Commercial Court Seminar, 20 June 2023: Unjust Enrichment

English Law Textbooks: Talking to Themselves or Talking to the Judges?

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(with Judicial Assistants Alice Horn and Serena Lee)

The Brief

I was invited by Foxton J – slightly provocatively – to examine for this seminar why English judges do not make more use in their judgments of the academic writing in the field of unjust enrichment. That was, of course, a leading question, assuming (i) that there is a definable extent to which we the judges should be making use of the academic sources in this area, and (ii) that in fact we do so only to some lesser extent. It hinted that there might be a plaintive cry from at least some academics of "*Why don't you take more notice of us?*". There are enough leading academics here this evening for us perhaps to be told whether that is a real concern of academia in this area.

By anecdotal contrast, I have heard the complaint voiced by a senior judge or two that the unjust enrichment treatises are less easy to use, and less helpful, than (say) *Benjamin's Sale of Goods*, *Chitty on Contracts*, or *Clerk & Lindsell on Torts*. They have seemed, so that complaint would have it, more occupied by an existential debate among themselves about unifying themes and overarching principles than by collecting, classifying and describing the case law in a way that will help to answer the case at hand.

It is perhaps, then, a timely coincidence that with this seminar already planned, and this paper under preparation, Professor Stevens' new book, "*The Laws of Restitution*", with its thematic emphasis on that titular plural, was drawn to my attention. Since Professor Stevens is with us this evening, and Lord Burrows is in the Chair, it is tempting to stop there and invite them to argue out before us the singular versus the plural (*Law vs. Laws*).

In his Preface, Professor Stevens insists that his new work "*is not a textbook, although … for many topics it could be used as one. Rather, it is a sustained argument as to how [this] part of the law fits together, and relates to other areas.*" So I suspect Lord Burrows' royalty stream is safe, likewise that of *Goff & Jones*, the writings of the late Professor Birks, and no doubt others. "*The Laws of Restitution*", I envisage, will become an addition, not a substitute, in the law library of anyone with more than a passing interest in the subject.

I dwell a moment more on the new book because of its Foreword, by Lord Reed, PSC. Far from evidencing an insufficiency of academic influence over the development of the law, Lord Reed there expresses the opinion that restitution, or unjust enrichment, has been a field of law "*in which the judiciary were particularly liable to defer to scholarly analysis*"; and he

notes the "*susceptibility of senior judges to the attractions of grand unifying theories*" but also the philosopher A N Whitehead's advice, referred to by Lord Rodger in *Customs and Excise Commissioners v Barclays Bank plc* [2006] UKHL 28, [2007] 1 AC 181, at [51], to "*Seek simplicity, and distrust it*".

For *puisne* judges seeking to determine causes that come before them in which it is said that the facts give rise to a claim in unjust enrichment, Lord Reed's cautionary observations find this, practical expression, namely that to tell them that an unjust enrichment claim requires (i) enrichment of the defendant, (ii) at the expense of the claimant, (iii) in circumstances the law will regard as unjust, (iv) in the absence of any countervailing defence, is frankly of no real use at all.

Response to the Brief

I speak as a judge who claims no subject-matter specialism in the field, and for whom, therefore, the first port of call, in case of need, has always been to *Goff & Jones*, rather than to an assumption that I already know the law because of a stock of personal expert knowledge of the cases. As an English judge, I speak also as one for whom it is like forensic gold dust to be shown binding or persuasive prior authority that there is no sensible reason to distinguish, or in its absence textbook or journal writing from a respected source giving consideration to the specific problem at hand (see, for example, *Pisante et al v Logothetis et al (No 2)* [2022] EWHC 2575 (Comm), in which the textooks in question were not 'unjust enrichment' textbooks at all, given the nature of the specific point I had to resolve). The opportunity when it comes along to analyse an area of law at greater length and in greater depth, because it is necessary to do so to decide the case at hand, is of course a privilege, and one that I would always hope to respect and relish. But the job would become impossible if that was necessary in every case.

With those limited personal credentials to tackle the brief, and like an awkward witness confronted with a loaded question in cross-examination, I found myself drawn more to an investigation of the question-begging premise than to an attempt to answer the question ultimately posed. What follows, therefore, is an attempt to identify and explore the facts concerning the use of academic sources in English judgments rather than an opinion on its sufficiency or insufficiency; and this paper will leave the reader to draw their own conclusion as to that. I pay tribute to the research work of High Court Judicial Assistants Alice Horn and Serena Lee for this paper[1], without which it would have required time I doubt I would have had to prepare it.

Basic Numbers

Unjust enrichment cases

A case law search on Westlaw indicates that there have been a total of 328 cases in this jurisdiction which have been flagged as 'unjust enrichment' cases[2], within a total of 890 'restitution' cases. Before delving further, a brief *caveat*. Those figures, and others that

[1] In the usual way, however, I accept sole responsibility for all opinions expressed and (especially) for any errors made in this paper.

[2] Though 10 of those predate *Lipkin Gorman*.

follow, are taken from the use of keyword searches via the Westlaw platform. The 'hits' generated have not been checked for accuracy, i.e. to ensure that each case flagged as such is a case I would also categorise as an unjust enrichment, or restitution, case. The intention is not to pretend to arithmetical accuracy, but rather to explore patterns and trends, for which purpose a general categorisation reliability of the law reporters will be sufficient.

Citing academic texts

Within that body of case law categorised by Westlaw as being of interest:

- *Goff & Jones* is referenced in 142 (of 328) unjust enrichment cases (within 277 of 890 restitution cases)
- *The Law of Restitution* (Burrows), in 33 unjust enrichment (out of 61 restitution cases)
- *A Restatement of the English Law of Unjust Enrichment* (Burrows), 27 unjust enrichment cases (out of 34 in total)
- *An Introduction to the Law of Restitution* (Birks), 21 unjust enrichment cases (out of 34 in total)
- *Unjust Enrichment* (Birks) – hard to be definitive given the limitation of search terms but appears to be 25 unjust enrichment cases (out of 39 in total), when including a reference to Birks within the sentence as a search parameter
- *The Principles of the Law of Restitution* (Virgo) 15 unjust enrichment cases (out of 25 in total)

Citing academic authors by name

In addition to that data, based on citations of the most well-known textbooks, there will be judicial references to journal articles, rather than main texts, and there may be cases citing the thinking of academic writers by name, without referencing a particular work of theirs. In the 328 cases categorised by Westlaw as unjust enrichment cases, searches suggested up to the following number of citations by name that may not have involved the citation of a textbook:

- Birks in 46 cases
- Virgo in 23 cases
- Stevens in 10 cases
- Day in 2 cases (though this is obviously hard to distinguish for through word searching)
- Beatson in 5 cases
- Burrows in 51 cases ('Professor Burrows', 24 citations, plus 'Professor Andrew Burrows', 11 citations, plus 'Andrew Burrows', 16 citations)[3].

