Thinking About Principles and Actions: Unjustified Enrichment in Scots and South African Law

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Restitution

Fritz Schulz in his book, *Classical Roman Law*, in a chapter entitled, 'Unjustified Enrichment and *Negotiorum Gestio*' remarks with reference to unjustified enrichment that:

> The classical law was sound and cleverly contrived […] but the compilers have completely ruined the classical law […] This law is one of the worst parts of Justinian's law; it has confused and irritated generations of lawyers and exercised an evil influence on continental codifications down to our times.[1]

Schulz then provides an overview of the 'the very simple classical law the compilers so horribly mutilated'.[2] He does so wholly by reference to the *condictio*. At that time it was an action (remedy) with a *formula* of its own for the recovery of a certain sum of money or a certain thing (*certum*) the ownership of which had been transferred by a *datio* from P (pursuer) to D (defender) under circumstances which the law required to be reversed. One example was the payment in error of a sum/thing that was undue (*condictio indebiti*). However, as Schulz himself recognised, the *formula* of the *condictio* had a condemnation for the return of exactly the same sum/thing that had been paid/transferred judged by reference to the moment of its receipt.[3] It had a strictly restitutionary measure. This meant that, if bound to return the *certum*, D might have to give up more than the amount by which he was enriched. Therefore, when viewed from the perspective of Roman law, the *condictio* was not a claim of unjustified *enrichment* as represented by Schulz. Its understanding in this respect was to change in due course and the first steps in that direction

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[1] Fritz Schulz, *Classical Roman Law* (Oxford, 1954), 611.

[2] Ibid., 612.

[3] Ibid.

were taken by Roman law. The modern French legal system still adheres to a restitutionary understanding of the *condictio* law which is distinguished from an enrichment claim *strictu sensu*.[4] This was the position taken by early modern Scottish law as represented by Stair for whom the *condictio* was also a restitutionary and not an enrichment claim. However, in contemporary Scots law, because it is now subject to a defence of change of position, the *condictio* is a claim of unjustified *enrichment*.

Enrichment

'*Actiones in factum: condemnatio de eo (in id) quod ad eum pervenit or in id quod locupletiores facti sunt*'

The origin of '*enrichment*' is not in the *condictio* but in other remedies of Roman law which recognised a number of praetorian actions *in factum* in which the measure of recovery was formulated as the recovery of what remained of a benefit that had been received by a third party but that was now held by D (*in id quod ad eum pervenit*) or the *enrichment* which D had acquired under certain circumstances at P's expense (*in quantum lucratus*).[5] These were *ad hoc* adjectival responses to a range of fact situations and not a unitarily sourced body of law. However, when, very much later, 'unjustified enrichment' became recognised in its own right as a unitary source of obligations, a central identifier of its content was those claims which gave rise to an 'enrichment' measure of recovery. In other words, the measure 'enrichment' was (and still is) a central identifier of the law called 'unjustified *enrichment*'. The development was complicated because of considerable fluidity in the understanding of the circumstances in which an enrichment measure of recovery should be recognised. Some instances in which Roman law had conceived of such a measure had come to be understood in wholly different terms. They, therefore, do not form part of the modern law of 'unjustified enrichment'. However, to the opposite effect, some cases like the *condictio*, which had not given rise to an enrichment measure in Roman law, were later understood by some legal systems in such terms and

[4] K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (3rd edn, 1998), 545.

[5] See E. Levy, *Privatstrafe und Schadensersatz* (Berlin, 1915), esp. 88ff; Max Kaser, *Das Romische Privatrecht (erster Abschnitt)* (Berlin, 1955), 502, 523.

therefore they do now form part of 'unjustified enrichment'. This is the case in Scotland and South Africa.

'Unjustified' Enrichment as a Source of Obligations: Beginnings

Pomponius is credited with the statement:

> *Iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiorum*. (By the law of nature it is fair that no one becomes richer by the loss and injury of another).[6]

This statement of principle shows that classical Roman law had developed beyond 'enrichment' as a measure of recovery alone towards the idea of '(*unjustified*) enrichment' as a source of obligations. Lenel traces the text's origin to a commentary on the *condictio* which suggests that some of the applications of the *condictio* had come to be associated with the idea of the prevention of *enrichment* from a relatively early period.[7] In time Pomponius' statement became a fertile source of new law. Hallebeek has observed that it was realised that the maxim against allowing one person to be enriched at the expense of another 'not only plays a role in legal reasoning, but is even suitable for actual application […] This was even acknowledged already in Justinianic law'.[8]

Principle and the Development of Remedies

To begin with, the main formative influence of the principle against 'enrichment' was still manifested as a measure of recovery. The difference was that it was now extended to some new fact situations in which it was thought appropriate to prevent one person benefitting (being enriched) at the expense of another. Prominently, 'enrichment' came to be applied by Roman law as a novel measure within *negotiorum gestio*.[9] Therein begins the history of the

[6] *Digest,*50.17.206. Cf. the related text *Digest,*12.6.44.

[7] Otto Lenel, *Palingenesia iuris civilis* (1889).

[8] Jan Hallebeek, 'Developments in Mediaeval Roman Law' in Eltjo J. H. Schrage (ed.), *Unjust Enrichment, The Comparative History of the Law of Restitution* (2nd edn, Berlin, 1999), 59–120.

[9] Max Kaser, *Das römische Privatrecht, die nachklassischen Entwicklungen* (Munich, 1975), 415.

actio negotiorum gestorum contraria (utilis) as an enrichment action.[10] At this point in time '*unjustified* enrichment' was too indistinct a conception to provide it with actionability in its own name. Rather, actionability was provided to the novel fact situations under the umbrella of a recognised remedy like the *actio negotiorum gestorum contraria* which was seen by some jurists as suitable for the application of an 'enrichment' measure in a particular, extended, fact situation. 'Enrichment' that had been a feature of the praetorian law was now recognised also by the *ius civile*. In its later history this special claim was applied by some legal systems to cases of unauthorised improvement of another's property that could not be accommodated under the terms of the *condictio*.

