. On the one hand the price due is fixed by the contract, whereas the amount to be paid by way of recompense has to be assessed by reference to the extent to which the defenders have been enriched.

⁷ 1990 SC at 303-4.

Lord Coulsfield dissented from this approach, concerned by the seeming oddity of the result that the buyers would not have to pay for goods which they had admittedly used and for the value of which the sellers had been suing for several years, the claim having prescribed for lack of action. He said:⁸

It seems to me to be singularly artificial to say that the pursuers made no “relevant claim” ... prior to ... December 1987 ... [I]t is true that the claim founded on the 1987 amendment is a claim grounded on the equitable rule of recompense, not a claim founded on the terms of the original contract. I do not question that these are different legal grounds of claim or that the value of the claim of recompense is different from that of the claim for the contract price. Nevertheless, in the circumstances of this case, the proper view is, in my opinion, that the pursuers’ claim in the action as originally raised was a claim for what was due to them out of the transaction by which they supplied goods which the defenders used. The fact that the pursuers’ claim was originally based on the terms of the contract should not, in my view, require that claim to be read so narrowly as to exclude another legal ground derived from exactly those facts and circumstances which have all along formed the subject matter of the action.

While there may be a good deal of sympathy for Lord Coulsfield’s approach in the circumstances of the case, the analysis of the majority must be preferred, at least as a matter of the interpretation of the statutory language concerning relevant claims. The statute speaks of *relevant* claims made for *implement* of an obligation. To be relevant, a claim must relate to the obligation which it is now sought to enforce. None of the judges oppose the proposition that payment of a contract price and recompense are different kinds of obligation; a contractual claim cannot implement an obligation of recompense, nor vice versa. The real problem with the *Devos* case is that it got off on the wrong foot with a holding that the seller’s material breach disabled him from recovering payment. Under the law as it stood at the time of the case, a buyer confronted with the supply of a consignment of goods part of which was faulty had to reject the whole consignment (in which case he was not liable for the price), or else accept the whole consignment, pay the price and offset it with a claim for damages.⁹ So had the case been correctly decided in the first place, there would have been no need to contemplate alternative means of

⁸ 1990 SC at 310.

⁹ *Aitken Campbell & Co Ltd v Boullen & Gattenby Ltd* 1908 SC 490. See now Sale and Supply of Goods Act 1994 s 3, adding a new s 35A to the Sale of Goods Act 1979.

reaching the just result. It is fortunate in these circumstances that the court resisted the temptation to distort the basic structure of the law and the words of the prescription statute.

The case is important, however, for its recognition that unjustified enrichment can arise in the setting of performances which were rendered under a contract. As we shall see in more detail later, this is consistent with a number of other earlier authorities and also, I shall suggest, with principle. The upshot is that a party may frame a claim in terms of contract and enrichment as alternative juridical bases for the action and, indeed, would be well advised to do so lest one fail when it is too late to turn to the other. The competency of such alternative pleading has been further recognised in *Bennett v Carse*.¹⁰ It may also be very important in cases where the facts may give rise to claims of implied contract or of enrichment, to be discussed below.

(2) Jurisdiction

Another important area of Scots law where instrumentalism has been resisted is in the application of the Civil Jurisdiction and Judgments Act 1982, which implements in the United Kingdom the Brussels Convention on Jurisdiction 1968. The Act confers jurisdiction upon certain courts other than those of the defender's domicile in matters "relating to" a contract, delict and quasi-delict, but makes no reference to matters relating to unjustified enrichment.¹¹ In *Strathaird Farms Ltd v G A Chattaway & Co*¹² Chattaway, a firm domiciled in England, supplied goods and services under a contract to Strathaird, a company domiciled in Scotland. Strathaird raised an action in Inverness sheriff court for

¹⁰ 1990 SLT 454.

¹¹ For commentary on "matters relating to a contract", see P R Beaumont, *Anton and Beaumont's Civil Jurisdiction in Scotland* (2nd ed, 1995), paras 5.17 - 5.28, and 9.18.

¹² 1993 SLT (Sh Ct) 36.

repayment of an overpayment of £5000. The question was whether this was a matter relating to a contract so that the courts for the place of the performance of the obligation in question had concurrent jurisdiction with those of the English defender's domicile. Scots law holds that it is a debtor's duty to pay or perform at the creditor's place of business. Sheriff Principal Ireland held that the action was a *condictio indebiti*, in which "the obligation arises not *ex contractu*, by virtue of any promise or agreement by the debtor that he will pay, but *ex lege*, because it would be unjust to allow the debtor to retain what he has received".¹³ Thus the creditor was entitled to be paid in Scotland and argued that the Scottish courts therefore had jurisdiction. Following Scottish authority binding upon him if relevant,¹⁴ Sheriff Principal Ireland took the view that "relating to a contract" meant "based on a contract", which did not include a case such as the present one where "the existence of the contract between the parties is only part of the historical background explaining why the payment was made".¹⁵ Sheriff Principal Ireland also thought that, had the statutory expression been "*related* to a contract" rather than "relating", the outcome would have been different:

"A matter *related* to a contract" clearly denotes something other than a contract which nevertheless has a relationship with the contract (*Oxford English Dictionary*, s v "related", 2a). On the other hand the phrase "in matters *relating* to a contract" need not import a reference to something outside the contract; the words "in matters relating" are a prepositional expression equivalent to "with reference to" (*Oxford English Dictionary*, s v "relate" II 7). I am conscious that in the construction of European legislation words are often found to mean something different from what may at first appear to be the proper construction. Nevertheless, on the assumption that the draftsman ... was an accurate and fastidious craftsman, I see no reason why he should not be supposed to have used the word "relating" deliberately, so that the matters referred to in the clause would be confined to contracts, to the exclusion of matters which are not contracts, even if they have some connection with them. If he had intended to include such non-

¹³ At p 37I.

¹⁴ Which was debatable, since they were cases on delict. For another recent Scottish case on "matters relating to a contract" in a delictual context, see *William Grant & Sons Ltd v Marie-Brizard & Roger International SA* 1996 GWD 23-1347.

¹⁵ 1993 SLT (Sh Ct) at p 39L.

contractual matters he would, on the assumption which I have just made, have used the word “related”.¹⁶

No doubt this “relatively narrow construction of matters relating to a contract”¹⁷ will have to be reconsidered in the light of the finding by a majority of the English Court of Appeal in *Kleinwort Benson v Glasgow District Council*,¹⁸ one of the many cases arising out of the decision in 1990 that “swaps” transactions between various finance houses and local authorities were *ultra vires* the authorities and therefore void. In the *Kleinwort* case the action for restitution of payments made under the void transaction was raised in England but the Scottish defendants argued that, the matter not being one relating to a contract, the only appropriate court was the one of their domicile, presumably the Court of Session or Glasgow sheriff court. At first instance this plea was successful;¹⁹ on appeal the Court of Appeal first made a reference of the issue to the European Court of Justice, which declined jurisdiction to make a ruling;²⁰ the Court of Appeal, Leggatt LJ dissenting, then took the view that the claim was a matter relating to a contract and that England being the place of performance of the obligation the English courts had concurrent jurisdiction in the case.

The reasoning of the majority is interesting. Millett LJ expressly rejects the view that “relating to a contract” means “based on a contract”. The word “contract” includes “a void contract”; there is a real difference between the case where negotiations had not led to a concluded contract, where there was no contract at all, and the case where they had led to a contract, so that there was a contract in fact, but one of the parties lacked contractual capacity, so that there was no contract in law. In the proceedings before the

¹⁶ 1993 SLT (Sh Ct) at p 40B-D.

¹⁷ Beaumont (n 11) 227.

¹⁸ [1996] 2 All ER 257 (CA).

¹⁹ [1993] QB 429; [1994] 4 All ER 865.

