

Missing Reliance

Peter Jaffey*

Andrew Burrows, Understanding the Law of Obligations: Essays on Contract, Tort and Restitution, Oxford: Hart Publishing, 1998, xxiv + 223, hb, £25.00.

This is a stimulating and wide-ranging set of essays on contract, tort and restitution. In a number of the essays, Professor Burrows emphasises the importance of classification based on the underlying basis or rationale for claims. He is surely right that this is crucial to the clarification and development of the law. However, in my view there are problems with the analysis that Burrows offers, particularly with respect to contract and restitution. With respect to contract, it seems to me to be a shortcoming of his approach that it fails to recognise the role of contract law in protecting reliance. Reliance and its relation to contract have attracted considerable debate at various times, but receive surprisingly little attention here. According to Burrows, the difficulties that have afflicted the law of restitution in recent years have been largely overcome by the recognition of the theory of unjust enrichment. For him, the development of the theory of unjust enrichment as the underlying basis for restitution is the archetypal example of the exercise of identifying underlying principles as a means of interpreting and developing the common law. However, the theory of unjust enrichment, at least in the form in which it has been widely recognised, is open to serious objections. In particular, it tends to obscure genuine distinctions between quite different claims. The failure to recognise the role of reliance in contract has contributed to the problem, because it has allowed the law of restitution and the theory of unjust enrichment to be invoked to explain claims that are properly understood as contractual claims protecting reliance.

Reliance in contract

Most people would agree with Burrows that “the law of contract is concerned with binding promises” (p 3) (or, one might say, more broadly, enforceable agreements), and that “the law of tort is concerned with ... wrongs other than breach of a binding

promise” (p 5). Burrows discusses what he regards as a subsidiary or “second level” distinction between contract and tort, viz., that contract is generally concerned with duties to confer benefits, and tort generally with duties not to cause harm (p 9). That contract is concerned with duties to confer benefits appears to follow from an analysis of contract in terms of promising: a promise entails the assumption of an obligation, and generally this will be an obligation to confer a benefit. Burrows observes that in the earlier article on which Essay 1 is based he tended to treat this distinction as also definitive of contract and tort. But he is surely right now to argue that the distinction in terms of agreement or promising is definitive, and that to the extent that the second distinction is valid it is merely a contingent feature of the law. Thus he discusses the possibility that the law of tort may sometimes generate duties to provide a benefit (pp 11-13), without regarding this as in any way a threat to the fundamental distinction between contract and tort.

One issue that Burrows surprisingly gives no attention to is the possibility that the “second-level” or subsidiary distinction between contract and tort might be false not because there are tortious duties to confer a benefit, but because contract law is often concerned not with enforcing a duty to confer a benefit arising from a promise but with providing a remedy in respect of reliance on a promise or agreement.¹ The original article on which Essay 1 is based was partly a response to the work of Atiyah, who argued exactly this.² It has often been suggested that there are a number of aspects of contract law that are difficult to reconcile with the idea that contracting parties have a duty to confer a contractual benefit, as opposed to merely being responsible for the reliance of the other contracting party on the agreement. For example, if a contracting party has a duty to perform a contract, a remedy of specific performance should surely be routinely available to compel him to perform his duty, whereas in fact the remedy is available only where damages are inadequate, which is plausibly understood to mean where actual performance of the contract is the only

* Department of Law, Brunel University.

¹ There are also possible cases where the promise is a promise not to cause harm e.g., a confidentiality agreement or a restrictive covenant.

² A.S. Burrows, “Contract, tort and restitution - a satisfactory division or not?” (1983) 99 LQR 217, 263, referring, inter alia, to P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979).

way to ensure that the other party does not lose out through his reliance on the contract. Similarly, the law on mitigation and duress seems to suggest that contract law is designed only to protect reliance on an agreement and not to compel performance.³ Even if contract law does generate duties to perform promises, there is no doubt that claims also arise as a response to loss incurred in reliance on the promise or agreement, in the form of “reliance damages”.⁴ In my view, the tendency to disregard reliance claims in contract has been responsible for the distortion of contract law by the false invocation of restitution to explain what are really contractual reliance claims, particularly by way of the restitutionary theory of “failure of consideration” advocated by Burrows (see below).