Early Modern Period: Scots Law

Pomponius' principle against unjustified enrichment provided a broad reference point as a source of new law. The first formal identification of unjustified enrichment as a unitary body of law was by Hugo Grotius in 1631.[11] The full recognition of unjustified unjustified enrichment as a distinct source of obligations in Scots law has been in the last thirty years (1985–2015), nearly four hundred years later than Grotius. As Lord Macmillan observed in *Fibrosa*, 'The mills of the law [can] grind slowly'.[12] One major delaying factor was the influence of the writings of Stair (1681).[13] His scheme of obligations drew from a theological tradition according to which obligations are 'conventional' (contract) or 'obediential' (owed to God). Stair, like Roman law, did not conceive of a body of law called unjustified enrichment. The subject matter that is now the contemporary law of unjustified enrichment is scattered within his titles on 'restitution' and 'recompence' which are sub-divisions of 'obediential' obligations formed, in line with the theological teaching, according to the content of the response, whether restitution, recompence (or reparation). This has now been closely studied by contemporary scholars and is well understood.[14] However, Stair's natural law classifications were not

[10] See e.g. for Italian Law, Paolo Gallo, 'Remedies for Unjust Enrichment in the History of Italian Law and in the Codice Civile' in Schrage (ed.), *Unjust Enrichment*, 275–88.

[11] Robert Feenstra, 'Grotius's Doctrine of Unjust Enrichment as a Source of Obligations: its Origin and its Influence in Roman-Dutch Law' in Schrage (ed.), *Unjust Enrichment*, 197–236.

[12] *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, 58.

[13] Stair, *Institutions of the Law of Scotland* (1681), I.3.7–9.

[14] D. Reid, Thomas Aquinas and Viscount Stair, the influence of scholastic moral

fully accepted by those who immediately followed him and the Roman law scheme of obligations sourced in contract, quasi contract, delict and quasi delict re-asserted itself over time. David Daube has shown that the form in which a law(s) is first cast can sustain its influence long after its original rationale has ceased.[15] The Roman scheme did not wholly supplant that of Stair. What resulted over time was a mix of the two. Notable was the idea that what, for Stair, was the *response* of 'recompence' in a range of obediential obligations came to be understood as a group of *causes of action* in the Scots law of unjustified enrichment. A broader classification known as the three 'Rs' then became established that, depending upon the context, expressed either most of the causes of action *or* the responses of a body of law which was centrally, but, at the edges, only loosely, associated with the idea of 'unjustified enrichment'. Pomponius' principle again played a developmental role in the gradual pulling-together of disparate causes of action around a broadly conceived idea of 'unjustified enrichment'.

Peter Birks, in two articles written in the late 1980s, provided the diagnosis that was eventually to sweep away the classificatory muddles into which Scots law had sunk.[16] He suggested that part of the cure lay in jettisoning causes of action like *condictio indebiti* drawn from the civilian tradition in favour of what he argued were the functionally superior 'unjust factors' of English law. He attracted supporters and opponents in Scotland. There followed a period of considerable academic debate and judicial activity. The results have been referred to by Niall Whitty as the Scottish 'enrichment revolution'.[17] Its direction has been to affirm and develop the civilian foundations of Scots law and to begin to re-cast the classifications of the past. Part of its achievement, mainly due to Lord Rodger's judgment in *Shilliday v Smith* (1998),[18] was to re-define the three 'Rs' as remedies/responses[19] alone to which the causes of action of unjustified enrichment give rise. He also identified the *condictio* in its

theology on Stair's account of restitution and recompense, 29(2) (2008) *Journal of Legal History*, 189-214.

[15] Daube, *Forms of Roman Legislation* (Westport, Conn., 1979).

[16] Peter Birks, 'Six Questions in Search of a Subject – Unjust Enrichment in a Crisis of Identity', *Juridical Review* (1985), 227–50; idem, 'Restitution: A View of Scots Law', *Current Legal Problems,* 38(1) (1985), 57–82.

[17] Niall R. Whitty, 'The Scottish Enrichment Revolution', *Scottish Law and Practice Quarterly,* 6 (2001), 167–85.

[18] 1998 SC 725 ('*Shilliday*').

[19] Lord Rodger identified them as remedies. It is thought that they are better understood to be 'responses' derived in origin from Stair. The remedy sought is the order of the court to make restitution or recompense.

various manifestations in Scots law as representative of a group of causes of action and *not* remedies. This had, in fact, been the position since the time of Justinian but was consistently mis-understood in Scots law by those who, due to the powerful iconography of classical Roman law, sought to re-invest the Scottish *condictio* with the remedial character that it had had in the formulary system of old Roman law. Lord Rodger's focus in *Shilliday* was exclusively on the *condictio* claims. He did not seek to enumerate what he saw to be the causes of action of unjustified enrichment as a whole nor did he consider their overall categorisation.

The purpose of this chapter is to examine two recent significant developments in the law of unjustified enrichment in Scotland that are major steps forward in the continuing enrichment revolution first remarked upon by Whitty: (1) the division of unjustified enrichment into groups of cases according to the *manner* in which the enrichment was acquired. This results from academic commentary on the law and needs to be explained further; and (2) the recognition, due to judicial activism, of *a general enrichment principle* that any benefit held by D at the expense of P *without a legal ground* is recoverable. Both developments import changes in the law which are challenging. However, each finds its origin, and therefore its initial justification at least, in the Scottish materials. Additionally, both resonate with equivalent understandings of unjustified enrichment in modern German law. Scots law in this context draws from the same historical materials as German law and there are perhaps lessons to be learnt from the German experience, not all of which are positive.