²⁰ Case no C-346/93, [1995] ECR I-615.

European Court of Justice three member States and the European Commission had submitted that the claim was one relating to a contract, while only one (Germany) had taken the opposite stance.²¹ It would be strange if the court deciding the issue of validity could not also decide the consequences of the invalidity. The wording of the legislation was deliberately vague to deal with the notorious difficulty of distinguishing contractual from restitutionary claims, and the fact that different states dealt with the overlap in different ways. Roch LJ derived support for his conclusion from earlier authority in the European Court of Justice that a matter relating to a contract included one where the parties' relationship was akin to a contract;²² and took the view that, since English law would apply to the claim, giving jurisdiction to the English court meant that the territorially best-qualified court would decide the matter.

Much of this is plainly result-oriented rather than conceptual reasoning, and does not wholly convince. As Leggatt LJ points out, most European jurisdictions recognise contract, tort and restitution as three distinct branches of the law. A restitutionary claim is therefore not a contractual one, and there was no doubt that the present claim was restitutionary in nature. The view that English law was applicable appears to rest on Article 10(1)(e) of the Rome Convention on the Law Applicable to Contractual Obligations 1980 (made part of both Scots and English law by the Contracts (Applicable Law) Act 1990), which declares that the consequences of a null contract are governed by

²¹ The member States which argued that the case was one relating to a contract were Spain, France and the United Kingdom. I am very grateful to Mr Nicolas Lockhart of the Chamber of Judge David Edward in the Court of Justice of the European Communities, for kindly supplying me with copies of the Report for the Hearing in the case.

²² Case 34/82, *Martin Peters Baunternehmung GmbH v Zuid Nederlandse Aannemers Vereniging* [1983] ECR 987. This case is not on all fours with the *Kleinwort Benson* one, since it involves what is clearly a valid consensual relationship (membership of a voluntary association) which happened not to be treated as contractual under either of the two potentially relevant laws (German and Dutch).

the law applicable to the contract; but this overlooks the express reservation against Article 10(1)(e) having the force of law in the United Kingdom made in section 2(2) of the 1990 Act precisely because this is a matter, not for the law of contract, but for the law of unjustified enrichment.²³ The omission of a provision in the Brussels Convention with regard to jurisdiction equivalent to that of the Rome Convention on applicable law could be taken as showing legislative intent in the former to exclude the consequences of nullity from the exceptions to the general rule that the appropriate jurisdiction to deal with the dispute is that of the defender's domicile. It is no objection that this means a Scottish court deciding a case according to English law; such is the very stuff of international private law. Most of Millett LJ's arguments also lack conviction: it seems counter-productive to regard a void contract as some sort of contract for at least some sorts of purposes, and there is no reason, in a pure question of law and interpretation, to give greater value to the views of a majority of those EC member states and institutions which had made observations on the subject to the European Court. The only Millett argument by which I find myself at all swayed is the strangeness of a court being able to determine that a contract is void (it is accepted that a claim that a contract is void is a matter relating to a contract for the purposes of the Brussels Convention²⁴), but not the consequences of that voidness; and even that remains a result-oriented rather than a conceptual objection.

The *Kleinwort* case is to go to the House of Lords, and it will be clear from what I have said that I believe reversal of the Court of Appeal would be correct. However, it is probably unlikely; the English courts have historically been avid for jurisdiction.

²³ *Hansard*, HL, 1990, vol 513, cols 1258-1259. In its submissions to the European Court of Justice the German Government suggested that Article 10(1)(e) was of no value in interpreting the jurisdiction convention since two Contracting States had entered a reservation in respect of it.

²⁴ Case 38/81, *Effer v Kantner* [1982] ECR 825.

Conversely the Scottish courts have often been strangely happy to turn customers away, usually to England!²⁵ Presumably, however, if a claim to restitution following a void contract is “a matter relating to a contract”, then so will be those cases such as *Devos* and others to which I will refer later where enrichment or enrichment-based claims arise in situations where there is a valid contract, that is, on breach or frustration.

(3) Choice of law

The *Kleimwort* case also indirectly raises choice of law issues at the interface of contract and unjustified enrichment. So far as the particular issue of void contracts is concerned, the matter is not settled for the United Kingdom as a result of its express reservation from Article 10(1)(e) of the Rome Convention. Also open is the situation where the void contract is one to which that Convention does not apply, or, again, where an enrichment claim arises in connection with a contract which is not void. Is this a matter of contract or enrichment law? The result could make a crucial difference to which system of law applies to the claims arising. The Scottish courts have recently had a first opportunity to pronounce on choice of laws in enrichment cases, following some academic discussion.²⁶ Do we look at the place of divestment or the place of enrichment? Do we take the law of the forum in which the issue is being settled? If a contract, void or otherwise, is lurking in the background, do we take the law applicable to the contract? In the *Barings* case, another litigation arising from an aborted ‘swaps’

²⁵ See for example *Bank of Scotland v IMRO* 1989 SLT 432.

transaction, Lord Penrose was confronted with a void contract which had contained a choice of English law. The pursuer argued that therefore English law governed its restitutionary claim arising from the nullity of the contract. After an extensive review of academic writing, Scottish and foreign, the judge took the view that the choice of law in a void contract could not determine the law to be applied to consequential enrichment remedies. While recognising a degree of force in the argument that the ends of justice and consistency might be best served if the law determining the nullity and the consequences thereof were the same, he pointed out that capricious results might also follow where, for example, there was a wholly artificial choice of law with no objective reality in the context of the parties' relationship. The qualified enactment of the Rome Convention in the United Kingdom recognised the possibility of two systems being applicable at different points in the unravelling of a void contract. In the end Lord Penrose endorsed the preferred general view amongst Scottish academics, which is that the country with the closest and most real connection with the enrichment should provide the applicable law, even if that could mean an outcome different from that applying to the contract, whether void or valid. The parties' intention, expressed in the void contract, was one but not a decisive factor. In a cross-border 'swaps' transaction the identity of enrichment creditor and debtor oscillated, and it was pure chance which party ended up as creditor and which as debtor; so the location of the final enrichment could not be a decisive factor either. Accordingly the matter was appropriate for full evidence of the parties' relationship before a final decision.

At one point in his opinion Lord Penrose comments that

²⁶ *Baring Brothers & Co Ltd v Cuninghame* DC 1996 GWD 25-1405; J Blaikie 'Unjust enrichment in the conflict of laws' 1984 JR 112; A E Anton, *Private International Law* 2ed (1991), 309; Stewart, *The Law of Restitution in Scotland* (1992) 206-11.

[I]t may be that in the majority of cases in which a remedy in restitution is required following failure of a contract, for whatever reason, the facts and circumstances are likely to point to the same system of law as appropriate for the resolution of the quasi-contractual issues between parties as would have been appropriate for the resolution of contractual issues had the contract stood.²⁷

The *Devos* case (in which choice of law issues were not in fact raised, presumably because there was an express choice of Scots law, or a deliberate tactical decision not to raise the matter) can be used to illustrate some of the potential hazards. Article 4 of the Rome Convention will presume in the absence of other factors that the law applicable to the contract is that of the country where the party rendering the contract's characteristic performance has its domicile or central administration. The contract was one for the sale of goods, and the characteristic performance of such a contract is the non-money obligation, namely the supply of goods. The law applicable to the contract is therefore that of the supplier's central administration, that is, Belgium. But when the supplier makes his claim for enrichment, Scots law may be applicable because the enrichment took place in Scotland.