Sometimes the idea that contract protects reliance loss has been thought to imply that contract is not concerned with rights arising from promises or agreements at all. This is the “death of contract” approach often attributed to Atiyah, which is directly relevant to the restitutionary theory of “failure of consideration”. But to argue that a contractual claim serves to protect reliance on a promise or agreement is not inconsistent with saying that the claim arises from the promise or agreement (although it might be thought inconsistent with the view that contract is necessarily concerned with claims to compel the provision of a benefit).

A reliance approach also seems to offer the best explanation of the problem, discussed by Burrows in Essay 8, of when a contracting party who has made a profit through a breach of contract should be stripped of the profit, by way of a claim for “disgorgement” or “restitution for wrongs”. Burrows mentions five different views and admits to being unsure of the best approach (pp 140-45). One would think that disgorgement should in principle be available whenever the defendant has acted wrongfully—i.e., has committed a breach of a contractual duty of performance—in order to give effect to the principle that a wrongdoer should not be allowed to profit from his wrong. On Burrows’s analysis, it seems that a contractor who fails to perform the contract always commits a breach of duty and should always be subject to disgorgement if he has made a profit. But most commentators have preferred to say

³ For a recent discussion see P. Jaffey, “A new version of the reliance theory” (1998) 49 NILQ 107.

⁴ As Burrows notes, pp 23-4.

that disgorgement should be available in some but not all such cases.⁵ If the defendant is understood to be responsible for the plaintiff's reliance on the contract, he should incur a duty to perform only when actual performance is necessary to ensure that the plaintiff does not suffer reliance loss—i.e., where damages are inadequate. It is only where such a duty has arisen and the defendant has breached it that disgorgement should be available. In other circumstances, the defendant is entitled not to perform, and incurs only a pecuniary liability to satisfy the plaintiff's reliance loss. The circumstances where a duty arises are also, of course, the circumstances where specific performance should be awarded to compel performance of the duty, if this is possible.

Similarly, the commission of a wrongful act is a necessary (although not a sufficient) condition for the imposition of punitive damages. Burrows suggests in Essay 1 that the reason why punitive damages are widely available in tort but not in contract is that since contract is “based on a voluntary undertaking, the courts ought to tailor the remedy in contract to what was voluntarily undertaken and should therefore be reluctant to invoke non-compensatory remedies In contrast, where the liability is purely imposed, as in tort, there need be no such reluctance” (p 13). But, where the contract has given rise to a duty to perform an undertaking, it is difficult to see why the imposition of punishment or disgorgement for a breach of the undertaking is inappropriate, or more particularly why it should be precluded by the fact that the duty arose by way of a voluntary undertaking; to the contrary, one would think that if the defendant has incurred a duty to fulfil the undertaking, then due respect for the duty would require recognition of the breach of duty as a wrongful act attracting disgorgement and punishment.⁶ The better explanation of why punitive damages are not usually available in contract is that contract is generally concerned only with responsibility for reliance.

Concurrent liability

⁵ See, for example, P.B.H. Birks, “Restitutionary damages for breach of contract: *Snepp* and the fusion of law and equity” [1987] LMCLQ 421 and G. Jones, “The recovery of benefits gained from a breach of contract” (1983) 99 LQR 443. *A-G v Blake* [1998] 2 WLR 805, decided after the publication of Burrows's book, is consistent with the argument in the text.

⁶ Subject to any requirement of knowledge or intention, especially for punishment.

In Essay 2, Burrows discusses the controversial question of concurrent liability in contract and tort. The main issue he addresses is whether, when a court has allowed a tortious claim as an alternative to a contractual claim, there is genuinely a distinct tortious claim, or whether the recognition of the tortious claim is really no more than a fiction that allows the plaintiff the benefit of more generous tort law rules on, say, limitation or remoteness or quantum. In the case where the defendant damages the property of the plaintiff in the course of carrying out a contract with the plaintiff, as in *Jackson v Mayfair Window Cleaning Co Ltd*,⁷ there seems to be no difficulty with concurrent liability in contract and tort. It is plausible that the contract expressly or by implication contains a term providing for the defendant to take reasonable care to avoid harm to the plaintiff's property, and the same or a similar duty could arise independently of the contract merely from the fact that the defendant was in a position to cause the damage in question. The tortious liability and the contractual liability are concurrent and distinct because the contractual liability arises from the agreement, whereas the tortious liability arises directly from the circumstances and events, irrespective of whether they also involve the performance of a contract. This is Burrows's conclusion, but he is surely mistaken in saying (apparently with reference to the subsidiary distinction mentioned above) that the reason why the tortious liability is independent of the contractual liability is that the tortious liability is "based on the defendant's harmful interference and not on a failure to benefit the plaintiff" (pp 25-6). In this situation both the contractual and the tortious claims surely arise from the breach of a duty not to cause harm.

