

Restitution and Contract: Non-Cumul?

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This article explores the extent to which it is or may be possible to have a claim both in contract and in restitution. Restitution will almost never be appropriate before a valid contract has been discharged but after it has been discharged a restitutionary claim may be available as well as a contractual one. A restitutionary claim cannot, however, be used to set aside the contractual allocation of risks. It is argued that while in the past English courts may have been too willing to conclude that restitution would be inconsistent with the allocation of risks, the view of those striving to show the independence of restitution that there will always be a restitutionary claim unless the contract, construed strictly against the party resisting restitution, has excluded it, goes too far in the opposite direction. The terms of the contract and its nature are of vital importance to the existence and extent of any restitutionary claim. Apart from the question of express or implied exclusion by a contractual remedial regime which is a complete code, the contract determines both whether contractual rights are "conditional" and defeasible or "unconditional", and whether the acts of the person against whom restitution is sought constitute part performance of the contract which will either bar a claim or for which the plaintiff will have to give credit.

INTRODUCTION

The purpose of this article is to explore the extent to which it is or may be possible to have a claim both in contract and in restitution. In recent years there has been much consideration of the position of overlapping

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claims in contract and tort and overlapping claims in tort and restitution. But scrutiny of the borderland between restitution and contract has largely been concerned with shaking off the influence of the implied contract theory, the effect of which was that contract was considered in effect to have swallowed up restitution. So the efforts of commentators have tended to focus on demonstrating that there can be independent restitutionary claims in "contractual" situations. This article is concerned with valid contracts, both where they are later discharged and before such discharge. It will not consider money paid and services rendered under transactions which never constitute a valid contract or void transactions.¹ Such transactions are not relevant in the present context since, *ex hypothesi* in such cases, there is no question of having a claim both in contract and in restitution.²

The borderland between contract and tort has been reasonably well mapped.³ It is clear that in many cases, exemplified by negligent failure by professionals, such as lawyers and surveyors, to carry out their undertakings to their clients, a defendant may be liable to the same plaintiff in both contract and in tort.⁴ Indeed the fact that tort liability may be grounded in an "assumption of responsibility", means that a negligent breach of contract may often give rise to claims in both contract and tort.⁵ Where this is so, "the plaintiff can advance his claim, as he wishes, either in contract or in tort, and no doubt he will advance the claim on the basis that is most advantageous to him".⁶ The practical differences between contract and tort include, for example, the measure of recovery, the period of limitation, the relevance of the plaintiff's

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- 1 Negotiations which are too uncertain or otherwise fail to mature into a contract (*e.g.*, *British Steel Corp. v. Cleveland Bridge & Engineering Ltd.* [1988] 1 All E.R. 504) exemplify the first situation, and local authority swaps transactions (*e.g.*, *Hazell v. Hammersmith & Fulham L.B.C.* [1992] 2 A.C. 1) exemplify the second.
 - 2 Andrew Burrows, *The Law of Restitution* 250-51 (1993), appears to lump together absolutely ineffective (void) transactions and contracts which, although valid, are later discharged. This may result in an oversimplified approach to restitution. In the former there was never an effective allocation of risk; in the latter there was and that allocation is only discharged prospectively. *Cf.* Keith Mason & John W. Carter, *Restitution Law in Australia* §§ 903-04 (1995). A further distinction exists between these two categories of transaction and a contract that is rescinded for misrepresentation, mistake or duress, where the rescission operates *ab initio*.
 - 3 *See, e.g.*, W.L. Prosser, Selected Topics on the Law of Torts 380 (1953).
 - 4 *Midland Bank Trust Co. Ltd. v. Hett, Stubbs and Kemp* [1979] Ch. 384; *Henderson v. Merrett Syndicates* [1995] 2 A.C. 145.
 - 5 *White v. Jones* [1995] 2 A.C. 207, on which see Tony Weir, *A Damposa Hereditas?*, 111 L.Q. Rev. 357 (1995).
 - 6 *Coupland v. Arabian Gulf Petroleum Co.* [1983] 3 All E.R. 226, 228 (Robert Goff, L.J.).

contributory fault (it is generally irrelevant in contract but relevant in tort), and assignability, since only a contractual claim can generally be assigned. But, although there may in principle be concurrent liability in contract and in tort, in many cases, particularly those involving economic loss, the court may decline to find a duty in tort where the parties are in a contractual relationship,⁷ or may hold that a term of a contract has excluded or limited what would otherwise be a tortious duty. This factor has been of particular importance in multi-party situations in which P seeks to sue D in tort but D is able to show that a contract between P and X or between D and Y has excluded or limited D's duty to P or that the contractual matrix means that P has agreed to bear the relevant risk.⁸

Turning to the borderland between contract and restitution, we soon see that there is a different pattern. First, while it is now clear that restitution is independent of contract and that there is an overlap between the two, where money is paid or work done under a valid contract there can be no restitutionary claim until the contract is discharged. Deane J, in *Pavey & Matthews Pty Ltd. v. Paul*⁹, stated that there is "neither occasion nor legal justification for the law to superimpose or impute an obligation or promise to pay a reasonable remuneration" where there is a valid and enforceable agreement governing the plaintiff's right to payment. Again, in *The Evia Luck*, Lord Goff stated that before any right to recover money paid under a contract could be established, the relevant contract first had to be avoided: "until this was done, the money in question was paid under a binding contract and so was irrecoverable in restitution".¹⁰ Once the contract is discharged, however, a restitutionary claim may be brought, in cases of breach of contract as an alternative to a claim for damages, and in principle a person may recover more by such a claim than would be recovered as damages for breach of contract.¹¹ Secondly, in English law by contrast with, for example, Israeli law,¹² in cases where the defendant has made a gain from a breach of contract

7 *Tai Hing Cotton Mill v. Liu Chong Hing Bank* [1986] A.C. 80, 107; *Greater Nottingham Co-operative Society v. Cementation Piling and Foundations Ltd.* [1989] Q.B. 1.

8 *Pacific Associates Inc. v. Baxter* [1990] 1 Q.B. 933; *Southern Water Authority v. Carey* [1985] 2 All E.R. 1077; *Norwich C.C. v. Harvey* [1989] 1 W.L.R. 828. See also *Marc Rich & Co. AG v. Bishop Rock Marine Co. Ltd.*, *The Nicholas H* [1996] A.C. 211, 239-40 (Lord Steyn).

9 (1987) 162 C.L.R. 221, 256 (High Court of Australia).

10 [1992] 2 A.C. 152, 165 (emphasis added).

11 *Compare Rowland v. Divall* [1923] 2 K.B. 500 (recovery of money) and *Harling v. Eddy* [1951] 2 K.B. 739; see also *Lodder v. Slowey* [1904] A.C. 442; *Rover International Ltd. v. Cannon Film Sales Ltd. (No. 3)* [1989] 1 W.L.R. 912 (*quantum meruit*).

12 *Adras Building Material v. Harlow & Jones GmbH* (1988) 42(1) P.D. translated

either from a third party or by saving expense by skimping on contractual performance, only very exceptionally will the plaintiff be able to recover the amount gained as opposed to its own loss.¹³ Thirdly, where the parties are in a contractual relationship, the contract may expressly or impliedly exclude or limit what would otherwise be a restitutionary obligation. Where, therefore there is a contractual regime which legislates for a particular eventuality, as a general rule the law of restitution has no part to play: As Lord Goff stated in *The Trident Beauty*, "the existence of the agreed regime renders the imposition by the law of a remedy in restitution both unnecessary and inappropriate",¹⁴ and "serious difficulties arise if the law seeks to expand the law of restitution to redistribute risks for which provision has been made under an applicable contract".¹⁵ But the legacy of the implied contract theory may mean that on the one hand courts can be too willing to rule that restitution has thus been excluded, and, on the other, that commentators can err in the opposite direction.

This article is principally concerned with the third of these propositions but the first is also addressed. It will be argued that the recognition of independent restitutionary claims should lead to acceptance that where they overlap with contractual claims the pattern should, in principle, be *similar* to that between contract and tort. The pattern will not be exactly the same for two reasons. First, in the borderland of restitution and contract there is no similarity in the object of the remedies as there is on the borderland between contract and tort, where both seek to compensate the plaintiff. Secondly, as we shall see, before discharge in nearly all cases and after discharge in some cases, allowing concurrence of claims would involve inconsistency and circularity. But it will be suggested that the argument of some that before discharge concurrence should be denied in all cases because any restitutionary claim necessarily involves such inconsistency with the contractual claim and the continuing right to contractual performance may neglect a small but theoretically important category of case. It will also be suggested that the argument that after discharge concurrence should be allowed in all cases unless the contract has, on a strict construction, excluded restitution overstates the position. Both tortious and restitutionary duties are imposed by the general law and can be regarded as background

and published in English in [1995] Restitution L. Rev. 235, and noted by Daniel Friedmann, *Restitution of Profits Gained by Party in Breach of Contract*, 104 L.Q. Rev. 383 (1988).

