Doubting the subsidiarity of unjust enrichment

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Courts and commentators frequently use the noun "subsidiarity" and the adjective "subsidiary" to help explain certain of unjust enrichment's relations with other areas of law and legal institutions—especially property, contract, and statute. However, the vocabulary of subsidiarity is unsuited for that purpose. It should disappear from unjust enrichment discourse. After its Introduction, this paper proceeds in four Parts. Parts II and III analyse accounts of unjust enrichment as subsidiary to property and contract. The instances in which unjust enrichment claims are said to be subsidiary to property and contract are ones in which a given enrichment is not unjust in the first place. They are situations where, as a matter of law, no unjust enrichment claim actually exists to be subsidiary to any other claim or institution. They cannot logically, therefore, represent examples of the so-called subsidiarity of unjust enrichment. They are better explained through the spectrum of the "unjust question" in the unjust enrichment inquiry. Part IV applies the same arguments to the interaction of unjust enrichment and statutes which are entirely inconsistent with unjust enrichment claims. It also demonstrates that unjust enrichment is not subsidiary to statutes which, though not exclusive of unjust enrichment, nevertheless alter its normal operation. Part V concludes.

I. INTRODUCTION

Distinguished scholars have remarked that unjust enrichment "always seems to raise the issue of subsidiarity".[1] This involves "questions of the relationship between [unjust] enrichment and other parts of the law".[2] More specifically, it concerns the *constraint*

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The following abbreviations are used:

Campbell, "Subsidiarity": M Campbell, "The Subsidiarity of Unjust Enrichment: Anglo-Franco-Scots Perspectives" (PhD Thesis, Edinburgh, 2019), available at https://era.ed.ac.uk/handle/1842/35761; Virgo, *Principles*: G Virgo, *The Principles of the Law of Restitution*, 3rd edn (Oxford, 2015).

1. D Johnston and R Zimmermann, "Unjustified Enrichment: Surveying the Landscape", ch.1 of D Johnston and R Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge, 2002), 29.

2. HL MacQueen, "Unjustified Enrichment, Subsidiarity and Contract", ch.11 of V Palmer and E Reid (eds), *Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland* (Edinburgh, 2009), 329.

of unjust enrichment claims by the operation of other kinds of claim or legal regime.[3] I have elsewhere shown, first, that subsidiarity is commonly accepted due to "the power and generality of unjust enrichment: a perceived need to prevent its upsetting solutions provided by other legal rules".[4] Secondly, however, whilst unjust enrichment seems to be "the only private law arena in which it has been addressed at any length", anglophone "private lawyers' understanding of subsidiarity in the abstract is germinal".[5] This paper builds upon those findings. True it is that a growing number of courts and commentators in the common law world frequently use the noun *subsidiarity* and the adjective *subsidiary* to help explain certain of unjust enrichment's relations with other areas of law—especially property, contract, and statute. However, the vocabulary of subsidiarity is unsuited for that purpose. It should disappear from unjust enrichment discourse.

This paper proceeds in four further Parts. Parts II and III analyse accounts of unjust enrichment as subsidiary to property and contract.[6] They show that the instances in which unjust enrichment claims are said to be subsidiary to property and contract are ones in which a given enrichment is not unjust in the first place. This means that they are situations where, as a matter of law, no unjust enrichment claim actually exists *to be* subsidiary to any other claim or institution. They cannot logically, therefore, represent examples of the so-called subsidiarity of unjust enrichment. They are better explained through the spectrum of the "unjust question"[7] in the unjust enrichment inquiry.[8] Part IV applies the same arguments to the interaction of unjust enrichment and statutes which are entirely inconsistent with unjust enrichment claims. It also demonstrates that unjust enrichment is not subsidiary to statutes which, though not exclusive of unjust enrichment, nevertheless alter its normal operation. Part V concludes.

English sources are addressed throughout. Australian material is also drawn upon, especially to establish that the arguments in Parts III and IV apply broadly.[9] Others have shown that, with care, examining these jurisdictions in parallel is fruitful, particularly when considering the requirement that a recoverable enrichment be unjust.[10] More generally, the

3. R Grantham and C Rickett, "On the Subsidiarity of Unjust Enrichment" (2001) 117 LQR 273, 273–274 and *passim*; L Smith, "Property, Subsidiarity and Unjust Enrichment", ch.21 of Johnston & Zimmermann (eds), *Unjustified Enrichment: key issues in comparative perspective* (2002) (hereafter "Property, Subsidiarity and Unjust Enrichment"), 596–597, 613, 623; C Jooste and EJH Schrage, "Subsidiarity of the General Action for Unjust Enrichment, I" [2016] TSAR 1, 7–9.

4. Campbell, "Subsidiarity", 1, 3, 5, and ch.3 esp 75–76, 82–84, 91–92, 96.

5. M Campbell, "Subsidiarity in Private Law?" (2020) 24 Edin L Rev 1, 6, 22.

6. Descriptions of some types of unjust enrichment claim as subsidiary to other unjust enrichment claims are not addressed because they are absent from common law systems; descriptions of unjust enrichment as subsidiary to tort or delict in purely anglophone legal systems are few and equivocal enough that they may be left aside too. For sceptical discussion, see Campbell, "Subsidiarity", chs 7 and 9.

7. A Burrows, "In Defence of Unjust Enrichment" [2019] CLJ 521, 528.

8. After whether the defendant was (1) enriched, (2) at the claimant's expense, (3) unjustly, (4) without defences: *Samsoondar v Capital Insurance Co Ltd* [2020] UKPC 33 (T&T), [18–20]; *Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd (No 3)* [2014] WASC 162, [45–55]; *Gill v Garrett* [2020] NSWSC 795, [427–430], all collecting and explaining authorities.

9. Brief mention of Scots law for illustrative purposes is explained at the start of Part IV, *post*, text to fnn 67–74.

10. C Mitchell and P Mitchell, "Recurring Issues in Failure of Basis" [2020] LMCLQ 498, 498–499; J Edelman and E Bant, *Unjust Enrichment*, 2nd edn (Oxford, 2016) chs 1, 6–7, also referring to authority from common law Canada "[a]t relevant points", including on the unjust question: *ibid*, 1–2, 122–125, 130–132. In the same supplementary fashion, Canadian authority is cited in Parts III and IV to show that the same basic positions as in England and Australia can obtain under Canada's "juristic reason" approach to the (in)justice of enrichments. For discussion, see *Moore v Sweet* 2018 SCC 52; [2018] 3 SCR 303; noted M McInnes (2019) 62 Can Bus LJ 277; JD McCamus (2020) 98 Can Bar Rev 109.

status of unjust enrichment in both countries is sufficiently similar for present purposes. Anglo-Australian unjust enrichment is not a cause of action, dispositive principle, or unified theory of instances in which restitutionary remedies are available; it is a concept that underlies, and assists in the explanation and development of, a category of claims.[11] References below to unjust enrichment claims are to those within this category,[12] which is not closed.[13]

II. UNJUST ENRICHMENT IS NOT SUBSIDIARY TO PROPERTY

The case law seems not to contain accounts describing unjust enrichment as *subsidiary* to property law or property claims. The practice remains the preserve of commentators. The unavailability of *indebitatus assumpsit* where ejectment would lie has been retrospectively explained as "analogous to what we are now learning to call 'subsidiarity'".[14] *Assumpsit*, it is said, "was a subsidiary remedy, not a universal substitute".[15] Though not all have adopted it,[16] comparable usage is observable in accounts of the modern law. So, it has been argued that unjust enrichment is "subsidiary in the sense that [its] scope and operation […] are necessarily constrained by the scope and operation of the other core doctrines of the private law, [including] the law of property".[17] Unjust enrichment's subsidiary nature entails that, where the consequences of a defective beneficial transfer "are already regulated, such that the restoration of the status quo ante is already provided for", unjust enrichment "has no role to play".[18] Thus, where a claimant "retains title to an asset that passes into [a] defendant's possession":

11. *Barnes v Eastenders Cash & Carry Plc* [2014] UKSC 26; [2014] Lloyd's Rep FC 461; [2015] AC 1, [102], [112], approving Australian authority; *HMRC v Investment Trust Companies (in liq)* [2017] UKSC 29; [2018] AC 275, [24], [39–42]; *Lowick Rose LLP v Swynson Ltd* [2017] UKSC 32; [2018] AC 313, [22]; *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32; 373 ALR 1, [74] (Gageler J), [150], [199], [212–213] (Nettle, Gordon and Edelman JJ, speculating that relevant differences may have lessened).

12. Including claims to recover benefits conferred (1) by mistake: *Universal Advance Technology Ltd v Lloyds Bank Plc* [2016] EWCA Civ 933, [21–29]; *Rema Tip Top Asia Pacific Pty Ltd v Grüterich* [2019] NSWSC 1594, [615–643]; (2) non gratuitously, in anticipation of a contract which fails to materialise: *Astra Asset Management UK Ltd v Co-Operative Bank Plc* [2019] EWHC 897 (Comm), [142–178]; *Warrington Management Pty Ltd v Kingslane Property Investments Pty Ltd* [2020] WASCA 8, [106–109], [129–150]; or (3) under an ineffective transaction: *Sharma v Simposh Ltd* [2011] EWCA Civ 1383; [2013] Ch 23, [21]; *Akierman Holdings Pty Ltd v Akerman (No 2)* [2020] NSWSC 970; 147 ACSR 63, [80].

