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Classification and Unjust Enrichment

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INTRODUCTION

One of the most striking changes in academic research and teaching in recent times has been the appearance of a new subject under the name of restitution or unjust enrichment. This has transformed the treatment of various areas of the common law that were historically neglected, confused and obscure, and has had, over a relatively short period, a marked effect on the approach of some judges to these areas. One of the most influential works has been Peter Birks's *An Introduction to the Law of Restitution*,¹ originally published nearly twenty years ago. Much of the literature has been concerned with exploring issues identified by Birks, in the terminology and according to the general approach that he adopted. Birks has been influential not only through this book and the numerous articles and other books that developed and modified his views, but also through scholarship that he has facilitated and promoted: important work has been produced by his research students and by participants in academic seminars and conferences organised by him. In addition, the *Restitution Law Review*, which Birks helped to found, has provided a new forum for the promotion and discussion of these developments.

Given the passage of time and the volume of literature, it is not surprising that *Unjust Enrichment*² reveals some significant changes from the approach originally taken in *An Introduction to the Law of Restitution*. But the new book is a contribution to the same general project, which is to bring together into a single body of law various claims that were historically separated and unrelated; in other words, to

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¹ P. Birks, *An Introduction to the Law of Restitution* (Oxford: Oxford University Press, rev edn 1989).

² P. Birks, *Unjust Enrichment* (Oxford: Oxford University Press, 2003). References are to this book unless otherwise stated.

establish restitution or unjust enrichment as a category of law analogous to the traditional categories of contract and tort.

The fundamental issue that this project raises is a matter of classification: what it means to say that there is a category of unjust enrichment law, and why it is important. This review will concentrate on this question. It will examine Birks's scheme of classification and the nature of his category of unjust enrichment, and its relation to other categories such as contract and property. This will involve concentrating mainly on Parts 1 and 3 of *Unjust Enrichment*. Part 1 has a chapter on Birks's 'core case' of unjust enrichment and a chapter on classification. These chapters explain his general approach to private law and unjust enrichment and propound a scheme of classification, a version of which first appeared in *An Introduction to the Law of Restitution*.³ Part 3 considers what counts as 'unjust' in Birks's theory of unjust enrichment. This reveals a significant change in Birks's thinking, the move from the theory of 'unjust factors' to the theory of 'no legal basis'.

Birks's discussion of his scheme of classification in Part 1 is not just a preliminary rhetorical flourish or a gesture at theory. It is at the heart of the project of showing that a rational understanding of private law requires the recognition of a category of unjust enrichment. Birks has always emphasised the importance of classification. Rightly, in my view, he has always insisted that the very use of concepts in reasoning, in the law as elsewhere, necessarily involves some form of classification; without it we are faced with an incomprehensible mass of particulars.⁴ But there are different types of classification, and it is argued below that Birks's scheme relies on a form of classification that is not appropriate for his project. I shall start with a discussion of classification in general, as a prelude to a discussion of Birks's scheme.

CLASSIFICATION IN THE LAW

Justificatory categories

The first of the two types of classification discussed here is classification by 'justification', or classification into 'justificatory categories'. This can be understood

³Above n 1, 20-23. The second dimension of Birks's classificatory grid consists of 'responses', including 'restitution', 'compensation' and 'punishment'. Birks contrasts a response with the causative event that gives rise to it. For reasons of space I have not discussed restitution as a remedy or response or the issues of 'multi-causality' and quadrature.

⁴ See for example P. Birks, 'Rights, wrongs and remedies' (2000) 20 OJLS 1, 3.

as follows. Where the law is settled, the determination of the legal position involves simply identifying an authoritative rule that uncontrovertibly applies to the facts in issue. In other cases there may be no authoritative applicable rule, or there may be uncertainty about whether a rule applies. It is not easy to give an uncontroversial account of legal reasoning in such cases. I think it would be conventional to say that the judge makes his determination by ‘analogical reasoning’, ie by drawing on principles underlying other rules that are not actually applicable to the facts.⁵ On one view, this should be understood as part of a broader exercise in determining what relevant rule is prescribed by the theory that adequately accounts for the case law and has the soundest moral basis.⁶ Others hold that where the issue is not resolved by an authoritative rule, the judge performs his task by determining the appropriate moral principles to apply.⁷ There will also be differences over what counts as settled law, and whether judges are confined to narrow incrementalism or whether more far-reaching changes are legitimate.⁸ It does not matter for present purposes that I have not explained this process precisely or adopted a particular understanding of it.⁹ I take it as uncontroversial that in some form this process is a recognisable part of the common law, and I shall refer to it as ‘analogical or theoretical reasoning’. Analogical or theoretical reasoning promotes consistency at a more abstract level, and thereby enhances the coherence, clarity and fairness of the law.

The concept of a justificatory category has to be understood in terms of analogical or theoretical reasoning. A justificatory category comprises claims that arise on the basis of a certain type of justification or underlying principle, so that a justificatory category can play a role in analogical or theoretical reasoning.¹⁰ Take contract as a possible justificatory category. I take it that contract is concerned with claims that arise from the principle that agreements should be observed, or some

⁵ See eg N. MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Oxford University Press, rev edn, 1994) ch 7; C. R. Sunstein, ‘On Analogical Reasoning’ (1992) 106 Harv LR 741; J. Raz, ‘Law and Value in Adjudication’, in *The Authority of Law* (Oxford: Oxford University Press, 1979). This may lead to the assimilation of different rules into a single rule covering matters that were previously understood to be governed by different rules; or it may be used to justify breaking down a rule into two distinct rules.

⁶ R. Dworkin, *Law’s Empire* (Oxford: Hart Publishing, 1998).

⁷ eg L. Alexander, ‘Bad Beginnings’ (1996) 145 U Penn LR.

⁸ For example, Dworkin’s approach would appear to leave open the possibility of more radical transformations of the law than the more traditional concept of analogical reasoning as a tool for incremental change.

⁹ Also, I have not discussed the controversial question whether this process should be understood as finding or making law.