13 A.G. v. Blake [1998] 1 All E.R. 833.

14 [1994] 1 W.L.R. 161, 164.

15 *Id.* at 166.

duties, which, when established in a prima facie way, are not excluded by the mere existence of a contractual duty unless they are so inconsistent with the applicable contract that, in accordance with ordinary principle, the parties must be taken to have agreed that the non-contractual duties are to be limited or excluded.¹⁶ But the terms of the contract and its nature are of vital importance to the existence and extent of whether a prima facie restitutionary claim has been established.

We can take two examples of the sort of fact situation that will be discussed to show the nature of the issues. The first concerns the payment of money.

*P agrees to buy widgets from D for £1,000 and pays the money to D. D fails to deliver the widgets.*¹⁷

The second concerns the rendering of services or transfer of property.

*P agrees to build a house for D or to sell D widgets for a specified price and does so. D fails to pay the price.*¹⁸

The claim in breach of contract is obvious, but there is also potentially a claim in restitution. In both cases D may be thought to have been "enriched" by the receipt of the money, the house or the widgets, and P may wish to claim that D make restitution to him by repaying the money or by paying him the value of the building work or the widgets. In the first case P's "contractual" claim is an unliquidated claim in damages (which, where the contract price is the market price will, subject to any expenses caused by the breach, be the amount in fact paid). In the second case P has two "contractual" claims, an unliquidated claim in damages and a liquidated claim for the sum due under the contract. There are further complications in the second case if P builds part of the house or delivers only some of the widgets.

I. THE POSITION OF THE ENGLISH TEXTS AND COMMENTARIES

Returning to the three propositions summarized above, we can see their

16 Adapting what Lord Goff stated of tortious duties in *Henderson v. Merrett Syndicates* [1995] 2 A.C. 145, at 194.

17 *E.g.*, *Rowland v. Dival* [1923] 2 K.B. 500.

18 *Sumpter v. Hedges* [1898] 1 Q.B. 673; *Lodder v. Slowey* (1900) 20 N.Z.L.R. 321, 358; [1904] A.C. 442; *Rover International Ltd. v. Cannon Films Sales Ltd.* (No. 3) [1989] 1 W.L.R. 912.

influence by a quick survey of the leading modern texts and commentaries on English law. Goff & Jones state that one of the limits to a restitutionary claim is where "the plaintiff conferred the benefit ... in pursuance of a valid common law, equitable or statutory obligation which he owed to the defendant",¹⁹ and that the most important illustration of this limit is the case where a plaintiff "contracted either to confer the benefit on another or, conversely, to forgo his right of restitution from another".²⁰ "If A confers a benefit on B under a valid contract, he must seek his remedy under that contract and not in restitution. The parties' rights and duties are governed by the contract"²¹ and the plaintiff "is restricted to his remedies under the contract which continues to govern the situation".²² If the plaintiff "has an accrued right to payment under the contract, his appropriate course is to proceed on the contract for the sum due rather than to determine the contract and claim in restitution".²³

Birks' *Introduction to the Law of Restitution* states that although "the facts may put one under a restitutionary liability, and, at the same time, disclose a contract which is not itself necessary to establish that liability",²⁴ in order to prevent the law of restitution from subverting bargains "there has to be a rule to the effect that, at least until the contract is prematurely discharged by frustration or in reaction to a repudiatory breach, the plaintiff can never put himself in a better position by suing in unjust enrichment rather than in contract".²⁵ For Birks, the decision to make a contractual claim predominate over a restitutionary claim is a matter of policy rather than one of pure analysis. He states that the plaintiff does not have an unrestricted choice whether to sue in contract or restitution because: "that option would allow him to obtain the

19 Lord Goff of Chieveley and Gareth Jones, *The Law of Restitution* 47 (Gareth Jones ed., 5th ed. 1999).

20 *Id.* at 45.

21 *Id.*

22 *Id.* at 403, 405.

23 *Id.* at 418.

24 Peter Birks, *An Introduction to the Law of Restitution* 46 (rev. ed., 1989). He states that the content of the contract may either have the same content as the restitutionary obligation or may have a different content. Note that this is stated in the context of what Birks terms overlaps by "alternative analysis"; because "restitutionary rights are always created by the operation of law as opposed to the consent of the party enriched", "the facts which constitute an unjust enrichment never include, unless fortuitously, a promise to make restitution", *id.* at 44, and therefore there can "be no overlaps in the nature of dependent description", *id.* at 46.

25 *Id.* at 47.

reasonable value even where he had been foolish enough to agree to perform at less than the market rate. So a free election between the two would subvert bargains."²⁶

While Birks, unlike Goff and Jones, offers us a reason for the general position, he leaves open the question why, if before the contract is discharged, the bargain would be subverted by restitution, once the contract is discharged, there is no such "subversion".²⁷

In his contribution to the volume of essays edited by Burrows, Friedmann takes a more rigorously analytical position. He states:

It is a basic tenet of the law of restitution that no recovery can be had for benefits conferred in fulfilment of a valid obligation owed to the recipient. The proposition seems self-evident. To hold otherwise would lead to a contradiction in terms. Thus, suppose A owes B £100. If A pays his debt, he can obviously not recover his payment back. To allow him to do so would be in direct conflict with the very concept that he was obligated to make the payment in the first place. Restitution will nullify the obligation.... To allow restitution would undermine the rules which originally imposed the obligation, and would lead the law of restitution to a direct conflict with that branch of the law which is the source of the obligation.²⁸

Where the performer has, in Birks' phrase, "been foolish enough to agree to perform at less than the market rate", Friedmann states that any argument that the recipient of the performance has been "unjustly enriched" by the "unfair" transaction can only be assessed in terms of the rules of contract law: it is "a pure question of contract law".²⁹ While disparity of price may entitle the rescission of a contract in some systems, it does not in English law, so the recipient's enrichment is based on a legal right and is therefore not in the legal sense "unjust".³⁰ But, after the discharge of the contract, he argues that in

²⁶ *Id.*

²⁷ In his Introduction (*supra* note 24, at 288), Birks thought that it was probably right to say that even after discharge a person could not do better from his non-contractual claim than he could have done in contract, but he has since rejected the argument that restitutionary claims are subject to a contract-price ceiling. See, Peter Birks, *In Defence of Free Acceptance*, in *Essays on the Law of Restitution* 136 (Andrew Burrows ed., 1995).

²⁸ Daniel Friedmann, *Valid, Voidable, Qualified, and Non-existing Obligations: An Alternative Perspective on the Law of Restitution*, in Burrows ed., *supra* note 27, at 247-48.

²⁹ *Id.* at 251.

³⁰ *Id.* at 250-51.

principle restitution should be available for performance rendered under the contract because "the performance was rendered on the basis of an expectation ... that the performing party would receive the counter performance".³¹

Burrows, in his discussion of failure of consideration as a ground for restitution, states:

[B]efore a party can claim restitution for failure of consideration, he must establish that he has no contractual obligation to confer the relevant benefit on the defendant: any relevant contract must be ineffective ... [i]t is by this principle that an undermining of contract by restitution is avoided and restitution is made subservient to contract. It is only when the parties' own allocation of risk is ineffective that the imposed standards set by the law of restitution can step in.³²

Burrows states that "the most compelling reason for this is the need to break the circularity of holding a party contractually liable to confer a benefit which the law of restitution requires the other party to return".³³ Once the contract has been discharged, however, the plaintiff can claim restitution, and at this stage, for Burrows, unless the plaintiff has contracted out of any right to restitution, there is no question of the contract operating to exclude or limit the restitutionary claim.³⁴ The analytical separateness of the restitutionary claim is, for Burrows, the key to allowing such a claim to be used to save a plaintiff from a bad bargain.

Finally, we should note that the position would appear to be the same in other systems of law. In Scots law it is established that there cannot be a claim in recompense where there is a valid subsisting contract and it would appear that this is true of all enrichment remedies.³⁵ The Australian text by Mason & Carter and Carter's subsequent contribution to the volume of essays edited by McInnes are to the same effect. For Mason & Carter the fundamental point is that, as a general rule, restitution issues arise in respect

31 *Id.* at 271-72 ("qualified obligations"). See also J. Beatson, *The Use and Abuse of Unjust Enrichment* 54-59 (1991) ("conditional right" to retain payment).

32 Burrows, *supra* note 2, at 250-51. Although this ground is primarily used in connexion with the recovery of money, Burrows treats restitution in respect of services rendered under this head. *Id.* at 267.