13. *Samsoondar* [2020] UKPC 33, [20]; *Gibb v Maidstone & Tunbridge Wells NHS Trust* [2010] EWCA Civ 678; [2010] IRLR 786, [25–28] (Laws LJ, with whom Rimer LJ agreed); *Bofinger v Kingsway Group Ltd* [2009] HCA 44; 230 CLR 269, [88–89] (Gummow, Hayne, Heydon, Kiefel and Bell JJ).

14. J Baker, "The History of Quasi-Contract in English Law", ch.3 of W Cornish and others (eds), *Restitution, Past, Present and Future: Essays in Honour of Gareth Jones* (Oxford, 1998), 52–53; passage also appearing in one of the papers on which this is based: J Baker, "The Use of Assumpsit for Restitutionary Money Claims—1600–1800", ch.2 of EJH Schrage (ed), *Unjust Enrichment: The Comparative Legal History of the Law of Restitution* (Berlin, 1995), 52–53.

15. J Baker, *An Introduction to English Legal History*, 5th edn (Oxford, 2019), 396–397.

16. Smith, "Property, Subsidiarity and Unjust Enrichment", 619–621, 623.

17. Grantham and Rickett (2001) 117 LQR 273, 273. See also R Grantham and C Rickett, *Enrichment and Restitution in New Zealand* (Oxford, 2000) 51–53; *idem*, "Property Rights as a Legally Significant Event" [2003] CLJ 717, 741–744; R Grantham, "The Equitable Basis of the Law of Restitution", ch.14 of S Degeling and J Edelman (eds), *Equity in Commercial Law* (Sydney, 2005), 365–371.

18. Grantham and Rickett (2001) 117 LQR 273, 291–293.

"[T]he mechanism for recovery is the right, inherent in [the claimant's] title, to the wealth represented by that asset. While it is possible to describe the defendant in such a case as enriched in lay terms, as a matter of legal doctrine there is no enrichment. The defendant's receipt was always encumbered with an obligation, arising from the [claimant]'s title, to return the property. That obligation means that there is nothing calling for the intervention of the law of unjust enrichment."[19]

This is unjust enrichment's subsidiarity to property. On this view, where a claimant retains title to an asset in a defendant's possession, the defendant is not unjustly enriched, and unjust enrichment has no function. Retention of title precludes unjust enrichment.[20]

The question whether retention of title does indeed prevent unjust enrichment is controversial.[21] As to rights in intangible property, which the tort of conversion does not protect,[22] the decision of the House of Lords in *Foskett v McKeown*[23] can be read as answering the question positively.[24] By reference to *Foskett*, a distinction "in principle" between claims to vindicate property rights, and claims in unjust enrichment, was later recognised in *Menelaou v Bank of Cyprus UK Ltd*.[25] Although, in that case, their Lordships did not specifically discuss the issue addressed in this paragraph, there are telling pinpoint references in the judgments to Lord Browne-Wilkinson's and Lord Hoffmann's *Foskett* speeches, and to a passage in Lord Millett's, where his Lordship referred to his own earlier, relevant remarks.[26] A noted first instance decision also presents the cases, including *Foskett*, and *Lipkin Gorman v Karpnale Ltd*,[27] as holding that the retention of either legal or equitable rights in assets, both intangible *and* tangible, prevents the existence of unjust enrichment.[28]

Without committing to a view on the background controversy, it is suggested that one plausible explanation for the authorities just mentioned is that, whilst a person may be

19. *Ibid*, 291–292 and fnn 107–108; citing, *inter alia*, *Foskett v McKeown* [2000] Lloyd's Rep IR 627; [2001] 1 AC 102 (HL). The language of subsidiarity is absent from that case.

20. Grantham and Rickett (2001) 117 LQR 273, 292: "the presence of a mechanism to restore the status quo ante, which encumbers the enrichment, denies the possibility both that the defendant is enriched and that such enrichment is unjust"; *idem*, [2003] CLJ 717, 743.

21. For a summary of possible positions in the debate, see E Bant, K Barker and S Degeling, "The Evolution of Unjust Enrichment Law: Theory and Practice", and M McInnes, "Enrichment", chs 1 and 13 of E Bant, K Barker and S Degeling (eds), *Research Handbook on Unjust Enrichment and Restitution* (Cheltenham, 2020), 5–6, 241, and the sources cited.

22. *Your Response Ltd v Datateam Business Media Ltd* [2014] EWCA Civ 281; [2015] QB 41, [13–15], [27].

23. *Foskett* [2001] 1 AC 102, 108, 110 (Lord Browne-Wilkinson), 115 (Lord Hoffmann), 127, 129 (Lord Millett). Lord Browne-Wilkinson set out his own reasoning and relevantly agreed with Lord Millett; and Lord Hoffmann's agreement with Lord Millett is general enough to encompass the relevant part of the latter's speech.

24. The remedy of ordering an option, as against delivery up, to pay damages in exchange for title to *goods* under the Torts (Interference with Goods) Act 1977, s.3(2)(b), might also support a positive answer to the question addressed in this paragraph. See M Bridge and others, *The Law of Personal Property*, 2nd edn (London, 2018), [32.052], commenting that "[d]amages in conversion are not so much designed to compensate the claimant for loss suffered, as to fix the price for a forced judicial sale of the asset".

25. *Menelaou v Bank of Cyprus UK Ltd* [2015] UKSC 66; [2015] 2 Lloyd's Rep 585; [2016] AC 176, [37] (Lord Clarke, from whose judgment the quoted words are taken), [98] (Lord Neuberger), [108] (Lord Carnwath). Whether all their Lordships applied this distinction when deciding the case is debateable: S Watterson, "Subrogation as a Remedy for Unjust Enrichment in the Supreme Court" [2016] CLJ 209.

26. The most important references are to Lord Millett's remarks in *Foskett* [2001] 1 AC 102, 127: *Menelaou* [2015] UKSC 66, [98] (Lord Neuberger, with whom Lord Clarke and Lord Kerr agreed on this point), [108] (Lord Carnwath).

27. [1991] 2 AC 548 (HL).

28. *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch); [2013] Ch 156, [63], [71–76], [83], [95].

enriched by her possession of an asset to which another holds title,[29] that enrichment is not unjust for the purposes of the law of unjust enrichment.[30] Lord Millett said that, in such a case, "[t]here is no 'unjust factor' to justify restitution (unless 'want of title' be one, which makes the point). The claimant succeeds if at all by virtue of his own title, not to reverse unjust enrichment".[31]

With this view of the authorities, some would at least partially agree.[32] However, a subsidiarity-based exposition of the cases is logically impossible. There simply cannot *exist* any unjust enrichment *to be* subsidiary to anything else in retention of title cases, as they are conceived of above. Assuming one agrees with that account of the law, it would be preferable straightforwardly to see these situations as ones of *just* enrichment, and a job for the law of property. This would better describe the legal reality, and avoid vocabulary which is apt to mislead.

III. UNJUST ENRICHMENT IS NOT SUBSIDIARY TO CONTRACT

At the contract-enrichment "interface",[33] the vocabulary of subsidiarity is used frequently by commentators, and increasingly in the courts. A substantial body of opinion "favours the view that restitutionary rights are subsidiary to those arising from contract".[34] For instance, the general exclusion of unjust enrichment where conferrals of benefits are regulated by contract has been referred to as a "subsidiarity doctrine",[35] or a "subsidiarity

29. It may be incorrect that there is no *enrichment* in *every* such case. A trustee not acting as an agent is enriched at common law on receipt of trust money (equitable title to which lies with another): *Skandinaviska Enskilda Banken AB (Publ) v Conway* [2019] UKPC 36 (Cay); [2020] AC 1111, [82–93], esp [89]; and see *Fischer v Nemeske Pty Ltd* [2016] HCA 11; 257 CLR 615, [16–17], [33] (French CJ and Bell J), [105–111] (Gageler J). More generally, if one is enriched, but not unjustly, when one *has* equitable title to an asset (*Davis v Jackson* [2017] EWHC 698 (Ch); [2017] 1 WLR 4005, [83–85]), it might plausibly be thought that a person coming into possession of an asset to which she has *no* title is enriched, at least (and perhaps unjustly).

30. It may be incorrect that there is no *injustice* in *every* such case. See, eg, *School Facility Management Ltd v Governing Body of Christ the King College* [2020] EWHC 1118 (Comm); [2020] PTSR 1913, [405–424], where a lease was void because *ultra vires* a college, and the use without payment by the college of real property over which the claimant retained the freehold was clearly an enrichment, at least one basis of which had failed (though for doubts about the precise periods of possession for which a claim would lie, see *ibid*, [433–440], [502–504]). (A further judgment in this litigation is under appeal at the time of writing: [2020] EWHC 1477 (Comm); [2020] 1 WLR 4825.)