¹⁰ Cf ‘functional categories’ in M. Moore, *Placing Blame* (Oxford: Clarendon Press, 1997), 18ff.

principle along these lines.¹¹ There are many types of agreement, but certain types of issue are common to them all, because they are concerned with aspects of this basic principle: for example, what an agreement is, what types of agreement should be enforced, what to do when an agreement does not provide for a contingency that has arisen, what sort of remedy is appropriate if the agreement is not performed, etc. The recognition of a category of contract, with a uniform framework for the treatment of claims, is a means of ensuring that such issues receive consistent treatment when they arise. Thus there might be a case where a claim is based on agreement but governed by a distinct set of rules using distinct concepts and terminology because historically it has not been recognised as a claim in contract.¹² Characterising the claim as contractual, and thereby revising the rules governing it and bringing it under the uniform framework for claims based on agreement, amounts to developing the law through analogical or theoretical reasoning.¹³

It seems to me that contract law is a sound justificatory category and is recognised as such. Tort is generally taken to be a justificatory category and I shall refer to it as such.¹⁴ Property law is also in my view a sound justificatory category, as I shall argue below.¹⁵ It could be that a category is recognised and operates as a justificatory category although the nature of the justification behind it is not properly understood or is controversial.¹⁶ Indeed, for any category there is likely to be some disagreement about the nature of its justification. The effect of the classification may not then be as clear-cut as the contractual illustration might suggest. But nevertheless it will determine in general terms how the issue is approached and what types of consideration are considered relevant.¹⁷

¹¹ There is room for different interpretations of this proposition, which can generate arguments concerning particular rules of contract law, but this does not imply that the proposition is not meaningful or that the principle cannot operate in the way suggested.

¹² For example, certain equitable doctrines expressed in terms of fraud or unconscionability appear to be actually concerned with reneging on an agreement, eg secret trusts or some cases of proprietary estoppel. 'Equity' is not in my view a justificatory category.

¹³ A category like contract will for the time being have a conventional or recognised scope that will tend to evolve in the light of analogical and theoretical reasoning.

¹⁴ It is a matter of controversy whether there are distinct categories of tort based on distinct types of justification, not reducible to a single more abstract formula.

¹⁵ The recognition of these categories as justificatory categories is reflected in a very full theoretical literature offering various theories of the category.

¹⁶ It is said that analogical reasoning is 'incompletely theorised', ie, it is a technique for solving a problem without a comprehensive theory: see Sunstein, above n 5, 747; E. Sherwin, 'A Defense of Analogical Reasoning in Law' (1999) 66 Univ of Chicago LR 1179.

¹⁷ One might say instead that a category is defined in terms of a certain type of problem, ie a type of situation involving a certain clash of interests requiring resolution, for which rival solutions might be offered.

For present purposes, the vital question is whether there is a justificatory category of unjust enrichment. The project pursued in *Unjust Enrichment* – the formation of a single body of law subject to a uniform framework, through analogical or theoretical reasoning – makes sense only if there is such a category.¹⁸ Before considering this question, we need to consider a second type of classification.

Classification by the form of legal relation

Consider a different type of category: the category of all events that constitute a legal wrong. This category can be expressed in another way. A wrong is a breach of duty. Thus the category can also be expressed as the category of ‘right/duty’ relations, where the claimant had a right that the defendant act (or refrain from acting) in a certain way, and the defendant breached his duty by failing to do so. For example, X might have a right to contractual performance correlating with a contractual duty on the part of Y; or X might have a right not to be assaulted by Y, and Y a correlative duty not to assault X.

An analogous concept is the concept of a power. X exercises a power where he changes the legal position by doing an act for this purpose. For example, X exercises a power when he terminates a contract with Y or transfers property to Y. Again, the concept can be expressed either in terms of a legal relation of power/liability – X has a power correlated with a liability on the part of Y to have his legal position altered – or in terms of an act that is specified by reference to the relation, ie, the act of exercising a power.

Right/duty relations and power/liability relations are two of the four types of legal relation identified by Hohfeld, the other two being the ‘liberty/no-right’ relation and the ‘disability/immunity’ relation.¹⁹ Hohfeld described his legal relations as

¹⁸ Some commentators have been sceptical about classification of this sort. One objection seems to be based on the idea that the law is just about identifying authoritative rules, and the classification of these rules is not generally relevant to solving any legal problem. Another objection seems to be that categories like contract and tort draw on various types of justification and it is unhelpful to differentiate between them along the lines suggested. See for example S. Hedley, ‘The Taxonomic Approach to Restitution’ in A. Hudson (ed), *New Perspectives on Property Law, Obligations and Restitution* (London: Cavendish, 2004); S. Waddams, ‘The Relation of Unjust Enrichment to Other Concepts’ in E. J. H. Schrage (ed), *Unjust Enrichment and the Law of Contract* (Dordrecht: Kluwer, 2001), and **S Waddams, *Dimensions of Private Law* (Cambridge: Cambridge University Press, 2003)**; P. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Oxford University Press 1979), 768. These points will not be pursued here.

¹⁹ For a summary, see N. E. Simmonds’s introduction in D. Campbell and P. Thomas (ed), W. N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Dartmouth: Ashgate, 2001).

‘fundamental conceptions’.²⁰ They are basic concepts or elements employed in the formulation of legal rules. It is often helpful to classify legal rules according to the category of legal relation constituted by the rule. This can help to clarify the meaning of the rule and to avoid errors of legal reasoning resulting from a misunderstanding over its meaning.²¹ Such categories are not justificatory categories. Rules having the same form of legal relation may fall into different justificatory categories: for example there are contractual right/duty relations and tortious right/duty relations, and there are powers to make a contract, powers to transfer property, and powers to waive a right against what would otherwise be a tort. Conversely, within a particular justificatory category there can be rules involving different forms of legal relation. In contract, for example, the creation of the contract involves the exercise of a power, but the relation established by the exercise of the power may be a right/duty relation. A classification of this sort according to the type of basic concept in terms of which the rule is formulated might be described as a formal classification.²²

There is another type of legal relation that is important for present purposes. Sometimes a defendant D is liable to compensate the claimant C for a loss, even though the loss cannot be said to have resulted from a wrong by D. An example might be where D is liable to compensate his neighbour C for harm caused by a dangerous thing emanating from D’s land.²³ Here D was entitled to keep the dangerous thing on his land, and he is liable irrespective of whether he could actually have prevented its escape from his land. D ‘keeps it at his peril’, which is to say that D’s liability arises from the fact that the harm was caused, irrespective of whether D committed a wrong in keeping the thing or in failing to prevent it from escaping. (Also, clearly one cannot say that the claim arose from the exercise of a power by C. The escape of the dangerous thing or the resulting harm is not the exercise of a power by anyone.) One might say that D has a conditional duty, ie a duty to pay compensation in the event

²⁰ *ibid.*

²¹ The classic example arises from the inconsistent usage of the word ‘right’ to mean both a right correlating with a duty – a ‘claim-right’ in Hohfeldian terminology – and also a liberty: see Simmonds *ibid.*, xix-xx. For a suggested example of the conflation of the right/duty and power/liability relations, see P. Jaffey, ‘Hohfeld’s power-liability/right-duty distinction in the law of restitution’ (2004) 17 *Can J Law and Juris* 295.

²² One might refer instead to classification by ‘modality’: see MacCormick, above n 5, 260.