A further theme of the chapter is to examine briefly the debate concerning the recognition, or not, of what is commonly referred to as a general enrichment 'action' in contemporary South African law that would mirror the new 'general' cause of action in Scotland. In South Africa the law of unjustified enrichment seemingly had reached stability in its overall conception on civilian lines as expressed in the recent monographs of Daniel Visser[20] and Jacques du Plessis.[21] This stability has now been challenged by Helen Scott who, in her more recent book, argues that the South African courts in fact adopt, and indeed should adopt (?) as functionally superior, an approach based to a significant degree on 'unjust factors' as developed by English law.[22] The experience of Scots law shows that problems arise at the interface of

[20] Daniel Visser, *Unjustified Enrichment* (Cape Town, 2008).

[21] Jacques du Plessis, *The South African Law of Unjustified Enrichment* (Claremont, 2012).

[22] Helen Scott, *Unjust Enrichment in South African Law, Rethinking Enrichment by Transfer* (Oxford, 2013).

the unfamiliar "general" civilian concept "retention without a legal ground" with the individual causes of action of unjustified enrichment with which the Scottish judges trained in the common law method are more familiar. What does 'retention without a legal basis' actually mean and how does it fit within a *system* of unjustified enrichment which, over time, has developed without it and in a different direction?

From Actions to General Justiciability: Remedies to Rights

The later history of the civil law (including Scots law) saw the recognition, at a differential rate, of unjustified enrichment as a concept that expresses the core requirements of a unitarily conceived body of law that now stands alongside e.g. 'contract' and 'delict', as a source of obligations. A range of disparate fact situations was first provided with actionability in remedies (actions) of Roman law that in the civilian tradition rested on the authority of the text of the *Corpus Iuris Civilis*. In Scotland the break from Roman law was made by Stair who replaced it, partly at least, with the authority of a Christian God. A positive by-product of Stair's revolution was to strip Scots law of much of the nomenclature of old Roman law drawn in origin from the formulary system, some of it obsolete even for late Roman law. '*Condictio*' remains part of the language of contemporary Scots law but, as we are reminded by Lord Rodger in *Shilliday*, the term no longer has an 'actional' import but has long been representative only of causes of action understood as *a system of rights* to recover a benefit under defined circumstances.[23] The transition from 'actions' to 'rights' renders obsolete for modern law restrictions like that of the *condictio* of the formulary system to the recovery only of a *certum*. In a properly conceived law of unjustified *enrichment* any benefit that enriches D at the expense of P is recoverable in principle. The cause of action *condictio indebiti* therefore must now also encompass the value of the performance of an undue service (*incertum*) if D was enriched by its receipt. Again the point was made by Lord Rodger in *Shilliday*.[24] Proceeding still further, since unjustified enrichment is recognised by the Scottish courts as a source of obligations, it – in all its applications – is generally justiciable as a system of rights on the basis of that recognition alone. 'Actions' as previously understood should have no

[23] *Shilliday*, 728C–D.
[24] Ibid., 727I–728A–D.

role to play. However, discussions of what is known as a general enrichment '*action*' persist in modern Scots and South African law. It is a puzzling dynamic.

The general enrichment 'action' is nothing other than one of a number of general principles of unjustified enrichment. It is referred to in such general 'actional' terms because, centrally, it expresses a single criterion of liability (cause of action) for the whole of the subject area. For South Africa Du Plessis explains that the scope of the modern law of unjustified enrichment has been constrained by the recognition only of a limited number of individual claims defined narrowly in conformity with their Roman law origins.[25] As yet South Africa has not recognised a *general*, all-encompassing, enrichment 'action'. If, as is likely, it is recognised in the future, it is argued that its major benefit will be to provide justiciability to fact situations which lie beyond the scope of the limited number of established claims. It may wholly supplant the established claims which all then become justiciable under its unitary terms or it may operate at a subsidiary level to them merely as a gap-filler.[26] A further benefit for South Africa in recognising the general 'action' is identified by Visser.[27] It will permit greater conceptual flexibility by enabling a redefinition of some claims in the light of developments in their understanding brought about by modern scholarship. He highlights 'interference' claims and argues that, because conceptually they are directed to the recovery of D's gain, they should not be subject to the normal rule that P must have suffered a mirror economic loss.

Sub-Diving Unjustified Enrichment into Groups of Claims

Due to the influence of Stair, Scots law now distinguishes according to the nature of the response to which each claim of unjustified enrichment gives rise, whether 'restitution' or 'recompence'.[28] Otherwise it has treated unjustified enrichment as a unity. By and large all the separate cases have been conceived in similar terms and subjected to the same general rules and principles. Since the law of unjustified enrichment itself lacked clear definition

[25] Du Plessis, *The South African Law of Unjustified Enrichment*, 1ff. For Scots law, see Martin Hogg, *Obligations* (2nd edn, Edinburgh, 2006), 237ff.

[26] See further below.

[27] Daniel Visser, 'The Potential Role of a General Enrichment Action', *Stellenbosch L .R.*, 20(3) (2009), 454–67, 461. Cf. for Scots law, *Exchange Telegraph Co. Ltd v Guilianotti* 1959 SC 19.

[28] *Institutions*, I.7–9.

until very recently, this is unsurprising. However, the 'enrichment revolution' has brought about major developments. Academic commentaries now recognise that although they are all expressions of 'unjustified enrichment', there are groups of claims in Scots law that have to be handled differently because they are conceptually and functionally distinct from each other in some significant respects.