31. *Foskett* [2001] 1 AC 102, 127; applied in *Scott v Bridge* [2020] EWHC 3116 (Ch), [149–151]; set out but not elaborated upon in *Armstrong* [2012] EWHC 10, [81]; and referred to by page number but not discussed in *Menelaou* [2015] UKSC 66, [98] (Lord Neuberger, with whom Lord Clarke and Lord Wilson agreed), [108] (Lord Carnwath). Looking at things differently, and following more recent developments, want of *authority* (as opposed to title) might now "be one", in Lord Millett's words: *Great Investments Ltd v Warner* [2016] FCAFC 85; 243 FCR 516, [52–69] (Jagot, Edelman and Moshinsky JJ); for discussion of which in broader context, see M Bryan, "No Intention to Benefit", ch.18 of Bant, Barker & Degeling (eds), *Research Handbook on Unjust Enrichment and Restitution* (2020).

32. Grantham and Rickett (2001) 117 LQR 273, 292; *idem*, [2003] CLJ 717, 743. These authors deny enrichment *and* injustice in retention of title cases.

33. HL MacQueen, "The Sophistication of Unjustified Enrichment" (2016) 20 Edin L Rev 312, 322.

34. J Eldridge and T Pilkington, "Discharged Contracts and *Quantum Meruit*" (2019) 41 Sydney L Rev 255, 258.

35. *Nikolic v Oladaily Pty Ltd* [2007] NSWCA 252, [101] (Mason P, with whom Campbell and Handley JJA agreed). In fairness, Mason P stated, and was party to statements of, similar propositions without reference to subsidiarity. See, respectively, *Coshott v Lenin* [2007] NSWCA 153, [10] (Mason P, with whom Spiegelman CJ and Campbell JA agreed); *Zavodnyik v Alex Constructions Pty Ltd* [2005] NSWCA 438; 67 NSWLR 457, [30] (Handley JA, with whom Mason P and Latham J agreed).

principle",[36] and placed under the heading, "the subsidiarity of restitutionary claims".[37] A hard-edged version of the view that "restitution should be considered to be subsidiary to the law of contract" might entail that "[i]t is only where [an] agreement does not operate, or has ceased to operate, [that] the law of unjust enrichment should have a role to play in any dispute between the parties".[38] A like proposition has been said to represent "the orthodox account": "unjust enrichment is a subsidiary doctrine which respects subsisting contracts unless and until they are fully disposed of".[39] Slightly less stringently, it has been written that:

> "It is only in exceptional cases that an unjust enrichment claim may operate where there is a subsisting contract. […] Thus, the law of unjust enrichment may be considered subsidiary to the law of contract. Subsidiarity in this sense means that an unjust enrichment claim is disallowed by the presence of a valid contractual relationship which accounts for the enrichment."[40]

More specific principles have been stated under the rubric of subsidiarity, too. Take the rules that no restitutionary claim arises where a contractual right to payment accrues prior to the termination of a contract;[41] or that a post-termination unjust enrichment claim in respect of services rendered cannot be pursued instead of a claim in contract for loss of bargain damages.[42] The proposition that no unjust enrichment claim lies where a dispute as to liability is settled under a still-valid contract of compromise has also been explained as part of "the general subsidiarity of unjust enrichment to the law of contract".[43] Further said to be an example of unjust enrichment's subsidiarity to contract law is the principle that unjust enrichment has no role to play where a contract makes express provision for restitution in certain circumstances. If parties choose to do this, any enrichment recoverable under the relevant contract terms will not be unjustly received in the first place.[44]

36. K Mason, JW Carter and GJ Tolhurst, *Mason & Carter's Restitution Law in Australia*, 3rd edn (Chatswood, NSW, 2016), [215].

37. *Mann* [2019] HCA 32, [14–18] (Kiefel CJ, Bell and Keane JJ). See also *Lloyd v Belconnen Lakeview Pty Ltd* [2019] FCA 2177; 377 ALR 234, [26] (Lee J); *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84; 378 ALR 585, [778] (White J, with whom Bromberg J agreed) (decision under appeal at the time of writing).

38. Virgo, *Principles*, 133–134.

39. R Havelock, "Rivalry over Liability for Defective Transfers", ch.6 of P Devonshire and R Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Oxford, 2019), 125; citing Grantham and Rickett (2001) 117 LQR 273.

40. TH Wu, "Unjust Enrichment and Contract", ch.6 of Bant, Barker & Degeling (eds), *Research Handbook on Unjust Enrichment and Restitution* (2020), 103, under the heading, "The Subsidiarity of Unjust Enrichment to [the] Law of Contract".

41. *Mann* [2019] HCA 32, [19] (Kiefel CJ, Bell and Keane JJ), under the heading, "the subsidiarity of restitutionary claims", and the subheading "Accrued contractual rights".

42. *Ibid*, [20–22].

43. A Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford, 2012), §29(a) and commentary, *ibid*, 151.

44. Grantham and Rickett (2001) 117 LQR 273, 273–274, 291–293, esp 291. The view expressed in this piece (which I discuss in detail in Campbell, "Subsidiarity", esp 72–76, chs 5–6, 253) that unjust enrichment is subsidiary to contract, has proved influential. See A O'Brien, "The Relationship between the Laws of Unjust Enrichment and Contract: Unpacking *Lumbers v Cook*" (2011) 32 Adel L Rev 83, 89–100, engaging closely with the authors' work, though arguing that contract's primacy rather than inherent characteristics of unjust enrichment is what renders the latter subsidiary to the former; Virgo, *Principles*, 133–134, citing the authors' article for the view that restitution is "subsidiary to the law of contract"; R Havelock, "A Taxonomic Approach to Quantum Meruit" (2016) 132 LQR 470, 475–477, making use of the authors' study in setting out the view that "unjust enrichment is a distinctly 'subsidiary' source of rights and duties". The piece also appears in the footnotes to an *obiter* passage in Gummow J's solo judgment in *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68; 208 CLR 516, [75]; behind a reference to J Dietrich, *Restitution: A New Perspective* (Alexandria, NSW, 1998). The plurality agreed only with his Honour's orders: *Roxborough* [2001] HCA 68, [31] (Gleeson CJ, Gaudron and Hayne JJ). Kirby J dissented; Callinan J simply concurred.

An authority often deployed[45] in support of views such as these is *The Trident Beauty*.[46] In that case, the House of Lords denied an unjust enrichment claim by the charterer of a vessel against the assignee (by way of security for a loan) of the owner's right to hire. In essence, this was because the charterparty provided that the *owner* would refund all overpaid hire, not the *assignee*, which had an unqualified right to payment. Lord Goff of Chieveley said:

"[A]s between [the] shipowner [Trident] and charterer [Pan Ocean], there is a contractual regime which legislates for the recovery of overpaid hire. It follows that, as a general rule, the law of restitution has no part to play in the matter; the existence of the agreed regime renders the imposition by the law of a remedy in restitution [against the assignee, Creditcorp,] both unnecessary and inappropriate. […] [S]erious 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. Moreover, it would in any event be unjust to do so in a case such as the present where the defendant, Creditcorp, is not the mere recipient of a windfall but is an assignee who has purchased from Trident the right to receive the contractual debt which the plaintiff, Pan Ocean, is now seeking to recover from Creditcorp in restitution despite the facts that the relevant contract imposes on the assignor (Trident) an obligation of repayment in the circumstances in question, and that there is nothing in the assignment which even contemplates, still less imposes, any additional obligation on the assignee (Creditcorp) to repay."[47]

Had his Lordship meant to invoke subsidiarity, his command of pertinent literature suggests that he would have done so.[48] Instead, Lord Goff reasoned that Creditcorp's enrichment was not unjust in the first place.[49] Restitution would have been inconsistent, both with the contract between Pan Ocean and Trident, making repayments Trident's responsibility, and the contract between Creditcorp and Trident, entitling Creditcorp unconditionally to hire from Pan Ocean.

This was, indeed, a situation where there was no "call for the intervention of the law of unjust enrichment".[50] But it was also one in which the subsidiarity of unjust enrichment was

45. See, eg, *Mann* [2019] HCA 32, [15], [17] (Kiefel CJ, Bell and Keane JJ); Grantham and Rickett (2001) 117 LQR 273, 291; O'Brien (2011) 32 Adel L Rev 83, 90, fn.42; Havelock (2016) 132 LQR 470, 473–477 esp 473–474; Wu (*supra*, fn.40), 103–104; C Jooste and EJH Schrage, "Subsidiarity of the General Action for Unjust Enrichment, II" [2016] TSAR 220, 226–230 esp 228–229.

46. *Pan Ocean Shipping Co Ltd v Creditcorp Ltd (The Trident Beauty)* [1994] 1 Lloyd's Rep 365; [1994] 1 WLR 161 (HL).