There is more difficulty in cases where the tortious liability is said to arise from an "assumption of responsibility", as originally held in *Hedley Byrne v Heller*.⁸ In my view, where the plaintiff has incurred reliance on the defendant's words or actions, as in the misstatement cases like *Hedley Byrne*, his claim should generally depend on whether the defendant has agreed to accept responsibility for the plaintiff's reliance.⁹ This is consistent with the approach in *Hedley Byrne*, although some more recent cases have departed from the idea of assumption of responsibility or agreement

⁷ [1952] 1 All ER 215, discussed by Burrows at p 25.

⁸ [1964] AC 465.

⁹ See P. Jaffey, above n 3 at 129-31.

as the test of liability.¹⁰ Burrows again argues that “there is no difficulty in regarding the imposition of a duty of care in tort as independent of any contractual liability” because the basis of the claim is that “the defendant has harmfully interfered with the plaintiff, not that the defendant has failed to benefit the plaintiff” (pp 28-9). But if the claim arises from an agreement by the defendant to take responsibility for reliance placed by the plaintiff on the defendant’s statement, as *Hedley Byrne* suggested, then the claim is based on agreement and is essentially contractual by Burrows’s definition, even though it is a claim in respect of harm suffered rather than the non-receipt of a benefit.

Burrows concludes that a claim arising from “assumption of responsibility” is in fact a claim arising from an agreement, and so is essentially contractual as opposed to tortious. As he says, this seems to imply, as a matter of “strict logic”, that there is no distinct concurrent claim in tort, and therefore that the plaintiff should be confined to a claim in contract, notwithstanding any disadvantages that might result in terms of, say, the limitation period. The “strictly logical development” would be to reform the law on limitations (p 31). Burrows argues that the “pragmatic solution” is to get around the limitation problem “by framing what is in essence a contractual claim as a claim in tort” (p 32). This is his preferred explanation for the leading decision of *Henderson v Merrett Syndicates*¹¹: we should “use the law of torts to plug the gaps left by contract law, but this should be done with full realisation of what we are doing.”¹² But this approach is liable to cause confusion. If a limitations statute denies a contractual claim in certain circumstances, then it denies a contractual claim whatever the claim is called. It is not so much “pragmatic” as fictional to pretend that the contractual claim is consistent with the statute if it is called a tort claim.¹³ The choice presented by Burrows between the pragmatic and the logical solutions seems to be really a choice between the fictional and the pedantic. If the limitations statute appears to operate unjustly, the issue is whether the court has available to it legitimate

¹⁰ e.g. *Smith v Eric Bush* [1990] 1 AC 831.

¹¹ [1994] 3 WLR 761.

¹² This is quoted at p 32 by Burrows from D. Harris and C. Veljanovski, “Liability for Economic Loss in Tort”, in M. Furmston ed., *The Law of Tort* (London: Duckworth, 1986), 59.

¹³ This assumes, along with Burrows and Lord Goff in *Henderson*, that a contractual claim is a claim based on agreement or promising: see Burrows at p 27.

means of interpreting it contrary to its strict wording or ostensible meaning. For example, if a limitations statute provides for an extended limitation period for tortious claims arising from negligence, and its rationale is understood to be to protect the plaintiff from the difficulty that he may not know when a breach of the duty of care has occurred, one might be able to argue that it is consistent with the statute, purposively rather than literally construed, to apply the extended limitation period also to contractual claims arising from a failure to exercise reasonable care, on the ground that the same difficulty arises in relation to a contractual claim of this sort. One might object that this is simply playing fast and loose with the words of the statute. But in fact it shows far more respect for the statute than simply evading it through a fiction.