²³ Under the rule in *Rylands v Fletcher* (1865) 3 H & C 774, 159 ER 737. The rule is often said to impose a ‘strict liability duty’, meaning a duty that is breached without fault. This need not be pursued here: the point is to illustrate the possibility of a strict liability relation in the sense defined. See A. Honoré, *Making Law Bind* (Oxford: Oxford University Press, 1987), 71.

that a certain type of harm occurs, but it is doubtful whether this is helpful or apt.²⁴ It is better to say that this is a ‘strict liability relation’: a strict liability relation specifies a causative event that generates a claim by C against D, the event being neither a breach of duty (by D) nor the exercise of a power (by C).²⁵

There is a particular type of strict liability relation that is important for present purposes. This is where the event that generates the claim is not an event that causes harm to C, nor even an act of D, but the receipt of a benefit by D, the claim being for the benefit or its value or some part of it. This category (or sub-category of the strict liability category) might reasonably be described as the category of ‘unjust enrichment’. It is a formal category in the sense above, not a justificatory category. It is not defined by reference to any particular justification or underlying principle.²⁶

BIRKS’S CLASSIFICATION

The nature of the classification

The classificatory scheme of *Unjust Enrichment* divides the law into the categories of ‘Consents’, ‘Wrongs’ and ‘Unjust Enrichments’, together with a miscellaneous residual category of ‘Other Events’. Birks describes this as a classification by ‘causative event’ (p 20ff),²⁷ but this does not really explain what sort of scheme it is. Although it is of course true, as Birks points out (p 20), that changes in the legal position, including the accrual of claims, arise from events (including acts), such ‘causative events’ can be classified in different ways. One could classify them in terms of justification, as contractual causative events (such as acceptance of an offer, or breach of contract, or frustration), or tortious causative events (such as breach of a duty of care), etc; and one could classify them in terms of the formal classification of basic legal concepts as discussed above – as wrongs, or exercises of a power, etc.²⁸

²⁴ It does not matter for present purposes whether strict liability relations of this sort can be adequately expressed in terms of conditional duties. The crucial point as discussed below is that strict liability relations and unjust enrichment as defined are not justificatory relations.

²⁵ Another example in tort might be consumer product liability. In contract, in many cases where a party is said to be liable for ‘breach of contract’ he cannot really be said to have committed a breach of duty: for an argument on these lines to explain the law on specific performance and disgorgement, see P. Jaffey, ‘Disgorgement and “Licence Fee Damages” in Contract’ (2004) 20 J Contract Law 57.

²⁶ **As Dennis Klimchuk pointed out to me**, although the category of ‘strict liability relations’ as defined is purely formal, the definition of the ‘unjust enrichment’ sub-category is by reference to a factor (receipt of a benefit) that is relevant to the justification, though it does not identify a justification of any sort.

²⁷ Causative events form the first dimension and ‘responses’ the second dimension of Birks’s ‘grid’ (at p 23): **see n3 above**.

²⁸ Clearly these are intersecting classifications.

Consider first the two categories of consents and wrongs. Birks describes contract and tort as slightly reduced versions of these categories (p 29). This suggests that the categories are intended as justificatory categories – versions of the standard justificatory categories of contract and tort.²⁹ However, Birks does not suggest any governing rationale or principle behind these categories, as would be required to explain their nature as justificatory categories. The classification is more plausibly understood as a formal classification as described above: this is an obvious interpretation of ‘wrongs’. There is no reference to formal legal relations, but as discussed above the category of wrongs can equally be expressed as the category of right/duty legal relations. Birks describes the category of consents as comprising ‘contracts, declarations of trust, conveyances, and wills’ (p 20). These are standard examples of the exercise of a power, and, described in terms of legal relations rather than events, this is the category of power/liability relations. As discussed above, these categories are not the same as the justificatory categories of contract and tort: some powers (including some private law powers) have nothing to do with contract – for example, the power to transfer property, make a will, or waive a tortious duty. Conversely, as Birks notes (p 20), contract is also concerned with breaches of duty, which fall within the wrongs category, not the consents category. Consents cannot be even roughly equivalent to contract, nor wrongs to tort.

Birks’s ‘unjust enrichment’ category

What about Birks’s category of ‘unjust enrichments’? Chapter 1 identifies what is described as the ‘core case’ of unjust enrichment – the case that is taken to be an indisputable example of unjust enrichment. This is the case of mistaken payment, where the claimant C has a claim to recover a sum mistakenly paid to the defendant D. Birks defines his category of unjust enrichment as comprising all cases that are ‘materially identical’ to this core case.³⁰ This is not sufficient to define the category, however, because there are many different criteria according to which other cases might be taken to be identical to or different from the core case. Birks identifies the following three defining features from which to generalise from the core case to the

²⁹ This seems to be generally assumed by both proponents and opponents. Proponents seem to treat Birks’s categories as equivalent to their own categories of contract and tort: see eg A. Burrows, *The Law of Restitution* (London: Butterworths, 2nd edn, 2003) 1. Cf Hedley, above n 18, 158.

³⁰ 3. Also, at 10, unjust enrichment is an event that generates a claim ‘by the same logic as explains ... the core case’ of mistaken payment.

category of unjust enrichment (pp 9-10): first, that D received a benefit; secondly, that the benefit was received ‘at C’s expense’; and, thirdly, that there is a reason why it would be unjust for D to retain the benefit. Later these become the first three stages of a general ‘five stage framework’ governing the law of unjust enrichment (p 34).³¹

How should this category be understood? It seems to be simply the category of all cases in which C acquires a claim against D as a result of the receipt of a benefit by D, for whatever reason. Different reasons for a claim are different ways in which the ‘unjust’ requirement is satisfied.³² This is simply the formal category of unjust enrichment as defined above: it appears, then, that Birks’s category of unjust enrichment is a formal category, not a justificatory category. This interpretation fits in with the formal categories of consents and wrongs in Birks’s classification, and it is also consistent with the fact that no characteristic justification or underlying principle is offered as the defining feature of the category. The third stage requirement that the benefit be ‘unjust’ does not itself provide such a defining feature. To the contrary, this requirement is, at least on its face, neutral as between different possible justifications.

However, as I argued above, the project of developing a new body of unjust enrichment law subject to a common framework, by a process of theoretical or analogical reasoning, calls for a justificatory category of unjust enrichment. And indeed the five stage framework seems to be intended to be analogous to, say, the framework of contract, consisting of issues such as whether there is offer and acceptance, whether there is consideration, whether the agreement has been performed as agreed, etc; or the framework for the law of negligence, consisting of issues such as whether there is a duty of reasonable care, whether there has been a breach, whether the damage is too remote, etc (pp 34-5). But in these cases the framework is plausibly based on the assumption that it governs a justificatory category, and is defensible only on this basis. It appears that *Unjust Enrichment* identifies and defines a formal category of unjust enrichment and then treats it as a justificatory category; but, as I hope has been made clear, there is no reason to assume that the formal category also happens to be a justificatory category.³³ Below, I shall

³¹ The fourth stage is whether C’s claim is in personam or in rem, and the fifth is whether there is a defence.