Not citing academic work is the exception

Those figures cannot be aggregated to produce a number of unjust enrichment cases citing academic authorities, as many will cite more than one academic source. Approaching the search from the other perspective, however, that is to say excluding cases with any reference

[3] **NB** This is only English case law. If we include all jurisdictions represented on Westlaw, the Burrows total goes up to 62.

to Goff[4], Birks, Burrows (in his academic capacity[5]), Virgo, or Stevens, left only 68 of the 328 unjust enrichment cases[6].

In round terms, therefore, there seems to be a reasonable basis to claim that the writings of leading academics are cited in 80% or so of judgments in this area; and that only c.20% of the time is no reference made.

Unreferenced influence

As a measure of influence, that c.80:20 split does not account for the influence of material not quoted or cited, be that an academic source that directly influenced the decision, or general reading in the academic sources that shaped the court's understanding.

William Day was critical in his article, "*Further Narrowing the Scope of Unjust Enrichment*"[7], of what he thought was a judicial tendency to adopt, in absence of citation, ideas first espoused in the academic literature. He evidenced this point by noting the "*striking similarity*" in the post-*Investment Trust Companies* approach to compound interest proposed by Professor Stevens in "*The Unjust Enrichment Disaster*", and the approach the Supreme Court adopted in *Prudential Assurance*[8], a draft copy of which he said had been provided to the Court[9].

It seems fair to observe that, despite the similarities in the approach ultimately adopted by the Supreme Court and Professor Stevens' views, *Prudential Assurance*, which overturned *Sempra* on the availability of compound interest in unjust enrichment claims, was decided with reference to five significant contextual factors which arose only after the decision in *Sempra* and which were not referenced by Day in his article. These were that:

1. The CJEU had since found that there was no requirement to award compound interest in a case where taxes were levied in breach of EU law.

2. The House of Lords had not considered that compound interest at common law conflicted with statutory provision stipulating only simple interest on overdue tax.

3. The retrospective limitation period introduced by Parliament to limit claims for compound interest against the Revenue (which was in place when *Sempra* was decided) had been struck down on the basis that they were incompatible with EU law.

4. Consequently, large claims for compound interest were disrupting public finances.

5. Decisions since *Sempra* called into question the recognition of a compound interest claim representing the value of money.

[4] As an exclusionary search term for this exercise, 'Goff' as the more singular surname was taken to be a sound proxy for Goff and Jones (in this context, almost invariably cited as a duo because of the book).
[5] This was done by searching only Professor Burrows/Andrew Burrows.
[6] And 111 of the 890 restitution cases.
[7] (2019) 78(1) CLJ24, at 27-28.
[8] *Prudential Assurance Co Ltd v Revenue and Customs Commissioners* [2018] UKSC 39
[9] He also referred to articles by Burrows, (2017) 133 L.Q.R. 537 at 541-42, and P.S. Davies [2018] L.M.C.L.Q. 433, at 437-438.

As to the Burrows article which Day cited in support of a consistent pattern of failure by the Supreme Court to cite academic opinion:

- The reference was to "*Narrowing the scope of unjust enrichment*", (2017) 133 L.Q.R. 537, written after *Investment Trust Companies*, in which the Supreme Court clarified the need for the alleged unjust enrichment to have been at the expense of the claimant.
- In the article, it was said that the one slight disappointment with the "*superb*" judgement was that Lord Reed had failed to note the academic writings on this issue. It was posited, diplomatically, that it may have been a case were although cited to the court, "*they were not thought to be particularly useful*", and it was acknowledged that Lord Reed made extensive reference to academic authority in *Benedetti v Sawiris*, but still it was notable that the similarity of the Court's findings to the reasoning in a case note by Frederick Wilmot-Smith ((2015) 131 L.Q.R. 531), which criticised the approach taken by the Court of Appeal in *ITC*, was not acknowledged.
- The article recognised that in the English common law system, past case law is a primary source of law in a way that academic commentary is not, and suggested that, whatever the level of citation in judgments, there was in this field an "*important and fruitful*" working relationship between courts and academics, and hoped "*long may that continue*".

Some provocative (rhetorical) questions arising might be the following:

1. Does it matter that the article to which Day refers was in draft? Given that it was in draft, was it appropriate to refer the Supreme Court to it, or (at the other extreme) ought the Supreme Court, if influenced by it, to have reserved judgment until after the article was published, so it could then be cited and its influence overtly acknowledged?
2. Does the fact that we now see large sections of the Virgo and Day note on the Court of Appeal decision in *Barton* show that the academic commentary on the lack of citation made a difference? Or does it just reflect the fact that Professor Burrows is now Lord Burrows, JSC?
3. *ITC* is one of the cases in which no reference was made to academic authority.
    a. Was that deliberate on Lord Reed's part, to emphasise his point (I paraphrase) that despite unjust enrichment being a newly established area of law, it was established as such because the case law showed that there was a place for it; but that recognition did not displace the previous decisions leading to it; and nor did the fact that it was a developing area mean academics (instead of case law) should (at all events primarily) determine how issues were to be dealt with?
    b. Whatever the answer to that, is *ITC* evidence of a material uncited academic impact on the development of the law? If so, the suggested conclusion that c.80% of cases recognised as unjust enrichment cases appear to have been influenced by the academic writing in the field may be an underestimate.
4. Might the 80%-odd also be an underestimate in that, as the unjust enrichment case law develops and matures, the tendency must be for a prior decision (which may have been influenced or based on ideas in the academic sources) more often to be available to answer the immediate issue, obviating the need, given our system of precedent, to cite anything more?

Lord Burrows, JSC still to make a mark?

That analysis suggests that, combining textbook citations and references to his name rather than the books, Professor Burrows' academic work may have been overtly influential in up to about one third of unjust enrichment cases (111 / 328).

By comparison, Lord Burrows, JSC had sat, according to Westlaw at the date when the searches were run, on 137 cases (including determinations of applications for permission to appeal), with reference to *dicta* of Lord Burrows seemingly being made in 277 other judgments.

