

INNER TEMPLE LECTURE ON UNJUST ENRICHMENT

February 17, 2014

Professor Andrew Burrows QC (Hon), FBA

Professor of the Law of England, University of Oxford and Fellow of All Souls College

It is a great pleasure to be back here in the Inner Temple and I would like to thank you for inviting me. Lord Justice Moore-Bick asked me to speak on anything I liked about the law of unjust enrichment. I am taking him at face value because part of what I want to talk about is something of an indulgence in that I want to start off by explaining to you about the Restatement of Unjust Enrichment project that I headed – which I hope will serve as a useful introduction to the subject – before I then turn for the rest of the lecture to examine the two most important recent cases in this area, both in the Supreme Court.

I am sure everyone here is familiar in general terms with the story of the law of unjust enrichment, originally called the law of restitution, over the last 50 years. There can be said to be four milestones or stages. First, the publication of Goff and Jones in 1966 denouncing the old implied contract ('quasi-contract') approach to most of this area and favouring an approach based on recognition of unjust enrichment as a source of the right to restitution. Second, the authoritative acceptance of that thesis, along with the crucial defence of change of position, by the House of Lords led by Lord Goff in *Lipkin Gorman v Karpnale* in 1991. Third, the flood of cases, dealing with the restitution of money paid under void contracts, in the interest rate swaps litigation in the 1990s. This enabled lots of issues on the law of unjust enrichment to be sorted out, especially the recognition of mistake of law as grounding restitution. Fourth, and the phase we are now in, the swath of litigation on restitution of overpaid tax prompted by the UK's corporation tax regime being held in some respects to be contrary to EU law in the conjoined ECJ cases of *Metallgesellschaft* and *Hoechst*. Again this is enabling many questions on the law of unjust enrichment, eg on limitation, change of position, and the so-called *Woolwich* principle to be resolved.

Against that fast-moving background, it seemed to me that the position had been reached when it would help everyone with an interest in the English Law of Unjust Enrichment to try to state as clearly and succinctly as possible what the present law is. Hence the idea of a Restatement. I'd like to make 5 general points about the project before turning to five points on the substantive content of the Restatement.

Five general points about the Restatement project

(1) The novelty of the project

The project was novel in two main senses. First, while Restatements – non-binding but statute-like formulations of the law - are commonplace in the USA, they have never had a role to play in England and Wales. I have long thought that, although we do not face the multi-jurisdictional problems encountered in the USA, this is a lacuna in our system and unjust enrichment seemed to me to be a particularly suitable area for trying out this novel approach. It has to be stressed that the idea is certainly not for the Restatement to be enacted as legislation. My hope is that the Restatement will

be persuasive in the courts but the intention is for the Restatement to supplement and enhance our understanding of the common law, making it more accessible, not to replace it.

The second novelty was that there has been relatively little joint work undertaken by legal academics working alongside judges and practitioners on a difficult area of the law. For this project, I therefore put together an advisory group half of whom were academics and half of whom were judges or practitioners. So this collaboration was again a novel feature of this project. My own view is that it worked extremely well and that we all learnt a great deal from each other. It was a rich and rewarding collaborative exercise.

(2) Working methods

The working methods we adopted were as follows. Over a period of about 18 months, four all day meetings of the advisory group were held. In advance of those meetings, drafts of parts of the Restatement and the commentary were prepared by me and circulated electronically. Comments were then sent back and revised versions of the Restatement and Commentary were again sent out in advance of each meeting. Those drafts were then discussed at the meetings. They were further revised in the light of the discussions. Further invaluable assistance on drafting was given by retired Parliamentary Counsel. I had first encountered Parliamentary Counsel during my time at the Law Commission in the 1990s and had come to admire greatly their skills as lawyers and ‘wordsmiths’.