³² When the ‘unjust’ requirement is satisfied, this must mean unjust as between D and C, so the issue really incorporates the ‘at C’s expense’ requirement.

³³ Other commentators who adopt broadly the same approach as Birks generally adopt a supposed ‘principle of unjust enrichment’ which purports to provide the justificatory basis for the category of unjust enrichment, eg Burrows, above n 29, ch 1, but Birks does not do this. This is a striking

argue that the formal category of unjust enrichment does not in fact correspond to a single justificatory category, but overlaps different justificatory categories, including contract and property. If this is right, then the approach adopted in *Unjust Enrichment* treats as a single justificatory category various claims that have quite different types of justification, and this threatens to distort the law.³⁴

Elsewhere, I have approached this problem by distinguishing between the ‘Weak Theory’ and the ‘Strong Theory’ of unjust enrichment.³⁵ The Weak Theory is the theory that there are claims that arise from the receipt of a benefit. The Weak Theory simply recognises a formal category of unjust enrichment and asserts that there are claims that fall within it, without saying anything about what sort of justification they have. The Strong Theory is the theory that this formal category is also a justificatory category. The danger lies in confusing the two theories, and assuming that the Strong Theory follows from the obvious truth of the Weak Theory.

It seems to me that one can see this difficulty emerging in *Unjust Enrichment*. There are references to certain cases where the claim is ostensibly an unjust enrichment claim – ie, as I would say, it is in the formal category of unjust enrichment – but it is accepted that the claim is not *really* an unjust enrichment claim.³⁶ One example is the case of a simple contractual loan where D receives a payment on the understanding that he incurs a liability for repayment (pp 11, 23).³⁷ Another contractual example might be where D receives a payment as C’s agent and has agreed that he will account to C for the value of any receipt. These are cases that fall within the formal category of unjust enrichment as defined above – i.e., they are cases where the causative event that generates the claim is the receipt of a benefit by D³⁸ – but Birks insists that they are not really unjust enrichment claims because the category of unjust enrichment excludes contractual claims. He later identifies other claims that

difference although not much commented on. Birks does not discuss the issue here, but see Birks, above n 1, 22-25.

³⁴ For examples of the types of error that can result, see further P. Jaffey, ‘The Theory of Unjust Enrichment’ in Hudson, above n 18, 182-85.

³⁵ P. Jaffey, ‘Two Theories of Unjust Enrichment’ in J Neyers *et al*, (ed), *Understanding Unjust Enrichment* (Oxford: Hart Publishing, 2004).

³⁶ Birks now accepts that claims for the benefit of a wrong are not unjust enrichment claims. (The idea of unjust enrichment as a single category divided between ‘autonomous unjust enrichment’ and ‘unjust enrichment for wrongs’ was previously an important feature of his approach and is retained by Burrows, above n 29, 5-6.)

³⁷ There appears to be some confusion here between the category of consent and the category of contract: see below at n 64.

³⁸ At least this appears to be Birks’s assumption. In his example the claim arises when the debt becomes payable, not when the loan is made. Receipt by an agent **seems** a better example for this reason.

fall (as I would say) within the formal category of unjust enrichment but are excluded from his category of unjust enrichment. For example, he says that a claim by the state for payment of tax is a claim that arises from the receipt of a benefit, but he denies that it is properly understood as an unjust enrichment claim (p 24). Similarly, claims for payment for ‘necessitous intervention’ where an intervenor C saves D’s property from harm in an emergency appear to arise from the receipt of a benefit, but again Birks excludes them from the category (p 22).³⁹ It seems to me that, although Birks’s definition of the category of unjust enrichment implies that it is a formal category, Birks also has a sense of unjust enrichment as a justificatory category, which cannot therefore encompass claims that have a quite different type of justification from the core case of the claim to recover a mistaken payment, in particular claims that fall into a recognised justificatory category such as contract.⁴⁰

Thus there appear to be signs of tension between formal and justificatory categories. *Unjust Enrichment* starts by defining a formal category of unjust enrichment based on the core case of mistaken payment, which is then refined by the exclusion of certain claims whose justification is recognised to be different from that of mistaken payment. But there is no reason to think that what is left is a single justificatory category, and no indication of what its basis might be. What is lacking is an attempt to address the crucial question of the justification of the mistaken payment claim. This will be considered below.

Birks as a formalist

Birks’s approach has sometimes been criticised in terms that imply scepticism about the very exercise of legal classification. Reviewing a collection of essays edited by Birks on the subject of legal classification, Campbell condemns it on the ground that

³⁹ Birks suggests that such a claim is not dependent on receipt and is not for a gain-based measure. But certainly it is much easier to justify the claim on the basis that there is a benefit to D than purely on the basis of D’s unsuccessful efforts, and the remedy is like the quantum meruit, which appears elsewhere to be assumed to be restitutionary and gain-based. Another example is receipt of property: see below at n 61.

⁴⁰ The same confusion of formal and justificatory categories is apparent in the discussion in Chapter 1 of unjust enrichment as the ‘tertium quid’ (pp 5-9). The traditional common law was divided into contract and tort, and Birks points out that the mistaken payment claim is neither of these, and therefore that it must represent a third category or ‘tertium quid’. Contract and tort are justificatory categories, and neither includes the claim for mistaken payment, so there must indeed be a justificatory category outside contract and tort that includes the mistaken payment claim. Birks identifies a formal category into which the mistaken payment claim falls, and he infers that this category is the third justificatory category. But there is no reason to assume that this formal category corresponds to a justificatory category, or, for that matter, that it does not encompass claims in contract or tort – in fact, it does include some contractual claims, as Birks’s own discussion reveals.

it is liable to 'carry a highly contentious hidden burden', and that it 'requires the ignoring or elimination of those considerations of social context which cannot be dealt with in abstract doctrinal scholarship', by which he means working only with law reports and not empirical social scientific work or philosophical inquiry into the 'correct apprehension of the empirical forms of ethical life'.⁴¹

I would accept this if it can be interpreted as an objection not to classification as such, but to formalism or formalist classification. Formalism here does not mean distinguishing between different formal legal relations in the way discussed above, which just means being clear about the meaning of the basic concepts used to formulate legal rules, and is clearly valuable. It means formulating and interpreting the law without consideration of underlying principle or justification. Expressed in this way, it may seem obvious that formalism is invidious. But the point is not straightforward. Where a rule is binding and applicable, the court has to apply it, and it does not have to consider the underlying principle or purpose or become involved in weighing it against other considerations: these matters have presumptively been resolved in the formulation of the rule. In this sense the application of rules is always formalist.⁴² The objection to adjudication or legal analysis on the ground that it is formalist is apt where judges purport to apply the law as if it involved only the uncontrovertible application of an authoritative rule when in fact this is not the case and some analogical or theoretical reasoning is necessary to dispose of the case. If this awkward necessity is obscured by the pretence that what is involved is only the straightforward application of a binding rule, the decision does indeed 'carr[y] a highly contentious hidden burden'. This is the well known Realist objection to formalism.⁴³