BUT of those 137 cases, only two were unjust enrichment cases. One was not a case in this jurisdiction, but likely to influential (*Samsoondar v Capital Insurance Company* in the Privy Council). In the other, *Barton et al v Morris*, Lord Burrows' influence is limited to that indirect influence that can be provided by the offering of a different way of looking at things whereby to understand what a judgment has decided (which is to say, putting it more bluntly but in doing so recording only what the majority decided and expressing no view of my own, my Lord, it seems, got the law wrong)[10].

Of the 277 references to his decisions, only five are to either of those judgments. (I note in passing, however, that there seems to have been a marked increase, at least by those putting forward legal argument in cases, in the number of citations of his academic work, since he became Lord Burrows, JSC.)

Why so much influence?

Having found evidence of academia's significant influence on this area of law, the question arises why, i.e. why are academic texts so widely cited in this field?

Academics credited with the identification of 'unjust enrichment' as a field of law in its own right

Firstly, as I have already mentioned, unjust enrichment is a new and evolving area of law. It was only properly established in this jurisdiction in 1991, by the House of Lords' decision in *Lipkin Gorman*. In *Dargamo Holdings v Avonwick*[11], Carr LJ credited *Goff & Jones* for planting the seeds ultimately responsible for the recognition of unjust enrichment in English law. She said, "*It was not until 1966 when Robert Goff and Gareth Jones (as they then were) published their ground-breaking work, The Law of Restitution (1st edn), that English law sought to recognise a principled basis for the law of restitution based on reversing unjust enrichment. Their thesis gained widespread acceptance amongst judges, practitioners and academics and, following ever-increasing judicial references to restitution and unjust enrichment, the subject was established firmly in English law by the House of Lords in Lipkin Gorman v Karpnale Ltd [1991] 2 AC 548 .*"

[10] Lord Briggs, Lord Stephens and Lady Rose, JJSC.
[11] [2021] EWCA Civ 1149 – In the section headed "The Law" she sets out the history of the law of unjust enrichment.

Difficulties of adjudicating on unjust enrichment

Unjust enrichment is not, as the title might suggest to the layperson, about a particular judge's sense of the fairness or unfairness of some set of facts.

As set out in *Dargamo Holdings,* "*The purpose of the claim is to correct normatively defective transfers of value, usually by restoring the parties to their pretransfer positions*."[12]

The origins of the claim, as noted by Lord Reed[13], "[go] *back to the Aristotelian conception of justice as the restoration of a balance or equilibrium which has been disrupted*".

But the ground upon which a successful claim may be put forward, as Lord Sumption said in *Swynson*, "*is not a matter of Judicial Discretion*".

To the contrary, as Lord Reed said in *ITC*, "*the legal rights arising from unjust enrichment should be determined by rules of law which are ascertainable and consistently applied*". Or as put with slightly more emphasis by Deane J in *Pavey*[14], unjust enrichment "*does not assert a judicial basis to do whatever idiosyncratic notions of what is fair and just might dictate … [Unjust enrichment] constitutes a unifying legal concept which explains why the law recognises, in a variety of distinct categories of case, an obligation on the part of the defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff* …".

Determining what is considered unjust

Thus the question becomes, in the absence of a general notion of fairness, or a judicial discretion, how are courts to determine what the law demands?

It is now widely accepted, following some debate[15], that any unjust enrichment claim involves four elements:

1) Has the defendant been enriched?
2) Was that enrichment at the claimant's expense?
3) Was that enrichment unjust?

   Here the burden lies on the claimant to establish, by reference to an unjust factor, things such as mistake, duress, undue influence, failure of basis or consideration, necessity, or legal compulsion, that in the circumstances the benefit conferred was not one they intended unconditionally to confer.

4) Do any defences apply?

[12] The full passage from which that excerpt is taken sets out "*The basic principle of Unjust Enrichment is now described as follows: "Despite its evolutionary nature, the common law claim in unjust enrichment can, for present purposes, be summarised as follows: a claimant has a right to restitution against a defendant who is unjustly enriched at the claimant's expense. The purpose of the claim is to correct normatively defective transfers of value, usually by restoring the parties to their pretransfer positions.""*

[13] in *ITC*

[14] In *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221

[15] To subject matter experts, this may seem a throwaway reference to the complex history of the law in this area, but it is a history which does not need to be explained or explored in this paper.

However, those elements are only "*a conceptual structure*"[16]. They should not be applied rigidly[17], and importantly, they are not tests[18]. As stated by Lord Reed[19], they are "*signposts towards areas of inquiry involving a number of distinct legal requirements.*"

Nor is the list of unjust factors at step 3 closed[20]. In the common law tradition, it remains open to claimants to advance cases seeking the recognition of novel unjust factors.

Putting that all together, we find ourselves adjudicating on matters in a young, highly fact sensitive area of law which demands that decisions be made "*in accordance with rules of law which are ascertainable and consistently applied*"[21], at a time when the rules are still largely being ascertained and defined.

That naturally affords room, more so than in other fields of law, it may be, to consider expressions of defined rules, and to examine the implications of the existing law, or of changes to it or novel applications of it, that may be proposed by academic contributors in the field.

Against all of that background, how within the analysis of unjust enrichment cases is the academic thinking being influential?

Methodology

To answer a question of that kind requires a review of the content of judgments, not merely a set of statistics on the citation of academic sources. I sought to identify the significant cases of the last decade or so that cited academic commentary or articles in relation to the *ratio* or the key issue before the court. That search returned around 20 results, including at the time of the initial research the Court of Appeal's decision in *Barton*. I then expanded the search to include significant decisions within the same time period which did not reference academic sources in the determination of the key issue before the court. That search produced far fewer results, 5 at the time. Of those, one was *Barton* (in the Court of Appeal), but now in the Supreme Court extensive reference is made to academic texts in the judgments of the majority and in the dissenting judgment of Lord Burrows, JSC (more anon. as to the other dissenting judgment, that of Lord Leggatt, JSC); and three of the five made at least some reference to academic texts, even if it did not seem critical to the ultimate determination of the central issues. Thus, now, only 2 of 24 significant recent cases make no reference at all to the academic writing in the field: *ITC*, the possible background to which I have pondered, above; and *Jeremy Stone*, which, though it dealt with unjust enrichment, was primarily concerned with claims for the recovery of funds in the aftermath of a fraudulent investment scheme[22].