(3) The type of Restatement

The word Restatement might suggest that one is purely concerned to state the present law. That would be marginally misleading. What has been aimed for is the best interpretation of the present law. In some limited circumstances, one would require a decision of the Supreme Court to lay down the law as set out in the *Restatement*. In other words, on some matters the Restatement takes a principled interpretation of the law that may be regarded as going further than the existing cases. The commentary makes clear where this is so. It may help to think of this as a ‘principled’ or ‘progressive’ Restatement.

(4) English law

As the title makes clear, this is certainly not a purported European codification of unjust enrichment. As most of you will be aware, there are on-going attempts to harmonise areas of private law across Europe. Particularly relevant to this project are the European model rules for ‘Unjustified Enrichment’ in Book VII of the *Draft Common Frame of Reference* (prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group)); and the proposed EU Regulation on a Common European Sales Law which has some provisions on restitution after termination of a contract for the sale of goods. I make no point about whether or not European legal harmonisation is a desirable or feasible goal. But what I do say is that it is essential that the subtleties of English law are properly understood before there is consideration of whether they should be abandoned in favour of a European approach.

(5) Restatement and commentary

What the finished product comprises is a 36 section Restatement with numerous subsections (that’s at pp 1-21 of the book) and an 80,000 word commentary which copies across the relevant section

from the Restatement (which is put in a grey-shaded box) and then contains the commentary on that section. The commentary makes extensive use of hypothetical or real examples in the belief that this is commonly the best way of understanding the law. The leading cases have been cited but, while there is some reference to the academic literature, the aim of the commentary is to explain the Restatement not to reproduce the textbooks in this area.

Five points on the substantive content of the Restatement

I would now like to turn to five brief points about the content of the Restatement. For those who know little about unjust enrichment, this may serve as a useful overview and for those who know a lot about the subject, it may serve as a happy reminder.

1. This is a Restatement of the English Law of Unjust Enrichment, it is not a Restatement of the English law of Restitution. Unjust enrichment describes an event or cause of action. Restitution describes a response or remedy. It used to be thought that it did not really matter whether in this area one focussed on the event or on the response not least because restitution is almost invariably the only response to unjust enrichment. But following the work of the late Peter Birks it has now become widely accepted especially by the academics but also by some influential judges - and this explains the change of title of the new 8th edn of Goff and Jones – that it really does matter which one focuses on because restitution may be the response to events or causes of action other than unjust enrichment. In particular restitution may be the response to a civil wrong ie instead of the standard monetary remedy of compensation, restitution stripping all or some of the defendant's gains may be a remedy for a tort or an equitable wrong or even, after *A-G v Blake*, a breach of contract. Those types of claim, where the wrong is the cause of action, raise different questions from an unjust enrichment claim. So the Restatement does not include restitution for wrongs: like the new edition of Goff and Jones, its scope is controlled by the event or cause of action of unjust enrichment not the response or remedy of restitution. This is in line with our traditional approach to dividing the law of obligations which divides according to events – contract and tort and now unjust enrichment – and not according to response – compensation, punishment, or restitution.

2. The Restatement is underpinned by the fourfold conceptual structure for unjust enrichment that has come to be recognised by the English courts. According to this every unjust enrichment claim involves asking four distinct questions:

- (1) Has the defendant been enriched? The 'enrichment' question.
- (2) Was the enrichment at the claimant's expense? The 'at the expense of' question.
- (3) Was the enrichment at the claimant's expense unjust? The 'unjust' question.
- (4) Are there any defences? The 'defences' question.

3. While all four of those questions give rise to many fascinating issues, some of which remain unresolved, the most important theoretical question is the third, the unjust question. The Restatement adopts the standard English approach to that question whereby the claimant must identify an unjust factor such as, for example, mistake, failure of consideration, duress, undue influence, or the unlawful obtaining of a benefit by a public authority (the so-called *Woolwich*-principle). This contrasts with the traditional civilian approach to the unjust question which looks

instead at whether there is an absence of juristic basis. But that contrast is not as sharp as it may at first sight appear to be because English law goes on to accept, as a general qualification on the unjust factor scheme – and this is set out in general terms in s 3(6) of the Restatement - that an enrichment is not unjust if the benefit was owed to the defendant by the claimant under a valid legal obligation. So, eg, the claimant cannot have restitution of a mistaken payment if the claimant owes that payment to the defendant.