47. [1994] 1 Lloyd's Rep 365, 368–369; [1994] 1 WLR 161, 164–166.

48. In the last edition of the noted work which his Lordship co-authored with Professor Gareth Jones, *The Law of Restitution*, 3rd edn (London, 1986), 12, a long footnote (58) refers to comparative work addressing unjust enrichment's supposed subsidiarity (page references given by the present writer): HC Gutteridge and RJA David, "The Doctrine of Unjustified Enrichment" [1934] CLJ 204, 212, 218–221; W Friedmann, "The Principle of Unjust Enrichment in English Law: A Study in Comparative Law, Part I" (1938) 16 Can Bar Rev 243, 261; JP Dawson, *Unjust Enrichment: A Comparative Analysis* (Boston, 1951), 106 and endnotes 118–120; B Nicholas, "Unjustified Enrichment in the Civil Law and Louisiana Law, I" (1961) 36 Tulane L Rev 605, 633–641. (That Lord Goff was not an author of the fourth edition of *The Law of Restitution* (London, 1993) is confirmed by his note in its front matter, and, eg, the review by S Hedley (1994) 13 CJQ 293, 294.)

49. Lord Lowry agreed with Lord Goff. Lord Woolf (with whom Lord Keith and Lord Slynn agreed), whose speech is less often quoted, held that (1) Creditcorp "was never intended to be under any obligation" to repay, and bore "no responsibility" for Trident's non-repayment; (2) "[t]here was nothing qualified about [Creditcorp's] right" to hire, which existed "quite independently of Pan Ocean's contract with Trident"; and (3) Creditcorp was not a party to which Pan Ocean should be allowed "to look for a repayment merely because Trident as part of their own financial arrangements" had assigned to it their right to payment: *The Trident Beauty* [1994] 1 Lloyd's Rep 365, 372–373; [1994] 1 WLR 161, 170–172.

50. Grantham and Rickett (2001) 117 LQR 273, 291.

impossible. As a matter of law, no unjust enrichment existed *to be* subsidiary to the contractual regime. To subsidiarity-based accounts of unjust enrichment's relations with contract, this is a fundamental objection,[51] which is supported by a considerable body of authority.

Unless there is a failure of the objective basis on which a contract is concluded,[52] then, as Edelman J put it, "no cause of action for restitution of unjust enrichment *can exist* where the action is *inconsistent* with the express or implied terms of [the] contract; to allow that remedy despite the terms of the contract would redistribute risks for which provision has been made by the contract".[53] This applies most clearly to benefits conferred in the presence of a valid and subsisting contract:[54] "enrichment sanctioned by the contract is not unjust".[55]

Example: *Funder v Bustco*.[56] Funder contracts with Themis and Bustco (acting by Themis) to fund Bustco's administration by Themis. Under the contract, Themis may in her absolute discretion call for Funder to transfer money to Bustco's account, to be deposited within seven days. Themis may use the money to satisfy payment of her fees, subject only to any necessary approval by the court. There is no general express or implied contractual right for Funder eventually to be repaid by Bustco. And, though Themis is contractually obliged to return surplus fee money to Funder once she ceases formally to act, the end of her appointment renders her powerless to deal with Bustco's account as its agent. As between Funder and Bustco, the contract provides, not for a repayable loan, but for an unconditional advance. Funder has no unjust enrichment claim against Bustco for any money paid over.

As the precise wording of Edelman J's dictum indicates, unjust enrichment is impossible here. The principle which his Honour set out goes further. So, A will not be unjustly enriched at B's expense where B goes unpaid after contracting with C to do work for C and A, and the condition on which B worked was that it would be paid by C.[57] Here, there

51. In addition to the sources already canvassed, see, eg, Havelock (2016) 132 LQR 470, 477, fn.55; *idem*, "The Valuation of Enrichment in the Supreme Court" [2013] RLR 97, 101; discussing, as an affirmation of the subsidiarity of unjust enrichment to contract, parts of the judgments in *Benedetti v Sawiris* [2013] UKSC 50; [2014] AC 938.

52. In which event an unjust enrichment claim may be allowed despite the contractual context. See *Argyle UAE Ltd v Par-La-Ville Hotel and Residences Ltd* [2018] EWCA Civ 1762, [51]: where the basis for a contract payment had "totally failed", an unjust enrichment claim did not "undermine the contractual arrangements"; *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 10)* [2016] WASC 90, [44–48]; *Avonwick Holdings Ltd v Azitio Holdings Ltd* [2020] EWHC 1844 (Comm), [780–798] (decision under appeal at the time of writing); discussing authorities such as *Roxborough* [2001] HCA 68; and *Barnes* [2014] UKSC 26. Such instances, in which unjust enrichment is unconstrained in the contractual context, cannot be ones of unjust enrichment's subsidiarity to contract. See further Campbell (2020) 24 Edin L Rev 1, 20–22.

53. *Anderson v McPherson (No 2)* [2012] WASC 19, [232], [234–239], esp [239] (emphasis added, internal quotation marks and references omitted). His Honour has elsewhere clarified that care is required with the conclusory language of risk-taking: *Lampson* [2014] WASC 162, [98–100], [119–120].

54. *Bailey v Barclays Bank Plc* [2014] EWHC 2882 (QB), [67(4)]; permission to appeal not sought on this point [2015] EWCA Civ 667; *Toll Global Forwarding Pty Ltd v Theiss Pty Ltd* [2015] WASC 365, [232], [245]. See also *Atlantic Lottery Corp Inc v Babstock* 2020 SCC 19; 447 DLR (4th) 543, [71].

55. *Newland Shipping and Forwarding Ltd v Toba Trading FZC* [2014] EWHC 661 (Comm), [87], [92].

56. This example is based on *Leibson Corp v TOC Investments Corp* [2018] EWCA Civ 763; [2019] 2 BCLC 381, [17–18], [53], [61–63] (Gloster LJ, with whom Singh LJ and Sir Jack Beatson agreed).

57. *MacDonald Dickens & Macklin (a firm) v Costello* [2011] EWCA Civ 930; [2012] QB 244; [20–23], [30]; *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [2018] UKPC 7 (Gue); [2019] AC 271, [144–151] (Lord Hodge, with whom Lord Sumption, and Lord Carnwath agreed), [194] (Lord Mance, dissenting on other grounds), [237] (Lord Briggs, dissenting on other grounds): A not unjustly enriched at B's expense where B complied with its contractual obligation to discharge A's indebtedness to C, and there was no provision for A to indemnify B. See also *Dantzer v CP Loewen Enterprises Ltd* [2005] ABCA 159; 54 Alta LR (4th) 182, [3–4]; affg [2004] ABQB 6, esp [45].

is a basis for A's enrichment where the would-be unjust enrichment *claimant* is in contract with a third party. The same position may hold where it is an unjust enrichment *defendant* who contracts with a third party.[58] A person's enrichment at another's expense may also be justified where a contract no longer subsists[59] on a given set of facts.[60]

Example: *Fund v Investor*.[61] Investor participates in Fund's investment scheme. Their agreement contains definitive valuation, withdrawal and redemption provisions. On making returns, Investor invokes these provisions and cashes out. Unfortunately, Fund puts most of its capital with the fraudulent scheme concocted by Evil Ponzistas. Fund collapses. Fund has no claim in unjust enrichment against Investor for the returns to which Investor was entitled under its contract with Fund, even though there no longer exists an agreement between the parties.

To this example involving a fully executed contract may be added the point that the justificatory power of the basis on which a benefit is conferred in a contractual context can outlast termination as well as performance. An enrichment conferred on a person whose right to it accrues before and survives termination[62] is not unjust, even though the contract is no longer on foot.[63]

In sum, where there has been no failure of the basis for a contractual regime, which itself relevantly approves or sanctions the conferral of a benefit, the issue of unjust enrichment "does not arise":[64] there is simply no such claim.[65] For this reason, unjust enrichment cannot be subsidiary to contract. There will never be a set of facts on which the two institutions can co-exist, and potentially overlap in their operation, in the way required for subsidiarity to be an accurate description of their interrelation. The unjust question in the unjust enrichment inquiry should do the explanatory work which subsidiarity cannot.

IV. UNJUST ENRICHMENT IS NOT SUBSIDIARY TO STATUTE

Courts of the major common law jurisdictions have not described unjust enrichment as *subsidiary* to any statutory regime. The scholarship is nearly as sparse. In his comparative survey, Professor Lionel Smith appears to accept in principle that unjust enrichment can

58. See *Lumbers v W Cook Builders Pty Ltd (in liq)* [2008] HCA 27; 232 CLR 635, [43–55], [77–80], [125–126]: A not unjustly enriched at C's expense where A contracted with B, who sub-contracted work to C, who went unpaid, and the condition on which C worked was that it would be paid by B.