33 Andrew Burrows, *Restitution from Assignees (The Trident Beauty)* [1994] *Restitution L. Rev.* 52, 54.

34 Burrows, *supra* note 2, at 266, 269.

35 See Hector McQueen, in *The Limits of the Law of Obligations* 185 (Daniel Visser ed., 1997) and authorities cited therein. See also Clive, in *Appendix to Scots Law Com. D.P. No. 99*, 46-48.

of ineffective rather than effective contracts. Restitution is not concerned with benefits conferred under valid contracts, an effective contract prevents proof of a claim in restitution, and ineffectiveness is a pre-condition to a claim for restitution.³⁶ "[N]o action can be brought for restitution while an inconsistent contractual promise exists between the parties in relation to the subject-matter of the claim." Mason and Carter state that the impact of discharge or rescission is to determine the validity of the claim for restitution. Further, they state that a valid contract which is discharged by full performance or by agreement does not exemplify an ineffective contract and therefore does not raise restitutionary issues.³⁷

In Canada for a restitutionary claim to exist there must be no "juristic reason" for the enrichment and the primary example of a juristic reason which prevents a claim is where the enrichment results from the fulfilment of a contract. Maddaugh & McCamus' Canadian text states that

where the enrichment results from the performance of a valid contractual obligation, the general policy favouring the security of transactions weighs against the intervention of restitutionary claims. Only if the transaction can be found to be unenforceable for a reason recognized either at law or in equity can the possibility of a restitutionary claim for the value of benefits conferred be entertained.³⁸

They state that while subtle problems may arise as to whether the enrichment is required by the terms of a valid contract, the distinction between such cases and those where it is not is unlikely to prove difficult in practice. This is similar to the position in German law where § 812 of the BGB requires that the recipient has obtained something "without legal cause", so that an enrichment based on a valid transaction is not unjustified.³⁹

Given this general approach it is perhaps not surprising that one United States commentator has sought to explain restitutionary liability as existing in those situations where the law creates bargains where the parties have not

36 Mason and Carter, *supra* note 2, at §§ 315, 901-2, 909. Note that for Mason & Carter this is only "the general rule". *Id.* at §315. They recognize that "*only rarely*" — i.e., it sometimes happens — "will the law of restitution *operate in the context of an effective contract*" (emphasis added). Examples are given *id.* at § 1302. See also Restitution: Developments in Unjust Enrichment 139, 142 (Mitchell McInness ed., 1996).

37 Mason & Carter, *supra* note 2, at §§ 909, 904.

38 Peter D. Maddaugh & John D. McCamus, *The Law of Restitution* 46 (1990).

39 See Reinhard Zimmermann & Jacques du Plessis, *Basic Features of the German Law of Unjust Enrichment* [1994] *Restitution L. Rev.* 14, 25-27.

done so. If cases on restitution present "the question of whether to create bargains where the parties have not done so",⁴⁰ *a fortiori* where the parties have created a bargain covering the ground there can be no question of restitution.

II. THREE QUESTIONS

This survey of the position taken by scholars suggests that there are three questions that must be addressed. First, is restitution before discharge in fact necessarily inconsistent with or "subversive" of contract, and, if so, why? Secondly, why do the commentators consider that restitution after discharge does not "subvert" contract? Thirdly, when will a person be held to have contracted out of a right to restitution? We shall see that it is difficult to keep the second and the third questions separate.

A. Does restitution before discharge in fact necessarily "subvert" contract, and, if so, why?

When a contract provides for one party, P, to confer a benefit on D, whether by the payment of money or the rendering of services, and pursuant to the contractual obligation P does so. P will be entitled to D's promised counter-performance at the time specified by the contract and at any rate on the completion of his performance. Take the case of work done, say building a house. P will be entitled to the money due to him under the contract from D at the time specified by the contract or when P has built the house. If before that time the contract is not discharged, performance is still possible, indeed it is normally due, and P remains able to put himself in a position to be entitled to the contractual counter-performance from D. P will have an accrued right to the contractual counter-performance at the latest on completion of the house. Where this is, as in our example, the payment of money P will have a liquidated claim in debt. Where D has broken the contract but either the breach is not one giving P the option of discharging the contract or P has opted not to do so, P will be entitled to damages from D. Why should any restitutionary claim that is in principle available to P be regarded as inconsistent with either the claim for damages or the claim for

40 Saul Levmore, *Explaining Restitution*, 71 U. Va. L. Rev. 65, 67 (1985). This approach, like Atiyah's, in effect reintegrates part of quasi-contract into a new broad conception of contract.

the sum due so as to preclude concurrent liability? Why, to use Friedmann's language, would it lead to a contradiction in terms?

It is not because contractual liability is the result of party autonomy whereas restitutionary liability is imposed by law, because that is so where the overlap is between contract and tort, and concurrence of claims is allowed there. Nor is it because of any risk of double recovery, since, as in the case of overlaps between contract and tort and between tort and restitution, concurrent liability requires a plaintiff to elect which remedy to pursue before judgment is entered. P's continued right to performance by D is not accordingly necessarily inconsistent with the right to restitution of what D has received from P. The argument which commands most support, whether for policy reasons or as a result of analysis, is that where P confers a benefit on D pursuant to a contract, the valuation of that work is a matter of contract, which, in English law, respects the parties' valuation. Valuation is in a sense part of risk allocation: P is taking the risk of market rises and D of falls in the market. To allow P to recover anything other than the contract value — such as the objective value, the market value, or a reasonable value — would be to reallocate that risk. In Birks' words, "courts would at a stroke have accepted the task of regulating the whole business of economic exchange".⁴¹

So on this argument, what makes a restitutionary claim in such circumstances "a contradiction in terms" is that it is a necessary subversion of the parties' own allocation of risk and determination of value in the contract for one of them to have a claim for *more* than what would be recovered by a contractual claim. But this does not in fact justify the total bar on restitutionary claims in such cases. First, it does not explain why a plaintiff is not allowed to proceed in restitution where an equal or lesser amount would be recovered than would be recovered in contract. It is at this stage that an important distinction is revealed between Birks' policy based rationale and Friedmann's analytical one, because the latter puts a logical stop on any restitutionary claim where the recipient's claim to what has been received is based on legal right. Secondly, the "reallocation of risk" argument does not take account of the fact that the desire to recover a larger sum is only one motive a person may have for seeking restitution rather than suing on the contract. There may be other motives. One is that the restitutionary claim will (where money is being recovered) be a liquidated claim rather than an unliquidated one, as claims for damages are. Where a liquidated claim can be brought there are procedural advantages and the difficulties of

41 Birks, *supra* note 24, at 47.

proof inherent in a damages claim are avoided. It is perhaps for this reason that Goff and Jones indicate that, even after discharge, if P has performed all (or substantially all) his obligations under the contract and has an accrued right to a liquidated sum under the contract, he "cannot have recourse to an action in restitution" and "his only action in respect of his contractual performance is an action for the contract price"⁴² which, unlike damages, completely protects his contractual expectations. Other motives for seeking restitution include a more favourable limitation period and jurisdictional or choice of law issues.

To sum up, if the reason for not allowing concurrence of action between restitutionary and contractual claims before discharge is to do with not subverting risk allocation and contractual valuation then doctrine should be directly focused on those factors and not on the discharge of the contract. Except in the case of speculative contracts, it should not be assumed, as it has been in the past, that all risks have been distributed to one side or the other.⁴³ Where all risks have not been so distributed, there will be a gap in the contractual allocation and there is room for adjustment either by applying the principle of unjust enrichment or some other principle. In such cases unjust enrichment would refer to such a gap in the contractual allocation of risks. If, therefore, the fundamental reason for not allowing concurrence of claim is the protection of risk allocation and contractual valuation, it does not suffice to justify the conclusion.⁴⁴ It should, in principle, be possible to bring a restitutionary claim where it would not reallocate risks or reassign value as an alternative to an action for breach of contract even before discharge. This is a radical notion; so radical that one is driven to look for another explanation for not allowing concurrence.

One such explanation is given by Friedmann. In the passage quoted above he states that "... to allow restitution would undermine the rules which originally imposed the obligation, and would lead the law of restitution to a direct conflict with that branch of the law which is the source of the obligation".⁴⁵ Similarly, Burrows states that "the most compelling reason ... [for barring restitution] ... is the need to break the circularity of holding a party

42 Goff and Jones, *supra* note 19, at 412. *See also* Mason & Carter, *supra* note 2, at § 904; George E. Palmer, *Law of Restitution* § 4.3 (1978).

43 *See* Larrinaga & Co. v. Soc. Franco-Americaine des Phosphates de Medulla, Paris (1922) 29 Com. Cas. 1, 18-19 (Lord Sumner).

44 Save, possibly, on the basis that restitution would normally reallocate risks or reassign value, and that the difficulty (and expense) of determining whether this is so on a case-by-case basis justifies a blanket, albeit "quick and dirty", rule.