Unjust Enrichment begins with the law concerning the recovery of a mistaken payment. The law governing mistaken payment is then extended to other claims that are considered to be unjust enrichment claims. This calls for justification by analogical or theoretical reasoning, or, in other words, it requires the other claims to fall in the same justificatory category. But, except with respect to the exclusion of certain claims from the category of unjust enrichment apparently by reference to their justification, the analysis is indifferent to the issue of justification by analogical or

⁴¹ D. Campbell, 'Classification and the Crisis of the Common Law' (1999) 26 JLS 369, 369-72, reviewing P. Birks (ed), *The Classification of Obligations* (Oxford: Clarendon Press, 1997).

⁴² See eg F. Schauer, 'Formalism' (1989) 97 Yale LJ 509.

⁴³ *ibid*, at 511-13.

theoretical reasoning. In general, it relies only on the fact that the cases fall in the same formal category. This is the classic formalist error.

A formalist approach is usually based on misgivings about the legitimacy of allowing judges to take account of matters of justification or underlying principle, on the ground that this leads them into political or moral questions, and one would expect this to be associated with the view that judges should be cautious incrementalists. By contrast, the formalist approach in *Unjust Enrichment* is employed in support of an argument for a far-reaching transformation of the common law, and there is surely a tension if not an inconsistency here.⁴⁴

PROPERTY LAW AND IN REM RIGHTS

In my view the law of property is a justificatory category concerned with rights to control and benefit from resources or ‘things’, including land, goods, and money. No doubt the justification underlying property law, and a regime of private property in particular, is uncertain and controversial. But it is surely nevertheless the case that property law is concerned with certain issues, such as what types of thing or resource should be subject to ownership, how ownership should be acquired, what rights the owner has (or different types of owner have) against third parties, etc., which relate to a certain distinct type of justification, so as to found a category comparable to justificatory categories like contract and tort.⁴⁵ This does not mean that fundamental issues that bring into question the justification behind property law are commonly at stake in ordinary cases, any more than comparable issues are at stake in ordinary contract or tort cases. It means only that these issues lie behind the ordinary rules and

⁴⁴ A quite different issue concerning unjust enrichment should be mentioned here. In some contexts it may be appropriate for the law not to be rule-based at all, but for the court to apply principles directly, weighing up conflicting principles in a balancing exercise and making a judgment about which should prevail in the circumstances of the case. This may lead to increased uncertainty and unpredictability, but it may also avoid injustice in some cases. It has been suggested that ‘unjust enrichment’ is such an area of law: see D Kennedy, ‘Form and Substance in Common Law Adjudication’ (1976) 89 Harv LR 1685, 1688. The traditional objection to the theory of unjust enrichment was that it involved the application of ‘personal moral opinion’, and this might be understood as a disparaging reference to non rule-based law from a formalist point of view. The modern arguments for the theory of unjust enrichment have often concentrated on responding to this. Such arguments miss the real point, since they do not go to the question whether there is a justificatory category of unjust enrichment at all.

⁴⁵ Subject to the comment at n 17 above. I would take the justification to be concerned, broadly speaking, with protecting people in respect of the investment of work and resources in creating or improving ‘things’.

loom large in the occasional case when the recognised rules fail to determine the outcome, ie in some cases where theoretical or analogical reasoning is in play.⁴⁶

Property law is sometimes described as the law of ‘in rem rights’. This might reasonably be understood to refer to property law as a justificatory category in the sense above. However, an in rem right is often defined as a right that subsists as against an indefinite number of people, as compared with an in personam right, which subsists against a finite number of people. These are formal, not justificatory, categories of legal relation in the sense discussed above, although this formal classification is independent of the formal categories considered above: for example, a power/liability relation can be in personam or in rem, as can a strict liability relation.⁴⁷ To say that a right is in rem in this sense does not disclose the nature of its justification, and in rem rights can arise in different justificatory categories. In tort, for example, although a claim for compensation is in personam, the right not to be harmed is in rem, but it is not generally thought to be part of the law of property. In contract, the power to make a contract is in rem because it can be exercised with respect to anyone, although the right under the contract and the remedial right to compensation are in personam. (Thus, as Hohfeld pointed out, the expressions ‘in rem’ and ‘in personam’ are inapt for their normal usage.⁴⁸ Where in rem rights arise in contract and tort they are not rights with respect to a ‘res’ or thing. Also in contract there can be an in personam right with respect to a thing, for example a simple contractual right to have it delivered.) It is true that the standard example of the in rem right is in the law of property, for example the right of ownership. But, as considered further below, a right of ownership can generate an in personam remedial right, for example an in personam claim against the recipient of an unauthorised transfer, and this is part of the law of property as a justificatory category.

Birks equates property law with the law of in rem rights, and he understands in rem rights in the standard sense above, ie as rights subsisting against an indefinite number of people (pp 26-34).⁴⁹ He argues that a claim cannot properly be said to arise

⁴⁶ This does not mean that grand issues arise in every case of analogical or theoretical reasoning.

⁴⁷ There is an ambiguity, since either the right-holders or the duty-bearers can be indefinite in number.

⁴⁸ Hohfeld, above n 19, 49ff. Hohfeld preferred the expressions ‘multital’ and ‘paucital’. I shall use the traditional expressions.

⁴⁹ It is true that the expressions ‘in rem’ and ‘proprietary’ are often used interchangeably. Often this will not cause any problem, but sometimes it is a cause of confusion. I used ‘proprietary’ to refer to the justificatory category of property, and in rem in its usual sense, in **P Jaffey, *The Nature and Scope of Restitution* (Oxford: Hart Publishing, 2000).**

in the category of property law. For Birks, to say that a claim arises in a certain category is to say that it arises from that category of causative event, defined according to his formal classification. A claim cannot arise in the category of property law because property, meaning an in rem right, is not a causative event (*ibid*).⁵⁰ It is true that an in rem right is not a causative event. How can a right be an event? Furthermore, the category of in rem relations cannot be expressed as a category of causative events in the way that the category of right-duty relations can be expressed as the category of wrongs or the category of power-liability relations can be expressed as the category of exercises of a power or consents. There are different types of in rem relation that translate into different types of causative event; for example, the exercise of an in rem power is a causative event, as is the breach of an in rem duty.