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[16] *Dargamo Holdings*
[17] *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32
[18] Lord Reed in *ITC* at [41]
[19] in *ITC*
[20] *Dargamo*, citing Lord Burrows (as Professor Burrows) in the 1st Edn of *The Restatement*
[21] Lord Reid in *ITC*
[22] which allows me another reference to my decision in *Pisante et al v Logothetis et al (No 2)*, *supra*, which I do not put forward as an especially significant case, but which is of passing interest at this point for being, like *Jeremy Stone*, a case (in relevant respect) about restitution whereby to restore a *status quo ante* following an investment induced by fraud

The 24 cases considered for the purposes of this analysis were the following:

(1) *School Facility Management Ltd and others v Governing Body of Christ the King College* [2021] EWCA Civ 1053; [2021] 1 W.L.R. 6129 (Nicola Davies, Popplewell, Dingemans LJJ)

(2) *Dargamo Holdings v Avonwick Holdings* [2021] EWCA Civ 1149 (Asplin, Carr LJJ and Sir Timothy Lloyd)

(3) *Surrey County Council v NHS Lincolnshire Clinical Commissioning Group* [2020] EWHC 3550 (QB); [2021] Q.B. 896 (Thornton J)

(4) *Vodafone Ltd & Ors v Office of Communications* [2019] EWHC 1234 (Comm); [2020] Q.B. 200 (Adrian Beltrami QC)

(5) *Banca Intesa Sanpaolo Spa, Dexia Crediop Sa v Comune Di Venezia* [2022] EWHC 2586 (Comm); [2022] 10 WLUK 152 (Foxton J)

(6) *Test claimants in the Franked Investment Income Group Litigation v Revenue and Customs Commissioners (No. 2)* [2020] UKSC 47; [2022] AC 1

(7) *Prudential Assurance Co Ltd v Revenue and Customs Commissioners* [2018] UKSC 39; [2018] 3 W.L.R. 652

(8) *Samsoondar v Capital Insurance Company Ltd* (Trinidad and Tobago) [2020] UKPC 33; [2021] 2 All ER (Comm) 353

(9) *Tecnimont v National Westminster Bank plc* [2022] EWHC 1172 (Comm); [2022] W.L.R.(D) 228 (HHJ Bird)

(10) *Dry Bulk Handy Holding Inc v Fayette International Holdings Ltd* ('The Bulk Chile') [2012] EWHC 2107 (Comm); [2012] 2 Lloyd's Rep. 594 (Andrew Smith J)

(11) *Test claimants in the FII Group Litigation v Revenue and Customs Commissioners* (No. 1) [2012] UKSC 19; [2012] 2 AC 337

(12) *Relfo Ltd (In Liquidation) v Varsani* [2014] EWCA Civ 360; [2015] 1 B.C.L.C. 14 (Arden, Gloster, Floyd LJJ)

(13) *Barnes v The Eastenders Group* [2014] UKSC 26; [2015] 1 AC 1

(14) *Delta Petroleum (Caribbean) Ltd v British Virgin Islands Electricity Corporation* [2020] UKPC 23; [2021] 1 W.L.R. 5741

(15) *Equitas Insurance v Municipal Mutual Insurance Ltd* [2019] EWCA Civ 718; [2020] Q.B. 418 (Patten, Leggatt, Males LJJ)

(16) *Sharma v Simposh* [2011] EWCA Civ 1383; [2013] Ch 23 (Laws, Toulson, Black LJJ)

(17) *Benedetti v Sawiris* [2013] UKSC 50; [2014] 1 AC 938

(18) *Test claimants in the FII Group Litigation v HMRC* (No. 3) [2021] UKSC 31; [2021] 1 W.L.R. 4354 38

(19) *Investment Trust Companies (in Liquidation) v Revenue and Customs Commissioners* [2017] UKSC 29

(20) *Barton v Gwyn Jones* [2023] UKSC 3 (Lord Briggs, Lord Stephens, Lady Rose, Lord Leggatt, Lord Burrows, JJSC; [2019] EWCA Civ 1999 (Asplin, Davis, Males LJJ)

(21) *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32 (Lord Neuberger of Abbotsbury PSC, Lord Mance, Lord Clarke of Stone-cum-Ebony, Lord Sumption , Lord Hodge JJSC)

(22) *Skandinaviska Enskilda Banken AB (Publ) v Conway* [2019] UKPC 36 (Lord Reed DPSC, Lord Wilson, Lord Lloyd-Jones, Lord Briggs JJSC, Sir Donnell Deeny)

(23) *Jeremy Stone Consultants Ltd v Nat West Bank plc* [2013] EWHC 208 (Ch) (Sales J)

(24) *Vodafone v Ofcom* [2020] EWCA Civ 183 (Sir Geoffrey Vos C, Underhill and Simon LJJ)

I do not hold that list out as definitive. There may be other decisions that would have merited an equal billing. In any event, for present purposes, those were the cases analysed.

Where in the 4-step unjust enrichment analysis is the academic writing being cited?

21 of the 24 cases made some explicit reference to academic sources. Of the 21 cases citing academic sources:

- 3 (possibly 4)[23] centred on the determination of whether or not the defendant had been enriched. These cases dealt with questions of what enrichment means, how enrichment is to be valued, and the relevance of interest to enrichment[24].
- 3 were principally concerned with determining if an enrichment could, in law, amount to enrichment at the claimant's expense[25]. These cases dealt primarily with the requirement of directness, and how that requirement was or was not met in banking cases.
- 13 focused on determining if the enrichment was unjust under any recognised factor, or if the factual situation justified the recognition by the law of a novel unjust factor. Here we find the court dealing with statutory and contractual issues to determine if the situation gives rise to a ground sufficient in law for a reversal of the enrichment to be required.[26]
- 3 cases turned to academic sources in the determination of whether a valid defence applied[27].

<u>Judicial techniques</u>

Having identified the (type of) issue for which academic authorities were being cited, I turn to the different ways in which those authorities were then used. The categorisation that

[23] As discussed above, in (7) *Prudential Assurance* the reasoning adopted is basically the same as the reasoning of Professor Stevens' article, "*The Unjust Enrichment Disaster*", but it is not cited.