45 Friedmann, *supra* note 28, at 247-48.

contractually liable to confer a benefit which the law of restitution requires the other party to return".⁴⁶ Restitution would, accordingly nullify the contractual obligation in circumstances when the rules of contract state that it subsists.

Let us illustrate this. Take the case where P has paid money to D under a valid contract and is entitled to restitution of the money (say on the ground of total failure of consideration) but the contract and with it P & D's obligations to perform remains on foot. If D had an accrued contractual right to the money this would be nullified unless he could invoke it as a defense to P's restitutionary claim. So a restitution claim in this situation would either nullify the contractual obligation, or if subject to a contractual defense, would be pointless. Even if at the time of the claim for repayment D did not have an accrued contractual right to the money, D would remain under a contractual duty to render performance to P which, when rendered, would give rise to a contractual right to the money with a similar effect. Unless it was clear that D would not perform, any restitution in favour of P would be temporary. An alternative way of looking at this fact situation is to say that surely a payee cannot be said to have been unjustly enriched if he was entitled and remains entitled to receive the sum paid to him.⁴⁷ Accordingly, the basic ingredients of a restitutionary claim cannot be made out in such a case.

This reasoning is, however, more difficult where P renders services to D in part performance of a valid contractual obligation. Here P's restitutionary claim would be for recompense; i.e. similar to D's obligation under the contract. Where P's obligation to perform is severable, P will have an accrued contractual right to payment for the part performance, and any restitutionary claim would, provided it was not for more than was due from D under the contract, not be inconsistent with or nullify the contract although it could be said to duplicate it and therefore to be pointless. Where P's obligation to perform is not severable, there will be no contractual claim, and the factors in the contract that lead a court to conclude that, on its true construction, the obligation is not severable should normally exclude any claim in restitution, altogether or until more complete performance is rendered.

It is submitted that, while this shows that, before discharge, a restitutionary claim will very often be in direct conflict or inconsistent with a contractual one or that it would in effect nullify the contractual obligation, it does not

46 *Supra* note 33, at 54.

47 *See* Kleinwort Benson Ltd. v. Lincoln CC [1998] 2 W.L.R. 1095, 1145-46 (Lord Hope).

show that this is necessarily so as a matter of analysis in all cases. An example of a case in which a restitutionary claim may not be inconsistent with or nullify a contractual obligation is provided by *Miles v. Wakefield M.B.C.*⁴⁸ In that case council employees worked "to rule" and did not carry out part of their contractual services. The employer had told the employees not to come to work at all unless they were prepared to work normally and this was held to preclude them being paid for the work they had done. But two of the judges in the House of Lords suggested that, if the employer had not made it clear that reduced or inefficient work would not be accepted, the employee would have been entitled to a reasonable sum for that reduced work. In that case the contract had not been discharged, a fact which causes formidable difficulties with any restitutionary claim on orthodox analysis.⁴⁹ The scenario based on *Miles v. Wakefield M.B.C.* may be one example of a situation which is more likely to be found in long term contracts in which there is more likely to be a gap in the allocation of risks and it is more difficult to say that the contract has allocated all risks as to the future to one of the parties. It may be that any entitlement to a reasonable sum for the reduced work in such a case is best classified as contractual rather than restitutionary. But that raises in a more limited and confined way the relationship of restitutionary and contractual obligations because a contractual explanation could only be based on a gap-filling implied term which, in many situations might appear somewhat fictional.

B. Why do most commentators consider that restitution after discharge does not "subvert" contract?

This section first considers the predominant approach by modern commentators and concludes that it is open to question. It then considers restitutionary claims between the parties to a contract concentrating on the position where there has been a breach of contract by D. Finally, it considers claims *affected by a contract* but not one between the parties to the restitutionary claim.

The general worry about a plaintiff escaping from a bad bargain by the use of a restitutionary claim has been mentioned. Leaving aside the difficult case of a plaintiff who is in breach of contract, in the context of recompense

48 [1987] A.C. 539. See also *Tea Tree Gully Builders v. Meston* (1992) 59 S.A.S.R. 344 (but contract unenforceable).

49 [1987] A.C. at 553, 563. Cf. Lord Bridge's doubts, *id.* at 552. Lord Brandon and Lord Oliver reserved their opinions.

for work done (*quantum meruit*) this has led many commentators, including Goff and Jones, to argue that the limit to such recompense should be the contract price. Some have argued that it should be the proportion of the contract price appropriate to the proportion of the work done. Even Birks and Burrows, who do not advocate these as a matter of principle, accept that a proration of the contract price should form the upper limit in one type of restitutionary claim. They distinguish cases in which the work has "incontrovertibly" benefited the defendant and those in which he is regarded as having benefited only because the work is part of the performance for which the defendant bargained.⁵⁰ In the latter case they consider that a proration of the contract price should form the upper limit of the restitutionary claim. But apart from this (and the difficult case of a plaintiff who is in breach of contract), after discharge a restitutionary claim can be granted even where it saves the plaintiff from a bad bargain. It is stated by Burrows that where the contract is void or once an initially valid contract is discharged for breach or frustration the plaintiff can claim restitution: "when the parties' own allocation of risk is ineffective ... the imposed standards set by the law of restitution can step in".⁵¹ For Burrows it is the independent and separate nature of the restitutionary claim that is the key to allowing this escape from bad bargains. The discharge is seen as rendering the contractual allocation of risk ineffective. The only limit to restitution once a contract is discharged occurs where the plaintiff has contracted out of his right to restitution: "once the contract has been discharged, and subject to the plaintiff having contracted-out of restitution, there is no need for the law of restitution to bow to contract".⁵² So, after discharge there can be concurrence between contractual claims and restitutionary claims; full concurrence in those based on incontrovertible benefit and limited concurrence in those based on what Burrows calls "bargained-for benefit".

As is evident from what has been said above, it is accepted that there can in principle be concurrence between contractual and restitutionary claims. But it is submitted that the approach which leaves the question of contracting out until the last stage of the inquiry, pays insufficient attention to the contract, particularly in cases of "incontrovertible benefit". Although, provided that sufficient sensitivity is shown in assessing whether the parties have "contracted out" of restitution, it will not lead to a different answer

50 Burrows, *supra* note 2, at 268-71 (also at 265). See also Birks, *supra* note 27, at 136; Michael Garner, *The Role of Subjective Benefit in the Law of Unjust Enrichment*, 10 Oxford J. of Legal Studies 42, 55 (1990). Cf. Palmer, *supra* note 42, at § 4.4.

51 Burrows, *supra* note 2, at 251.

52 *Id.* at 266, 269.

in many cases, it has a distorting effect. In the absence of such sensitivity it can lead to an unjustified unwillingness to recognize that restitution has been excluded by the contract. An example of this unwillingness is to be found in some of the reactions to the decision of the House of Lords in *Pan Ocean Shipping Co. v. Creditcorp, The Trident Beauty* in 1994.⁵³

It is submitted that in all cases where restitution is sought of money paid or work done under a contract, the contractual allocations of risk and its impact upon any restitutionary claim are relevant at an earlier stage. It is necessary to determine whether restitution is inconsistent with the contract; whether it would reallocate a contractual risk, in which case it should not be permitted, or whether it fills a gap in the contractual scheme, in which case it can be granted.⁵⁴ It is clear that the discharge of a contract by breach, frustration or performance is non-retrospective and cannot affect accrued rights under the contract. But, although on discharge, with limited exceptions, the contract provisions cease to operate and are replaced by a secondary obligation to compensate the innocent party, the discharge of a contract has no bearing on the initial characteristics and extent of any given right which is a function of the interpretation of that contract.

The contract may provide that a right is to be absolute and indefeasible or conditional (or qualified) and defeasible. Where a contract has been part performed, for example by building half a house, the contract may provide that there is to be no remuneration for this part performance which is to be at the part-performer's risk, it may provide for pro-rata (or some other) remuneration under the contract, or it may do neither but leave open the possibility of non-contractual restitutionary recompense. In both types of case (accrued right and no right) the contractual provision may be clear on the face of the contract. Even where it is not clear on the face of the contract, it may be so on the true *construction* of the contract as a whole in its commercial or other context, or it may, where the tough tests required to establish an implied term are satisfied, be so as a matter of *implication*.

The fundamental reason that post-discharge restitution does not necessarily "subvert" contract is that the recipient's accrued right to the money paid or work done under the contract may be conditional or qualified and thus defeasible. We shall see that where the right to money paid is defeasible there is no impediment to restitution. Similarly, in the case of

53 [1994] 1 W.L.R. 161.