59. Of course, no contract need ever have been concluded in the first place for an enrichment to be justified where its conferral was not relevantly conditional, or where the basis on which it was conferred subsists: *Moorgate Capital (Corporate Finance) Ltd v HIG European Capital Partners LLP* [2019] EWHC 1421 (Comm), [93–102]; *Moorgate Capital (Corporate Finance) Ltd v Sun European Partners LLP* [2020] EWHC 593 (Comm), [140].

60. *Re Stanford International Bank Ltd (in liq)* [2019] UKPC 45 (Antig & Barb); [2020] 1 BCLC 446, [66–67]; *Sino Iron Pty Ltd v Mineralogy Pty Ltd* [2015] WASC 429, [101]. See also *Palmar Properties Inc v JEL Investments Ltd* [2013] BCSC 623, [30], [42], [71]; affd [2014] BCCA 169; and the $100 discharged loan example in L Smith, "Demystifying Juristic Reasons" (2007) 45 Can Bus LJ 281, 292.

61. This example is based on *Fairfield Sentry Ltd v Migani* [2014] UKPC 9 (BVI); [2014] 1 CLC 611, [3], [17], [18–19], [24], [27–31].

62. See *Hurst v Bryk* [2002] 1 AC 185 (HL), 193–194.

63. *Cadogan Petroleum Holdings Ltd v Global Process Systems LLC* [2013] EWHC 214 (Comm); [2013] 2 Lloyd's Rep 26, [18–21], [27], [41–42], where a contract provided for retention of pre-termination payments and for further post-termination payments.

64. *Landmark Ltd v American International Bank (in rec'ship)* [2014] UKPC 17 (Antig & Barb), [29].

65. *Re Stanford* [2019] UKPC 45, [67].

be subsidiary to statute. However, his conclusion is limited: "[t]he common law does not know 'subsidiarity' by that name, but elements of that relationship appear to be embedded in the law".[66] This cannot be fairly taken as a claim that unjust enrichment is subsidiary to statute.

The position in Scotland is different.[67] There, the judges *have* described unjustified enrichment as *subsidiary* to statutory regimes.[68] The effect of the authorities is that, absent "special and strong circumstances", which no pursuer has ever established,[69] all unjustified enrichment claims[70] are subsidiary, in that they are unavailable where statutory routes of redress are either concurrently *available* to a pursuer,[71] or *were* available to a pursuer, but are now barred.[72] Professor Birks pointed out the value to English lawyers of a Scottish perspective on matters of unjust enrichment.[73] Here, we take away a cautionary tale,[74] which prompts the pre-emptive argument in the present Part of this paper that the error of describing unjust enrichment as subsidiary to statute should be avoided. This is developed by addressing three categories of case in which unjust enrichment interacts with statutory regimes.

In the first category are cases where a statutory regime directly sanctions a person's enrichment. For example, legislation may require the conferral of a benefit, perhaps pursuant to a demand;[75] or permit its being taken by one person from another. In such situations, there can be no *unjust* enrichment.

66. Smith, "Property, Subsidiarity and Unjust Enrichment", 613–614, 623.

67. I consider the supposed subsidiarity of unjustified enrichment in Scots law in detail in Campbell, "Subsidiarity". Only a fragment is addressed here.

68. See also EM Clive, *Draft Rules on Unjustified Enrichment and Commentary* (Separate appendix to Scot Law Com DP no 99; HMSO Scot, 1994), r.11 and commentary, *ibid*, 86–87.

69. But see *Malak v Inglis* [2019] SC HAM 100; 2020 Fam LR 47, [10], allowing averments of such circumstances to continue to proof.

70. For a typology, see HL MacQueen and Lord Eassie (eds), *Gloag & Henderson: The Law of Scotland*, 14th edn (Edinburgh, 2017), [24.02], [24.08], [24.16], [24.20]; and for the modern approach generally, see *Lindsay v Outlook Finance Ltd* [2020] CSOH 90, [14].

71. *Transco Plc v Glasgow City Council* [2005] CSOH 76; 2005 SLT 958, esp [18–19] (Lord Hodge): open action under the Court of Session Act 1988, s.45. On this case, confirming that an unjustified enrichment claim was dismissed "on the basis that the principle of subsidiarity applied", see *McCalls Ltd v Aberdeen City Council* [2020] CSIH 41; 2020 SLT 1147, [45].

72. *Courtney's Executors v Campbell* [2016] CSOH 136; 2017 SCLR 387, esp [52–54], [56], [58], [60] (Lord Beckett): time-barred action under the Family Law (Scotland) Act 2006, s.28; overruled only as regards the interaction of unjustified enrichment with the specific statute before the court in *Pert v McCaffrey* [2020] CSIH 5; 2020 SC 259, [24], [33]; noted M Campbell (2020) 24 Edin L Rev 400.

73. P Birks, "Restitution: A View of the Scots Law" [1985] CLP 57, 57.

74. See further Campbell, "Subsidiarity", ch.4, esp 91–93, 105–116, 132–136.

75. Burrows, *Restatement* (*supra*, fn.43), §3(6): generally, "an enrichment is not unjust if the benefit was owed to the defendant by the claimant under a valid […] statutory […] obligation"; cited in *Vodafone Ltd v Office of Communications* [2019] EWHC 1234 (Comm); [2020] QB 200, [31–34], in explaining that payments made following demands under invalid regulations increasing licence fees were not unjust enrichments to the extent that they would have been due under previous valid regulations, and that what were disputed were claims only to sums for the payment of which the previous regulations could have provided no legal ground; reasoning summarised on appeal, and impliedly approved in discussion of the defendant's recoverable enrichment [2020] EWCA Civ 183; [2020] QB 200, [26], [100], [106]; *Commissioner of State Revenue v ACN 005057349 Pty Ltd* [2017] HCA 6; 261 CLR 509, [87] (Bell and Gordon JJ, with whom Kiefel, Keane and Gageler JJ agreed): payments made following assessments (ie, following demands) for statutory land tax were "made in discharge of a legally enforceable obligation to pay", such that the tax commissioner was not "unjustly enriched". See also *KBA Canada Inc v Supreme Graphics Ltd* [2014] BCCA 117; 372 DLR (4th) 303, [38–42]; cited with approval in *Moore* 2018 SCC 52, [70].

Example: *Half Empty v Half Full*.[76] Half Full abstracts water from Half Empty's waterways for many years. Half Empty looks over correspondence between the parties and thinks it is owed money in respect of Half Full's activities. It transpires that Half Full has licences to abstract water from Half Empty's waterways under a statutory scheme. Half Full's rights to the water mean that it is not unjustly enriched by the value which it derives from its abstraction.

The second category of case comprises instances where a statute confers no entitlement to any enrichment. Instead, it is expressly or impliedly (by its policy, for example) inconsistent with unjust enrichment. It approves one person's enrichment at another's expense, such that the former's enrichment is justified.[77]

Example: *Cowboys v Rogue Traders*.[78] Rogue Traders fines Cowboys under a statutory penalty regime. The regime incorporates an appeal mechanism, providing for a full rehearing and re-quantification on the merits. Cowboys pays its fine. Cowgirls does not pay, but pursues a successful statutory appeal, the time limit for which subsequently expires. Realising that it too could have appealed for the same reasons as Cowgirls, Cowboys attempts to claim in unjust enrichment against Rogue Traders. But the construction of the statutory regime reveals that it was intended to be the only way to dispute the imposition of penalties. Rogue Traders' enrichment is not unjust.

In both these categories of case, the subsidiarity of unjust enrichment to statute is impossible. This is because they involve statutes which are entirely inconsistent with unjust enrichment. These statutes *justify* enrichments. They prevent unjust enrichments ever from existing. If unjust enrichment does not exist on a set of facts, it cannot join a plurality of claims or regimes which overlap in their application to those facts: there simply *is* no unjust enrichment *to be* subsidiary in the first place. Where, then, as a matter of interpretation,[79] a statutory regime wholly excludes an unjust enrichment claim, arguments about unjust enrichment's subsidiarity do not get off the ground.

The third category of case is less straightforward. It encompasses instances where statutory regimes are not exclusive of unjust enrichment claims, but alter in some way the law of unjust enrichment in its application to sets of facts. Of this, the following is a particularly clear illustration, involving as it does the legislative denial of "a central and important defence"[80] to an unjust enrichment claim.

76. This example is based on *Canal & River Trust v Thames Water Utilities Ltd* [2016] EWHC 1547 (Ch), [87]; affd on other grounds [2018] EWCA Civ 342.

77. *R (Child Poverty Action Group) v Secretary of State for Work and Pensions* [2010] UKSC 54; [2011] 2 AC 15, [15] (Lord Brown), [35] (Sir John Dyson JSC), [39] (Lord Rodger): statute meant to be comprehensive scheme for recovery of benefits conferred, to the exclusion of unjust enrichment claims; *Littlewoods Ltd v HMRC* [2017] UKSC 70; [2018] AC 869, [39–40] (Lord Reed and Lord Hodge, for the Court): statutory scheme inconsistent with and exclusive of common law unjust enrichment claims for interest; *Griffiths (deceased) and Jones on behalf of the Ngaliwurru and Nungali Peoples v Northern Territory* [2019] HCA 7; 364 ALR 208, [131–132], [137] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ): benefits derived by A from the statutory extinction of B's title "not unjust". See also *Gladstone v Canada (Attorney General)* 2005 SCC 21; [2005] 1 SCR 325, [19–22] (Major J, for the Court): statute provided a "juristic reason for any incidental enrichment which may have occurred in its operation".