Restitution

It is the law of restitution that receives most attention in these essays. Burrows is an advocate of the theory of unjust enrichment as the foundation for the law of restitution (see pp 6, 45, 99), and he appears to adopt it unquestioningly, although he also accepts that its foundations are underdeveloped (p 118). However, there is surprisingly little discussion of the nature of unjust enrichment, or of the arguments for it, or, for that matter, of the various arguments that have been made against it. Although they are not gathered together and presented as such, the following considerations emerge from the various essays as supporting the principle of unjust enrichment.

First, there are clearly claims that are not contractual or tortious, and to which a benefit received by the defendant is relevant. These are often found under various “dishonest or opaque labels”, including “quasi-contract, subrogation, constructive trust, money had and received ...”¹⁴ and have come to be treated together as the law of restitution. The theory of unjust enrichment subsumes them under a single governing principle. The alternative seems to be to treat this body of law as an arbitrary miscellany, and thus the theory appears to represent an advance in principled reasoning and rational classification in the law (p 99). Consequently, critics of unjust

¹⁴ This comes from the dust-jacket of P. Birks, *An Introduction to the Law of Restitution* (Oxford: Clarendon Press, 1985), which Burrows cites at p 46.

enrichment have sometimes been branded as opponents of rational thinking.¹⁵ More specifically, the theory of unjust enrichment provides an alternative to the clearly fallacious “implied contract” theory, which classified some of these claims as contractual, or at least “quasi-contractual” (p 100); and it cuts across and undermines the archaic division between law and equity, which distinguishes between claims by reference to the form of the proceedings through which the claim was pursued before the Judicature Acts were passed in the last century (pp 100-01). But there are serious objections to the theory of unjust enrichment. In my view, the field of law understood as the law of restitution and supposed to be governed by a single principle of unjust enrichment actually breaks down into three quite distinct fields. In each of these benefit is relevant, but in different ways, because a claim arises on a different basis. The artificial forcing together of these fields has caused considerable confusion and unnecessary complexity.

One fault-line is already partly recognised. As Burrows notes, the law of restitution is thought to have two sub-categories, “autonomous restitution” and “restitution for wrongs” (p 61). “Restitution for wrongs” (which was referred to above in connection with breach of contract) is understood to be the legal response of stripping the defendant of the benefit he has made through a wrong. It is worth noting in passing that “restitution” here is quite inapt because the effect is not to return anything to the plaintiff or to restore him to a previous position; it is now common to use the preferable expression “disgorgement”. It is sometimes said that restitution for wrongs or disgorgement is a type of remedy for a wrong. But this is not strictly correct, or at least it is an inappropriate usage. A remedy for a wrong serves to rectify the effect of the wrong so far as the plaintiff is concerned, typically by specific performance, injunction or compensation. Disgorgement is not a remedy in this sense. Its function is to prevent the defendant from profiting from the wrong, not in order to assist the plaintiff, but in order to promote the public interest. Thus disgorgement is better described as a legal response, not as a remedy. Also, disgorgement is not a category of claim. It is a response that is in principle apt in respect of any claim that arises from wrongdoing. If the law of restitution, or the law of unjust enrichment, defines a category of claim, like contract or tort, disgorgement cannot be a sub-

¹⁵ See e.g. P.B.H. Birks, “Unjust enrichment—a reply to Mr Hedley” (1985) 5 LS 69-70; A.S. Burrows, *The Law of Restitution* (London: Butterworths, 1993), 6.

category, because it is not a type of claim at all, but a response.¹⁶ The failure to recognise the true nature of disgorgement has obscured the important issue of the relationship between disgorgement and punishment, which is also a public interest response to wrongdoing. Punishment in civil proceedings is understood to be subject to a procedural objection, on the ground that the division between civil and criminal proceedings principally reflects an allocation of functions by which the provision of remedies for the benefit of the victim is a matter for civil proceedings and the infliction of punishment in the public interest a matter for criminal proceedings. The same procedural objection appears to apply in principle to disgorgement, as a public interest response, but is obscured by the misclassification of disgorgement under the principle of unjust enrichment. To my mind, the Law Commission Report on *Aggravated, Exemplary and Restitutionary Damages*,¹⁷ discussed by Burrows in Essay 8, is flawed in failing to recognise this close association between disgorgement and punishment.¹⁸