54 See J. Beatson, *Discharge for Breach: The Position of Instalments, Deposits and Other Payments Due Before Completion*, 97 L.Q. Rev. 389 (1981); Beatson, *supra* note 31, at 12-15, 45-94.

services rendered where no contractual right to payment has accrued and where there is no impediment to restitution, the award of recompense (*quantum meruit*) in a sum greater than a proration of the contract price for part performance does not necessarily undermine contract. This is because it is still the case that damages will not compensate for all losses, for example third-party losses, "hassle" and disappointment are not generally recoverable. Furthermore, it does not follow that the part-performer would have agreed to do the smaller amount of work at a prorated price, since there are always fixed costs and normally economies of scale. Where the performer is an innocent party and the recipient is a contract-breaker there is the additional factor that restricting the performer to the contract price or a proration protects the contractual expectations of the contract breaker who is, however, only entitled to have those expectations protected provided he remains ready and willing to perform his contract which, *ex hypothesi* he is not in such a case.⁵⁵ There is, moreover, the formal reason that, on discharge, the terms of the contract cease to have effect save regarding *accrued obligations*. In *The Trident Beauty*, in the context of the recovery of money, Lord Goff stated that before discharge restitution is "unnecessary and inappropriate" but "if the contract ceases to bind different considerations may arise".⁵⁶ It is, however, clear from his Lordship's speech that even after discharge there will be no restitution if *before discharge* a contractual obligation to pay had accrued due. In the light of the earlier case law "accrued due" must be taken to mean had unconditionally accrued due. As indicated, the distinction between an obligation which has unconditionally accrued due and one which has only conditionally accrued due has important implications for the availability of restitutionary claim.

C. Claims between the parties to a contract after it has been discharged:

1. Money paid

Where one party to a contract (P) is entitled to be treated to be discharged from further performance of the contract by reason of the breach of the other (D), and does so, any money paid by P to D can be recovered provided that the consideration for the payment has *totally* failed. There is little discussion in the cases of breach by D about contractual exclusion of the restitutionary claim. Most of the discussion is about what constitutes a total failure of consideration and, in recent cases, of whether the requirement of "totality"

⁵⁵ Palmer, *supra* note 42, at §4.4.

⁵⁶ [1994] 1 W.L.R. at 164.

is justified. The requirement may well be "on the turn" at any rate in cases in which D's counter-performance under the contract was itself the payment of money, as where P paid money to D pursuant to a contract of loan.⁵⁷ But in principle a contract can exclude restitution, even when it is sought by the innocent party. So, when will it?

Where the terms of the contract expressly deal with repayment and recompense following discharge, this will be held to exclude a restitutionary right. Although this is only stated in cases in which the contract was frustrated⁵⁸ or where it is P rather than D who is in breach,⁵⁹ the same must in principle apply to a case where it was D who had broken the contract. A contractual term which provides that D is to indemnify P in respect of a given payment by or liability of P would similarly be held to exclude a restitutionary claim by P.⁶⁰ Burrows argues that "restitution is not ousted by a term of the contract that is consistent with, and no more onerous than, the obligation that would otherwise be imposed"⁶¹ and that "it is at least doubtful"⁶² in *The Trident Beauty* whether Pan Ocean's express entitlement to repayment under the contract constituted a contracting out of restitution vis a vis Trident (the other contracting party). His reasoning is that restitution would have been neither more onerous nor inconsistent with the obligation in the contract. But this is to neglect the distinction between accrued contractual rights⁶³ and unaccrued rights and the fact that, with regard to the former, the contract provisions have crystallized before discharge. It also appears to neglect the distinction between claims in debt and claims for damages which, for the reason given above,⁶⁴ may be of vital importance in determining whether there should be a restitutionary claim as well as one founded on the contract.

Even where the contractual provisions are not expressly concerned with repayment, they may exclude restitution where they establish a remedial

57 *Goss v. Chilcott* [1996] A.C. 788, 798. See also *David Securities Pty Ltd. v. Commonwealth Bank of Australia* (1992) 175 C.L.R. 353, 383.

58 *B.P. Exploration Co. (Libya) Ltd. v. Hunt (No. 2)* [1979] 1 W.L.R. 783, 806-07. See section 2(3) of the Law Reform (Frustrated Contracts) Act 1943.

59 *The Trident Beauty* [1994] 1 W.L.R. 161 ("any overpaid hire or excess deposit" is "to be returned at once").

60 See the scenario in *James Moore & Sons Ltd. v. University of Ottawa* (1974) 49 D.L.R. 3d 666, but assume that the architect's promise to indemnify P had been made with D's authority.

61 Burrows, *supra* note 33, at 55.

62 *Id.*

63 The distinction between unconditional and conditional accrual is discussed *infra*.

64 See *supra* text at note 39.

regime which is a complete code.⁶⁵ The House of Lords has held that for such a regime to exclude the right to recover accrued debts under the contract there need to be clear words in the contract.⁶⁶ A contracting party is presumed not to intend to abandon its common law remedies,⁶⁷ and there is no need expressly to preserve common law remedies as had been done in *Hyundai Heavy Industries Ltd. v. Papadopoulos*.⁶⁸ The right to the sum due under the contract is fundamental to the enforcement of contractual undertakings so it is not surprising that courts should require very clear words before holding that a contractual remedial regime excludes this right. The question is whether a similarly strict approach will be taken to the exclusion of restitutionary claims. Although, in *Dies v. British International Mining and Finance Co. Ltd.*⁶⁹ it was said that "where the language used in a contract is neutral, the general rule is that the law confers ... the right to recover" money paid, there are indications that the approach will not be as strict, and that if there is any "presumption" against the exclusion of restitutionary claims it is weaker. The position, however, is not altogether clear.

First, in *B.P. Exploration Co. (Libya) Ltd. v. Hunt (No. 2)* Robert Goff J. (as he then was) rejected the submission that section 2(3) of the Law Reform (Frustrated Contracts) Act 1943 only precluded restitution following frustration "where the contractual provision was *clearly* intended to have effect in the event of the frustrating circumstances".⁷⁰ He stated that the effect of the subsection depends "simply upon applying the ordinary principles of construction", i.e., the statutory restitutionary regime is excluded where the contract contains any provision which, upon the true construction of the contract, is intended to have effect in the circumstances arising which operate to frustrate the contract (or which would but for the provision so operate). The clause must accordingly be intended to operate after the discharge of the contract by the frustrating event. It is submitted that section 2(3) is simply a statutory enactment of the common law position, and that a similar approach

65 *Stocznia Gdanska S.A. v. Latvian Shipbuilders* [1996] 2 Lloyd's Rep. 132, *aff'd on this point*, [1998] 1 W.L.R. 574.

66 *Id.*

67 *Gilbert-Ash (Northern) Ltd. v. Modern Engineering* [1974] A.C. 689, 717, *applied in Stocznia Gdanska S.A. v. Latvian Shipbuilders* [1998] 1 W.L.R. 574.

68 [1980] 1 W.L.R. 1129.

69 [1939] 1 K.B. 724, 742 (in the context of a contract for the sale of goods).

70 [1979] 1 W.L.R. 783, 806. In the House of Lords, Lord Brandon concluded that the clause did not exclude the right to restitution because there was nothing in the contract to show that the parties contemplated political risks such as the expropriation of the concession. *B.P. Exploration Co. (Libya) Ltd. v. Hunt (No. 2)* [1983] A.C. 352, 372.

would be taken where the issue is whether a contractual remedial regime has excluded a restitutionary claim following discharge for breach. Robert Goff J. analyzed the matter in terms of contractual risk, but although this was done in respect of recompense for services rendered (considered in the next section) rather than recovery of money paid, the approach is of general application and cannot be confined to discharge by frustration. But notwithstanding what was said in this part of his judgment, the way his Lordship approached the construction of the relevant clause in that case suggests that it will in practice not be easy to achieve such exclusion of restitutionary claims. The reasons for this approach are discussed in the next section.

Secondly, the nature of the payment as discerned from the type of contract or the description of the payment in the contract may also exclude or limit a restitutionary claim. The contract may provide that a right is to be absolute and indefeasible or conditional and defeasible, and this may be express or implied. Take a contract for the provision of services for a payment. If, on a true construction of the contract,⁷¹ the obligation to make the payment is entirely independent of the other party's contractual obligation to render the services, the entitlement to the payment, once it has accrued due, is independent of whether the services have been rendered. Obligations to pay a deposit and other payments as security for due performance of the payer's obligations are examples of this. So where a payment is security for due performance or is described as a deposit or earnest, it has been held that it cannot be recovered by a contract-breaker⁷² and, in the case of a frustrated contract, may be caught by section 2(3) of the U.K.'s Law Reform (Frustrated Contracts) Act 1943.⁷³ Another example of a payment obligation which may be held to be independent of the other party's obligation to perform is where another term of the contract ensures that there will be no unjust enrichment if the payment is irrecoverable. This may explain the finding in *The Trident Beauty* that the obligation to pay hire was independent of the obligation

71 See J.W. Carter & Gregory Tolhurst, *Restitution: Payments Made Prior to Discharge of Contract*, 7 J.C.L. 273 (1994); J.W. Carter, *Discharged Contracts: Claims for Restitution*, 11 J.C.L. 130 (1997); J. Beatson & Gregory Tolhurst [1998] Cambridge L.J. 253 (Casenote).