78. This example is based on *Lindum Construction Co Ltd v Office of Fair Trading* [2014] EWHC 1613 (Ch); [2014] Bus LR 681, [120–121].

79. As to which, see A Burrows, "Statutory Interpretation", lecture 1 of *idem*, *Thinking about Statutes* (Cambridge, 2018).

80. *Cavenagh Investment Pte Ltd v Kaushik Rajiv* [2013] SGHC 45; [2013] 2 SLR 543, [59].

Example: *Company (by its liquidators) v Bank*.[81] Bank redeems shares in Company, which it holds as nominee for Customer. Company pays out to Bank, which pays out to Customer. The payments to Bank are unlawful preferences, rendered voidable by the insolvency legislation because too close in time to Company's entry into liquidation.[82] This occurs following the discovery of fraudulent trading by an investment manager, which inflated the value of Company, and caused it mistakenly to continue redemption payments such as the one to Bank, despite its being in serious financial difficulty. The liquidators commence proceedings to avoid the payments, and recover their value from Bank. The insolvency statute provides no cause of action for the return of the impugned payments; it merely renders them voidable.[83] One means of recovery at common law is unjust enrichment,[84] which the liquidators employ. Any change of position defence which Bank might have is barred.[85] This upholds the insolvency legislation's policy of prioritising the restoration of value to insolvent companies for the benefit of their creditors over the potential negative impact of recovery upon the recipients of preferences.

No good can come of starting to employ the vocabulary of subsidiarity to describe this and similar interactions between statute and principles of unjust enrichment in the judge-made common law.[86]

To demonstrate this, it is useful to understand a point of detail in what is being described when courts and commentators talk of the subsidiarity of unjust enrichment. Some courts and commentators are describing an inherent feature of the law of unjust enrichment itself.[87] Others are describing the domination of unjust enrichment by other parts of the law.[88] These characterisations suggest that the interaction between unjust enrichment and statute in our example—which we will call *Company v Bank*, for ease—can be conceived

81. This example is based on *SEB v Conway* [2019] UKPC 36, [75–117]. That this was a Privy Council appeal from the Cayman Islands is unproblematic. The Board was concerned with legislation in the common law mould, and plainly applied a recognisably English model of unjust enrichment (referring specifically to "English law" in discussing change of position: *ibid*, [95]), albeit with reference to authority from across the common law world. In a Cayman Islands appeal raising an unjust enrichment point just over 20 months before *Conway*, the Board recorded that "the common law […] in this respect [was] not suggested to be different as between the Cayman Islands and England", and applied English authority, or Privy Council cases which themselves applied English law: *DD Growth Premium 2X Fund v RMF Market Neutral Strategies (Master) Ltd* [2017] UKPC 36 (Cay); [2018] Bus LR 1595, [3], [58–64]. For the strong persuasive force of Privy Council decisions on points of English law, see *Willers v Joyce (No 2)* [2016] UKSC 44; [2018] AC 843.

82. *SEB v Conway* [2019] UKPC 36, [60–61]. The statutory provision in this case was the Cayman Islands Companies Law (2013 Revision), s.145(1), which survives in the 2021 Revision of the Companies Act: "Every conveyance or transfer of property, or charge thereon, and every payment obligation and judicial proceeding, made, incurred, taken or suffered by any company in favour of any creditor at a time when the company is unable to pay its debts within the meaning of section 93 with a view to giving such creditor a preference over the other creditors shall be invalid if made, incurred, taken or suffered within six months immediately preceding the commencement of a liquidation."

83. *Ibid*, [63], [74], comparing the Insolvency Act 1986, s.239. This contrasts in turn with, eg, s.284 of that Act, which is silent as to the consequences of avoidance: *Ahmed v Ingram* [2018] EWCA Civ 519; [2018] BPIR 535, [29–41].

84. *SEB v Conway* [2019] UKPC 36, [63], [75–80].

85. Compare openness to change of position-*type* thinking under *different* regimes, such as the Insolvency Act 1986, s.340: *Re Fowlds (a bankrupt)* [2020] EWHC 1200 (Ch); [2020] BPIR 1111, esp [19–22], and the authorities there discussed.

86. For this and other senses of "common law", see *PGA v The Queen* [2012] HCA 21; 245 CLR 355, [20–23].

87. *Transco* [2005] CSOH 76, [12–13]; *Courtney's Executors* [2016] CSOH 136, [52]; *McCalls v Aberdeen* [2020] CSIH 41, [45]; Grantham and Rickett (2001) 117 LQR 273, 291–293; *idem*, [2003] CLJ 717, 741–744.

88. By the law of contract, for example: O'Brien (2011) 32 Adel L Rev 83, 89–100. See also, *semble*, Virgo, *Principles*, 133–134.

of in two ways. First, it may be an instance of statute's *sovereignty*: statute's primacy is what alters unjust enrichment. Secondly, and obversely, it may show unjust enrichment's *subjecting itself* to statute: the former's own rules bar the change of position defence where its success would stultify statutory regimes, and their underlying policies.[89] On either view, subsidiarity is an inapt description of what is happening for two reasons.

First, and as I have elsewhere shown, "subsidiarity is fundamentally about the allocation of competence or authority among entities, or groups of entities, on a *conditional* basis"; and "is characterised by the operation of a *rebuttable presumption* as to where competence or authority lies"[90] among a plurality of entities,[91] capable of overlapping, "in the sense that the subject(s) of their action is (or are) the same".[92] The entities in *Company v Bank* are the insolvency legislation, and unjust enrichment at common law. They overlap in their application to the same set of facts: the mistaken payments to Bank, effected contrary to the statutory prohibition of preferences. The overlap is such that the unrestrained concurrent operation of the common law would upset the statutory regime.[93] The prophylactic solution is to bar change of position, part of the common law regime. But nobody would argue that the primacy of legislative regimes where overlapping unjust enrichment claims at common law might stultify them is other than absolute.[94] The exclusion is in no sense conditional or rebuttable: the common law always yields to legislation,[95] "the supreme form of law".[96] Subsidiarity can only describe a relationship between entities if none of them is exclusively competent. It cannot describe a relationship in which one entity is "sovereign over any other entity […]. In such a situation, there would be nothing for subsidiarity to do, because authority in that context would be allocated *unconditionally*. This goes against the essence of subsidiarity."[97] On that basis, *Company v Bank*, and similar situations, cannot be examples of the subsidiarity of unjust enrichment to statute.

89. See *O'Neil v Gale* [2013] EWCA Civ 1554; [2014] Lloyd's Rep FC 202, [28–29]. For change of position's potentially stultifying effects in the context of *Woolwich*-type claims (see *Woolwich EBS v IRC* [1993] AC 70 (HL)) and claims for restitution from public authorities of money paid under a mistake of law, see *Ipswich Town FC Co Ltd v Suffolk Constabulary* [2017] EWHC 375 (QB), [79]; *Prudential Assurance Co Ltd v HMRC* [2013] EWHC 3249 (Ch); [2014] STC 1236, [167–193] esp [188] (Henderson J); affd as to unavailability of change of position; but stultification not discussed, and decision rev'd in part [2016] EWCA Civ 376; [2017] 1 WLR 4031, [147–152]; in turn revd in part [2018] UKSC 39; [2019] AC 929; *Test Claimants in the FII Group Litigation v HMRC* [2014] EWHC 4302 (Ch); [2015] STC 1471, [309–339] esp [315] (Henderson J); affd without detailed discussion on this point [2016] EWCA Civ 1180, esp [278], [285], [336].

90. Campbell (2020) 24 Edin L Rev 1, 7–8 (emphasis altered, internal quotation marks omitted).

91. *Ibid*, 13–14.

92. *Ibid*, 14–15.

93. Where regimes *do* concur freely on the same set of facts, as where they "can be invoked in any order and for any reason", they are not in a relationship of subsidiarity: *ibid*, 20–22. Such concurrence is often unobjectionable: *Fistar v Riverwood Legion and Community Club Ltd* [2016] NSWCA 81; 91 NSWLR 732, esp [46–51].

94. *Lone v Hounslow London Borough Council* [2019] EWCA Civ 2206; [2020] 1 WLR 952, [51–56] (Arnold LJ, with whom Asplin and Underhill LJJ agreed), and the authorities there cited; *Equuscorp Pty Ltd v Haxton* [2012] HCA 7; 246 CLR 498, [25], [45], [96], [111].

95. *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61, [42]. In light of this, and the "not conditional or rebuttable" reasoning in the main text, the precise sense in which judges' law-making role can be described accurately as "subsidiary" to Parliament's may be uncertain. See *Johnson v Unisys Ltd* [2001] UKHL 13; [2003] 1 AC 518, [37] (Lord Hoffmann).