More importantly, to say that a claim falls into a certain category of law should generally be understood to mean that there is such a *justificatory* category into which it falls. This is, in my view, what is meant by saying that a claim is contractual or tortious, and its significance lies in the fundamental justification for the claim and the role of the category in analogical or theoretical reasoning. If, as Birks argues, property law refers to the formal category of in rem rights, then it is right to say that a claim cannot fall into such a category. But if, to the contrary, property law is properly understood as a justificatory category like contract or tort, then it is legitimate to say that a claim arises in property law. Furthermore, as considered further in the next section, one can identify the type of causative event (although it is not found in Birks's formal classification) that, in the type of case generally at issue in the present context, triggers a claim in the justificatory category of property, namely the event of an invalid transfer.

THE 'CORE CASE' OF UNJUST ENRICHMENT

As discussed above, Birks argues that the claim to recover a mistaken payment is the 'core case' in the category of unjust enrichment, but he does not address the question of the nature of the justification of this core case. It is necessary to address this question if the core case is to be the basis for developing a category through analogical or theoretical reasoning. In my view the claim is to be explained as

⁵⁰ See also P. Birks, 'Property and Unjust Enrichment: Categorical Truths' [1997] NZ LR 623.

follows. C was originally the owner of the money that was mistakenly transferred.⁵¹ It is in the nature of ownership (by virtue of the distinctive type of justification that underlies it), that an owner of property or money has a right to it as against anyone who receives it other than through a valid transfer. A valid transfer is a transfer made by the valid exercise of the owner's power of transfer, by the owner or by someone else with authority.⁵² Thus an owner C acquires a claim against a recipient D if D receives money through a transfer from C unless the transfer was by way of a valid exercise of C's power of transfer (ie where there was no purported exercise of the power or where there was a purported exercise vitiated by a factor such as mistake). If the recipient D were free of a claim, the injustice (the basis of the claim for 'unjust enrichment') would lie in the fact of C's original ownership, and in the absence of a valid exercise of the owner's power of transfer. These are matters relating to property or ownership, and, as I see it, this is the justificatory category into which the mistaken payment claim falls. Thus the category of analogous cases of which mistaken payment is an example, to which one can generalise from mistaken payment, comprises claims where C owns money or other property that passes to D other than through the valid exercise of C's power of transfer as owner.⁵³

Many commentators presuppose the validity of a contrary argument. This is that in the usual case of mistaken payment title passes to D, so that when C makes a claim he is not enforcing his original title; and therefore that the claim cannot be based on C's original right of ownership, since he has lost it.⁵⁴ Similarly, one might think that if title has passed it must follow that the owner's power of transfer was validly exercised,⁵⁵ which again suggests that there can be no claim based on the original right of ownership. But neither of these points is correct. If C has lost his

⁵¹ At common law, ownership is said not to be a condition of the claim, in the sense that if there is an invalid transfer from the owner X to Y, and then another invalid transfer from Y to Z, Y may have a claim against Z even though Y is not the owner. (It is said that there is no absolute ownership, only relative ownership.) But Y has the claim on the basis that he is presumed to be the owner as against Z. The point is to allow Y's claim without having to consider X's claim against Y. The basis of the claim must be in the end to protect ownership.

⁵² As noted above, this refers to tangible things and money: see further P. Jaffey, 'In Rem Claims to Wealth and Surviving Value' (2002) 55 *Current Legal Problems* 263.

⁵³ Including claims to traceable proceeds. This may be stated too narrowly, since there may be other types of claim arising from the claimant's ownership, for example a claim for payment for the unauthorised use of property. I argue for this general approach to restitution and ownership in P. Jaffey, above n 49, and Jaffey, above n 52.

⁵⁴ I take this to be almost universally assumed: see eg Burrows, above n 29, 9.

⁵⁵ This seems to be the understanding of the case where title passes even though the transfer is mistaken, because the mistake was not 'fundamental'. It cannot apply to the case where it is said that title is lost because the proceeds are no longer traceable.

right of ownership, then of course he cannot enforce it as such. But this means only that if he has a claim it must be an in personam claim (or possibly a new and different type of in rem right) (pp 32-33); it in no way implies that the claim is not entirely explicable as arising from and by virtue of the original right of ownership, within the justificatory category of property.

Of course, one might also say that the claim falls into a formal category of unjust enrichment (just as claims arising in contract can fall within the formal category of unjust enrichment). This is quite consistent with saying that, in justificatory terms, the claim arises from the claimant's original right of ownership and is in the category of property law, and the latter is the more important way to characterise the claim. Describing the claim as an unjust enrichment claim gives no indication of the relevance of the claimant's mistake, and it does not explain why, if the claimant's power as owner to transfer his property was exercised validly, it should be thought unjust for the recipient to keep the benefit of the transfer.⁵⁶

Most commentators distinguish between two types of case. They say that there can be a claim based on C's original ownership (where title did not pass) and an alternative claim based on unjust enrichment (where title did pass). The implication is that property and unjust enrichment are alternative justificatory categories. This has led to controversy over how to distinguish between them, in terms of when they arise or their content.⁵⁷ But no basis for this distinction in terms of different rationales for the two claims can be found in the literature, and over the long history of the relevant law the judges have not been troubled by the supposed distinction until it became the subject of academic controversy in recent years.⁵⁸

⁵⁶ It is a controversial and important question whether and in what circumstances the claim should be in rem or in personam but this is quite a different question from whether the claim is within the justificatory category of ownership or property.

⁵⁷ This pseudo-problem is illustrated by *Macmillan Inc v Bishopsgate Investment Trust (no 3)* [1996] 1 WLR 387. Birks attributes this approach to Virgo (pp 31-33), but it appears to be the only available approach for commentators who accept the possibility of a (justificatory) category of unjust enrichment claims, but are not prepared to deny that sometimes claims also arise from the claimant's ownership.

⁵⁸ ie, the 'equitable proprietary claim' and money had and received. It is sometimes argued by supporters of a theory of unjust enrichment that the argument above for an ownership-based analysis of what they would describe as unjust enrichment claims must be wrong, because it cannot account for cases where the claimant provided labour or services rather than making a transfer of property: see eg L. D. Smith, 'Unjust Enrichment, Property, and the Structure of Trusts' (2000) 116 LQR 412, 419. But on the approach above it is only claims that arise from a defective transfer of property or money that are ownership-based. Other claims within the formal category of unjust enrichment, including claims in respect of services, call for a different type of justification.