72 *Hyundai v. Papadopoulos* [1980] 1 W.L.R. 1129; *Stocznia Gdanska S.A.* [1998] 1 W.L.R. 574.

73 *B.P. v. Hunt* [1979] 1 W.L.R. at 806-07 ("the court should not act inconsistently with the contractual intention of the parties applicable in the events which have occurred").

to repay any overpayments.⁷⁴ In such circumstances there is no need to have recourse to the law of restitution.

In principle the position should be the same where it is the innocent party who has made the payment, although in such cases it is open to a court to hold that the nature of the payment as "security" or "earnest" does not survive the discharge of the contract where the discharge is the result of the payee's breach: it is only "conditionally" a security payment. It would be exceptional for a contract breaker to be held to be entitled to retain a security payment,⁷⁵ but it is not impossible given a sufficiently clear stipulation and in view of the fact that the innocent party will have an action for damages in respect of any loss suffered. Again, where the object of a fiduciary duty (the beneficiary) permits the fiduciary to act in a situation which would otherwise be presented as involving a conflict of interest and duty or of duties, the beneficiary's normal right to the profits resulting from such conflict will not arise. This may be because the nature of the duty is modified⁷⁶ or because the liability is excluded.⁷⁷

Thirdly, the nature of the payee's partial counter-performance as determined by the contract is relevant, indeed vital, to the establishment of any restitutionary claim. If what was done constitutes part performance of the contract then that contractual specification prevents or excludes restitution by preventing there from being a total failure of consideration. Even if the requirement of "totality" goes, the contract specification will limit the extent of any restitutionary claim by requiring P to return any benefit received (including on this hypothesis a non-pecuniary benefit and the value of work received). Where D has spent money in connection with the contract, only if it counts as part performance of the contract will P have to give credit for that performance.

It is therefore submitted that although there is a "background" common law right to restitution where the ingredients of a restitutionary claim are

74 [1994] 1 W.L.R. 161, 166, 169, 171. *See infra* text at note 91, *but cf.* the powerful criticism of this result by Gregory Tolhurst [1999] Cambridge L.J. 546 (forthcoming).

75 Similarly, the principle that a party may not rely on its own breach to bring a contract to an end is a principle of construction rather than a rule of law. *Alghussein Establishment v. Eton College* [1988] 1 W.L.R. 587; *Cheall v. Association of Professional Executive Clerical and Computer Staff* [1983] 2 A.C. 180; *Gyllenhammar & Partners International Ltd. v. Sour Brodogradevna Industrija* [1989] 2 Lloyd's Rep. 403, 416.

76 *Kelly v. Cooper* [1993] A.C. 205.

77 *Stubbs v. Slater* [1910] 1 Ch. 632; *GWJ v. Cunliffe* 9 Ch. App. 525; *Barry v. Stanton* (1876) 3 Ch. D. 502.

established, the position differs from that concerning accrued rights to the sum due under the contract. The position is more complicated and any presumption of non-exclusion is weaker because the nature of the contract is in many cases crucial to the establishment and extent of any restitutionary claim.

2. Services rendered/work done

Where one party to a contract (P) has performed or part-performed his obligations under the contract by rendering services or doing work and later elects to be discharged from further performance of the contract by reason of the breach of the other (D), P will in principle have four possible remedial routes. He will be able to recover (unliquidated) damages for breach of contract, a liquidated sum in debt in respect of the amount of any payment that has accrued due under the contract, possibly a *contractual quantum meruit* (right to recompense),⁷⁸ and a *restitutionary quantum meruit*.⁷⁹

Where the right to recompense under the contract accrues incrementally as the services are rendered, there is great overlap between the contractual rights to the accrued sum due, recompense by a contractual quantum meruit, and recompense by a restitutionary quantum meruit. In principle, where the obligation is severable so that contractual rights have accrued, there should be no room for restitution save in the limited class of case in which restitution is not inconsistent with contract. The general position was stated by Lord Goff in *The Trident Beauty*;⁸⁰ even after discharge there will be no restitution if before discharge a contractual obligation to pay had accrued due because in such a case restitution is duplicative and pointless. Again, it should be noted that in such a case there will be a liquidated claim in debt rather than an unliquidated damages claim, and that this may be the reason for this conclusion.

Where the obligation to pay only arises on complete performance, there can be no accrued right under the original contract (though there may have been a consensual substitution of another contract for it) but there is no necessary impediment to either a contractual or a restitutionary claim to recompense. This is because, where D has broken the contract so seriously that it can be discharged by P, it is not open to D to argue (as it is where D is not in breach) that the services were only wanted in the context of full

78 *Steven v. Bromley & Son* [1919] 2 K.B. 722.

79 *Planche v. Colburn* (1831) 8 Bing. 14; *De Barnardy v. Harding* (1853) 8 Ex. Ch. 822; *The Batis* [1990] 1 Lloyd's Rep. 345.

80 [1994] 1 W.L.R. at 164.

performance: it is because of D's breach that such full performance is no longer possible.

Again, there is little discussion of contractual exclusion of the restitutionary claim in the cases where D has breached the contract. Much of the discussion has been about the unfortunate tendency of some courts to construe an obligation as entire where the contract provided for a lump sum to be paid after completion of performance and to regard the performer as having accepted the risk of incomplete or defective performance from this fact alone, often in order to protect consumers and others whose bargaining power is weak.⁸¹ More recently, the unpalatable consequences that can follow — in particular the fact that the injured party could retain the benefit of the incomplete performance without paying for it — have led courts to seek to avoid construing an obligation as entire or to escape from the logical consequences of so construing it.

A court can properly avoid the consequences of construing an obligation as entire in two situations. First, where the injured party has *accepted* the partial performance. Secondly, although this is not so clearly established, where the part performer can establish that the services rendered or the work done has *incontrovertibly benefited* the other party so as to give rise to a claim in restitution. The mere fact that a person appears to have benefited from the part-performance of an entire obligation, has not generally sufficed to ground a claim for recompense.⁸² But, where it can be shown that the recipient of the part performance has gained a readily realizable financial benefit or has been saved expense which he must have incurred, there is some support for the view that the part-performer would be entitled to reasonable remuneration⁸³ save where the parties have made it clear that the risk of non— completion

81 *E.g.*, in contracts for small building works on private houses. *See* *Munro v. Butt* (1858) 8 E. & B. 735, 754; Law Commission, *Pecuniary Restitution on Breach of Contract*, Law Com. No. 121, (1983) 37 & para. 2.25 and page 37 (Mr. B.J. Davenport Q.C.'s dissent). For criticism of this position, see J. Beatson, *Anson's Law of Contract* 486-89 (27th ed. 1998).

82 *Sumpter v. Hedges* [1898] 1 Q.B. 190 (claim regarding partly erected building); *Bolton v. Mahadeva* [1972] 1 W.L.R. 1009.

83 *Sumpter v. Hedges* [1898] 1 Q.B. 190 (claim regarding bricks used); *Hain Shipping Co. Ltd. v. Tate & Lyle Ltd.* (1936) 41 Com. Cas 350 (Lord Atkin, Lord Wright M.R. & Lord Maugham); *Procter & Gamble Philippine Manufacturing Corp. v. Peter Cremer GmbH & Co., (The 'Manilla')* [1988] 3 All E.R. 843, 855; *Miles v. Wakefield M.B.C.* [1987] A.C. 539, 553, 563. *See also* *Britton v. Turner*, 6 N.H. 481, 26 Am. Dec. 713 (1834) (New Hampshire).

is to be borne by the part-performer even where there is such a benefit.⁸⁴ The underdevelopment of the law of restitution until recently and the tendency to construe an obligation as "entire" simply because the contract provides for a lump sum has, however, also led to authority — somewhat illogically — favouring a remedy in a third situation; where the part performer has *substantially performed* the "entire" obligation.⁸⁵

But the reasoning developed above in the context of the recovery of money paid is equally relevant to recompense for services. There will be situations in which a contract provides for post-discharge recompense or contains a remedial regime which is a complete code. Further, in many cases of services rendered it will only be because the part performance is part of the contracted "benefit" that the ingredients of a restitutionary claim can be made out. In such cases if the obligation is *truly* entire and it has only been partly performed, it is in principle one in which the risk has been assigned by the contract to the performer. Finally, even in a case of incontrovertible benefit, as defined above, if the parties have contracted that P shall not be paid until the occurrence of an event, and by reason of the discharge of the contract that event does not or cannot occur, other features of the contract or its nature may lead the court to conclude that P has taken the risk of non-payment.