The explanation for the existence of the 'groups' is that they were conceived as different causes of action in Roman law each with a distinct remedy of its own. They are brought together as expressions of unjustified enrichment only much later by modern scholarship. In Roman law the groups were the *condictio*, good faith possessor/builder on another's land, some acquisitions of ownership by D of what belonged to P without his permission, and payment of another's debt cases. The same groups are now identified, and distinguished from one another in Scots law, according to the *manner* in which the enrichment is acquired; whether by *deliberate conferral* of a benefit upon D by P; by P's *imposition* of a benefit upon D, by D's *interference* with the property and analogous rights of P and by D having had his *debt* or duty *discharged* by P under certain circumstances.

The identification of the groups by reference to the *manner* in which the enrichment was acquired is made by German law which in turn drew from Roman law. In Roman law the *condictio* required a '*negotium*' between the parties. The German Civil Code of 1900 gave '*negotium*' primacy by specific mention of those cases of unjustified enrichment received by a '*Leistung*' (deliberate performance) distinguished from a residual amorphous category of cases acquired 'in any other way' (*in sonstiger Weise*). Notwithstanding the wording of the Code that a benefit might be received in different ways (by performance or not) unjustified enrichment as a whole was then treated as a unity in the sense that all cases were subject to the same general rules.[29] In particular, a single criterion of liability in the form of a general enrichment principle or action was, and *ex facie* still is, applied in a unitary sense to all the cases. The principle is that any person who, at the expense of another, received a benefit *without a legal ground* (*ohne rechtlichen Grund*) is bound to restore it. However, unjustified enrichment is a composite of different groups of cases in which different party interests are involved. This was the important recognition of Walter Wilburg and Ernst von Caemmerer writing on German law commencing in

[29] There are some specific rules which only apply to the *Leistungskondiktion*: §§ 814, 815, 817, s. 2 BGB.

the 1930s.[30] Extrapolating from the approach of the Code which identifies the manner in which the benefit was acquired (*Leistung […] oder in sonstiger Weise […] erlangt* – what was received by performance or in any other way) they sub-divided what had been the amorphous 'other' group along the lines of its original Roman law constituents but now, under the influence of the Code, they identified each group by reference to the different manner in which the benefit was acquired. They also showed that the general principle 'retention without a legal ground' has to be understood differently depending on the group of cases to which it is applied. It is now accepted in Germany that the Code provisions on unjustified enrichment have to be understood in this way.

The groups of the contemporary law of unjustified enrichment originate in the different forms of action of Roman law but their description according to the manner of the enrichment is a modern innovation. The 'manner' descriptors are useful expressions of the essence of each group and therefore as the first signposts in understanding the law. For example, where property has been improved in circumstances giving rise to a cause of action they focus the initial enquiry on whether the enrichment resulted from a '*deliberate conferral*' resulting *e.g.* from an *agreement* between the parties which went wrong, or, which is quite different, from an '*imposition*' because an improver acted in the mistaken belief that the property was his own.

The differentiation between the groups has substantive value. For example, in most unjustified enrichment claims mirror 'loss' on P's part is a necessary requirement. However, in an 'interference' claim, as where D knowingly used P's property without right, at issue is the recovery by P of D's unjustified *gain*. As noted by Visser, it is not essential that P should have suffered a mirror loss in such a case. No differentiation was made in Scots law between the groups at the time of the decision in *Exchange Telegraph Co. Ltd v Giulianotti* which explains why, in what looks like a clear 'interference' case, one reason for the rejection of P's claim was that it had suffered no loss through D's unauthorised use of its service.[31]

Sometimes the 'manner' descriptors are treated as statements of the causes of action of unjustified enrichment. This is incorrect. Thus, for example, the 'deliberate conferral' grouping in Scots law comprises the many *condictio* based

[30] Walter Wilburg, *Die Lehre von der ungerechtfertigten Bereicherung nach* österreichischem *und deutschem Recht* (Graz, 1934); Ernst von Caemmerer, 'Bereicherung und unerlaubte Handlung' in *Festschrift für Ernst Rabel, vol. 1* (Tubingen, 1954), 333–401.

[31] 1959 SC 19.

causes of action. The 'imposition' group comprises the causes of action built up upon the good faith possessor/improver paradigm *etc.*

Causes of Action and the General Enrichment Principle (Action)

As a result of recent judicial activism Scots law has recently recognised a single criterion of liability to which all causes of action in unjustified enrichment now conform that a benefit which is retained by D at P's expense *without a legal ground* is recoverable. This is the general enrichment principle that is commonly referred to as the general enrichment 'action'.

In *Shilliday*, Lord President Rodger said that:

> [M]any […] have pondered what is meant by unjust enrichment. While recognising that it may well not cover all cases, for present purposes I am content to adopt the brief explanation which Lord Cullen gave in *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* at pp. 348–349: a person may be said to be unjustly enriched at another's expense when he has obtained a benefit from the other's actings or expenditure, *without there being a legal ground which would justify him retaining that benefit*.[32]

Lord Rodger applied the principle only to the *condictio* cases. This was rapidly to change. Drawing from modern civilian legal systems, Lord Hope elevated what had been a broad principle in Scots law into a general principle. In the hearing of the appeal of *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* before the House of Lords (1998), he said:

> The event which gives rise to the granting of the remedy is the enrichment. *In general terms* it may be said that the remedy is available where the enrichment *lacks a legal ground to justify the retention of the benefit*. In such circumstances it is held to be unjust.[33]

The principle was then given a still wider application. In an English appeal before the House of Lords (1999), Lord Hope said that:

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[32] *Shilliday*, 727B–D. The emphasis is my own.