96. *R (Miller) v The Prime Minister* [2019] UKSC 41; [2020] AC 373, [41].

97. Campbell (2020) 24 Edin L Rev 1, 15–20 esp 19 (emphasis altered).

Secondly, and regardless, the vocabulary of subsidiarity does not capture the nuance of what happens in *Company v Bank*-type scenarios. Plainly, they are removed from simple facts, governed by enclaves of pure common law,[98] or relatively independent statutory regimes.[99] Nor do they resemble straightforward cases of common law "paralysis"[100] or removal by statute,[101] which checks the development of case law,[102] or replaces it.[103] Instead, they seem to involve a "symbiotic relationship":[104] common law fulfilling statute, yet modified by it; statute sculpting the common law, yet dependent upon it.[105] This produces what Professor (now Lord) Burrows has called "new […] common law [or] 'statute-based common law'";[106] and it perhaps implies the creation of statutory and common law "amalgams" of one kind or another.[107]

We could think of the redress afforded to Company (acting by its liquidators) in *Company v Bank* as an amalgam of common law and statute: a change-of-position-less unjust enrichment claim, given its special form by the insolvency regime.[108] The claim cannot be wholly statutory, because the legislation affords no cause of action. Yet it is only because of the statute that change of position is barred;[109] and unjust enrichment is being employed where the injustice lies, not between Company and Bank – the parties to the claim – but between Bank and Company's other creditors.[110] It is therefore equally strained to say that Company's restitutionary claim is purely of common law creation. This ignores the statute, or at least presupposes a difficult separation between the legislation in the equation, and the principles of unjust enrichment in play.[111] Where, as here, statute

98. Such as the law of the particular lien: *Sheianov v Sarner International Ltd* [2020] EWHC 1214 (QB); [2020] 1 WLR 3963, [50].

99. For instance, the statutory law of limited liability partnerships is independently intelligible on important matters such as the creation and termination of LLPs, even if it relies on the common law of agency, for example: Limited Liability Partnerships Act 2000, s.6(1).

100. *Brodie v Singleton Shire Council* [2001] HCA 29; 206 CLR 512, [132] (Gaudron, McHugh, and Gummow JJ).

101. As to both eventualities, see A Burrows, "The Interaction Between Common Law and Statute", lecture 2 of *idem*, *Thinking about Statutes* (Cambridge, 2018), 56–67. See also Sir P Sales, "The Common Law: Context and Method" (2019) 135 LQR 47, 62–63.

102. See, eg, *Prudential Assurance Co Ltd v HMRC* [2018] UKSC 39; [2019] AC 929: common law, *inter alia*, having gone further than statute allowed.

103. See, eg, see *Serafin v Malkiewicz* [2020] UKSC 23; [2020] 1 WLR 2455, [66–78]: statutory replacement for a common law defence.

104. *Brodie* [2001] HCA 29, [31] (Gleeson CJ); MJ Leeming, "Theories and Principles Underlying the Development of the Common Law—The Statutory Elephant in the Room" (2013) 36 UNSWLJ 1002, 1014–1021.

105. A Burrows, "The Relationship between Common Law and Statute in the Law of Obligations" (2012) 128 LQR 232, 234–236; discussed more briefly by Burrows, "Interaction" (*supra*, fn.101), 57–58.

106. Burrows (2012) 128 LQR 232, 234–236 (esp 235), 240–244 (esp 240). Among other examples, Professor Burrows (as his Lordship then was) instances "the cases on whether the second test under the Contracts (Rights of Third Parties) Act 1999 [s.1(1)(b)] for the conferral of a right on a third party is made out": (2012) 128 LQR 232, 241. See further J Beatson, J Cartwright and A Burrows (eds), *Anson's Law of Contract*, 31st edn (Oxford, 2020), 627–632.

107. PS Atiyah, "Common Law and Statute Law" (1985) 48 MLR 1, 6; set out in *Esso Australia Resources Ltd v Federal Commissioner of Taxation* [1999] HCA 67; 201 CLR 49, [20] (Gleeson CJ, Gaudron and Gummow JJ).

108. For something like this suggestion (but considering change of position's application to the facts in case it is wrong), see *Re D'Eye* [2016] BPIR 883 (Ch), [49–59] esp [49]; approved in *Officeserve Technologies Ltd (in compulsory liq) v Annabel's (Berkeley Square) Ltd* [2018] EWHC 2168 (Ch); [2019] Ch 103, [32]; and referred to in *SEB v Conway* [2019] UKPC 36, [115].

109. *SEB v Conway* [2019] UKPC 36, [97], [103–104].

110. *Ibid*, [80].

111. For such doubts in a different context, see *Fairfax Media Publications Pty Ltd v Gayle* [2019] NSWCA 172; 100 NSWLR 155, [258–259] (Leeming JA, with whom Bell P and Gleeson JA agreed).

and common law interact so synergistically, it may make little sense to discuss them as if they are not operating as one. If Company's claim is, indeed, a kind of *single* hybrid, then in *Company v Bank*, unjust enrichment cannot logically be subsidiary to statute. For this to be possible in any context, unjust enrichment must exist independently of the thing *to which* it is to be subsidiary. The language of subsidiarity can only clarify interactions between *multiple* claims or regimes, which are engaged on a set of facts.[112]

The above suggestion may be wrong. The restitutionary regime in *Company v Bank* may not really be a composite creature of common law and statute, with unjust enrichment and the insolvency legislation instead remaining juridically separate, at least to some extent. But, even if this is true, subsidiarity still does not illuminate their interaction on the facts. A simple question arises. Which is subsidiary: unjust enrichment, or the statute? Which is providing "assistance or supplement"[113] to the other? It is, in fact, hard to say. Without unjust enrichment, the insolvency statute could be less useful to Company's liquidators. Their recovery of assets properly owed to Company depends entirely upon "the general law which applies in the situation resulting from the avoidance", namely, "any other statutory provisions which may be applicable, or […] the common law".[114] But on their own, normal principles of unjust enrichment could defeat "the well-established principle of public policy which is applied […] to deny effect to arrangements in fraudem legis", by affording a defence to Bank with no "basis in centuries' worth of case law on insolvency";[115] and which could defeat a claim by Company's liquidators aimed at giving "effect to a statutory scheme which has been enacted by the legislature mainly in the public interest for the protection of creditors as a class".[116] Plainly, the designation of either unjust enrichment or statute as subsidiary here is too simplistic to be useful.

In this respect, instances like *Company v Bank* bear out starkly, in the context of unjust enrichment's relations with statute, the concern that the language of subsidiarity lacks sophistication. This has been expressed, both in general, and in the particular context of unjust enrichment's interaction with contract law.[117] For some sceptics, "the language of 'subsidiarity' suggests that English law maintains a hierarchy of rights under which rights generated by the law of unjust enrichment are invariably placed at the bottom".[118] It is inadvisable to commit to this view. Below surface-level, there is no consensus about whether relationships of subsidiarity involve straightforward hierarchies.[119] However, we

112. Campbell (2020) 24 Edin L Rev 1, 13–15 esp 13, 14.

113. *Ibid*, 7; M Conaglen, *Fiduciary Loyalty* (Oxford, 2010), 75–76, 97–105, ch.10.

114. *SEB v Conway* [2019] UKPC 36, [63], [75]. A personal restitutionary claim at common law against a creditor not subject to change of position might be desirable if, for example, the preference takes the form of a payment in the creditor's favour to a creditor-nominated third party who is untraceable; or a payment to a creditor, who then buys property that falls in value. For the latter example, see *Lipkin Gorman* [1991] 2 AC 548, 562 (Lord Templeman).

115. *SEB v Conway* [2019] UKPC 36, [104].

116. *Ibid*, [111].

117. C Mitchell, P Mitchell and S Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment*, 9th edn (London, 2016) (hereafter "*Goff & Jones*, 9th edn"), [2.04]; agreeing with and generalising from the more specific views of S Waddams, "Contract and Unjust Enrichment: Competing Categories, or Complementary Concepts?", ch.9 of C Rickett and R Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Oxford, 2008). Less direct but still circumspect was G Jones (ed), *Goff & Jones: The Law of Restitution*, 7th edn (London, 2007), [1.061], fn.78; 6th edn (London, 2002), [1.061], fn.78.

118. *Goff & Jones*, 9th edn, [2.04].