Some confusion has arisen in the literature because of the conflation of disgorgement with the “use claim” or claim under the user principle: both of these are described as claims for restitutionary damages or restitution for wrongs. A claim under the user principle is a claim for payment for the unauthorised use of property, for example where the defendant has used a path across the plaintiff’s land, or “borrowed” his chattel.¹⁹ It is a type of claim like a contractual or tortious claim. It is not the same thing as disgorgement. Its rationale is not to strip the defendant of his profit but to secure payment to the plaintiff for the use of his property. The conflation of the two is due to the theory of unjust enrichment, and is not found in the traditional case law, where the use claim typically took the form of a claim for “mesne damages” or money had and received, whereas disgorgement took the form of exemplary damages, or in equity a constructive trust or account of profits. Burrows makes a mistake, I believe, in discussing together (see pp 142-3), on the one hand, cases like

¹⁶ Even if restitution is a category of remedy (so that some claims in contract or tort are also restitutionary), disgorgement cannot be subsumed within it because disgorgement is not a remedy.

¹⁷ Law Com 247, 1997.

¹⁸ Burrows was apparently the Law Commissioner responsible for this report.

¹⁹ e.g. *Penarth Dock Engineering Co Ltd v Pounds* [1963] 1 Lloyd’s Rep 359, *Ministry of Defence v Ashman* [1993] 2 EGLR 102.

Surrey CC v Bredero Homes,²⁰ and *Wrotham Park Estate v Parkside Homes*,²¹ and, on the other hand, cases like *A-G v Guardian Newspapers (Spycatcher)*²² and *Reading v A-G*.²³ In the former cases, the issue is whether the plaintiff is entitled to a sum measured as a small fraction of the defendant's profit from breach of covenant—which can be understood as unauthorised use of the covenantee's land—as reasonable payment for the benefit taken. In the latter cases, the issue is whether the defendant should be stripped of his profits altogether on the ground that he has acquired them through a wrong.

The second fault-line cuts through the remaining category of “autonomous restitution”, or “restitution for unjust enrichment by subtraction”. This category forces together two distinct claims: the claim to reverse a vitiated transfer of wealth or property, and the claim for payment for work done in the absence of a contract. Again, these two claims are distinguished in the traditional case law: at common law the former took the form of money had and received, and the latter the quantum meruit. There is a vitiated transfer of property or wealth of the plaintiff where it is transferred by him mistakenly or under compulsion or by someone else without his authority.²⁴ The defendant is liable in the measure of the value of the wealth or property received, and the claim serves to reverse the transfer. A claim for payment arises where the plaintiff has done work or incurred expenditure in conferring a benefit on the defendant, for which he seeks payment. The remedy for such a claim is payment for the work done in conferring the benefit. The effect is not to reverse a transfer of wealth or property but to give effect to an exchange of benefit for payment. The general rule is that there is no payment for work done except where the defendant has agreed to pay for it, and the claim is then contractual. But it appears that a non-contractual claim for payment arises in some cases, principally on the ground that, for one reason or another, it was not feasible for the parties to contract.²⁵ Such claims are

²⁰ [1993] 3 All ER 705.

²¹ [1974] 1 WLR 798.

²² [1988] 3 All ER 545.

²³ [1951] AC 507.

²⁴ “Lack of authority” as a vitiating factor corresponds to what is often described by academic writers in restitution as “ignorance”: see e.g. Burrows at p 105.

²⁵ Including the case where they thought they were contracting but did not because of a mistake.

nowadays described as restitutionary, but they are distinct from claims to reverse a vitiated transfer. Forcing the two types of claim together has caused confusion, and this can be illustrated by reference to two leading cases that Burrows discusses: *Lipkin Gorman v Karpnale*,²⁶ which is said to represent the recognition of the law of restitution and the principle of unjust enrichment in English law, and *Pavey & Matthews v Paul*,²⁷ which is said to play a corresponding role in the law of Australia.²⁸ In fact, the former involved a claim to reverse a vitiated transfer of wealth, and the latter a claim for payment for work done in conferring a benefit.