4. The Restatement accepts that the restitution that responds to an unjust enrichment may be personal or, in certain circumstances, proprietary. The standard restitutionary response is a personal right to a ‘monetary restitutionary award’ measured by the value of the enrichment received by the defendant. As a personal right this is enforceable only against the defendant or his representatives. The term ‘monetary restitutionary award’ is used in the *Restatement* as a modern simplification of the archaic terminology - such as an award of money had and received to the claimant’s use or an award of money paid to the defendant’s use or a quantum meruit or an account - that has traditionally bedevilled the law on restitutionary remedies. Apart from that standard personal remedy, the restitution can in certain circumstances be proprietary: and there are four main examples of proprietary restitutionary responses established in the unjust enrichment cases, namely a lien, subrogation to a discharged security, rescission (or rectification) revesting title, and a beneficial interest under a constructive or resulting trust. The major practical importance of proprietary restitution is that, in contrast to personal restitution, it gives priority to the claimant on the defendant’s insolvency. But it is important to recognise that, as against personal restitution, proprietary restitution is limited in three ways: first, it is dependent on the defendant *retaining* a particular asset or a right in property or in having had a secured liability discharged; secondly, some unjust factors, most obviously failure of consideration, do not in general trigger proprietary restitution; and thirdly, there is a general restriction - shown particularly in subrogation cases – that where the claimant has, as part of a bargain, taken the risk of being unsecured or inadequately secured, proprietary restitution should not give the claimant better security than it bargained for. Personal and proprietary restitution is dealt with in section 5 and Part 5 of the *Restatement*.

5. Finally, the law of unjust enrichment comprises aspects of both common law and equity. In the law of unjust enrichment, hardly anything today turns on whether a rule or principle is historically derived from the common law courts or the Court of Chancery. In particular, it is a myth to think that equity is more discretionary and less principled than the common law. So it is that the *Restatement* presents an integrated view of common law and equity within this area. Indeed with one minor exception, there is no reference at all in the *Restatement* to the historical labelling of common law and equity although that distinction is occasionally referred to in the commentary.

Two important recent cases

So much for my self-indulgence. I would now like to turn to the two most important recent cases in the law of unjust enrichment, both in 2013 in the Supreme Court: *Pitt v Holt* and *Benedetti v Sawiris*. Rather neatly for this talk, each deals with one element only of the unjust enrichment 4-stage test. *Pitt v Holt* is concerned with the unjust question and deals with the most important unjust factor of mistake; *Benedetti* deals with enrichment. Both, I am delighted to say, cited my Restatement, although as we shall see, not necessarily with approval.

(1) *Pitt v Holt*

Pitt v Holt [2013] UKSC 26, [2013] 2 WLR 1200, [2013] 3 All ER 429 raised the long-debated question as to what the test for mistake should be in relation to the restitution of gifts and other voluntary dispositions. The background to this is that the law on the restitution of mistaken payments has been expanded over the last 35 years in two main senses. First, as regards payments made by mistake of fact, the courts have moved to a general 'but for' causation test departing from the old more restrictive 'supposed liability' test. Prima facie (and subject to defences such as change of position) one is entitled to restitution of a mistaken payment if one would not have made the payment but for the mistake. Robert Goff J gave the seminal judgment making the move to a causation approach in *Barclays Bank v WJ Simms* and that was approved in several subsequent cases for example by the Court of Appeal in *Lloyds Bank plc v Independent Insurance Co Ltd*. The second development, expanding recovery for mistaken payments, was that the old general law that one could not recover for mistakes of law as opposed to fact was departed from in *Kleinwort Benson v Lincoln CC*, one of the swaps cases. That was subsequently applied to mistakes of law as to one's tax liability in *Deutsche Morgan Grenfell Group plc v IRC* which dealt with the restitutionary consequences of the UK's advanced corporation tax legislation having being held to be contrary in some respects to EU law by the ECJ in *Metallgesellschaft v IRC* and *Hoechst AG v IRC*. That in turn underpins the ongoing litigation on mistakenly paid corporation tax, involving restitutionary claims running into several billions of pounds, in cases such as *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners*.