[24] (14) *Delta Petroleum,* (17) *Benedetti,* (18) *Test claimants in the FII Group Litigation v HMRC (No.3),*

[25] (9) *Tecnimont,* (12) *Relfo,* (24) *Vodafone v Ofcom*

[26] (2) *Dargamo,* (3) *Surrey v NHS Lincolshire,* (5) *Banca Intesa,* (6) *Test C (No. 2)*, (8) *Samsoondar,* (10) *Dry Bulk*, (11) *Test C v HMRC (No. 1),* (12) Relfo, (13) *Barnes,* (15) *Equitas Insurance*, (16) *Sharma,* (20) *Barton,* (21) *Swynson,*

[27] (1) *School of Facility Management*, (4) *Vodafone v Ofcom,* (22) *Skadinaviska*

follows has no prior or independent source. It is just a categorisation suggested by the review of these recent cases. That said, I would recognise it as descriptive of the different ways in which we judges find ourselves constructing reasoning from existing case law.

(Note: (20) *Barton* is not included in this review, given the complexity of categorisation presented now by a Supreme Court decision on a 3:2 majority with the dissenting judgments adopting different analyses. It is discussed separately, in the final main section of this paper, below.)

Defining or restating principles

In four of the cases, use of academic sources was limited to the provision of definitions and the restatement of accepted principles[28].

- In (16) *Sharma*, the adoption of Birk's definitions of what 'failure of basis' meant [24] and how to identify the 'basis' of a transfer [45] were determinative of the key issues in the case. This illustrates the impact academics can have simply by stating the accepted legal position and/or consolidating principles reflected in various sources (mainly case law) into applicable statements of legal principle.
- In (21) *Swynson*, (22) *Skandinaviska*, and (24) *Vodafone v Ofcom*, the use of the authorities is to set out or restate established principles, but these do not impact greatly on the outcome of the case. Even then, however, these cases evidence that judges pick up and read from the academic texts when tackling an unjust enrichment problem.

Comparing and contrasting

A further four cases make use of the commentaries to compare the various approaches to issues arising *obiter*[29].

- In (1) *School of Facilities Management*, Popplewell LJ compared the approach suggested by four academics, here Birks, Burrows, Goff & Jones, and Edelman & Bant, to determine how, and specifically in what order, the counter-restitution principle should be applied. Ultimately, having examined the authorities, Popplewell LJ found that the issue did not arise on the facts.
- A similar 'compare and contrast' approach was applied *obiter* in (10) *Dry Bulk* and (15) *Equitas*, though with a difference in the level of emphasis.
    - In (10) *Dry Bulk*, which dealt with a claim under a bill of lading, a tertiary argument was made for the recovery of a *quantum merit* on the basis that the defendant had been unjustly enriched as a result of 'freely accepting' services for which he ought to have known that payment would have been expected. The court held that the services were not freely accepted, but subject to a binding contract and therefore the matter did not require determination.
    - Before moving to the analysis on the existence of such a principle, Andrew Smith J held that the original way in which the claim for unjust enrichment had been put – that the defendants, having been unjustly enriched at the expense of the claimant, were entitled to restitution if the defendant could not establish a relevant defence - failed as it lacked a recognised unjust factor. In

[28] (21) *Swynson*, (22) *Skandinaviska*, (24) *Vodafone v Ofcom* [2020] EWCA Civ 183, and (16) *Sharma*
[29] (1) *School of Facilities Management*, (10) *Dry Bulk*, (15) *Equitas*, and (8) *Samsoondar*

response, the claimant said the claim could be based on free acceptance, quoting *Goff & Jones*.

  - The judge noted that: "*A principle of this kind has had more academic than judicial recognition (and has been questioned academically: for example, by A Burrows in "Free Acceptance and the Law of Restitution" …) … 82. For my part, I consider that English law probably does provide quantum meruit relief for "freely accepted" services, but I am not persuaded that Fayette would have been liable on this basis even if I had rejected the other claims.*"
  - Before getting to that conclusion, he noted that the principle of free acceptance was recognised by Arden LJ in (17) *Benedetti*.
  - (15) *Equitas* is interesting as it involves Leggatt LJ (as he was then) foreshadowing what is now his dissenting judgment in the Supreme Court in *Barton*. His judgment in *Equitas* was supplementary, providing additional reasoning but also concurring with the main judgement.
  - At [144], he dealt with a suggestion by Burrows that there could be exceptions to the rule that there cannot be a claim for unjust enrichment where a defendant is legally entitled to the enrichment. He contrasted this with four articles arguing against that position. Then at [145], he suggested that the "*response of allowing an equitable principle or restitutionary claim to override a valid and binding contract should in my view be regarded as an absolutely last resort, if not a counsel of despair*".
- In (8) *Samsoondar*, Lord Burrow's Privy Council case, he dealt *obiter* with the question whether mistake as opposed to legal compulsion could found an unjust enrichment claim. This was not pleaded and so not considered in the courts below. The claimant failed in his claim on the basis that he had not been subject to legal compulsion to pay a third party; therefore, no pleaded unjust factor arose.
  - Burrows cited Birks and Goff & Jones, before stating that "*in principle there seems to be no good reason why reliance on mistake rather than legal compulsion should mean that no restitution is available in respect of the discharge of another's liability*".
  - He also noted (which will have made the academic writing an obvious resource to consult, whoever the judge) that the case law was "*far from straight forward"*

Setting out, to distinguish

In seven cases, the academic authorities are used to set out the established legal position, as a basis against which the change arising from a proposed development of the law might be examined for acceptability.

Four cases used the 'set out and distinguish' approach as a background against which to refuse a proposed change to the existing law. That is to say, to show that the change suggested was outwith the established bounds of the law of unjust enrichment and out of pace with the development of the law, so that the court should decline to develop the law as proposed[30]. (11) *Tecnimont* is discussed at greater length in the final main section of this paper, below. The other three are:

[30] (4) *Vodafone v Ofcom*, (11) *Tecnimont*, (14) *Delta Petroleum*, (18) *Test claimants (No. 3),*