II TREATING ENRICHMENT AND CONTRACT TOGETHER

In 1985 Peter Birks expressed the view that not only were contract and unjustified enrichment quite distinct areas of the law of obligations but also that "these involuntary obligations [*of unjustified enrichment*] ought to be treated entirely separately from contract".²⁸ While this proposition seems reasonable for initial exposition of the two subjects, there are a number of qualifications which ought to be entered. It would be a poor lawyer who was not fully aware of the interaction between contract and unjustified

²⁷ Transcript 24 May 1996, at 59. I am very grateful to my colleague David P Sellar, advocate, for obtaining a copy of the opinion of Lord Penrose for me.

²⁸ Birks (n 1) 228.

enrichment, and it is absolutely necessary for these advanced purposes to treat the two together at some stage. For confirmation of this, one need only look at some of the recent attempts to produce “codes” embodying internationally acceptable principles of contract law (e.g. those produced by UNIDROIT,²⁹ the European Contract Commission led by Professor Ole Lando,³⁰ and Harvey McGregor QC for the English and Scottish Law Commissions³¹), all of which have to deal with enrichment or restitutionary issues at various points. Again, the Scottish Law Commission has recently published for discussion a draft code of enrichment law which is the personal work of Dr Eric Clive, one of the Commissioners, and it makes frequent reference to contract law.³² Enrichment cannot ignore contract anymore than contract can enrichment.

(1) Enrichment lawyers cannot ignore contract law

First, then, why can an enrichment lawyer not ignore contract law? In various ways Scots law limits the availability of enrichment remedies where there is a contract. It is obvious that a contractual arrangement of this performance for that price cannot be

²⁹ *Principles of International Commercial Contracts* (1994), henceforth PICC.

³⁰ O Lando and H Beale (eds) *Principles of European Contract Law* (forthcoming, henceforth PECL). A first volume of these *Principles* was published in 1995, but the full version will appear in 1997. The present writer is the Scottish representative on the Lando Commission.

³¹ H McGregor, *Contract Code prepared for the English Law Commission* (1993), henceforth McGregor Code. For the background to this work in a joint project of the Scottish and English Law Commissions in the late 1960s and early 1970s to produce a contract code for the whole of the United Kingdom see also A E Anton ‘Obstacles to codification’ 1982 *JR* 15 at 20-22; Lord Davidson ‘Law reform - the case for caution in an age of revolution’ (1990) 35 *Journal of the Law Society of Scotland* 219 at 220-1.

³² Dr Clive’s code (henceforth the Clive “code”) appears as a separately published Appendix to Scottish Law Commission Discussion Paper No 99, *Judicial Abolition of the Error of Law and its Aftermath*

upset by a claim on either side that the other is enriched under the contract. Fair price doctrines long ago evaporated in Scots law, if they were ever part of it. The Clive “code” of unjustified enrichment follows the existing law when it provides that an enrichment is justified and irrecoverable if the enriched person is entitled to it by virtue of a contract.³³ It has recently been held in the Inner House that even “windfall” gains which can be traced to contractual entitlements do not constitute enrichment.³⁴ There is also a rule clearly articulated in the cases that where there is a valid subsisting contract there can be no claim in recompense.³⁵ *Connelly v Simpson*³⁶ is authority for the proposition that, apart from frustration, the *condictio causa data causa non secuta* is not available in cases where there is a contractual relationship between the parties; a view propounded vigorously and persuasively both before and after that case by Robin Evans-Jones.³⁷ In the great case of *Morgan Guaranty Trust Co v Lothian Regional Council*³⁸ Lord President Hope stated that the orderly development of Scots enrichment law would be best served if in general there were not different rules to be applied in each of its remedies without clear justification;³⁹

(1996). It represents Dr Clive’s personal views rather than those of the Scottish Law Commission, and is not a restatement of the existing law.

³³ Rule 5(1)(d).

³⁴ *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1996 GWD 21-1218. I am again grateful to David P Sellar for providing me with a transcript of the judicial opinions in this case.

³⁵ Gloag, *Contract*, 320; *NV Devos Gebroeder v Sunderland Sportswear Ltd* 1990 SC 291; *Morgan Guaranty Trust Co of New York v Lothian RC* 1995 SLT 299 at 309J-K per Lord President Hope; *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1996 GWD 21-1281.

³⁶ 1993 SC 391.

³⁷ See his articles, “Contract, unjust enrichment and the third reception of Roman law in Scotland”, (1993) 109 *LQR* 663; and (with J A Dieckmann) “The dark side of *Connelly v Simpson*”, 1995 *JR* 90.

³⁸ 1995 SLT 299.

³⁹ 1995 SLT at 310B. The Lord President was thinking in particular of the error in law rule in repetition (the *condictio indebiti*).

and it seems highly likely that there is a general rule against using any of the enrichment remedies where there is a valid subsisting contract.

This view gathers support from Niall Whitty's masterly analysis of indirect enrichment claims in Scots law.⁴⁰ In general it is clear that recovery of indirect enrichment is extremely rare in Scotland. One of the major factors in the cases deciding against recovery has been the existence of contracts in the enrichment chain between the pursuer and the defender. Where a pursuer has contracted with a third party (T) and from that contract there ensues a benefit to the defender, the Scottish courts have tended to the view that the pursuer relied on the credit of T rather than the defender in performing the contract, and hence has no recovery against the latter. Sometimes this is expressed as a matter of the pursuer having suffered no loss, or as the defender's benefit being incidental, or as being simply a matter of the contract's existence being an absolute bar to the enrichment claim.⁴¹ The existence of a contract between T and the defender may also have an effect, inasmuch as if T uses moneys obtained from the pursuer to perform his contract with the defender, the latter cannot be enriched by payment of what he was owed by the defender, nor should he be exposed to a second claim by the pursuer, having given value for what he has received, albeit to the middleman T rather than to the pursuer, nor should he unfairly lose the advantage of defences available against T but not the pursuer.⁴²

(2) Contract lawyers cannot ignore enrichment law

A contract lawyer cannot ignore enrichment law because that law may solve some of the problems left by the application of contract law in particular situations.

⁴⁰ 'Indirect enrichment in Scots law' 1994 *JR* 200, 239 (two parts).

⁴¹ *Ibid* 211-17.

⁴² *Ibid* 217-21.

(a) *Contract rules hold that there is no contract*

Many of the rules of contract law concern whether or not there is a contract. As noted above, the result of applying these rules may be that there is no contract although the parties act as though there was one. Instances of such situations would be the rules on void and illegal contracts, and agreements which are not recorded in due form (for example, in writing). In such cases, enrichment rules are frequently used in Scotland as in South Africa, to do justice between the parties in respect of performances rendered despite the invalidity.⁴³ This is also the approach to be found in the UNIDROIT and Lando Commission principles and the McGregor code.⁴⁴ Of course, this does not offend against the principles outlined in the preceding paragraphs, because in these situations there is no contract and so no problem on those grounds about setting enrichment law to work.⁴⁵ Further, and subject to the debates mentioned below about the appropriateness of particular actions in different situations, in Scotland there is generally no need to point to “unjust factors” requiring the enrichment to be reversed, as may be the position in parallel situations in England;⁴⁶ it is usually enough that a transfer

⁴³ See generally Scottish Law Commission Discussion Paper No 95, *Recovery of Benefits Conferred Under Error of Law*, vol 2 (1993), paras 2.204 - 2.225. There are difficulties arising from Scots law’s recognition of the *Abstraktionsprinzip*: see K G C Reid ‘Unjustified enrichment and property law’ 1994 *JR* 167 at 175-8. For South Africa see J G Lotz (revised A de W Horak) ‘Enrichment’, 9 *LAWSA* paras 79, 83.

⁴⁴ PICC, article 3.17; PECL, article 4.116; McGregor Code, paras 565-7, 573-4, 585-7.

⁴⁵ For civilian systems generally see Englard (n 4), paras 5.64-5.127; P Gallo ‘Unjust enrichment: a comparative analysis’ (1992) 40 *American Journal of Comparative Law* 431 at 445-48, and R Zimmermann, ‘Unjustified enrichment: the modern civilian approach’ (1995) 15 *Oxford Journal of Legal Studies* 403 at 406-7.