[33] 1998 SC (HL) 90 ('*Dollar Land*') at 98H–I, 99E–F. The emphasis is my own.

> [T]he underlying principle […] is that of unjust enrichment. The purpose of the principle is to provide a remedy for recovery of the enrichment *where no legal ground exists to justify its retention*.[34]

The concept 'without a legal ground' (*sine causa*) originated in relation to the *condictio*. The classical Roman jurist, Papinian, said that:

> *Haec condictio ex bono et aequo introducta, quod alterius apud alterum sine causa deprehenditur, revocare consueuit* (this *condictio* which is based on the idea of what is good and fair enables a person to recover from another what the latter holds without a legal ground).[35]

Papinian's statement is taken from Justinian's Digest title on the *condictio indebiti*. A more general formulation of the *condictio* is dealt with in Book 12.7 of Justinian's Digest entitled, '*De Condictione Sine Causa*' (*condictio* claim for what is retained without a legal ground). In the language of the *ius commune* the *condictio sine causa* has both a particular application (*sine causa specialis*) to facts which fall outwith the established claims and a general application (*sine causa generalis*) as 'the common basis of all of the enrichment *condictiones*'. It has been used in both senses in Scots law since the earliest of times; *Findlay v Monro* decided in 1698 is a nice example.[36] The nominate *condictio* claims like e.g. *indebiti* supported by the *condictio sine causa* as defined is *the* system of the *condictio*. The system, its operation and its value for Scots law have been laid out in detail elsewhere.[37] As noted, Birks in his early work on restitution, founding on the decision of the Court of Session in *Masters and Seamen of Dundee v Cockerill*,[38] criticised the overly narrow operation of the *condictio indebiti* and recommended that it be jettisoned by Scots law in favour of the more expansive cause of action of English law, 'mistake'.[39] However, he focused on one application of the *condictio* alone (*indebiti*) and ignored the wider 'system' of which the *condictio sine causa* is a part. *Masters and Seamen of Dundee* raises a problem of overly narrow pleadings and not of the limitations of the *condictio* when it is understood as a complete system.

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[34] *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, 409. The emphasis is my own.

[35] *Digest,*12.6.66.

[36] Mor. 1767.

[37] Robin Evans-Jones, *Unjustified Enrichment*, *vol. 1: Enrichment by Deliberate Conferral* (Edinburgh, 2003), esp. ch. 6.

[38] (1869) 8 M. 278 ('*Masters and Seamen of Dundee*'), discussed further below.

[39] Birks, 'Six Questions'; idem, 'Restitution: A View of Scots Law'.

General Enrichment Principle: Different Meanings for Different Groups

The origin of the concept 'retention without a legal ground' is in the *condictio* alone in Roman law. In Stair it is also applied only to the *condictio.* This was its sole context where it was therefore a broad but not a general principle. Its recent elevation to a general principle is a major innovation for Scots law that has been brought about by leading judge(s), in particular by Lord Hope. The nature of the causes of action in the groups of enrichment cases is so different that if the application of the principle is to be 'general', then 'without a legal ground' has to be understood differently in relation to each group. This was recognised by German law in the 1930s. The *condictio* claims, broadly expressed, apply to cases where the parties have deliberately transacted for a legally recognised purpose (ground) that failed. *Condictio indebiti*, for example, applies where P deliberately conferred a benefit on D *to discharge* an existing debt or duty: *e.g.* P pays D £100 because he thinks that he owes him £100. If the payment discharges the existing debt D's ground (right) to retain the money lies in the valid discharge. However, if the parties then discover that the debt had already been paid, because discharge of a non-existent debt is not possible, their purpose to discharge the debt with the second payment necessarily failed. Since there was no discharge D holds the money 'without a legal ground' and it is recoverable. The identification of the 'ground' in the 'discharge' is very different indeed from the meaning given to it *e.g.* in the recent decision in *McGraddie v McGraddie and Green*.[40] P had paid his son money to buy him, P, a house. His son (D1) and partner (D2) did not buy the house and used the money for their own purposes. The son was held to be in breach of a fiduciary duty and his partner liable in unjustified enrichment because she held the benefit 'without a legal ground'. D2 had benefitted gratuitously from money to which P alone was entitled. The paradigm in unjustified enrichment is 'interference' with P's property rights. 'Without a legal ground' signifies that the benefit was taken 'without right' as that is understood in relation to an 'interference' claim. No assimilation in this sense is possible with the meaning 'failure to discharge' in the *condictio indebiti*.

General Enrichment Principle: It is Not a Wholly New Beginning

In Scots law 'retention without a legal ground' now identifies the single

[40] [2010] CSOH 60; [2012] CSIH 23.

condition under which P has a right in unjustified enrichment generally to recover a benefit held at his expense by D. Its function as a broad principle in relation to the *condictio* claims has always been recognised by Scots law albeit, to date, sometimes in a haphazard fashion. One value of the judicial recognition of the general application of the principle is that it emphasises the importance of the 'system' of the law of unjustified enrichment as a whole of which the *condictio* is just one part. It also provides breadth to the *condictio* claims and a mechanism for flexibility while maintaining stability. New fact situations may arise which do not fit within the requirements of an established cause of action. They may nevertheless be recognised as generating a cause of action if they are expressive of the general principle.[41] For example, *condictio indebiti* narrowly construed concerns the recovery of undue sums/things/services conferred in error as to legal liability. The *condictio sine causa* (retention without a legal ground) permits recovery of undue sums made under compulsion or in doubt as to legal liability. The common element which provides the stability in all of these cases is that the benefit must be *undue* and held without a legal ground in that sense. Flexibility is provided by the recognition that what is undue should be recoverable beyond cases of error alone; as in a case of doubt as to liability. 'Doubt' has long been recognised by Scots law – in the language of English law – as a sufficient vitiating factor to found a claim where the recovery of 'undue' is at issue.[42] Where P *knew* that what he conferred was undue it is not recoverable in the absence of compulsion. 'Knowledge' cannot normally be assimilated with 'error' as a vitiating factor, whereas 'compulsion' and 'doubt' can.