In the Restatement we explicitly left open (it was one of the three points on which we sat on the fence) whether the test of mistake for gifts should be more restrictive than a but for causation test. We had hoped that this would be decided once and for all in *Pitt v Holt*. Unfortunately as I shall now explain the uncertainty on this question was not resolved.

So the facts in *Pitt v Holt* involved a mistake of law in relation to tax, not in the corporate context but in the very different domestic context of a voluntary disposition following a tragic accident. Mrs Pitt was initially the receiver, appointed by the Court of Protection, for her husband who had suffered severe head injuries in a car accident. She received on his behalf damages for personal injury and, on taking professional investment advice, the damages were used to create, in 1994, a discretionary special needs trust for Mr Pitt and to some extent for Mrs Pitt and their children. But Mrs Pitt, through those advising her, failed to think through the inheritance tax implications so that the way the trust was set up meant that, ultimately, Mr Pitt's estate incurred £200,000-£300,000 of inheritance tax that (in line with what statute allowed in s 89 of Inheritance Tax Act 1984) could have been entirely avoided by simple amendments to the terms of the trust. Mr Pitt died in 2007 and Mrs Pitt, as his personal representative, sought to rescind the trust, inter alia, for the mistake she had made in her capacity as receiver. Although the setting up of the trust was not a gift as such, it was a voluntary disposition (on the facts, it was an investment largely on behalf of Mr Pitt) but it was implicitly accepted that the same approach should be applied to such dispositions as to gifts.

I am confining my attention here entirely to the claim for rescission for mistake. I am not going to deal at all with the other ground for rescission which was put on the basis of the rule in *Hastings-Bass*. This rule concerns a claim that a trustee's discretion has not been properly exercised. The Supreme Court reined in the rule by making clear that for it to apply there must be a breach of duty

by the fiduciary and on these facts there was no such breach by Mrs Pitt in her capacity as receiver. She had acted entirely reasonably in taking and following the investment advice she was given.

In contrast the claim for rescission for mistake succeeded overturning the Court of Appeal. Lord Walker gave the sole judgment with whom the other six Supreme Court justices agreed.

Three basic points, that I think we all probably knew, were helpfully given the Supreme Court's stamp of approval. First, a claimant must show a mistake as opposed to a misprediction as the future. Secondly, fault on behalf of the claimant in making the payment is irrelevant unless it goes so far as to amount to deliberate risk-taking. Thirdly, there is no need for the mistake to be known to or induced by the defendant. Where there is no contract to wipe away, a unilateral mistake is sufficient. Additionally, and perhaps more controversial but a relatively minor point in practice, is that a distinction was drawn between mistake which triggers relief and causative ignorance which, it was held, does not. That is, if the claimant has never had in mind, actively or passively, the incorrect fact or law, he cannot say that he was mistaken about it and is not entitled to relief. Here it was felt that Mrs Pitt had made a mistake, albeit a tacit mistake, as to the impact of inheritance tax.

On the central issue of what the test for mistake in gifts and voluntary dispositions should be - is more than but for causation needed? – Lord Walker reasoned that there needs to be a causative mistake of sufficient gravity that, on the facts, it would be unjust or unconscionable to leave the mistake uncorrected. He rejected as too narrow the idea, put forward in some earlier cases, eg by Millett J in *Gibbon v Mitchell* [1990] 1 WLR 1304, that only a mistake as to the effect of a disposition (ie its legal character or nature) not its consequences (eg its tax implications) should trigger rescission. In deciding whether the mistake was of sufficient gravity there should be a close examination of the facts as there also needed to be in deciding objectively whether it would be unjust or unconscionable to leave the mistake uncorrected. Lord Walker also said at [122] that 'as additional guidance to judges [in deciding whether a mistake was of sufficient gravity] the test will normally be satisfied only when there is a mistake as to the legal character or nature of a transaction, or as to some matter of fact or law which is basic to the transaction.' And later, at [128], he went on: '[The court] must consider in the round the existence of a distinct mistake ... its degree of centrality to the transaction in question and the seriousness of its consequences, and make an evaluative judgment whether it would be unconscionable, or unjust, to leave the mistake uncorrected.'