Where there is a vitiated or ineffective transfer of wealth or property belonging to the plaintiff, restitution lawyers take the view that two distinct claims to reverse the transfer can arise: a proprietary claim and a restitutionary claim. Sometimes, it is thought, there is an ineffective transfer, which fails to pass title to the property or wealth. In such a case, the plaintiff's claim is based on the defendant's receipt or possession of property or wealth, title to which remains with the plaintiff. In other cases, it is thought, title passes, but the transfer is vitiated in some way, and this gives the plaintiff a restitutionary claim, which is understood to be based not on the plaintiff's retention of title or the defendant's interference with title, but on the principle of unjust enrichment. Burrows refers to the "continuing mystery of the relationship between property law and unjust enrichment" (p 115). In fact, there is no good reason to distinguish between these supposedly distinct claims. There is a single proprietary or, if one prefers, restitutionary claim arising from the receipt of wealth or property and designed to reverse the transfer on the ground that the intention of the plaintiff to make the transfer was absent, vitiated or bypassed. No distinction is to be found in the traditional case law: at common law a claim to reverse a payment was uniformly pursued by way of an action for money had and received, and in equity by way of an equitable proprietary claim or claim under a constructive trust, without any differentiation, in either case, reflecting the supposed distinction between

²⁶ [1991] 2 AC 548.

²⁷ (1986) 162 CLR 221.

²⁸ Although there is no hint of it in Burrows's discussion, many commentators have argued for a distinction along these lines: e.g. S. Stoljar, *The Law of Quasi-Contract* (Boston: The Law Book Co, 2nd edn., 1989); P. Watts, "Restitution - a property principle and a services principle" [1995] RLR 49; see also P. Jaffey, *The Nature and Scope of Restitution* (Oxford: Hart Publishing, 2000).

restitutionary and proprietary claims. Thus the controversy that has developed, involving increasingly complex and obscure attempts at elucidation, is simply based on a false distinction induced by the theory of unjust enrichment. This is, I believe, the solution to the “continuing mystery”, although not a solution that will be easy for advocates of the theory of unjust enrichment to swallow.²⁹

In *Lipkin Gorman*, a partner in the plaintiff firm of solicitors used the firm’s money to gamble in the defendant’s casino. The plaintiff was allowed a claim for money had and received or restitution against the defendant in respect of the money received by the defendant through the unauthorised transfer of the plaintiff’s money. According to Burrows, the “prime importance of the case is that all of their Lordships explicitly based the decision on unjust enrichment” (p 52). If this is understood to mean merely that the claim should no longer be understood as in any sense contractual or quasi-contractual it is uncontroversial. But if it is understood to support the view that there is a distinction between a proprietary claim and a claim in restitution based on unjust enrichment, and that the latter claim is the same as a non-contractual claim for payment for work done or a claim for disgorgement (which is the crux of the academic theory of unjust enrichment), one can only say that nothing along these lines was considered in the judgments or comes anywhere near the ratio of the case. It has been a matter of controversy in the academic literature whether the claim in *Lipkin Gorman* was really a proprietary claim or a restitutionary or unjust enrichment claim.³⁰ In fact there is nothing in the case to indicate that the claim was one rather than the other, or to show that there is a distinction between the two.

The second case, *Pavey & Matthews v Paul*, was concerned with a claim for payment for work done, not a claim to reverse a vitiated transfer of wealth or property. The plaintiff had done building work for the defendant under a contract that failed the statutory formality requirements governing building work. It was held that although a contractual claim was ruled out by the statute, a restitutionary claim was

²⁹ The distinction in the text between “proprietary” and “restitutionary” is different from the distinction between “in rem” and “in personam”, or “personal” and “proprietary”.

³⁰ See e.g. W.J. Swadling “A claim in restitution?” [1996] LMCLQ 63; P. Birks, “Property and unjust enrichment: categorical truths” [1997] NZ Law Review 623; R.B. Grantham and C.E.F. Rickett, “Property and unjust enrichment: categorical truths or unnecessary compexity?” [1997] NZ Law Review 668.

available in respect of the benefit received. But if no contractual claim is allowed, it is difficult to see what the alternative basis for a claim is—the general rule is that no claim for payment for work done in conferring a benefit arises in the absence of an agreement to pay. If the claim is a restitutionary claim based on unjust enrichment, it is unclear what the “unjust factor” is. Burrows takes the view that the unjust factor in *Pavey* was “failure of consideration” (p 89).