Some Problems: *Condictio Causa Data Causa non Secuta* and Retention without a Legal Ground

All contemporary Scottish judges were educated to think of 'unjustified enrichment' only within the terms of the three Rs. Against that background the recognition of the general enrichment principle is a large step. Its 'newness' has led some judges to seek wholly fresh beginnings in the concept 'retention without a legal ground'. For example, in a *condictio* context, where the conclusion is inappropriate, they have held that a legal ground which entitles D to retain what he received from P must be a *legally obligatory* transaction like a contract.

[41] Evans-Jones, *Unjustified Enrichment*, *vol. 1*, ch. 6; idem, *vol. 2*, ch. 3.

[42] Cf. *Balfour v Smith and Logan* (1877) 4 R 454.

The *condictio causa data causa non secuta* has had a complicated history in Scots law mainly because of its exposure to the idea that it lies in circumstances of 'failure of consideration'. That apart, it is the claim to recover what is given for a future legal purpose out with contract that fails. For example, as in *Shilliday*, P repaired D's house in anticipation of their marriage. The marriage did not take place. P recovered her expenditure to the extent that D was enriched thereby. It is of the essence of the claim that the future purpose that failed (marriage) is *not* enforceable: P was unable to force the marriage on D but she is entitled to recover benefits conferred on that 'ground' if it never took place. However, drawing from the principle 'retention without a legal ground' two recent cases before the Court of Session turned the 'non–enforceability' of the future purpose (ground) on its head by requiring that it must be legally obligatory. At issue in both cases was the determination of the time from when prescription begins to run. It was decided in each that, because P was not *legally bound* to enrich D when he/she did, prescription runs from the moment of the receipt of the benefit since from that moment there was also no legal ground for its retention. On a novel understanding of 'legal ground' in both cases a claim which, *ex facie*, had not prescribed was dismissed on the ground that it had prescribed.

(1) *Virdee v Stewart*[43]
P, at her own expense but with some grant aid, built a house on the croft of her brother for use by her family and her brother when the house was not occupied. The house was completed in August 1994. In 2009 the relationship of the siblings broke down and P was excluded by her brother from use of the house. She raised a claim of unjustified enrichment for her costs. It was held that since the brother had no enforceable legal right to the house when it was built it was retained by him without a legal ground from that moment. The prescriptive period of five years was therefore seen to have run from 1994. However, the basis for D's retention of his enrichment was the agreement with his sister (which was not conceived as a contract). The agreement failed in 2009 which is when the prescription should have started to run. The case was not appealed. If the claim had been successful it would have raised an interesting issue concerning the measure of recovery.

(2) *Thomson v Mooney*[44]

[43] [2011] CSOH 50.
[44] [2012] CSOH 177.

In June 2005 P enriched D by a series of payments which he claimed were made in anticipation of marriage and continued co-habitation. The parties never married and in September 2007 they ceased to co-habit. P raised the *condictio causa data causa non secuta* to recover the money. D's defence was that the claim had prescribed. In the decision at first instance D's ground for retention of the benefit was approached from the perspective of the new general enrichment principle. The reasoning was that since P's payments were gratuitous (not legally enforceable) he could have recovered them immediately from D had he wished. The conclusion was then drawn that since D had never had an enforceable legal entitlement to the money, by definition she had had no legal ground to retain it from the moment of its receipt. P's payments had been made more than five years before the claim was raised and it was held that it had therefore prescribed.

(3) Retention without a Legal Ground: Possible Origins of the Idea that the Ground must be Legally Enforceable?

Lord Hope was partly, perhaps primarily, responsible for the recognition of the general enrichment principle in Scots law. In his leading judgment before the House of Lords in *Dollar Land* he identified a contract as a legal ground which entitles D to retain a benefit received by him at P's expense.[45] On the facts before the Committee the consequence was that it was by reference to the surviving lease contract between the parties that their dispute had to be resolved. This was important because the result based on the contract was very severe. For their investment of more than two million pounds in Cumbernauld shopping centre Dollar Land was held, under the terms of the contract, to be entitled to a return of £1 (one pound) *per* year for the next 125 years. It was probably from the presentation of contract as the paradigm 'legal ground' that the conclusion has been drawn elsewhere that a legal ground must be a legally enforceable transaction.

(4) Subsidiarity

Lord Hope was clear in Dollar Land that the law of unjustified enrichment is subsidiary to contract. This is well understood. Within the law of unjustified

[45] *Dollar Land* at e.g. 94D–F. The merits of the decision of the House of Lords is sometimes questioned; see Robin Evans-Jones, 'Thinking about Some Scots Law: Lord Rodger and Unjustified Enrichment' in Andrew Burrows, David Johnston and Reinhard Zimmerman (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford, 2013), 431–45.