⁴⁶ For the debate on this subject in England see *Westdeutsche Landesbank Girozentrale v Islington LBC* [1994] 4 All ER 890 (Hobhouse J and CA), commented upon by A Burrows ‘Swaps and the friction between common law and equity’ (1995) 3 *RLR* 15-29. In the House of Lords the case was determined

was made under a contract which was void. The legal cause of the transaction does not exist and retention of the enrichment is *ipso facto* unjustified. This is also the approach to be found in the Clive “code”.⁴⁷

There may be other problems: for example, applying enrichment law to contracts void or unenforceable on grounds of illegality may cut across the policy underpinning the illegality of the contract.⁴⁸ Moreover, in Scotland there are debates over which of the various remedies may be applicable in given situations. In the *Morgan* case, it was held that repetition (the *condictio indebiti*) was the appropriate remedy for void contracts, a view supported by Robin Evans-Jones, and the position of South African law.⁴⁹ Niall Whitty and the Scottish Law Commission have however made a powerful argument that, where the voidness arises from the incapacity of the enriched (as in the *Morgan* case), the appropriate remedy is recompense.⁵⁰ Again, where a contract is illegal, there is debate as to whether the remedy (if there is to be one) is the *condictio ob turpem vel injustam causam* (as

solely upon whether or not compound interest was recoverable, but see the comments of Lord Goff [1996] 2 All ER 961 at 967-8.

⁴⁷ Rules 2(3), 5(3), 7(2)(a).

⁴⁸ See for civilian systems generally K Zweigert and H Kötz, *Introduction to Comparative Law* 2nd revd edn trans T Weir (1992) 614-20; for Scotland, R Evans-Jones, “Repetition of payments in *sponsiones ludicrae*”, (1993) 61 *Scottish Law Gazette* 11; for South Africa, Lotz revd Horak (n 43) paras 82-84. The McGregor Code, paras 515-518, provides for “exceptional cases” where restitution upon illegal contracts is allowed.

⁴⁹ R Evans Jones ‘Swaps, error of law and unjustified enrichment’ (1995) 1 *Scottish Law and Practice Quarterly* 1; R Evans-Jones ‘From “undue transfer” to “retention without a legal basis” (the *condictio indebiti* and *condictio ob turpem vel injustam causam*)’ in *The Civil Law Tradition in Scotland*, ed R Evans-Jones (Stair Society supplementary series, 1995). For South African law see Lotz revd Horak (n 43) para 79.

⁵⁰ N R Whitty ‘Ultra vires swap contracts and unjustified enrichment’, 1994 SLT (News) 337; Scottish Law Commission (n 43) paras- 2.216; Scottish Law Commission (n 32) paras 4.28 - 4.40.

in South African law⁵¹), the *condictio indebiti* (this having embraced the former) or perhaps recompense.⁵² The leading case of *Cuthbertson v Lowes*⁵³ does not make explicit the basis upon which the pursuer was able to recover the market value of goods supplied under an illegal contract and presumably consumed. It may be that this debate underlines the need for Scots law to move forward from its traditional distinctions between different forms of action and concentrate instead upon the identification and application of general principles of unjustified enrichment.

(b) Pre-contractual negotiations

A recurring issue in the Scottish cases is that of pre-contractual negotiations which leave it uncertain as to whether or not the parties have concluded a contract, or which are broken off without a contract being concluded.⁵⁴ Here the question is not the invalidity of an apparent obligation but whether the parties have reached sufficient agreement for there to be a contract at all. If not, and if there have nonetheless been exchanges of value between the negotiating parties, there seems no reason in principle why enrichment law should not be invoked.⁵⁵ On the whole, however, the Scottish

⁵¹ Lotz revd Horak, (n 43) paras 82-3.

⁵² See Scottish Law Commission (n 43) paras 2.220 - 2.223, 3.1 - 3.12; R Evans-Jones and D McKenzie, "Towards a profile of the *condictio ob turpem vel injustam causam* in Scots law", 1994 JR 60; Evans-Jones (n 49); A F Rodger, in *Gloag & Henderson The Law of Scotland* 10ed (1995) paras 29.6, 29.15 (p 484); W D H Sellar 'Unjust enrichment' in *The Laws of Scotland: Stair Memorial Encyclopedia*, vol 15 (1996), para 66.

⁵³ (1870) 8 M 1073. This case was followed in the leading South African decision *Jajbhay v Cassim* 1939 AD 537.

⁵⁴ For the comparative position see England (n 4) paras 5.128-5.131.

⁵⁵ There is also the situation where one party incurs pre-contractual expenditure without conferring a direct benefit on the other negotiating party. Scots law has allowed the party suffering loss to claim what

courts have been reluctant to grant enrichment remedies in modern times, perhaps on the basis that where one party anticipates a successful conclusion to the bargaining process by commencing performance, the risk that the contract will not be concluded falls on him.⁵⁶ Sometimes in order to avoid apparently unjust results the court has adopted a broad approach as to what constitutes a contract, thereby enabling it to grant contractual remedies. A recent example is *Avintair Ltd v Ryder Airline Services Ltd*.⁵⁷ The claim was for payment of commission in respect of services rendered. The defender argued that, although the services had been rendered, the parties had also been negotiating over the price and, in the absence of agreement on this essential term, there could be no concluded contract, and so no basis for payment existed. The court held that there was a contract despite the existence of dissensus between the parties. Lord President Hope commented:⁵⁸

There is no doubt that parties must achieve consensus in idem upon all the essential matters before there can be said to be a contract between them. ... But it does not always follow that there is no contract where something which affects the parties' contractual relationship has not yet been agreed. ... But there is an important difference between cases where nothing has been done by either party to implement the alleged contract and cases where a party to the alleged contract has already provided the goods or services for which he seeks payment. It is likely to be more difficult in the former case to enforce the contract if there is no agreement about the remuneration which is to be paid, because in the ordinary case the price is one of the essential matters upon which agreement is required. Where goods or services have been provided, however, the usual rule is that there is an obligation to pay for them unless they have been provided gratuitously. So it is easier in these case, if there is no agreement about the price or remuneration, for an obligation to pay a reasonable sum to be implied.

With respect, this reasoning seems either to conflate the question of whether there is a contract with that of the price, if any, to be paid if there is a contract, or to assume, highly debatably, that there was a contract which did not contain a provision about price. It also seems to suggest that the question of whether or not there is a contract depends

is usually known as “reimbursement” in such cases, but the remedy has not been granted much in modern cases. The authorities are reviewed in *Dawson International plc v Coats Paton plc* 1988 SLT 854.

⁵⁶ McBryde *Contract* 35-8.

⁵⁷ 1994 SLT 613.

⁵⁸ At 615H - 616A.

upon whether or not the parties have commenced performance. Thus Lord President Hope comments that the “no contract” argument “does not take sufficient account of the fact that the pursuers’ case is that they have already rendered the services for which they claim payment”.⁵⁹ A preferable approach would be to determine first whether or not there is a contract, and then to consider what if any payments should be made in respect of any actual exchanges of value between the parties. Where parties are still negotiating over a major term, it cannot be right to say that that process can be short-circuited by rendering performance and asking the court to fix a reasonable price on the basis of implied contract. But that is not to say that, if negotiations are broken off after performance has been rendered in good faith, there can never be any recovery. Unjustified enrichment may well have taken place and, in the circumstances of the *Avintair* case, the remedy in Scotland appears to be recompense.⁶⁰

The case also illustrates an uncertainty often encountered in Scots law between the enrichment remedy of recompense and an implied contract.⁶¹ Thus Lord President Hope comments that “... goods or services were provided which ought to be paid for. In such circumstances a claim may be based either on recompense or implied contract”.⁶² Earlier in his opinion he quotes with approval the comment of the textbook writer Gloag that “it may often be unnecessary to decide whether a claim for payment should be rested on implied contract or on the principle of recompense”.⁶³ It has been rightly

⁵⁹ At 617D.