- (4) *Vodafone*, in which this approach was used by the court as a basis to defeat the claimant's attempt to establish, in reliance on Goff & Jones, a new principle in the law of unjust enrichment.
    - Ofcom made an unlawful demand for payment which it did not know was unlawful. Had it realised the demand was unlawful, under its own powers, it could have made lawful changes to the regulations which would have made the same fees legally chargeable.
    - Ofcom argued in reliance on that counterfactual that there was no unjust enrichment and supported the reliance on counterfactuals by reference a discussion in Goff & Jones of several cases in which some form of counterfactual was applied, or may have been applied, to resolve a particular issue. In essence it seems to have argued that taken as a whole the examples set out by the academics added up to a rule which should be applied by the court.
    - This was rejected by the court. There was also something of a warning note levelled at academics for too readily taking it upon themselves to suggest novel principles, or to suggest that they had been established, rather than to keep in mind that individual cases may turn on their particular circumstances and do not always make new law.
- (14) *Delta*, in which the 'set out and distinguish' technique applied to reject the submission that the court should further narrow the definition of enrichment, to include only benefit *retained* by the defendant, which if accepted would have defeated the restitution claim as the defendant was no longer in possession of the enrichment.
    - The argument was made by the defendant in reliance on *R (Seago) v HMCTS* [2012] EWHC 3490 (Admin) in which the court did not order restitution against a liquidator to whom the claimant had erroneously been ordered to pay money.
    - Lord Leggat relied on the analysis in Goff & Jones to distinguish *Delta* from *Seago*. Goff & Jones posited that the liquidator had a change of position defence and that this was why restitution was not ordered.
    - Lord Leggat went on to clarify that "*if the respondent has sold the property transferred*, *he is liable to make restitution of the proceeds*".
- (18) *Test Cs (No. 3)*, where the technique explained why it was possible, generally, but not warranted on the facts, to reduce the defendant's enrichment in light of any liability arising as a result of the unjust payment.
    - The court cited Virgo, Edelman and Bant, and Lord Burrows, to the effect that the *quantum* of enrichment may not be as simple as the amount of money transferred to the defendant, and the court should have regard to the net value of the enrichment in light of any automatic costs, e.g. if receipt of funds meant loss of a valuable tax benefit, the court could take into account the lost value in determining the enrichment.
    - But while they affirmed the principle, the court distinguished the facts on the basis that the purported reduction in the value of HMRC's enrichment was not triggered by the payment. The tax credits which it claimed had reduced its enrichment were due to be paid either way. Thus, the facts were distinguished, and the legal principle was upheld but not expanded.

Equally the 'define and distinguish' approach has been used as a basis upon which to justify diverging from an apparently accepted position, or evolving the law. Here the court has shown how the proposed change differs from the established position before finding that the proposed change should be accepted/implemented[31].

- This approach was followed in (3) *Surrey CC v NHS Lincolnshire*. as part of the decision to accept a proposed novel unjust factor. Thornton J held that NHS Lincolnshire had been unjustly enriched as it had failed to assess and take over the treatment of an autistic patient who had been in Surrey's care when that patient reached adulthood. The novel element was that Surrey, who continued to provide care, had a statutory duty to do so until Lincolnshire took over, which they erroneously refused to do. Surrey's claim depended on the court finding that Linconshire had been enriched as a result of Surrey complying with a statutory duty, as a result of which the payments made by Surrey were not unlawful or *ultra vires* – Surrey was in those circumstances legally obliged to pay. It also involved finding that an enrichment had occurred, not via the payment of any funds, but via the discharge of a liability.
- Thornton J noted that the case was comparable to the *Woolwich*, and *Auckland* principles, but to be distinguished on the facts, largely for the reasons above.
- She then relied on the *Restatement*'s analysis to hold that the *Woolwich* and *Auckland* principles were founded on the "controlling concept" of "public law unlawfulness" and for the proposition that Surrey's statutory duty did not override the unlawfulness, so as to find by analogy that the claim should succeed since the underlying principles accorded with the established legal rules even if the facts were distinct.
- In (5) *Banca Intesa*, Foxton J used the academic commentary as a test, addressing and overcoming, in turn, each of the reasons given by commentaries for the unavailability of a change of position defence in response to a claim for unjust enrichment founded on a 'failure of basis' by reason of a contract assumed to be valid having been void at law. He found that the answer was "*in principle, yes*". This is a detailed example of the 'set out and distinguish' approach. Foxton J followed a clear pattern of 1) this is the accepted position, 2) this is the point of difference between the submission and the law as it stands, 3) this is the case law and academic commentary on the point, and 4) this is the conclusion, in light of 1)-3). (*Banca Intesa* is subject to appeal, but (I respectfully suggest) the quality of the analysis, as an illustration of the 'set out and distinguish' technique, is independent of whether the Court of Appeal agree with Foxton J's evaluative conclusion at the end of it.)
- In (12) *Relfo*, Arden, Gloster and Floyd LJJ considered the meaning of a supposed rule that the defendant's enrichment had to have been received 'directly' from the claimant. This "*direct providers only rule*" was referred to as the 'DPR'. The court found that the existing body of decisions already surpassed the limitation propounded by the academic texts, and as such determined that the court had, by its actions, shown an intent to evolve beyond the academic position. This is most clearly stated by Gloster LJ at [104]: "*It is clear from the cases to which Arden LJ referred that the court has not limited the remedy to cases falling within what Professor Burrows in*

[31] (3) *Surrey v NHS Lincolnshire*, (5) *Banca Intesa*, and (12) *Relfo*

The Restatement refers to as "the direct providers only" rule and that there are exceptions to the rule."

- Again, the court started from what was said to be the accepted rule, as set out in Burrows' *Restatement*, and then considered other sources who "*favoured a wider principle than the DPR*". Arden LJ then reasoned that as the exceptions were a "*motley collection*" taken from a range of different areas of law they were not the "*principles for imposing liability for unjust enrichment carved out of the DPR*". On this basis she concluded that Burrow's list was not an exhaustive list of exceptions.
- In reliance on those decisions, she posited that a "*general principle*" was emerging which required only a "*sufficient link*". This was supported by Gloster LJ in the quote above and Floyd LJ who observed that the courts had not always "*rigidly observed*" the DPR.
- The Supreme Court reversed this, and the "*sufficient link*" idea, in *ITC*, considering that a test for enrichment which relied on "*economic or commercial reality*" was "*difficult to apply with any rigour or certainty…or consistently with the purpose of restitution*". *Relfo* was said to be an exceptional case as it involved a "*sham*" designed to conceal the connection between the claimant and defendant.

Building blocks

In two cases, the academic commentaries have been used as the building blocks in the rationale of a decision – either to show why something cannot be said to be the position in law, or to explain why something should, or should not, in law, be possible[32].