The tendency of the court, in the past, to conclude that an obligation is entire simply because the contract postpones payment until the other party has completely performed his obligations has, as indicated, led courts to try to escape from the logical consequences of characterizing an obligation as entire. Thus, in *B.P. Exploration (Libya) Co. Ltd. v. Hunt*, while stating that contractual exclusion of restitution was to be determined by the ordinary principles of construction, the way Robert Goff J. approached the construction of the relevant clause in that case shows that it will not be easy to achieve such exclusion. First, he rejected the argument that if the time for payment under the contract had not yet come (i.e., there was no accrued right) there would be no right to recompense in that context in accordance with the statutory scheme for restitution.⁸⁶ If this is because his Lordship did not consider the postponement of the time of payment as indicating that the obligation was entire, this is, with respect, absolutely correct. To justify a conclusion that the obligation was entire there would have

84 Pecuniary Restitution on Breach of Contract, Law Com. No. 121, paras. 2.66- 2.69, 2.73 (1983).

85 *Dakin (H.) & Co. Ltd. v. Lee* [1916] 1 K.B. 566. The criticism is set out in more detail in Beatson, *supra* note 81, at 487-88.

86 [1979] 1 W.L.R. at 829.

to be other indications in the contract; for instance, as in *Cutter v. Powell*,⁸⁷ contractual remuneration significantly greater than the normal market value and reasonable value of the services. But, as the Law Commission later pointed out, such postponement has generally been taken by courts as an indication that the obligation was entire. If his Lordship had in mind this looser, and unsatisfactory, designation of obligations as entire, his reluctance may be the result of an unwillingness to accept the consequences of such designation and the deployment of the law of restitution as a way out. While this may be understandable, and perhaps justifiable on pragmatic grounds, it is submitted that it is open to question on grounds of principle. Second, he stated that where there is no clear indication that parties intended a contractual provision to be applicable in the event of frustration, "the court has to be very careful before it draws the inference that the clause was intended to be applicable in such radically changed circumstances".⁸⁸

Where D has committed a breach of contract, a court will similarly be very careful before concluding that a clause enables the contract-breaker to benefit from his wrong, but again, it is necessary to look at the allocation of the contractual risks. It is possible for a guilty party to assign the relevant risk to the innocent party who will then either have no claim at all in respect of it, or no restitutionary claim but only his damages claim for loss suffered. The ill-fated and much criticized Law Commission proposals on Pecuniary Restitution on Breach of Contract also took a strict view of this. The Commission stated that to be effective to exclude a restitutionary claim:⁸⁹

"contract terms will have to be tightly drawn. They will have to show that the parties both adverted to the possibility of less than complete performance and catered for it."

In the context of the loose designation of obligations as entire, again this may be understandable, and perhaps justifiable on pragmatic grounds. But it makes no sense if the courts adopt a strict approach to the characterization of an obligation as entire.

In conclusion, although after discharge it may well be the case that a restitutionary claim will be available as well as a contractual one, it is not correct to state that the contractual allocation of risks can simply be thrown over and is irrelevant to the existence and extent of the restitutionary claim.

87 (1795) 6 T.R. 320.

88 [1979] 1 W.L.R. at 829.

89 Pecuniary Restitution on Breach of Contract, (1983) Law Com. No. 121, para 2.69.

As Cardozo J. stated in a case in which a contract had been discharged by the contractor's death after part- performance of a construction contract, the contractor's death

"did not emancipate the plaintiff [the contractor's widow] from the contract; it limited her at every turn. She could not stir a step without reference to the contract nor profit by a dollar without adhering to its covenants."⁹⁰

In the past before the development of the modern law of restitution, there was a tendency to assume that the risk of part-performance generally lay on the part- performer; unless there was an accrued right to payment under the contract, he got nothing. Cardozo J.'s statement may exhibit signs of this tendency. One of the most important contributions of restitution and the principle of unjust enrichment has been to show that contractual allocations of risk do not always apply, and in particular that they do not necessarily apply where the consequence is to give the other party an uncovenanted windfall. But while we all now appreciate that a restitutionary remedy does not necessarily constitute a redistribution of risks allocated by the contract, we must not forget that it *might* do so, and that what is needed is a sensitive construction of the contract as a whole rather than the *contra proferentum* approach used in the context of exemption clauses and clauses ousting accrued contractual rights. As Lord Goff stated in *The Trident Beauty* (albeit in the context of a three party situation), to consider whether a party to a contract is entitled to recover money paid, "...it is necessary first to turn to the [contract] which grounded the relationship."⁹¹

D. Restitutionary claims affected by a contract between the claimant (P) and a third party (TP)

It has been argued above that the repayment provision in *The Trident Beauty* was effective to exclude a right of restitution as between the parties to the charterparty (Pan Ocean and Trident). But the claim for repayment of the hire was made against Creditcorp, a third party assignee of Trident's rights under that contract. There were two strands in the reasoning of the House of Lords rejecting Pan Ocean's claim to the money as having been paid on a consideration which had totally failed.

90 *Bucchini v. Paterno Construction* 153 N.Y. 256, 295 (1930). See the discussion in Beatson, *supra* note 31, at 85-89.

91 [1994] 1 W.L.R. 161, 163.

First, it was held by Lord Woolf (and Lord Keith, and Lord Slynn) that "there is no justification for subjecting an assignee, because he has received a payment in advance, to an obligation to make a repayment because of the non-performance of an event for which he has no responsibility".⁹² Inherent in this is the proposition that the right of restitution for failure of consideration under a binding contract⁹³ can only be made against the other party to that contract. Lord Woolf and those who agreed with him also considered that there was no case for P's position to be improved because TP had assigned its rights to D. But for Lord Goff the mere fact that the benefit on D had been conferred by P in the performance of a valid contract with TP did not necessarily exclude a restitutionary claim: this was a matter for debate which it was not necessary to resolve in that case. This was because Lord Goff held that the contractual regime between P and TP precluded a restitutionary claim against D because the existence of an agreed regime renders the imposition of a remedy by the law "both unnecessary and inappropriate".⁹⁴

The reasoning and the result of the case have been criticized. Tettenborn asks, why, "[h]aving paid Creditcorp for something they did not get, why should Pan Ocean not have got their money back?".⁹⁵ Burrows considers that the only legitimate reason for denying restitution centers on the contract of assignment, that much of their Lordships reasoning would "unduly restrict the principle against unjust enrichment" and that "the case is best treated by saying simply that restitution should not upset a valid contract of assignment".⁹⁶ It may not in fact be so easy to pigeonhole the decision in this way. It is argued that the case is open to question as a matter of assignment law since the right assigned should not have been characterized as unconditional because it called for payment prior to its being earned and was therefore prima facie qualified.⁹⁷ Leaving aside this issue, it is submitted that, although it is difficult to disentangle the reasoning and the result from the fact that there was an assignment, the result is not only justifiable on this narrow ground.

First, as Friedmann points out,⁹⁸ hiving off the case of assignment would require distinguishing the position of a payee D who is an assignee and a payee D who receives the payment pursuant to a contractual (or non-contractual)

92 [1994] 1 W.L.R. at 170-71.

93 His statements were made in the context of such a contract, and although he did not expressly limit what he said in this way, they should be so read.

94 Lord Lowry agreed with Lord Goff, but he also agreed with Lord Woolf.

95 [1993] Cambridge L.J. 220.

96 *Supra* note 33., at 55-56.

97 Gregory Tolhurst [1999] Cambridge L.J. 546 (forthcoming).

98 See Daniel Friedmann, *Restitution from an Assignee*, 110 L.Q. Rev. 521 (1994).

instruction to P by the contracting party (TP) that P pay D. D may be entitled vis a vis TP to the payment: it might be an indirect payment of a debt owed by TP, or TP may wish to make a gift to D. Burrows' argument, that D's enrichment is unjust because of a failure of consideration in the P-TP contract, appears to disregard the allocation of risk (*quoad* a restitutionary claim) in that contract. Even in its own terms it is not wholly satisfactory because it places importance on the fact that D (Creditcorp) were not "mere donees and were not getting something for nothing" but appears only to recognize the operation of this factor where there has been an assignment. Surely, the position would not have been different if the assignment to Creditcorp had been part of a gift by TP?