As regards the six examples that I gave in the *Restatement* to try to tease out the answer Lord Walker commented at [126] that 'it is impossible, in my view, to give more than the most tentative answer to the problems posed by Professor Andrew Burrows in his *Restatement of the English Law of Unjust Enrichment* (2012, OUP) at p 66: we simply do not know enough about the facts.' But he did not actually go on to give even the most tentative answer.

While accepting that mistakes of law as to the tax consequences could trigger rescission, Lord Walker went on to say, at [135], that in the case of mistakes in the context of some tax avoidance schemes that have gone wrong a 'court might think it right to refuse relief either on the ground that such claimants, acting on supposedly expert advice, must be taken to have accepted the risk that the scheme would prove ineffective, or on the ground that discretionary relief should be refused on grounds of public policy'.

Here it was decided on the facts that the mistake of law in relation to the tax was sufficient to allow the claimant to rescind the trust and that there was nothing objectionable in public policy terms about that.

Although a very elegant and learned judgment, I would make two major criticisms of it.

The first is its lack of clarity on the test being applied. It suggests that something more serious than a mere 'but for' test is required to rescind gifts and voluntary dispositions but it does not explain what that more serious test is other than by a resort to the justice of the case on the facts. As I have said, it did not offer even tentative answers to the six problems posed in the *Restatement*.

The second criticism is that the judgment does not place the issue at stake in its full legal context. Lord Walker confined himself to talking of rescission in equity and trusts law. Although he referred to several books and articles on unjust enrichment he never himself seemed to think it helpful to regard the relevant area of law as being unjust enrichment or restitution. Directly linked to this, and indeed the consequence of it, is that he said nothing about the restitution of gifts at common law. If a claimant brings an action for money had and received for a mistakenly paid gift of money, does the *Pitt v Holt* test apply or are we to apply a wider 'but for' test? If so, how can such a distinction be justified? I have heard it suggested that the narrower test in *Pitt v Holt* is best rationalised as applying only where the restitution is proprietary – on the facts one was reversing a trust – and is inapplicable to a standard personal claim for restitution. So, eg, Sir Terence Etherton in his 2013 Annual Lecture given to the Association of Contentious Trust and Probate Specialists entitled 'The Role of Equity in Mistaken Transactions' (published in that Association's Newsletter Issue 169 in December 2013) has written as follows at paras 51 -51:

'I return to the task of seeing whether there is a principled and logical explanation for the different causative tests for, on the one hand, personal liability at common law for unjust enrichment caused by the claimant's spontaneous mistake and, on the other hand, the right of rescission under the equitable doctrine of *Pitt v Holt*. I consider that there is. It lies in the important distinction between on the one hand, a personal monetary remedy for unjust enrichment and, on the other hand, a remedy which sets aside a transaction and so inevitably gives rise to proprietary consequences... in sort, it is right that relief giving rise to such proprietary consequences ... should be more difficult to obtain than an order for the payment of money by way of a personal restitutionary remedy.'

But there is not a hint of that rationalisation in Lord Walker's reasoning and the truth is that we simply do not know what the Supreme Court's view on this is.

The conclusion is that *Pitt v Holt* has raised as many questions as it has answered.