In *Unjust Enrichment*, Birks takes a different position. He says that in cases where title passes the claim is an unjust enrichment claim,⁵⁹ but in other cases where the claimant retains title and enforces his continuing right of ownership,⁶⁰ the claim is neither an unjust enrichment claim (because the right of ownership that the claimant enforces does not arise from the transfer),⁶¹ nor is it a claim based on property or ownership (because, as discussed above, property or ownership is not a causative event). Instead, Birks says that the claim should be characterised by reference to the event that originally gave rise to the claimant's right of ownership, which might have been consent, wrong, unjust enrichment or another type of event, depending on how the claimant originally acquired the property (pp 32-3, 55). I do not understand Birks to suggest that the conditions for the claim against the recipient depend in any way on how the property was acquired by the claimant. The rationale for ownership and for protecting it do not depend on this. It is difficult to see what purpose is served by a classification that divides up in this way claims by an owner whose property has been invalidly transferred.

UNJUST ENRICHMENT AND CONTRACT

As mentioned above, Birks concedes that there are contractual claims that arise from the receipt of a benefit (ie are within the formal category of unjust enrichment), but he excludes these from his category of unjust enrichment, presumably because he conceives of his category as being in the nature of a justificatory category as I have described it. Birks's example is the simple case of a loan, where there is a claim to recover a payment based on contract.⁶² By contrast, the case regarded by Birks and many others as a standard case of unjust enrichment is where C paid D a sum in advance of performance of a contract by D, and D did not perform. C may be entitled to recover the prepayment (pp 125-7).⁶³ But why is this claim not a contractual claim,

⁵⁹ Which can be in personam or a new and different type of in rem right (pp 32-33).

⁶⁰ Birks distinguishes between three forms of claim (pp 54-58): the *vindicatio* and wrongful interference, which are both based on the claimant's having title, although this can be a new title arising from unjust enrichment or a retained title; and the unjust enrichment claim, which the claimant can make where he has no title, but also where he has title but waives it.

⁶¹ This is surely an unjust enrichment claim in the formal sense. There is a claim that arises as a result of and on the event of the transfer.

⁶² See n 37 above.

⁶³ Strictly speaking the claim is available only where there has been a 'complete failure of consideration'.

falling outside Birks's unjust enrichment category, just like the claim to recover a loan?

The thinking here may be that the claim is not contractual because, by contrast with the example of a loan, D did not actually agree to repay the money: he agreed to provide the specified contractual performance. But it is exceptional in contract for the remedy to be for D to do something that he actually agreed to do in the contract. It is true only in the case of claims for payment of an accrued debt or for specific performance. It is not true in the ordinary case of damages, although of course no-one doubts that a claim for damages is a claim in contract.⁶⁴ If we look for the justification for C's right to recover his money, it seems quite clear that it lies in contract, in the sense that it arises from the principle underlying the law of contract, even if the precise form of the connection between the principle that agreements should be observed and the right to recover a prepayment is not immediately obvious.⁶⁵ Again, one might wish to say that although the claim is contractual in justificatory terms, it is in formal terms an unjust enrichment claim, just as the mistaken payment claim is in terms of its justification a property law claim and also in formal terms an unjust enrichment claim. Just as 'unjust enrichment' provides no distinct alternative justification for the mistaken payment claim, so 'unjust enrichment' provides no non-contractual justification of the claim to recover a contractual prepayment.

'UNJUST FACTORS' AND 'NO LEGAL BASIS'

The 'no legal basis' approach

Birks's five stage framework for the analysis of unjust enrichment claims was mentioned above. The important first three stages – that D received a benefit, that it was at C's expense, and that it would be unjust for no claim to arise – emerge from the discussion of the core case of mistaken payment.⁶⁶ These three stages are identified from the features of the core case that define the category of unjust enrichment. The most fundamental issues arise in connection with the third stage of the framework, the 'unjust' requirement. In the past Birks has approached this

⁶⁴ The argument may be that D did not 'consent' to repay the prepayment. On this approach contractual claims are confined to claims to enforce primary rights (p 20). This reflects confusion between consent or exercise of power as an event creating a contract and contract as a category based on the principle that agreements should be enforced.

⁶⁵ In my view, it is to be explained in terms of the protection of reliance in contract: see Jaffey, above n 49, ch 2.

⁶⁶ See **text at n 31** above.

question in terms of ‘unjust factors’. The concept of unjust factors is derived from the concept of vitiating factors like mistake. On the unjust factor approach, these vitiating factors are assimilated with other so-called unjust factors, in particular ‘qualified intent’, where the claimant made a transfer intending it to be recoverable in the event of some condition not being fulfilled, and also various so-called policy grounds for an unjust enrichment claim.⁶⁷ This unjust factor approach has always been contrasted with a rival approach according to which an unjust enrichment claim arises not from one of a number of possible unjust factors, but from the fact that there is an ‘absence of basis’ or ‘no legal basis’ for the receipt and retention of the benefit by the defendant. This is said to be the civil law approach.⁶⁸ In *Unjust Enrichment*, Birks has for the first time abandoned the unjust factor approach in favour of the no legal basis approach. This will generally be seen as the most striking development in his thinking, and it will no doubt give rise to much discussion.

One reason why Birks finds the no legal basis approach appealing is that it appears to give unjust enrichment a unity that **is** lacking in the unjust factor approach, which appears to consist in a miscellany of different grounds for a claim (p 93). Although he does not put it in this way, to say that the unjust factors are a miscellany is best understood to mean that (as argued above) unjust enrichment claims arising from different unjust factors do not belong in the same justificatory category.⁶⁹ (In fact, under the property approach above, vitiating factors – though not Birks’s other unjust factors – are unified in this sense in relation to transfers of property: in every case their significance is that they preclude the valid exercise by the claimant of his power of transfer as owner.⁷⁰) By contrast, in appearing to offer a single unifying formula, the no legal basis approach suggests that unjust enrichment claims do indeed constitute a justificatory category.⁷¹ The question then is whether it is possible to

⁶⁷ At one time there was also thought to be a fault-based category (p 37).

⁶⁸ My comments are directed at Birks’s version of the no legal basis approach, not at other accounts of the civil law approach to unjust enrichment.

⁶⁹ One might argue that the unjust factor approach should be understood to be based on a formal category of unjust enrichment as explained above, the different unjust factors or categories of unjust factor representing different justificatory categories. This interpretation casts light on some arguments in the unjust enrichment literature: for example, ‘failure of consideration’ as an unjust factor meaning non-performance of a contract, and ‘retention of title’ as an unjust factor justifying a claim to recover property invalidly transferred. But this interpretation does not correspond to the way in which unjust factors are usually understood and applied.

⁷⁰ Cf Birks’s discussion of ‘intent-based unjust factors’ as different ways in which there might be no legal basis (pp 99-101).