Secondly, would not restitution against D be inconsistent with P's accrued right under the contract with TP to repayment. The right had accrued before discharge and restitution on the facts of *The Trident Beauty* would involve a similar circularity to that which Burrows sees as the compelling reason for denying restitution before discharge. The contractual regime provided for any repayment to be by TP, the arrangements between D and TP certainly did not contemplate a repayment by D of any monies received by it. If P recovered from D, D would, it is submitted have a right to be indemnified by TP (a right which, in view of TP's insolvency, would be worthless). So the result would be for restitution to (in Birks' words) "subvert"⁹⁹ the contractual arrangements between the three parties by which the obligation to repay was to be on TP and the risk of TP's insolvency was to be on P and not on D.

Thirdly, Burrows' critique of Lord Woolf's argument that a claim for failure of consideration under a binding contract can only be made against the other party to that contract is, it is submitted, open to question. It is said that Lord Woolf's position does not take account of the fact that failure of consideration can trigger restitution even if there has never been a valid contract and that restricting restitution to the contracting parties can make no sense in such non-contractual situations. But it does not follow from this that the conditions under which a restitutionary claim are established for failure of consideration are the same whether or not there is a valid contract. For, where there is such a contract, it is possible for rights under it to accrue indefeasibly before discharge, as happened in *The Trident Beauty*. The existence of the contractual provision for repayment of overpayments meant that there was no need for a "conditional right" analysis to prevent the unjust enrichment of the payee.¹⁰⁰ In fact the contractual provision gave

99 Birks, *supra* note 24, at 46.

100 Note that Lord Goff stated that, in the context of the particular contract,

the payer superior protection to that given by the common law of restitution because of the current requirement in English law that there be a "total" failure of consideration before a restitutionary claim can be brought.¹⁰¹ There is, moreover, a distinction between restitutionary claims after breach of contract or frustration based on total failure of consideration and those based on mistake or compulsion because of the different way in which the contract is undone: one is prospectively discharged the other is rescinded ab initio.

Burrows also states that the fact that a restitutionary claim based upon a mistake of fact would not have been restricted to the contracting parties tells against Lord Woolf because "it would be most unfortunate if closely analogous "unjust factors" carried different approaches to claims against third parties".¹⁰² Again, it is submitted that there are differences between the two grounds for restitution, and, *Barclays Bank v. Simms*, the case cited by Burrows, has a vital difference from the present situation: at the time the payment there was made it was not authorized by the contract because of the stop-cheque notice. I am not aware of nor does Burrows cite any authority for the proposition that a mistaken payment under a valid contract can be recovered before the contract is set aside. Indeed it seems clear both from the *Simms* case and the recent decision of the Court of Appeal in *Lloyds Bank plc v. Independent Insurance Co. Ltd.*¹⁰³ that it cannot. In *Barclays Bank v. Simms* Robert Goff J described the distinction between a payment made with or without mandate as "crucial".¹⁰⁴ Where the payment is made with mandate (i.e., is a contractual payment) not only is the bank (P) entitled to have recourse to its customer (TP) but the customer's debt to the payee (D) is discharged. The consequence is that the payee has given consideration for the mistake and, "although the payment has been caused by the bank's mistake, the money is irrecoverable from the payee unless the transaction of payment is itself set aside".¹⁰⁵ In *Lloyds Bank plc v. Independent Insurance Co. Ltd.* the Court rejected the argument that even an authorized payment by the bank (P) may unjustly enrich the payee (D) where the bank is mistaken,

"conditional" meant not final because of the *contractual obligation* to repay. [1994] 1 W.L.R. 161, 165. In other words, there was no need to characterize the payment obligation itself as "conditional". In the phrase used in *Dies v. British International Mining and Finance Co. Ltd.* [1939] 1 K.B. 724, 742 (*see supra* text at note 64), the language used in the contract was not neutral.

101 *See The Trident Beauty* [1994] 1 W.L.R. 161, 165 (Lord Goff).

102 *Supra* note 33, at 5.

103 [1999] 2 W.L.R. 987.

104 [1979] 3 All E.R. 522, 539.

105 *Id.* at 539-40.

for instance as to whether there were funds in the customer's account because in such a case the customer's debt was discharged. As Lord Hope stated in *Kleinwort Benson Ltd. v. Lincoln CC* "the payee cannot be said to have been unjustly enriched if he was entitled to receive the sum paid to him".¹⁰⁶ Where, however, the payment is made without mandate (i.e., is not a contractual payment), prima facie the bank is entitled to recover the money.

It is submitted that the critics of *Trident Beauty* show an insufficient sensitivity to the effect of a valid contract and the existence of accrued rights in debt under it on restitutionary claims. It is submitted that the basic position should be the same as that gradually and painfully emerging where P sues D in tort and D relies on an exclusion clause in a contract between P and TP. In that context the position now is that D will generally succeed by showing that the exclusion clause restricts or excludes the tortious duty of care that D would otherwise owe to P¹⁰⁷ or by the recognition that there is nothing in the privity of contract doctrine truly intended to prevent D relying on such an exclusion clause by way of defense.¹⁰⁸ The nature of the claim P brings against D should not affect this. In short the privity doctrine does not apply (or is subject to an exception) where D is defending a claim brought against him — whether in tort or in restitution — by relying on an exemption clause in a contract between P and TP which is intended to protect him or otherwise to modify P's rights.

One question remains unclear. There are two potential routes; the analogue of the first route in the tort cases above, concentrating on the effect of the contractual arrangements on P's ground for restitution, and the analogue of the second route, the exception to the rule precluding a third party relying on a contract for his benefit where this is done by way of defense. If one focuses on the effect of the contractual arrangements on P's ground for a restitutionary claim, on what some rebarbatively call the "unjust" factor, one is focusing on whether P took the risk of non-recovery from D. If one uses the contract for the benefit of a third party approach, however,

¹⁰⁶ [1998] 3 W.L.R. at 1145.

¹⁰⁷ See cases cited at *supra* notes 7-8 and Daniel Friedmann, *supra* note 98.

¹⁰⁸ *London Drugs Ltd. v. Kuehene & Nagel International Ltd.* [1992] 3 S.C.R. 299 (Canada). See also *The Mahkutai*, [1996] A.C. 650, 665 (but the exclusive jurisdiction clause was held not to be intended to benefit third parties); *Dresser U.K. Ltd. v. Falcongate Freight Management Ltd.* [1992] 1 Q.B. 502, 511 (Bingham L.J.) (describing the principle of bailment on terms as "a pragmatic legal recognition of commercial reality"); *Privity of Contract: Contracts for the Benefit of Third Parties*, Law Com. C.P. No. 121 (1991), paras. 4.8-4.12; Law Com. No. 242 (1996) para. 2.19 ff.

the key is whether P and TP intended in their contract to shield D from a restitutionary claim by P. If they did, it is submitted that P should not succeed, even if, absent the contract, he is able to make out a prima facie right to restitution on one of the established grounds. But on this second approach, if they did not so intend, then the fact that the contract between P and TP provided for P to be recompensed by TP in respect of any benefit P conferred on D need not necessarily bar P's restitutionary claim against D. This may occur where, for example, TP is a guarantor of D's liability or is P's insurer. Whether in practice there is any real difference between these two approaches remains to be seen, for it must be an open question whether, when there is no intention so to benefit D, P in fact takes the risk.

CONCLUSION

Restitution will almost never be appropriate before a valid contract has been discharged. There are a number of reasons for this. First, where P has an accrued claim in debt in respect of the performance rendered the claim in debt will give him all the protection a restitutionary claim would give him. Secondly, allowing a restitutionary claim will often involve subverting the contractual allocation of risks and the contractual valuation of performance. Thirdly, holding a party (P) contractually liable to confer a benefit upon the other (D) which the law of restitution requires D to return to P or to make recompense to P is circular. Nevertheless, it should not be assumed that restitution is inevitably barred as a matter of analysis. There may be a gap in the contractual allocation of risks and, though there is no contractual right to repayment or recompense, the contract may, as in the fact situation contemplated by two of their Lordships in *Miles v. Wakefield M.B.C.*, contain no impediment to restitution.¹⁰⁹ Similarly, it has been argued that restitution does not inevitably cause circularity or duplication.

After a valid contract has been discharged, it is clear a restitutionary claim may be available as well as a contractual one. It is equally clear that the contractual allocation of risks cannot simply be thrown over. The history of the English law of restitution may lead courts to be too willing to conclude that restitution has thus been excluded by a contract. But commentators striving to show the independence of restitution can err in the opposite direction. So the view of some that there will always be a restitutionary claim unless the contract, construed strictly against the

109 See *supra* text at note 81 for an example.

party resisting restitution, has excluded it, goes too far. The terms of the contract and its nature are of vital importance to the existence and extent of any restitutionary claim. Apart from the question of express or implied exclusion by a contractual remedial regime which is a complete code, the contract determines both whether contractual rights are "conditional" and defeasible or "unconditional", and whether the acts of the person against whom restitution is sought (D) constitute part performance of the contract which will either bar P's claim or for which P will have to give credit.