(2) *Benedetti v Sawiris*

Benedetti v Sawiris [2013] UKSC 50, [2013] 3 WLR 351, [2013] 4 All ER 253 was concerned with the valuation of enrichment, namely services, in the law of unjust enrichment. In the traditional terminology it dealt with the proper valuation of a non-contractual quantum meruit. Mr Benedetti worked in, and owned companies that operated in, the telecommunications business. He performed services, loosely describable as brokerage services, which led to the defendant successfully

purchasing an Italian communications company called Wind. Benedetti performed those services in the expectation that a contract for payment in the form of shares in Wind would be concluded but no such contract was concluded. The case was therefore argued in the SC on the assumption that the claimant's only possible entitlement to payment was in the law of unjust enrichment for restitution of the value of the requested services performed.

This was not a case where Mr Benedetti had been paid nothing by the defendant for the services rendered. On the contrary, he had already in effect been paid 67m euros. But he said that that was nowhere near enough and that, in two respects, the evidence showed that the defendant valued his services at far higher than 67m euros. First, had the anticipated contract for the services been concluded, it would have paid him in shares which would have been worth far more than 67m euros. Secondly, in negotiations for an out of court settlement of the dispute, the defendant had offered him an additional 75m euros.

The trial judge had awarded him an additional 75m euros but that had been overturned by the CA which had said that the out of court settlement was irrelevant. But the CA did award him an additional 14.5m on the basis that the 67m euros had been intended as a part payment only. Mr Benedetti appealed to the SC on the ground that that additional payment was far too low. The defendant cross-appealed on the ground that he should not have been awarded anything over and above the 67m euros that he had already been paid.

The Supreme Court decided that Mr Benedetti was not entitled to anything more than the 67m euros that he had already been paid. On the contrary, as the market value of the services he had performed had been established to be 36.3 m euros, he was not entitled in the law of unjust enrichment to any more than 36.3m. By being paid 67m euros he had therefore already been paid more than he was entitled to in the law of unjust enrichment.

In reaching that conclusion the SC embarked on the most careful analysis of the concept of enrichment and its valuation in the law of unjust enrichment that we have seen in this, or any other, jurisdiction.

The leading judgment was given by Lord Clarke with whom Lords Kerr and Wilson agreed. With three minor quibbles, it is a superb judgment. He applies what I would refer to as the conventional approach favoured in the academic literature which was extensively referred to. So he started off by setting out the four questions that every lawyer should answer in approaching any unjust enrichment enquiry. He then explained that, in relation to enrichment, the starting point is to take an objective view of the benefit but that, in order to respect the freedom of choice of the defendant, that objective starting point must give way to the recognition of so-called 'subjective devaluation'. That is, one must recognise that what might be a benefit to a reasonable person may not be a benefit to the particular defendant; and that the price which a reasonable person would pay, as reflected in the market value, may not be the price the particular defendant would pay. This idea underpins the oft-cited statement of Pollock CB from the old case of *Taylor v Laird* (1865) 25 LJ Ex 329, 332, 'One cleans another's shoes what can the other do but put them on.' Similarly, if you come along and clean my car, I should be entitled to say that I prefer my car dirty so that your services are of no benefit to me.

The recognition of subjective devaluation was not actually in dispute but the claimant was using it as a launch-pad for arguing that subjective revaluation or overvaluation, ie where the defendant could be shown to value services at over the market rate, should also be recognised within the law of unjust enrichment. However, Lord Clarke made clear that this converse idea of subjective revaluation or overvaluation ought to have no place, subject perhaps to exceptional circumstances, in the law of unjust enrichment because recognising subjective revaluation is unnecessary in order to protect the defendant's freedom of choice and autonomy. To go above the market rate a claimant would need to establish a contractual entitlement; and Lord Clarke cited with approval the rejection of subjective revaluation in two hypothetical situations set out in my Restatement. Mr Benedetti's attempts to argue that he was entitled to more than the market rate because of the defendant's subjective revaluation of his services therefore failed as a matter of principle.

In any event, Lord Clarke went on to say that, on the facts, there was no evidence that could be used to establish subjective revaluation: the agreement for the shares had not been concluded and dealt with different circumstances; and a sum agreed to be paid in settlement of the dispute did not reflect the price the defendant would have paid for the services eg it was designed to remove the hassle and cost of litigation.