- In (2) *Dargamo Holdings*, Carr LJ examined the extent to which a claim in unjust enrichment was precluded by the existence of a contract between the parties. The case concerned a contract which it was submitted was entered into on the basis that certain payments were made in respect of a future contract the details of which were not included in the parties' signed contract. The paying party claimed for unjust enrichment, but the court found that the contractual terms allocated the risk. As a result, this was not a case where unjust enrichment should intervene.
- Academic authorities were relied on to analyse the extent to which the existence of the contract precluded the claim and for the rationale for excluding the claim:
    - Burrow's *Restatement* was used to codify the exceptions to the rule
    - Goff & Jones provided the rationale for the exceptions
    - Birks was used to highlight how rare an exception to the rule would be
    - Wilmot-Smith was used to defeat the defendant's submission that unjust enrichment is a "*gap filling*" mechanism subservient to contract
- Carr LJ explained that it should not be thought that unjust enrichment is an inferior source of rights and obligations, but nonetheless there is often "*no "space" for the law of unjust enrichment in particular claims*." [75]
- In (11) *Test claimants (No. 1)* the Supreme Court used the academic sources as building blocks of the rationale when it decided to extend the *Woolwich* principle to apply in absence of an unlawful demand by the public authority.

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[32] (2) *Dargamo Holdings*, (11) *Test claimants* (No. 1)

Supporting a decision to overrule a HL/SC decision

In one case (or perhaps two cases), academic commentary was used to provide support for departing from a judgment at the highest level.

In one instance (or possibly two instances, if we account for the uncited contribution of Stevens in *Prudential Assurance* (see above)), academic commentary was used as support for arguments in which the Supreme Court overturned earlier decisions by the House of Lords; (6) *Test claimants (No. 2)* and, (7) *Prudential Assurance.*

- *Test claimants* overturned the House of Lords on what it meant for a mistake of law to be discoverable with reasonable diligence. The link to unjust enrichment is the discoverability of a situation where the basis for the transaction is not the same as the basis on which the parties had acted so as to give rise to a potential failure of basis.
- *Prudential Assurance* overturned the House of Lords in *Sempra Metals* on the availability of compound interest in unjust enrichment claims.

It is an obvious comment, but this role for academic writing is perhaps critically important where an applicant seeks reversal of a decision by the House of Lords or the Supreme Court, as who other than academics may so freely criticise the approach taken in those decisions if they consider it to be problematic.

Particular contributions

Finally, I now identify and discuss examples, some larger, some smaller, of academic contributions to the substance of the developing law, irrespective of questions of the judicial technique used when deploying the academic sources in judgments.

(i) Introducing new / improved terminology

- Adoption of Failure of Basis

  The dispute over the nomenclature to be applied to this unjust factor predates the recognition of unjust enrichment as a distinct field of law. The definition to be applied in the context of the law of restitution has been agreed since Birks' revised 1989 edition of *An Introduction to the Law of Restitution*[33]. The best or preferred term to represent the concept has been less clear.

  To avoid potential confusion with 'failure of consideration' in contract law, Birks argued for a Roman understanding of 'failure of condition'. That is to say that failure of consideration simply referred to a conditionality in relation to the conferred benefit, and in that regard a condition which happens to fail.

  In 2011 the 8th Edition of Goff & Jones, the first to be published as "*The Law of Unjust Enrichment*" (not "*The Law of Restitution*"), the authors addressed the

[33] "*It means that the state of affairs contemplated as the basis or the reason for the payment has failed to materialise, or if it did exist, has failed to sustain itself.*"; *Ibid* at p.223.

continuing use of both terms and put their support behind the use of "failure of basis" in unjust enrichment. Then:

- From 2012, cases moved to failure of basis, following Goff & Jones.
- The court engaged with this dialogue in *Barnes* in 2014, noting at [105] that "*Whichever terminology is used, the legal content is the same. The attraction of "failure of basis" is that it is more apt, but "failure of consideration" is more familiar.*"
- In 2021, in *Dargamo*, Carr LJ stated that she preferred to adopt the terminology of "*failure of basis*" suggested by Goff and Jones.
- Most recently, the change in terminology was endorsed this year by the Supreme Court in *Barton*, affirming that, for the reasons set out in *Dargamo*, the term 'failure of basis' is generally to be preferred to 'failure of consideration'.

(ii) Accepting a suggestion to apply test at different stage of the analysis

- In (17) *Benedetti v Sawiris* [2013] UKSC 50, in which the court accepted a principle of 'subjective devaluation' to the assessment of the defendant's enrichment, Lord Reed, noting that the principle was based on recognition of the defendant's freedom of choice, suggested in reliance on academic sources that the issue was best dealt with at stage 3 (unjust factors), an approach he considered to have the virtue of simplicity.

(iii) Determining a novel unjust factor or narrowing a previously recognised factor

Aiding in the development of a novel unjust factor:

- In *Surrey County Council v NHS Lincolnshire Clinical Commissioning Group* [2020] EWHC 3550 (QB) Thornton J relied on *The Restatement* for the proposition that both the *Woolwich* and *Auckland* unjust factors were based on the "*controlling concept*" of public law unlawfulness and reasoned that this by analogy permitted an unjust enrichment claim on the facts of that case, and also that the fact that Surrey had been obliged by statue to pay for the individuals' care did not nullify the novel unjust factor where the claim was brought on the basis that NHS Lincolnshire was enriched as a result of not paying for care that was their responsibility, and that failure to discharge a legal duty caused the statutory liability to be passed to Surrey.

Aiding in the determination of whether an existing factor should be narrowed:

- *In Delta Petroleum (Caribbean) Ltd v British Virgin Islands Electricity Corporation (British Virgin Islands)*, the defendant argued that any enrichment no longer retained by the defendant should be considered when determining the value of the defendant's enrichment. The defendant argued that this position was supported by the academic authorities. The court rejected the argument, relying *inter alia* on *Goff & Jones* (7th Ed. at 16-001) for the proposition that if the defendant has sold the property transferred, he is liable to make restitution of the proceeds, with the effect that the position as stated by *Goff & Jones* was incorporated into the case law, and the defendant's proposed narrowing of the definition of enrichment was rejected.

(iv) Responding to an academic consensus

Courts seem likely to respond when the academic literature reaches a consensus:

- In (9) *Tecnimont Arabia Limited v National Westminster Bank plc*[34] the claimant sought, in reliance on a consensus of several academic sources, to persuade the court to recognise a novel exception to the requirement of directness at stage 2 (enrichment at the expense of the claimant).
- In (11) *Test claimants in the FII Group Litigation v Revenue and Customs Commissioners* (No. 1) [2012] UKSC 19 the Court was asked to extend the application of the *Woolwich* principle (as an unjust factor) to cover situations in which an unlawful payment had been made but without any unlawful demand[35].