enrichment the issue of subsidiarity arises at a number of levels. One concerns the standing of the general 'action'. Martin Hogg has written that 'it is not necessarily the case that […] there is, or ought to be, a general anti-enrichment "action" […] opinion is divided as to whether there should be a number of anti-enrichment actions or […] a single general enrichment action'.[46] What Hogg means is that, once recognised, should the general 'action' supplant all the other long established claims under its unitary terms or should it remain subsidiary in that it is used only when absolutely necessary? Subsidiarity of the general claim is very strongly advised.[47] Firstly, it has been shown that it is not in fact unitary in meaning but has to be understood differently according to context. Secondly, it can too easily undermine the established law if it is not constrained. For example, to found a *condictio indebiti* P must prove that the benefit was received by D, that it was undue and conferred in error as to legal liability. The *condictio indebiti* may also certainly be expressed more succinctly in the terms of the general principle that D retains the benefit 'without a legal ground'. However, if, instead of using it as a mere convenient shorthand, a court approaches the applications of the *condictio indebiti* from the perspective of the general principle alone, because it expresses only a single abstract condition (without a legal ground) the result can be to elide and confuse what are the more numerous conditions that need to be satisfied to found the claim.[48] In determining what is 'unjustified' and founds a cause of action, Birks made the point that the law looks downwards to the decided cases and not upwards to an unknowable justice in the sky.[49] In *Virdee* and *Thomson* examined above the general principle was treated as a wholly new beginning in the understanding of the cause of action even although its requirements as a *condictio* in Scots law have been well known for hundreds of years. The result was that unjustified enrichment had indeed set off in pursuit of an unknowable, or simply wrong, justice in the sky.

(5) Turning the Corner: Appeal in *Thomson v Mooney*[50] and Judgment of Lord Tyre in *Stork Technical Services (RBG) Ltd v Ross*[51]

The problems with the understanding of 'legal ground' in respect of the cause of action *condictio causa data causa non secuta* can be viewed as the inevitable early

[46] *Obligations*, 237-238.

[47] Cf. Hogg, *Obligations*, 237.

[48] Cf. Visser, 'The Potential Role of a General Enrichment Action', 456–8.

[49] Peter Birks, *An Introduction to the Law of Restitution* (Oxford, 1989), 19.

[50] [2013] CSIH 115.

[51] [2015] CSOH 10A.

consequence of the major innovation which the recognition of the general principle represents. A greater judicial ease with the results of the enrichment revolution is evidenced by two more recent decisions.

(a) *Thomson v Mooney*

The decision at first instance was overturned on appeal. Drawing on the writing of Stair on the *condictio causa data causa non secuta* the Inner House of the Court of Session identified the failure of the parties' agreement as the moment from which prescription began to run and not the time of payment. It therefore held that P's cause of action had not prescribed:

> so long as the cause in contemplation of which the enrichment was conferred is still in contemplation or still to be provided, and its accomplishment has not yet failed, the enrichment cannot be said to be *sine causa* (without a legal ground) and thus cannot be unjustified.

(b) *Stork Technical Services (RBG) Ltd v Ross*

Lord Tyre considered whether a claim for restitution is available to recover a payment made by one party to a contract for a reciprocation by the other that amounts to a failure of mutuality which is a breach of their contract. He stated that the law of Scotland is still in development and that the outcome is 'of more than academic interest'. In an insightful judgment he brought to an end the troubled history of the *condictio causa data causa non secuta* as the appropriate claim for restitution following rescission of a contract for a *serious* breach and he identified the right to restitution in such circumstances as founded in the law of contract, not unjustified enrichment. The restitutionary right which had been understood for many years to lie in circumstances of 'failure of consideration' in the law of unjustified enrichment was re-defined by Lord Tyre as resting on a 'failure of mutuality' within the contract.[52]

General Enrichment 'Action': South Africa

Writing in 1985 Reinhard Zimmermann noted the 'cause célèbre' of *Nortje en 'n ander v Pool* where in 1966 the South African Appellate Division (now the Supreme Court of Appeal) rejected the idea of a general enrichment

[52] See esp. R. Evans-Jones and J. A. Dieckmann, 'The Dark Side of *Connelly v. Simpson*', *Juridical Review* (1995), 90–101.

action.[53] The underlying policy consideration was that such an action would open the floodgates for judicial intervention'. However, Zimmermann argued persuasively in favour of recognition of the principle. He concluded his review of the issues in the following terms: 'There seems to be a valuable treasure of experience at hand once South African law has done what seems inevitable: recognised the general enrichment principle."[54]

Thirty years later the general enrichment action/principle has still to be recognised. Nevertheless the Rubicon, if such it ever was, has probably been crossed. Visser observes in relation to two recent decisions of the Supreme Court of Appeal, especially *McCarthy Retail (Pty) Ltd v Shortdistance Carriers CC*,[55] that they:

> represent a watershed in the South African law of unjustified enrichment. By announcing that it would, when the next opportunity arose, recognise a general enrichment action, the Supreme Court of Appeal has made it possible to refashion this part of our law in a way which resonates with current values in our society, and which renders it responsive to modern commercial demands.[56]

(1) *McCarthy Retail (Pty) Ltd v Shortdistance Carriers CC*

The respondent's truck had been damaged. It was taken to the appellant's garage where the respondent's (owner's) instructions were that it was not to be repaired until the respondent's insurers had given the go-ahead. Due to a misunderstanding between the appellant and the respondent's insurers, the truck was repaired without the go-ahead being given. The respondent's insurance claim was repudiated (albeit wrongfully). Subsequently the insurance claim prescribed. The appellant claimed from the respondent (owner) the cost of the repairs to the truck by way of an enrichment claim. The claim was dismissed in the Provincial Division. Before the Supreme Court of Appeal (SCA) it was held that: the case concerned a typical instance of necessary and useful improvements made to an owner's property without there being a contract between the repairer and owner. The appellant had been either a

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[53] Reinhard Zimmermann, 'A Road through the Enrichment Forest', *Comparative and International Law Journal of Southern Africa,* 18 (1985), 1–20; citing 1966 (3) SA 96 (A).

[54] Ibid., 20.