My three minor quibbles on Lord Clarke's judgment are as follows. First, having relied on the language of 'subjective devaluation' he mysteriously at the end of that section of his judgment says at [26], 'I certainly agree with Lord Reed that the expression 'subjective devaluation' is somewhat misleading.' With respect, I see nothing misleading about it and Lord Clarke does not explain his thinking here. Of course, it is shorthand only but I would argue that it is useful shorthand to reflect the law of unjust enrichment's concern for the need to respect the defendant's freedom of choice including his choice in relation to the price the defendant was willing to pay. Secondly, in the same para [26], in seeking to explain the difference between his approach and that of Lord Reed, Lord Clarke discusses a hypothetical situation where the defendant has not chosen the services and yet accepts that it is beneficial but at a price below the market rate. It is not clear to me what he here had in mind because I am unaware of a situation in the law of unjust enrichment where a person is liable for accepting that he has been benefitted and yet has not chosen the benefit. Perhaps he had in mind what the academics have termed an 'incontrovertible benefit' – where no reasonable person would deny that the defendant has been enriched as, for example, where defendant has been saved a necessary expense or has turned a non-money benefit into money - but, if so, I am not sure that this brings out any distinction between his approach and that of Lord Reed. The third minor quibble is that Lord Clarke leaves open the possibility of 'subjective revaluation' being valid in exceptional circumstances. But he does not explain what sort of exceptional circumstances he has in mind.

The other main judgment was given by Lord Reed, Lord Neuberger agreeing with both Lord Clarke and Lord Reed. Lord Reed purported to be taking a different approach to Lord Clarke and much academic time has been spent trying to work out where, if at all, the differences lie between them. Lord Clarke starts with an objective approach, goes on to recognise downward subjectivity and explains normatively why that is different from upward subjectivity which he rejects. In contrast, Lord Reed purports to regard the valuation process as objective from start to finish. However, the crucial point is that his notion of objectivity – based on the market value to a reasonable person in the defendant's position – takes a very wide view of what is meant by 'in the defendant's position'.

At least sometimes, this appears to include the price at which this particular defendant was willing to pay. So examples of what Lord Clarke discusses under the labels of subjective devaluation or subjective revaluation appear to become examples for Lord Reed of assessing the objective market value for this particular defendant. That is why it is so difficult to pinpoint examples where the two approaches would lead to different results.

It seems to me that, at least in principle, there is a possible flaw in Lord Reed's approach. At some stage, it surely becomes unrealistic to treat the defendant's willingness to pay at a particular price as merely fixing the market price for a reasonable person in the defendant's position. At some point the law has to deal with the defendant who is not pricing according to the rate that a reasonable person in his or her position would pay: ie the defendant may be a person who, while enriched according to the tests of benefit, was not willing to pay other than at a substantial discount rate below the reasonable rate or was willing to pay at a higher rate than the reasonable rate. In other words, there may be good (objective) evidence that the defendant's pricing might be unreasonably low or unreasonably high. Lord Clarke's approach tells us overtly, within the analysis of enrichment, why the law of unjust enrichment will apply the defendant's unreasonably lower pricing (to protect the defendant's freedom of choice) but not the defendant's unreasonably higher pricing. In contrast it is hard to see within the logic of Lord Reed's reasoning why the law should draw that distinction.

So, although putting forward an example may be problematic, let us assume C cleans D's windows mistakenly thinking that D is a client. D allows C to do so knowing that C will want paying something (ie D freely accepts). The sum a reasonable person in D's position would pay for the windows would be £10 (ie that is the market rate). There is objective evidence that D is only ever willing to pay £2 for his windows to be cleaned. I would suggest that the law of unjust enrichment does, and should, only award C £2 as the restitutionary award. This is because subjective devaluation is recognised so as to respect D's freedom of choice. In contrast, it would appear that the answer Lord Reed would give is that the award in unjust enrichment should be £10.

Thank you very much for listening to me.