⁶⁰ For further comment on *Avintair* also favouring an enrichment rather than a contractual approach, see G D L Cameron ‘Consensus in dissensus’ 1995 SLT (News) 132.

⁶¹ See e.g. *Shetland Islands Council v BP Petroleum Development Ltd* 1990 SLT 82; *Hamilton DC v Lennon* 1990 SLT 533; *Rochester Poster Services Ltd v A G Barr plc* 1994 SLT (Sh Ct) 2; *GTW Holdings Ltd v Toet* 1994 SLT (Sh Ct) 16.

⁶² 1994 SLT at p 617F.

⁶³ Gloag *Contract* 291.

observed, however, that “this approach tends to obscure the distinction between contract and unjust enrichment”.⁶⁴ The principal distinction referred to in the textbooks lies in the measure of recovery: *quantum meruit* in implied contract, *quantum lucratus* in recompense; but there may well be others, such as the availability of defences in one and not the other. The uncertainty may also be observed in cases where A allows B to use his property in circumstances where there is no intention to confer a gratuitous benefit. It has been suggested that wherever the background to this is consensual the appropriate action is implied contract; otherwise the case is one for recompense on the grounds of interference with proprietary rights.⁶⁵

(c) Enrichment claims on valid but no longer subsisting contracts

Where a contract - or, more accurately, a contractual obligation - has ceased to subsist in the sense that although the contract was valid it is no longer enforceable, enrichment remedies may be used in respect of performances rendered under the contract for which there cannot now be a contractual recovery. The performances rendered under subsequently frustrated contracts which contain no provision dealing with this eventuality may be restored or paid for by enrichment remedies.⁶⁶ Insofar as this has involved the use of the *condictio causa data causa non secuta*, the authorities have been the subject of academic criticism in recent times but are probably too well-entrenched to be uprooted.⁶⁷ And there seems no reason why Scots law should not

⁶⁴ Cameron (n 60) 134.

⁶⁵ *Shetland Islands Council v BP Petroleum Development Ltd* 1990 SLT 82. See further A J M Steven ‘Recompense for interference in Scots law’ 1996 *JR* 51 at 52-6.

⁶⁶ See England (n 4) paras 5.167-5.199; McGregor Code, paras 598-9.

⁶⁷ Evans-Jones (n 37); G MacCormack, “The *condictio causa data causa non secuta*”, in *The Civil Law Tradition in Scotland*, ed R Evans-Jones (Stair Society supplementary series, 1995).

follow the example of South African law, and use other *condictiones* in such situations (e.g. the *condictio ob causam finitam*⁶⁸) or its native remedy of recompense in services cases such as the English *BP Exploration v Hunt*.⁶⁹ Contractual obligations may also cease to subsist through prescription - the absence of a relevant claim under or acknowledgement of the existence of the obligation for a continuous period of five years - and, as we have seen, the Scottish courts have accepted in principle that there may be an enrichment claim in respect of performances made under the prescribed contract.⁷⁰

Valid contracts may be discharged by performance or lapse of time according to their terms. If performance continues thereafter without a new contract, enrichment may have a role. There are Scots cases where a contract for the hire of moveables came to an end, but the hirer continued in possession and was found liable in recompense.⁷¹

(d) Subsisting contracts: the claims of contract-breakers

There are also situations where enrichment remedies may arise in respect of performances rendered under a valid and subsisting contract. A simple example is overpayment by a debtor in a contractual relationship.⁷² The same would presumably be true in a case where the supplier of goods (and services?) over-supplied. The Scottish courts have also indicated on numerous occasions that enrichment remedies may be available to a contract-breaker who is unable to recover for his performance under the

⁶⁸ For the *condictio ob causam finitam* in Scots law see Stair, *Inst*, I, vii, 7. It is also mentioned in Craig, *Jus Feudale*, III, v, 23. For the interesting suggestion that this *condictio* was (unwittingly) applied in the leading Scottish case of *Cantiere San Rocco SA v Clyde Shipbuilding and Engineering Co Ltd* 1923 SC (HL) 105, see *Parkin v Smuts* 1978 3 SA 55 (T) at 58 per Van Reenen J.

⁶⁹ [1979] 1 WLR 783.

⁷⁰ *NV Devos Gebroeder v Sunderland Sportswear* 1990 SC 291.

⁷¹ *Chisholm v Alexander* (1882) 19 SLR 835. See further Steven (n 65) 53-55.

⁷² See e.g. *Strathaird Farms Ltd v G A Chattaway & Co* 1993 SLT (Sh Ct) 36.

contract in consequence of the doctrine of mutuality, which, like the South African doctrine of reciprocity, states that a party in breach may not claim performance of what is due to him under the contract.⁷³ It seems that before the enrichment remedy may be used the innocent party must have terminated the contract. The classic case is that of the builder who fails to complete or completes defectively; but a number of other situations are illustrated in the Scottish sources.⁷⁴ Very often the courts have managed to resolve the problems without invoking the law of unjustified enrichment. By holding that a contract-breaker is not in material breach, and thereby removing the innocent party's remedy of termination, they have allowed him to sue for the contract price with a deduction or set-off for the other party's claim to damages for breach. However, this approach is simply not possible in all cases. The best example in the Scottish case law is *Thomson v Archibald*,⁷⁵ where a builder abandoned the contract with the work only 45% done. It cannot be pretended that the builder here was in anything but material breach, and it would be extraordinary if the contractual price was the starting point for any claim he might have. Equally there can be no claim at all unless the employer uses the work done as the basis for completion by another builder, because otherwise there can be no question of his being enriched. Given that the contract provides no answer if the

⁷³ See generally for this and what follows H L MacQueen 'Unjustified enrichment and breach of contract' 1994 JR 137 at 149-66; also Sellar (n 52) para 67. On mutuality, which clearly derives from the civilian *exceptio non adimpleti contractus*, see most recently W W McBryde, 'Remedies for breach of contract', (1996) 1 *Edinburgh Law Review* at 43-78; *idem*, 'Mutuality retained', *ibid*, 135-9.

⁷⁴ The latest case, *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1996 GWD 21-1218, concerned the landlord's justified termination of a commercial lease and a claim by the erstwhile tenant to a "windfall" gain thereby allegedly arising for the landlord. It was accepted that a contract-breaker might have an enrichment claim but held (Lord Rodger of Earlsferry dissenting) that on the facts the gain was an intended contractual entitlement and that the contract expressly excluded recovery in the circumstances.

⁷⁵ 1990 GWD 26-1438, Edinburgh Sheriff Court, June 4, 1990.

employer does use the first builder's work as a basis for completion, it seems that resort must be had to the law of unjustified enrichment. Finally, this claim by the builder can of course be met by the employer's claim for damages for breach of contract.

The position which results may be complex. Let us suppose a building contract under which the price is £10,000. The builder abandons having done 45% of the work; for simplicity's sake, suppose that work is worth £4,500. The employer completes through a second builder at a cost of £7,000. If he does not have to pay the first builder, the employer is in fact better off through the breach and can get no or only nominal damages from the first builder. If however the first builder has an enrichment claim, the picture begins to change. If he gets £4,500, then the building has cost the employer £1,500 more than the original contract price. He has a loss which he can set off against the builder's enrichment claim. Thus it is only if the builder's claim does not lead to the employer having to pay more than the contract price *in total* that it can be made good in full. It was in this sense that I observed in 1994 that the contract price limits the enrichment *recovery*, rather than making a suggestion that it provided a limit for the enrichment *claim*.⁷⁶

Given the background of his own case law, the Scots lawyer reacts with interest to the South African position, under which the contract-breaker disabled from making a contractual claim by the doctrine of reciprocity may nonetheless have a claim if the innocent party accepts the defective work even when the contract has not been terminated. There has been controversy as to whether or not this is a contractual or an enrichment claim.⁷⁷ Other civilian systems also allow the contract-breaker a claim, usually

⁷⁶ See MacQueen (n 73) 163, more accurately expressed than the sentence at *ibid* 166 criticised by Dieckmann and Evans-Jones (n 37) 100 n 29.