“Failure of consideration” is understood to provide a ground for a restitutionary claim where a valid contract is terminated as well as where there is no valid contract, and it is helpful to consider this type of case first. Where there is a valid contract, a quantum meruit for work done under the contract is sometimes allowed as an alternative to expectation damages when the contract terminates early as a result of breach or frustration. Burrows argues that “the unjust factor grounding restitution in this area is failure of consideration: that is, the plaintiff has not received the defendant’s contractually promised performance which was the plaintiff’s basis for rendering the benefit to the defendant” (p 83, and see also p 23) But is there really a non-contractual claim here? As Burrows himself defines it, the claim arises from the failure to perform the agreement. The reason why Burrows excludes the possibility that the claim is contractual seems to go back to his understanding of contract, as discussed above. If contractual claims arise only from the breach of a promise to provide a benefit, it might appear that they must be claims for compensation for breach of an obligation to confer a benefit, which would necessarily be a claim for expectation damages, not a quantum meruit. But, as mentioned above, a claim can arise in respect of loss incurred in reliance on a promise or agreement; the standard case is the reliance damages claim in respect of expenditure incurred under a contract. A claim for payment for work done in reliance on an agreement is not simply a claim for loss like a reliance damages claim—because it provides a return for work done in addition to reimbursement of loss—but it is a form of reliance claim arising from the agreement. This seems to me to provide a far more plausible basis for the quantum meruit in this type of case than the idea that it is a restitutionary claim that results from the non-performance of the agreement but is not actually based on the agreement.

An important issue in this type of case is whether the quantum meruit should be measured by reference to the value placed by the parties on the work—that is, in

terms of a proportion of the agreed payment for the whole contractual performance. This should presumably be the case if the quantum meruit is a contractual reliance claim. But if the quantum meruit is a non-contractual, restitutionary claim, one would expect the measure of reasonable payment for the work to be assessed independently of the contract.³¹ This might enable a plaintiff to use the quantum meruit to avoid the consequences of a bad bargain. Burrows argues that the quantum meruit is indeed independent of the contract because “the thrust of the plaintiff’s claim for failure of consideration is not that the defendant has committed a breach of contract but rather that the defendant has been unjustly enriched by receiving a benefit from the defendant that was rendered on the basis of a counter-performance by the defendant that has not been forthcoming” (p 23). Thus he takes the view that the quantum meruit need not be constrained by what one might call the “contractual valuation” (*loc cit.*). He contrasts this with the position for “reliance damages”, which are indeed capped by the expectation measure.³² There is little authority on the point, and many commentators take the view that the quantum meruit should be subject to the contractual valuation, just like reliance damages, and this is consistent with the analysis of the quantum meruit as akin to reliance damages.³³

The effect of this restitutionary theory of failure of consideration is to subvert the contract by allowing the plaintiff a claim that can in reality only be justified as a claim based on the agreement, but on terms set by the court that may be inconsistent with the contract. Thus it is interesting to note that Burrows’s restitutionary theory of failure of consideration has the same effect as the death of contract theory, according to which a claim in contract is not based on the agreement but on reliance, independent of the agreement, so that the terms of the agreement are not determinative of the measure of claim. There is a certain irony here, because, as mentioned above, Essay 1 and the article on which it was based were intended partly

³¹ This appears to be Burrows’s view: see p 23.

³² pp 23-24; and see *CCC Films (London) Ltd Impact v Quadrant Films Ltd* [1985] QB 16.

³³ For a recent discussion, see A. Skelton, *Restitution and Contract* (London: Mansfield Press, 1998). There is a reference in Burrows’s formulation to the defendant’s having benefited, but in fact it is clear that a quantum meruit can be awarded in respect of work done under a contract whether or not the work has yet conferred any benefit on the defendant: e.g. *Planché v Colburn* (1831) 8 Bing 14, 131 ER 305.

to refute this death of contract analysis, which subverts the distinction, which Burrows seeks to uphold, between contract, restitution and tort.