119. Campbell (2020) 24 Edin L Rev 1, 7, fn.37.

should certainly not rush to employ the vocabulary in places where it contributes nothing to our understanding. More likely to help with the issues in play is steady focus on the "varied and complex questions" which "[t]he interrelation and interaction between common law and statute may trigger",[120] as they arise with regard to unjust enrichment. This is especially so in situations like *Company v Bank*, where the interdependence of statute and unjust enrichment is such that their differentiation may be something approaching "a false dichotomy".[121] Thankfully, the necessary tools are to hand: they are simply the well-known techniques of common law and statutory interpretation. These are distinct in character.[122] But it is no surprise that they should sometimes have to work, and be applied, concurrently.[123]

V. CONCLUSIONS

"In every legal system, understanding the interaction of restitution with other legal categories presents a challenge."[124] With this, the vocabulary of subsidiarity does not assist. Unjust enrichment cannot logically be described as subsidiary to property, contract, or statutes entirely inconsistent with unjust enrichment claims. The problem is fundamental. Accounts of unjust enrichment's relations with other legal institutions fail when they refer to unjust enrichment as if it exists in a given fact situation when it does not. The more difficult example of *Company v Bank* shows that, whether or not it is always strictly illogical to describe unjust enrichment as subsidiary to statute, use of the vocabulary should still be eschewed.

The major implication of the arguments presented here is that courts and commentators must jettison subsidiarity. As has been seen, its purchase is regrettably substantial across the anglophone legal world. More unfortunately, there are signs that it is spreading: from accounts of unjust enrichment's interaction with the three institutions addressed here, to analyses involving wrongdoing. In late 2020, the Court of Appeal tentatively entertained the possibility that unjust enrichment might have "a subsidiary role to play in limiting the liability of a fiduciary to account" for unauthorised profits following a breach of fiduciary duty; but the Court recognised—in the same breath—that no unjust enrichment claim was in play at all.[125] We see here the fundamental problem to which much of this paper is

120. *Esso* [1999] HCA 67, [18] (Gleeson CJ, Gaudron and Gummow JJ); *Aid/Watch Inc v Federal Commissioner of Taxation* [2010] HCA 42; 241 CLR 539, [22].

121. A phrase used in a different instance of statutory and common law interaction in *Plaintiff S10/2011 v Minister for Immigration and Citizenship* [2012] HCA 31; 246 CLR 636, [97] (Gummow, Hayne, Crennan and Bell JJ). See also *Vella v Commissioner of Police (NSW)* [2019] HCA 38; 374 ALR 1, [86] (Bell, Keane, Nettle and Edelman JJ).

122. *Ogden Industries Pty v Lucas* [1970] AC 113 (PC (Aus)), 127 (Lord Upjohn, for the Board); *Brennan v Comcare* (1994) 50 FCR 555 (FCAFC), 571–572.

123. We might instance the Companies Act 2006, s.180 here. This renders possible tandem exercises in the interpretation of (i) provisions relating to directors' duties, which are "based on" and must "be interpreted and applied in the same way as common law rules or equitable principles" (*ibid*, s.170(3)–(4)); and (ii) the provisions of Part 10, Chapters 4 and 4A, of the same Act, to be interpreted using ordinary principles of statutory construction.

124. L Smith, "Restitution", ch.3 of M Tushnet and P Cane (eds), *The Oxford Handbook of Legal Studies* (Oxford, 2005), 53.

125. *Gray v Global Energy Horizons Corp* [2020] EWCA Civ 1668, [127]. The report of this decision as a Practice Note omits the paragraph referred to (see [2021] 1 WLR 2264, 2270), which remains in the full transcript.

directed: no unjust enrichment, no subsidiarity. Such evidence of burgeoning confusion suggests that, the sooner the notion of the subsidiarity of unjust enrichment receives its judicial quietus, the better.

From a more positive perspective, the principal advantages of proceeding as suggested are twofold. First, over subsidiarity-based exposition of unjust enrichment's relations with other areas of law and legal institutions, the alternatives proposed above—reliance upon the unjust question, and ordinary processes of reasoning with precedent and statute—have the merit of reflecting better the reasoning in the decided cases. These are the "starting point" for any attempt to understand the law of unjust enrichment.[126] Academics often attempt to refine the work of the judges.[127] But, as this paper has sought to show, the case law already explains quite well unjust enrichment's interaction with other areas of law and legal institutions. By contrast, subsidiarity does not even approach the legal realities. If anything, it positively distracts from the substance of when, why and how unjust enrichment does or should yield to the operation of other legal regimes. There can be no reason for its continued use, or more widespread adoption. Similar objections have motivated like conclusions before.[128]

Secondly, unjust enrichment can ill afford unnecessary complications in general, still less as concerns its relations with other legal regimes. In this regard, the approaches put forward here promote clarity for future development. For this valuable commodity[129] the courts are striving,[130] in a domain beset by continued uncertainty as to its working vocabulary,[131] component parts,[132] structure[133] and very identity.[134] Professor MacCormick cautioned that in the laudable pursuit of clear law, "rules can be or come to be wholly arbitrary and lacking in sound reason".[135] However, this is not a situation in which "the temptation of elegance"[136] needs to be resisted: the suggestions in this paper encourage clarity where subsidiarity provides none at all.

126. *Investment Trust Companies (in liq) v HMRC* [2015] EWCA Civ 82; [2015] STC 1280, [47] (Patten LJ, for the Court); revd on other grounds by the Supreme Court, which also emphasised "centuries' worth of relevant authorities [as] a valuable resource", and discouraged the courts from "reinventing the wheel": [2017] UKSC 29; [2018] AC 275, [40].

127. *Patel v Mirza* [2016] UKSC 42; [2016] 2 Lloyd's Rep 300; [2017] AC 467, [170] (Lord Neuberger).

128. See, eg, P Birks, "Rights, Wrongs, and Remedies" (2000) 20 OJLS 1, 3, 36, arguing that "the word 'remedy' […] should be eliminated from our analytical vocabulary", because it was thought unstable and misleading.

129. *Merkur Island Shipping Corp v Laughton* [1983] 2 AC 570 (HL), 612 (Lord Diplock, with whom the rest of their Lordships agreed): "[a]bsence of clarity is destructive of the rule of law."

130. See, eg, *HMRC v ITC* [2017] UKSC 29, [38–41] (Lord Reed, for the Court).

131. *Ibid*, [38], referring to "the uncertainty which has resulted from the use of vague and generalised language"; *Shilliday v Smith* 1998 SC 725 (IH), 727 (Lord Rodger LP).

132. P Jaffey, "Restitution", ch.7 of R Halson and D Campbell (eds), *Research Handbook on Remedies in Private Law* (Cheltenham, 2019); R Gregson, "Is Subrogation a Remedy for Unjust Enrichment?" (2020) 136 LQR 482.

133. See, *inter alia*, L Smith, "Restitution: A New Start?", ch.5 of P Devonshire and R Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Oxford, 2019); R Stevens, "The Unjust Enrichment Disaster" (2018) 134 LQR 574; P Letelier, "A Wrong Turn? Reconsidering the Unified Approach to Unjust Enrichment Claims" (2020) 136 LQR 121.

134. K Barker, "Unjust Enrichment in Australia: What Is(n't) it? Implications for Legal Reasoning and Practice" (2020) 43 Melbourne UL Rev 903.

135. N MacCormick, "General Legal Concepts", in N Whitty (ed), *Stair Memorial Encyclopaedia*, reissue (London, 2008), [123–125].

136. R Goff, "The Search for Principle" (1983) 69 Proc Brit Acad 169, 174.

"Precision in the use of terms" may only "go some way in ameliorating […] uncertainty" in the law.[137] Despite this, we still accept that linguistic imprecision is "not generally allowed to lawyers".[138] Their vocabulary cannot be "faultless", but they should "be sure of what they mean when they speak their own chosen language".[139] Distinguished jurists have for long made this point,[140] and continue to do so.[141] The concern here is not for "terminology for its own sake, but rather for clarity of meaning".[142] With "clear thought" and "lucid expression", we might find our way to a better understanding of substance.[143] From the specific realm of unjust enrichment, this paper is a reminder of the general benefits which derive from close attention to use of words in legal discourse.

137. *Alwie Handoyo v Tjong Very Sumito* [2013] SGCA 44; [2013] 4 SLR 308, [126] (Rajah JA, for the Court). See also *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2020] FCAFC 122; 381 ALR 457, [15] (Allsop CJ, with whom Jagot J agreed): "the finely worked language of the lawyer's craft […] is unlikely to be definitive […]" (decision under appeal at the time of writing).

138. *Brooks v Burns Philp Trustee Co Ltd* (1969) 121 CLR 432 (HCA), 458 (Windeyer J, dissenting; comparing the position of lawyers with that of Humpty Dumpty).

139. Justice W Fullagar, "Legal Terminology" (1957) 1 Melbourne UL Rev 1, 8.

140. *Mann* [2019] HCA 32, [150] (Nettle, Gordon and Edelman JJ), citing Professor John Chipman Gray for the view that "loose vocabulary is a fruitful mother of evils": "Some Definitions and Questions in Jurisprudence" (1892) 6 Harv L Rev 21, 21.

141. *Western Australia v Manado* [2020] HCA 9; 376 ALR 427, [82–84] (Edelman J); WMC Gummow, "What is in a word? 'Legitimate' interests and expectations as common law criteria" (2018) 45 Aust Bar Rev 23.

142. *Babstock* 2020 SCC 19, [23].

143. WN Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 Yale LJ 16, 28–29.