⁷⁷ *Hauman v Nortje* 1914 AD 293; *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A).

classified as contractual, if the innocent party “accepts” the performance, subject to cure of any outstanding defects at the contract-breaker’s expense.⁷⁸ Professor Visser, drawing on readings from Voet and other civilians, has argued that the South African courts have been wrong to deny the possibility of a contract-breaker’s claim being one for enrichment.⁷⁹ The key to this is that a contractual claim will tend to start, as in Scotland, with the contract price, which incorporates an element of profit for the contract-breaker; a more appropriate start-point for recovery is surely the extent to which, if at all, the innocent party has been enriched by the performance actually rendered.

(3) Contract rules which prevent unjustified enrichment

A third point is that prevention of unjustified enrichment is one of the roles of contract law. There are a number of rules in which this is clear. Three examples seem particularly significant, restitution upon termination for breach, so-called *quantum meruit* claims, and *restitutio in integrum* after the reduction of a voidable contract.

(a) Restitution upon termination of contract for breach

Scots law allows a party who has terminated a contract for the other’s breach to claim restitution of any performance rendered before the termination.⁸⁰ “Restitution” is here used neither in its Scots technical sense as one of the enrichment remedies nor in

⁷⁸ G H Treitel, *Remedies for Breach of Contract: a Comparative Account* (1988), 289, 308-10; England (n 4) paras 5.153-5.155.

⁷⁹ D P Visser ‘Rethinking unjustified enrichment: a perspective of the competition between contractual and enrichment remedies’ 1992 *Acta Juridica* 203 at 231-6.

⁸⁰ MacQueen (n 73) 139-49; Dieckmann and Evans-Jones (n 37); Sellar (n 52) paras 38-43. For the equivalent rules in South Africa see van Rensburg, Lotz and van Rhijn revd Christie, ‘Contract’, 5(1) LAWSA, para 256, and for a more general comparative picture see Treitel (n 78) 382-92, and England (n 4) paras 5.135-5.146.

the English sense as a general term for unjustified enrichment, but simply to mean “restoration”. The basis of this in Scotland seems to be that an anticipated counter-performance under the contract has not been received, and that accordingly the contract-breaker is enriched. But this does not mean necessarily that enrichment law is operating within contract law in this instance. After *Connelly v Simpson*⁸¹ it would seem to be correct both as a matter of authority and of principle to say that this right of restitution is not an instance of the *condictio causa data causa non secuta*.⁸² However, this does not mean that enrichment considerations are irrelevant, and in Scotland it is undecided whether a full-blown enrichment analysis can be applied to the claim, taking account, for example, of change of position defences which might be offered. German law clearly holds that the claim is contractual, and so requiring full restoration of what has been performed,⁸³ while South African law also appears to reject an enrichment approach to the question.⁸⁴ However, Professor Visser has argued that restitution upon termination of contract in

⁸¹ 1993 SC 391.

⁸² Scottish Law Commission (n 32) 86 note 305 suggests that the views which I expressed in *MacQueen* (n 73) are in conflict with the views of Professor Evans-Jones about the role of the *condictio causa data causa non secuta*. This is a misrepresentation of my views: the article emphasises the existence of a right of restitution after breach, and avoids any comment on whether it is to be explained by the *condictio*.

⁸³ Treitel (n 78) 388.

⁸⁴ *Baker v Probert* 1985 3 SA 429 (A). The point was of importance here because the plaintiff was seeking recovery of money paid to the defendant’s agent but not transmitted on to the defendant, and it was argued against recovery that the defendant was therefore not enriched. It was held that payment to the agent was payment to the principal and that contractually the principal was bound to repay. The enrichment liability of a principal when only his agent has been benefited is an unresolved question in Scotland but there seems no strong reason of principle or common sense why he should not be liable: see Scottish Law Commission (n 43) 182-83.

South Africa is based on unjustified enrichment.⁸⁵ The Clive enrichment “code” provides that a person is to be treated as enriched if he has acquired an economic benefit under a contract terminated by rescission for breach, even if the benefit was received for some consideration under the contract, and that the contract will not justify retention of the enrichment;⁸⁶ meaning that the action for recovery in his scheme would be one under the general law of enrichment.

A crucial point is the tension between the restitutionary claim and the general acceptance in Scotland of the theory that termination of a contract is generally prospective in effect rather than retrospective. The tension is resolved in Scots law through the concept of accrued rights, which points to the enrichment-preventing nature of the remedy. There can be no restitution in respect of such accrued rights. The courts have been reluctant to hold that rights have accrued merely because they fall due under the contract. The concern has been that this could mean something akin to forfeiture of performances tendered before termination of the contract. Instead there is a clear tendency to find accrual when a performance has been met by the anticipated counterpart performance on the other side,⁸⁷ underlining the point that the contract rules are here operating to prevent enrichment of one side at the expense of the other.

An interesting recent decision on accrued rights is *Lloyds Bank v Bamberger*.⁸⁸ A seller of heritable property rescinded from the contract following the purchaser’s failure to pay the price on time. Under a clause in the contract, the seller then claimed interest

⁸⁵ Visser (n 79) at 225-31. Note also R H Christie, *The Law of Contract in South Africa* 2nd ed (1991) at 635: “ ... the object of cancellation .. is .. to terminate the contract there and then but not retrospectively. Restitution by either or both parties should therefore be ordered only to the extent necessary to avoid unjustified enrichment.”

⁸⁶ Rules 2(3), 7(2)(b).

⁸⁷ MacQueen (n 73) 144-6.

on the price for the period from the contractual date of entry to the date of the rescission. The court refused the seller's claim, on the basis that by rescinding the contract he was intimating that he was no longer prepared to accept payment of the price due under the contract, and could not now enforce a claim for interest on a price which *ex hypothesi* was no longer payable. The sellers argued that the rights under the interest clause had accrued prior to rescission, making the interest payable even though the price was not. There was much reference to, but little analysis of, the controversial English case of *Hyundai Heavy Industries v Papadopoulos*.⁸⁹ There the House of Lords held that buyers of a ship to be built remained liable for an instalment of the price due on 15 July even after the shipbuilders rescinded for non-payment on 6 September, on the basis that the shipbuilders' right to the instalment had accrued before the rescission. This result looks like a forfeiture for breach, and the decision was by the narrowest of majorities, with one of the dissenters being the Scottish judge Lord Keith. The other Scottish judge (Lord Fraser) was however in the majority. However, he reasoned on the basis that the instalments were not simply part of a *purchase* price for goods but were designed to meet the shipbuilder's need for cash flow as work proceeded. In his view it was only if contractual payments were of this nature that a right to payment arising but not fulfilled before termination was not destroyed by that event. In other words, the right to payment did not accrue simply because the contract said payment was due; accrual occurred because the creditor had in some sense earned it.

Lloyds Bank v Bamberger supports this approach as to when a contractual right may be said to have accrued so that it remains enforceable after rescission, and to be a rejection of the extreme interpretation of *Hyundai*, which is that rights arising before rescission are unaffected because rescission is only prospective in its effects. It is part of

⁸⁸ 1993 SC 570.