[55] 2001 (3) SA 482 (SCA).

[56] Visser, *Unjustified Enrichment*, 7.

lawful or *bona fide* occupier and on that ground it (garage) was entitled to the cost of the repairs from the owner.

The leading judgment was given by Schutz JA. He observed that the rich Roman source material has (to date) not led to an unqualified judicial recognition of a unified general principle of unjustified enrichment nor a general enrichment action.[57] Fear of a tide of litigation has constrained the recognition of the latter. In his view this fear has been misplaced because it fails to take into account that a general enrichment action is itself subject to constraints: 'under a general action only very few actions would succeed which would not have succeeded under one or other of the forms of action or their continued extensions'. He identified the function of the general enrichment action as being to fill the gaps: 'In a rare case where even an extension of an old action will not suffice I would favour the recognition of a general action. The rules governing it should not be too difficult to establish […] We have been applying many of them for a long time'.

Schutz JA signalled that in due course South Africa will recognise a general enrichment action. Harms JA expressed 'some diffidence' on the point.[58] According to Schutz JA it is best treated as subsidiary to the established claims; its function will mainly be gap-filling. It should not initiate a wholly new beginning for unjustified enrichment. As regards its impact, he is conservative. Visser, by contrast, sees its potential as more transformative.

Conclusions

(1) Scotland

As a result of the recent 'revolution' – both academic and judicial – unjustified enrichment is recognised in Scots law as a source of obligations in its own right subject to a set of general principles stated within a new structure. In *Shilliday* Lord Rodger affirmed that the term *condictio* represents a cause of action alone and, building on the insight of Birks, he provided the judicial authority which has led to the solution of the classificatory muddles of the three Rs. The judiciary has recognised a general cause of action, 'retention without a legal basis'. Most prominent in this regard has been Lord Hope. The recognition did not arise from the need to address a novel fact situation. It came about as an organic, natural, development of the law. Was it worthwhile? Views no doubt

[57] *McCarthy Retail*, 487E–J, 488–9.

[58] Ibid., 496A–B.

differ. In this writer's opinion it is important in providing 'range' and 'system' to the law of unjustified enrichment. We may note that Visser has suggested that come the day of its recognition in South Africa, it will be the *Donoghue v Stevenson*[59] of the law of unjustified enrichment.[60] However, it has not been without problems. 'Retention without a legal ground' has complicated the landscape of unjustified enrichment in Scotland. There have been difficulties in understanding what it means and it has been treated by some judges as a wholly new beginning and not subsidiary to the established causes of action. Thereby it immediately started to go wrong. It is best treated as subsidiary as that has been explained.[61]

One big question remains: Why the revolution in which the judiciary has been so rapidly and usefully pro-active? When he held the Chair of Civil Law at the University of Edinburgh, Birks convinced the broad legal community in both England and Scotland of the importance of the 'new' subject 'unjustified enrichment'. The "revolution" in Scotland is a testament to the powerful personal influence of Peter Birks notwithstanding that he first argued for the development of the law in a different direction from that which has since been taken in Scotland.

(2) South Africa

Sixteen years after *McCarthy Retail* (2001) the general enrichment action has yet to be recognised notwithstanding many attempts by academics to foster it. Much has been made of the negative influence of the decision of the Appellate Division in 1966 in *Nortje en 'n ander v Pool*.[62] Whether that is justifiable has been questioned elsewhere by this writer.[63]

The recognition of a general enrichment action in South Africa will not occur as an organic development of the law as it has in Scotland. A special case that reveals a "gap" in the law is required. *McCarty Retail* was not seen to be the right case because, according to the SCA, it did not raise a 'new' fact situation. It was treated as a "typical" improvements case in which the owner was the only person enriched, who, *ipso facto*, was therefore liable. Whether this conclusion was justified is open to question for a number of complex reasons which cannot be explored here. Some observations highlight the problem. The

[59] 1929 SC 461; 1932 SC (HL) 31; [1932] AC 562.

[60] Visser, *Unjustified Enrichment*, 12.

[61] Cf. Hogg, *Obligations*, 237.

[62] 1966 (3) SA 96 (A).

[63] Evans-Jones, 'Searching for "Imposed" Enrichment in Improvements'.

owner of the truck was made to bear the risks deriving from the relationship garage-insurance company even although he had had no dealings with the garage. Yet, Mr Dinkel, the garage proprietor, was described as an impatient and impulsive man who could easily have jumped to the conclusion that he had the authority to repair when in fact he did not.[64] Furthermore, the owner had paid the insurance premiums and so, to that extent at least, by being held liable in full to the garage for the repair costs he was made to "double-pay". In the circumstances it seems to this writer that some attempt should have been made to balance the interests of the owner and the garage. The easy classification of the facts as a "typical" improvement case allowed a too easy attribution of all risks to the owner of the truck.

Over a long period of time the Appellate Division/SCA has refused to recognise a general enrichment "action" because it fears academic and judicial "over-creativity" which, as Birks described it, would lead to an unknowable justice in the sky. The recent experience of Scotland confirms that, to begin with at least, such a fear may not be misplaced. Yet there is perhaps some irony in the fact that arguably the SCA was overly creative in *McCarthy Retail* in seeking to maintain the *status quo*. Its purpose in presenting this as a "typical" improvements case was to reach a fair solution in which the owner was not allowed to get off "scot-free".[65] He certainly did not get off scot-free; quite the opposite. Yet quite where the justice of the result lies seems rather elusive.

[64] Ibid., 486. This judgment of the character of Mr Dinkel was made by the judge of first instance.

[65] I am very grateful to Philip Hellwege, Jacques du Plessis, Helen Scott and Euan West for their comments.