Burrows believes, to return to *Pavey*, that where a quantum meruit is awarded as payment for work done under an invalid or unenforceable contract, “failure of consideration” in the sense outlined above is again the basis for it: “The only difference is that here the defendant’s promise was not a valid contractual one” (p 89). But it is surely mistaken to say that there is no contractual claim because the contract is void or unenforceable—which seems to mean that there is no agreement or promise, or that if there is an agreement or promise it does not give rise to enforceable rights—but then to say that there is a non-contractual claim that arises from the agreement or promise. If *Pavey* was correctly decided, it is best understood as a contractual claim, which involved enforcing the contract notwithstanding the statute. One might say that this simply contradicts the statute; but, rightly or wrongly, there are many cases where the court has disregarded the strict wording of an invalidating statute, on the principle that the defendant should not be allowed to invoke a statute as an “instrument of fraud”.³⁴

Another possible non-contractual basis for claims for payment is the doctrine of “free acceptance”, which was developed by Birks and Goff and Jones, and is discussed at length by Burrows in Essay 4. According to the doctrine, a defendant is liable to pay for a benefit received if he knew that the plaintiff was providing the benefit to him with a view to being paid, and he nevertheless failed to tell the plaintiff that he would not be paid if he proceeded to provide the benefit. Burrows rejects the doctrine in Essay 4. He argues, first, that free acceptance does not establish that the defendant was enriched: “There is no reason why one should assume that a freely accepting defendant actually regards himself as being benefited by what the plaintiff has conferred. On the contrary a defendant is just as likely to accept what the plaintiff is conferring on him where he considers it neither beneficial nor detrimental as where he considers it beneficial” (p 76). But the likelihood that the defendant is neutral with respect to what he receives is negligible. The real point here is not that free acceptance does not show that the defendant prefers to have the benefit rather than not, but that it provides no indication of *how much* it is actually worth to the

³⁴ e.g. *Rochefoucauld v Boustead* [1897] 1 Ch 196, which concerned a trust; the same principle has been applied in connection with secret trusts, proprietary estoppel and part performance.

defendant, and so of what he should be made to pay for it. Free acceptance is normally understood to imply that the defendant should be liable to pay the market price for the benefit, but there is no basis to infer that the defendant actually thought that the benefit was worth this price unless, when he failed to reject it, he knew that this would subject him to liability to pay the market price (and if this is the case, the valuation of the benefit is irrelevant to liability anyway).

The real question is whether free acceptance provides a ground for a claim for the market price irrespective of the real value of the benefit to the defendant. Burrows rejects the argument that free acceptance can generate such a claim.³⁵ Here it appears that he confuses two issues. The first is whether a claim should arise from free acceptance as defined above, and the second is whether, if such a claim is allowed, it is a restitutionary claim, and, if it is not, what its basis is. It seems to me that if a claim does arise from free acceptance (as defined) it is not a claim in restitution or unjust enrichment. It does not arise from the receipt of a benefit, but from the defendant's failure to act. This failure to act might be understood to generate a claim in two ways. First, it may be that in some circumstances the defendant's silence or inaction can be reasonably interpreted as the acceptance of an offer, so generating a contractual liability for payment. This is no doubt not the usual contractual rule, but it may be that there are exceptions. Secondly, it may be that the defendant has in some circumstances a duty to save the plaintiff from unnecessary work and expenditure, so that if he fails to carry out his duty he acts wrongfully and can be liable to compensate the plaintiff.³⁶ Such a claim would be in essence tortious. It would be a rare example of a duty of positive action to save the plaintiff from harm.³⁷

At one time what is now understood as the law of restitution was blighted by fictions and fragmented into a miscellany of causes of action, whose rationales were obscured by archaic terminologies and forms of action. The modern treatment of this area is characterised by the conviction that looking behind the cases for underlying

³⁵ i.e., that free acceptance constitutes an "unjust factor" generating a restitutionary claim: see pp 74, 77ff.

³⁶ This seems to be the position in the "mistake" cases of proprietary estoppel: see e.g. *Ramsden v Dyson* (1866) LR 1 HL 129, 140-1, per Lord Cranworth.

³⁷ The appropriate remedy would appear to be compensation for loss, which might differ from payment at the market value.

principles is crucial in making the law clearer, fairer and more coherent. Burrows has been at the forefront of this project, writing in the clear and forthright style displayed in these essays. But although, as Burrows says, the theory of unjust enrichment has helped to eliminate the fiction of implied contract and contributed to the integration of law and equity, it also suffers from serious defects. It conflates the distinct claims for restitution of a vitiated transfer of wealth, for payment for work done, and for disgorgement; it has generated confusion and unnecessary controversy over a supposed distinction between proprietary claims and claims in restitution or unjust enrichment; and it has led to the misconceived theory of failure of consideration as an “unjust factor”, which has contributed to obscuring the proper role of reliance in contract.