In *Tecnimont*, the court declined to recognise the exception on the basis that since the articles in question, *ITC* had clarified the law. The causation-based analyses relied on by the academics to justify the exception contended for by the claimant were found to be contrary to the Court's reasoning in *ITC*, and as a result the proposed exception was not allowed.[36]

In *Test claimants (No.1)*, the court was taken to some nine separate academic sources, each of which supported the claimant's argument. Citing the "*formidable volume of distinguished academic opinion*" and the recuring theme among them of the "*high constitutional importance of the principle that there should be no taxation without Parliament…*", the court accepted the proposition that the change in law should be made and Lord Hope went on to state that the Supreme Court "*should restate the Woolwich Principle*"[37] to reflect the academic consensus.

(v) Value placed by the judiciary on the work of academics:

In *Samsoondar*, one of the two unjust enrichment cases on which Lord Burrows has sait (*Samsoondar v Capital Insurance Company Ltd* (Trinidad and Tobago) [2020] UKPC 33; [2021] 2 All ER (Comm)), there is effectively an invitation for more thoughts, or a suitable case to decide so that the law can be clarified. The judgment opens as follows:

> "*1. Although the principal sum at stake in this motor insurance dispute is only $43,400, the case raises such interesting legal issues that, at times, the Board felt almost as if it was tackling an exam question. It involves the retrospectivity of a judicial interpretation of a statute, which overturned a previous judicial interpretation, and, in the light of that, there are questions on contractual interpretation and on the compulsory or mistaken discharge of another's legal liability in the law of unjust enrichment. As will become clear - and perhaps*

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[34] [2022] EWHC 1172 (Comm)

[35] a self-assessment indicated a sum was due, part of which was *ultra vires*, and which was paid, but no demand was issued.

[36] The court issued a further warning in regard to the Brindle and Cox authority (which had set out its thesis in terms of how the law ought to develop) to the effect that it was the court, not the academics, who make the law. See para 6-49.

[37] His formulation is: "*so as to cover all sums paid to a public authority in response to (and sufficiently causally connected with) an apparent statutory requirement to pay tax which (in fact and in law) is not lawfully due*."; which accords with the academic view.

> *disappointingly for the development of the law - it will be unnecessary to answer all those questions in order to decide this appeal.*"

When considering whether mistake can operate as the unjust factor Lord Burrows set out a provisional view, then relied on the commentaries to explain the current contradictions within the case law.

> "*25…..In principle, there seems no good reason why reliance on mistake rather than legal compulsion should mean that no restitution is available in respect of the discharge of another's liability. However, the case law on this question is far from straightforward: see, eg, Birks, An Introduction to the Law of Restitution, revised ed (1989), pp 185-193; and Goff and Jones on The Law of Unjust Enrichment (eds Mitchell, Mitchell and Watterson, 9th ed (2018), para 5-61). As nothing turns on further examination of this issue, and as we have heard no submissions on it, we decline to say anything more about it.*"

This valued the contribution of academic writers devoting attention to a specific aspect so as to highlight an uncertainty in the state of the law.

(vi) Contribution of Day and Virgo in Barton

- Professors Day and Virgo criticised the reasoning of the Court of Appeal in *Barton* in an article titled "*Risks on the contract/unjust enrichment borderline*"[38].

  In the Supreme Court, the majority judgment (written by Lady Rose, with whom Lord Briggs and Lord Stevens agreed) cited with approval the acceptance, in previous decisions, of the definitions of "failure of basis" and the "unjust" element of unjust enrichment proposed by *Goff & Jones*[39].

  Then, when dealing with the effect of the contract on the unjust enrichment claim, at [103], Lady Rose stated, having concluded that any obligation on Foxpace to pay commission in the absence of a sale for £6.5 million, £6.5 million being the sale price envisioned at the time the commission agreement was concluded, was "*at odds with what was agreed by them*": "*I agree therefore with the criticism of the Court of Appeal's decision in the article …that the Court of Appeal was mistaken in the inference it drew from the silence of the contract and the judge's rejection of the "if, and only if" evidence:*", before setting out in full the paragraph at which Day and Virgo explained their reasoning.

  In Lord Burrow's dissenting judgement, he referenced *Goff & Jones* for a general discussion on the interrelationship between contract and unjust enrichment at [226], the possibility of excluding by contract a liability to give restitution for unjust enrichment at [235], and Birks' definition of failure of basis at [232]-[233]. He also engaged directly with Day and Virgo's analysis of the decision below. At [230], having stated that in his view free acceptance is not an unjust factor, he relied on the rationale provided in the article: "*The objection to free acceptance as a factor was well put by William Day and Graham Virgo …*", setting out the relevant paragraph

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[38] (2020) 136 LQR 349-354

[39] *Dargamo Holdings* and *Barnes v Eastenders* respectively

from the article in full. Then again, at [239], in setting out his ultimate conclusions on the matter, Lord Burrows returned to the article, acknowledging that he was disagreeing with its central thrust in reasoning that the silence of a contract results in the application of any default law and that in relevant respect, "*here there is the default law of unjust enrichment*".

A few points stand out:

- First, the work and perspective of the academics was highly respected.
- Second, through their reliance on and references to academic work, the court affirmed the use of academic commentary as a significant tool to aid in the evaluation of arguments.
- Third, the conclusion may be to agree with the commentary, to disagree with it, or a bit of both. That does not diminish the value of the contribution.
- Fourth, the use (or lack thereof) of academic sources may be symptomatic of the court's *a priori* inclinations as to how the issue before them is properly to be characterised. In my brief review of *Barton* in the Supreme Court, above, I made no reference to Lord Leggatt's dissent. That is not because no academic sources are used in Lord Leggatt's judgment. To the contrary, we find there numerous references to academic articles and commentaries … *on the law of contract*. After all, that was the exclusive lens through which for Lord Leggatt the issue in *Barton* fell to be decided. That is to say, for Lord Leggatt, *Barton* was not an unjust enrichment case at all: "*Nevertheless, there is another reason why the existence of a contract precludes a claim based on the law of unjust enrichment. That is that there already exists a system of law for determining what rights and remedies contracting parties have in relation to the subject matter of their contract. That is the law of contract*." (*ibid*, at [191]).