⁸⁹ [1980] 2 All ER 29 (HL).

the court's argument that rescission can have retrospective effects, including restitution of payments made in advance of the receipt of the other side's performance. Lord Justice Clerk Ross states:

Under our law, a seller who rescinds such a contract of sale [*of land or goods*] cannot retain advances or instalments of the price that he has received, but is required to repay these to the purchaser unless the payment falls to be regarded as a deposit.⁹⁰

The possibility of restitution means that rights cannot be held to have accrued simply because they have fallen due and or have given rise to performance, unless the contract clearly so provides.

The Clive enrichment “code” also gives effect to the principle that restitution does not affect rights which have accrued in the sense that the performance has been reciprocated:

7(3) ... a contract which provides for performance in severable parts or stages is presumed, unless the contract indicates the contrary, to exclude redress in so far as performance by one party under, and substantially in accordance with, the contract has been met by performance by the other party under, and substantially in accordance with, the contract.

Although the right of restitution upon termination thus depends upon non-reciprocation, there is not any requirement of “total failure of consideration” apparent in Scots law in this area.⁹¹ The restitution may follow upon proper performance upon both sides of the contract giving each party accrued and irrecoverable rights, with the restitution being only in respect of that part of the contract which was improperly performed.⁹² A difficult question which has not received much attention is the relationship between the concept of accrued rights and the possibility of mutual

⁹⁰ 1993 SC at 573.

⁹¹ There is an incautious reference to “total failure of consideration” by Lord Ross in *Lloyds Bank v Bamberger* at 573 but it is submitted that this should be regarded as *per incuriam*.

⁹² *Graham v United Turkey Red Co* 1922 SC 583 may provide an instance where an agent was held entitled to commission earned before he broke the contract with his principal, but not to commission earned thereafter. Had the principal paid in advance, or paid before discovering the breach, he presumably could not have recovered pre-breach commission but only post-breach commission.

restitution, as may happen in sale of goods when the buyer rejects faulty goods, returning them to the seller while at the same time reclaiming any payment of or towards the price. Perhaps it may be said that no right has accrued until the performance on one side has been met by the correct and non-contract-breaking performance of the other side.

The crucial question to which the existence of this right of restitution gives rise is whether the claimant may use it to avoid a bad bargain; that is to say, whether the contractual expectation may be defeated by the restitutionary approach.⁹³ The best Scottish illustration of such a situation is *Connelly v Simpson*.⁹⁴ C paid £16,000 to S for one-third of the shares in S's company, but did not take delivery because he wished to minimise the value of his estate during his divorce proceedings which were also under way at this time. Over the following two years, the company did badly; S first issued more shares to raise capital, thereby diluting the value of C's holding, and then put the company into voluntary liquidation. C's shares were now worth just £400, and he was offered this sum by the liquidator. C's bargain was evidently a bad one, and he sought restitution from S of his £16,000. There are a number of technical difficulties about the case, including an uncertainty as to whether S was truly in breach, and, as already noted, a debate about the applicability to the case of the *condictio causa data causa non secuta*. Setting these to one side, however, the real issue was whether C could avoid the consequences of a bad bargain, and the decision of the court was that he could not. Johannes Dieckmann and Robin Evans-Jones have persuasively argued the opposite point of view, on the grounds that S was indeed in repudiatory breach and that it was therefore inappropriate for C to bear the resultant loss. However, it was not pleaded that S was in breach, and it is debatable whether the commercial decisions that he made did in fact constitute breach or repudiation. Thus, had S not put his company into liquidation, the Insolvency Act

⁹³ See Burrows (n 5) 112-114.

⁹⁴ 1993 SC 391.

1986 might have entailed his incurring personal liability to the company's creditors for unwisely keeping the company going in bad times rather than winding it up. Earlier, issuing shares may have been the only option by which the value of C's acquisition had some chance of being preserved. There certainly seems to be a considerable difference between this situation and the rather unlikely one figured by Dieckmann and Evans-Jones, where F pays J in advance for goods on a falling market and J in breach then somehow manages to resell the goods to H at a higher price. It could be readily agreed that J should repay F in these circumstances without it being an inexorable conclusion that in the *Connelly* case S should repay C.

The case also points back to the concept of accrued rights. For what had C paid his £16,000? The answer may not be shares but rather a right to delivery of shares upon demand. On both sides of this bargain rights had therefore accrued and could not be reversed through the subsequent ill fortunes of S's company. Lord McCluskey's opinion also dwells on the long interval in time which elapsed after C had paid his £16,000 as a factor against restitution. One is reminded of the limited period which a buyer has in a sale of goods to reject the goods; there may be acceptance barring rejection and restitution of the price by lapse of a reasonable time, although the buyer does of course still have a right to damages for the breach of contract.

A further interesting issue about restitution, rescission for breach and contract arises from a decision of the House of Lords in an English appeal, *Pan Ocean Shipping Ltd v Creditcorp Ltd (The Trident Beauty)*.⁹⁵ In this case, P entered a time charterparty with the owners of a vessel (T). Under the charterparty hire payments were made in advance for 15-day periods. T assigned its rights to C under a credit facility arrangement. P usually paid C direct. T was unable to provide the ship for a period in respect of which P had paid C. T was not worth suing, and P claimed restitution from C. The judge at first

instance upheld the claim but was reversed in the Court of Appeal.⁹⁶ The latter ruling was upheld by the House of Lords.

The ratio seems to be that the charterparty provided a mechanism for restitution by T if the ship could not be provided after an advance payment had been made. Lord Goff said that “it is always recognised that serious difficulties arise if the law seeks to expand the law of restitution to redistribute risks for which provision has been made under an applicable contract”.⁹⁷ It was argued that on ordinary principles of assignation C could be in no better position than T with regard to the money. But the answer to this is that assignation can only transfer rights, not liabilities. As Lord Woolf put it: “Why should P have two alternative parties to whom to look for a repayment merely because T, as part of their own financial arrangements, have assigned their right to receive payment to a third party, C?”⁹⁸ The difficulty is that in fact P had paid C direct, and not through the intermediary, T, and C knew what the payments were for; but the sparse Scottish authority supports the outcome in *The Trident Beauty* and the reasoning which underlies it.⁹⁹ In particular, while the debtor may take against the assignee the *defences* which it has against the cedent, it cannot invoke against the assignee the *counter-claims* which arise against the cedent.

Finally in connection with restitution upon termination, it is worth considering the relevant provisions of the UNIDROIT, Lando Commission, and McGregor “codes”

⁹⁵ [1994] 1 All ER 470.

⁹⁶ [1993] 1 Lloyd's Rep 443.

⁹⁷ [1994] 1 All ER at p 475.

⁹⁸ [1994] 1 All ER at p 480.

⁹⁹ See *Binstock Miller & Co v Coia & Co* (1957) 73 Sh Ct Rep 178; supported as correct by W A Wilson, *The Scottish Law of Debt* (2nd ed, 1991), para 27.2 note 94, but criticised by McBryde, *Contract*, para 17.86. McBryde's criticisms are answered by H L MacQueen 'Title to sue' *The Laws of Scotland: Stair Memorial Encyclopedia*, vol 15 (1996), para 864.

of contract law. The effect of termination under both the Lando (Article 4.305) and UNIDROIT (Article 7.3.5) codes is to release parties from their obligations to effect and to receive future performance. The Lando code alone states that accrued rights and liabilities are unaffected. Termination is thus basically prospective rather than retroactive. Nonetheless under the Lando code the terminating party may reject property previously received from the other party if its value to the former has been fundamentally reduced as a result of the latter's non-performance (Article 4.306).¹⁰⁰ Money which has been paid for a performance which has not been received, or has been properly rejected, may be recovered after termination (Article 4.307). Similarly with property supplied and capable of return for which payment or other counter-performance has not been received (Article 4.308). If a performance has been rendered and cannot be returned, but there has been no counter-payment or counter-performance, a reasonable amount can be recovered for the value of the performance to the other party (Article 4.309). It should be noted that these remedies are also available to the contract-breaker.

UNIDROIT also provides for rights of restitution on termination, which may be applied for by either party, and is subject to concurrent restitution on the other side (Article 7.3.6). Where restitution in kind is not possible or appropriate, allowance should be made in money wherever reasonable. However, restitution is not to affect accrued rights: "if performance of the contract has extended over a period of time and the contract is divisible, restitution can only be claimed for the period after termination has taken effect". The McGregor code also makes quite elaborate provision for a right of restitution upon termination (Articles 461-471). Either party may claim; there must be failure of a counter-performance but there is no need for "total failure of consideration";

¹⁰⁰ PECL 182, provides illustrative examples: (1) supply of computer without software; (2) supply of computer system without essential component.

there is no restitution where neither party is in substantial breach; and the contract consideration provides a ceiling on recovery.¹⁰¹

(b) Quantum meruit claims

In *ERDC Construction Ltd v H M Love & Co*¹⁰² the Second Division of the Court of Session held that an innocent party who has terminated a contract following the other party's material breach may make what is called a *quantum meruit* claim in respect of the performance rendered before termination; essentially payment at a reasonable rate (as distinct from the contract price or the enrichment of the recipient of the performance). In so ruling the court followed English and Canadian authority.¹⁰³ The practical benefit for the innocent party arises where the contract provides no mechanism for pricing the work done prior to termination (as, for example, in a lump sum building contract) while at the same time avoiding the alternative but necessarily speculative claim for damages. Possibly, it may also give a better return than would be provided by either damages or the original contract price.¹⁰⁴

As James Wolffe has pointed out,¹⁰⁵ the terminology of *quantum meruit* has a contractual overtone for the Scots lawyer;¹⁰⁶ yet the claim is one under which there is departure from the terms of the contract. The aim is clearly to prevent the enrichment

¹⁰¹ Note that the Uniform Law on International Sales, art 78(2), and the Vienna Convention on the International Sale of Goods, art 81(2), also provide for restitution upon termination.

¹⁰² 1995 SLT 254.

¹⁰³ *Lodder v Sloney* [1904] AC 442; *Morrison-Knudsen Co Inc v British Columbia Hydro and Power Authority* (1978) 85 DLR (3d) 186.

¹⁰⁴ As for example in the famous Californian case of *Boomer v Muir* 24 P 2d 570 (Cal App 1933).

¹⁰⁵ 'Contract and recompense: *ERDC Construction Ltd v H M Love*' (1997) 1 *Edinburgh Law Review* 00.

¹⁰⁶ See also above, II(2)(b).

of the defender at the expense of the pursuer. It would seem more appropriate to regard it as an enrichment claim, arising because a contractual claim for the price of work done is unavailable to one who has not yet completed the contract work.¹⁰⁷

(c) Voidable contracts and restitutio in integrum

Another body of contract rules which seem to function to prevent enrichment is that concerned with the reduction of voidable contracts. Scots law has accepted the doctrine that before a voidable contract can be reduced there must be *restitutio in integrum*, that is, restoration to the position before the contract was made. It has been argued by Professor Visser that, where applied, this remedy reverses enrichment.¹⁰⁸ Both parties are under a duty to restore; the requirement that *restitutio* be possible may give what is in effect a non-enrichment or change of position defence. In Scots law a very literal approach has been taken to the requirement that *restitutio in integrum* be possible, which tends to mean that restitution does not take place. In the last major case, however, a decision of the House of Lords in 1939, this literal approach was discouraged in cases of fraud, and monetary restitution was allowed.¹⁰⁹ Were a provisional proposal of the Scottish Law Commission that the courts be generally empowered to grant a monetary surrogatum for *restitutio in integrum* to be introduced, it would clearly be possible for the award to be determined according to enrichment criteria not confined to pure restitution in the Scottish sense of restoration of full value.¹¹⁰ The Commission figures a case in

¹⁰⁷ However, it cannot be said that no contractual remedy is available, given that there may be an action for damages.

¹⁰⁸ Visser (n 79) at pp 210-225.

¹⁰⁹ *Spence v Cranford* 1939 SC (HL) 52.

¹¹⁰ Scottish Law Commission Memorandum No 42, *Defective Consent and Consequential Matters* (1978), vol 2, Part IV.

which the voidable contract is for the sale of a painting believed to be a modern copy of a Rubens, but in fact a genuine Rubens which is then sold on; the buyer, it suggests, should not be liable to pay back the full value of a genuine Rubens but simply for the profit he has made on the transaction.¹¹¹ This seems perfectly consistent with the general principles of recompense.¹¹² It may finally be noted that the Clive draft enrichment “code” includes voidable contracts within its scope.¹¹³

III. CONCLUSIONS

What conclusions may be drawn from this rather brief survey of the Scottish position on the relationship between contract and unjustified enrichment? Put very simply, it seems that although, like other civilian and mixed systems, the law draws a clear distinction between the two branches of the law of obligations, this does not preclude a functional linkage in that very often the consequence of applying contract rules will be to leave the field open to unjustified enrichment. This is not merely a matter of saying that enrichment steps in when, despite what parties may expect and intend, no contract ever exists, or when a contract ceases to exist or to be legally enforceable, although that is obviously one of the most important roles of enrichment law. Clearly, however, enrichment can also operate when there is a contract, providing the solution when that contract does not yield up the answer to a problem. The classic example is that of the contract-breaking part-performer who nonetheless does effect a transfer of value to his contractual partner. In many cases it would either be wrong or impossible to provide an answer to this problem by way of the contract, and the appropriate way of looking at the matter seems to me to be through the law of enrichment. I do not think that this will

¹¹¹ Ibid, 155.

¹¹² See Steven (n 65) especially at 59-61.

¹¹³ Rules 2(3), 5(3).

lead to over-protection of contract-breakers, because what must always be kept in mind is the undoubted existence of a breach of contract claim in the other direction, which will almost certainly ensure that the contract-breaker does not do better out of the breach than he would have done by performing.

This leads on to the perception that there is a fundamental antithesis between enrichment law, which effects restoration of parties to their pre-exchange position, and contract law, which puts parties in the position they expected to be in as a result of the transaction. But the distinction is a fine one in many instances, notably the type of case in which the Scottish courts have fumbled rather uncertainly between implied contract and recompense; that is to say, those involving the supply of goods which are then consumed, the supply of services, and the use of someone else's property. The upshot of such cases, whether determined according to contract law or enrichment law, is usually that the recipient pays the market rate for what he has received, looking very much more like a fulfilment of the transaction than a restoration. Again, in contract law it is clear that there are rules which allow the restoration of parties to a former position: restitution upon termination for breach and *restitutio in integrum* following the reduction of voidable contracts. There are other rules which show that prevention of unjustified enrichment is one of the goals of contract law.

Is there then a value in retaining the traditional distinction of contract from the law of unjustified enrichment? I would argue that there is, for at least two very obvious reasons. We began with Peter Birks' fear that unjustified enrichment might become contaminated by contract law in that it might be thought that no enrichment could be reversed unless there was some sort of contract-like relationship between the parties. That remains an important point, if only because there are so many non-contractual situations in which the law of unjustified enrichment quite properly applies, and misunderstanding would threaten that position. Equally, however, we should take the

converse fear, that contract law might become contaminated by enrichment law. If prevention of enrichment is a function of contract law, it is quite clearly not the dominant function of contract law. To allow concepts of unjustified enrichment an unbridled scope throughout contract law would be to undermine fatally the fundamental justification for enforcing contracts, which remains the legitimacy of the pursuit of improvement in one's position even at another's expense, provided that certain minimal rules are complied with.