⁷¹ Birks says that the no legal basis approach makes unjust enrichment more like contract and less like tort (pp 93-94). He also says that contract is like a ‘closely knit family’ and tort is like a ‘loose

provide an account of the no legal basis approach to sustain this. Birks offers a couple of abstract formulations of the no legal basis approach. For example, he says that under the no legal basis approach the question is whether the recipient was entitled to the benefit, as opposed to whether the transfer was vitiated by ‘incomplete intent’ (or some other factor) (p 88). Also, he says that there is no legal basis where there is no explanation of the benefit known to the law (pp 88-9). These formulations do not seem to me to offer anything in the nature of a distinct principle or type of justification such as to support the argument for a justificatory category. But Birks also offers a more concrete interpretation of no legal basis as ‘failure of purpose’; to this we now turn.

‘No legal basis’ as ‘failure of purpose’

According to Birks, there is no legal basis for a receipt by D if it does not achieve C’s purpose in transferring it. C’s purpose must be understood in terms of its intended legal effect or ‘explanatory outcome’, such as making a gift, creating a contract or a trust, or discharging a liability (p 90).⁷² A standard example of no legal basis as failure of purpose is where C made a payment to discharge a liability that it turns out did not exist (p 89).⁷³ There is no legal basis because the non-existence of the liability means that C’s purpose of discharging a liability was not fulfilled.⁷⁴ The traditional English analysis is that the payment was vitiated by mistake. (For Birks, this is the unjust factor approach, but as argued above it should be understood to mean that the vitiating factor – eg mistake – vitiated the owner’s exercise of his power of transfer.)

It seems to me unhelpful to say that the reason for the claim is that C’s purpose of discharging the liability was not fulfilled. The reason why his purpose was not fulfilled is that it was formed in the light of a mistaken understanding of the situation, and it is surely this mistake that provides the basic justification for the claim. The effect of Birks’s approach seems to be to confine recovery for mistake to a

federation’ (pp 15, 94), which might reflect a sense that contract is a justificatory category and tort a formal category consisting of different torts governed by distinct principles not reducible to a single more abstract principle.

⁷² 90. This appears to be the development of ‘qualified intent’ (previously described by Birks as ‘failure of consideration’) into a general basis for unjust enrichment claims. It does not seem to be explained why it is that only purposes formulated in terms of the ‘explanatory outcomes’ are relevant.

⁷³ The leading case discussed by Birks is *Kelly v Solari* (1841) 9 M&W 54; 152 ER 24.

⁷⁴ As Birks explains (pp 89-90), it cannot be the simple fact that there was no liability that in itself means that there was no legal basis: for example, it might be that the purpose was to make a gift, and here the absence of a liability would be immaterial.

certain type of basic or fundamental mistake, viz., mistake as to the direct legal effect or ‘explanatory outcome’ of the transfer. For example, it seems that it would exclude recovery in the ordinary case of a mistaken gift, where C intended a gift but was mistaken about some fact that prompted him to make it (because here a gift was intended and achieved). There is no doubt much to be said for restricting claims based on mistake in some such way.⁷⁵ But this does not imply that the claim is not based on mistake.⁷⁶

It is not clear whether failure of purpose should be understood as a particular manifestation of no legal basis, or whether it is a general elaboration of the concept, which gives content to the more abstract formulations mentioned above, and is of general application. The former seems to imply that it is in the nature of an unjust factor, but this appears not to be intended (pp 90-91). The latter seems clearly wrong, because there are cases that must come within Birks’s category of unjust enrichment but surely cannot be explained in terms failure of purpose. For example, in the case of a payment under duress, it appears that C’s purpose is indeed fulfilled,⁷⁷ and it is difficult to see how the claim can be explained other than on the basis of a vitiating factor.⁷⁸ Also consider the case where C’s money is transferred to D without C’s authority, ie, by a stranger or by an agent or trustee acting without authority.⁷⁹ Here, one cannot say that C’s purpose in making the transfer was not fulfilled. On my understanding Birks says that there is no legal basis because C had no relevant purpose at all (p 138).⁸⁰ But this does not appear to be an application of the same principle, that a transfer by C is recoverable if C’s purpose in making it was not fulfilled. By contrast, this type of case is easily explained as a case where the owner’s

⁷⁵ This has been a controversial issue in the literature. See eg T. Krebs, ‘A German Contribution to English Unjust Enrichment Law’ [1999] RLR 271; cf Jaffey, above n 49, 167.

⁷⁶ Sometimes Birks implies that the transfer is recoverable simply because C intended it to be recoverable if his purposes were not fulfilled: ‘Every intended transfer is made with qualified intent’ (p 10). But it is doubtful whether transferors do as a matter of fact have such an intention; more importantly, the issue is whether, if they do, the intention should have any legal effect (in the absence of agreement from the other party).

⁷⁷ The same argument would apply with respect to other vitiating factors, including undue influence.

⁷⁸ Leaving aside explanations based on wrongdoing. C’s purpose is presumably to make a gift (or discharge a liability, etc) in order to avoid the execution of D’s threat against him. If one objects that this was not really C’s purpose, this can only mean that his purpose was vitiated.

⁷⁹ Birks used to say that this was a case of ‘ignorance’, but this idea has apparently been abandoned. For criticism of it, see Jaffey, above n 49, 161.

⁸⁰ Alternatively he considers the absence of a legal basis to be obvious. The transfer is obviously invalid because it is obvious that the owner’s power of transfer was not exercised. Ostensibly Birks’s approach would appear to cover cases where a trustee or agent acted *within* his authority.

power of transfer was not validly exercised, by the owner or someone else with authority.

More generally, where C disposes of his money or property to D or does work for the benefit of D, it seems to me very doubtful whether the failure of C's purpose in doing so should in itself provide the ground for a claim. In the absence of an agreement with D, generally C should bear the risk that the purposes he had in mind were not fulfilled.⁸¹ But whether or not there is room for a claim based on failure of purpose in some circumstances, Birks's concept of failure of purpose surely does not provide the basis for a justificatory category of unjust enrichment.⁸²

CONCLUSION

Unjust Enrichment is a contribution to a longstanding project of establishing a category of unjust enrichment claims in the law, analogous to the categories of contract or tort, involving the reorganisation and reinterpretation of parts of the traditional common law. Although Birks is surely right to insist on the importance of classification, in my view there is no basis for a category of unjust enrichment of the sort necessary to justify this project. This would have to be a category defined in terms of a common underlying principle or justification, such as to justify the common treatment of claims in terms of a common framework for determining when a claim arises – ie a justificatory category as explained above. I have argued that, to the contrary, the classification of private law set out in *Unjust Enrichment* involves a formal category of unjust enrichment claims that says nothing about their justification. (The concept of 'no legal liability' or 'failure of purpose' might be intended to provide the basis for a justificatory category, but I cannot see a convincing argument to this effect.) If there is indeed no genuine justificatory category of unjust enrichment, the mistake of supposing that there is results in the assimilation into a

⁸¹ There is a readily-available mechanism available to C if he is not prepared to take this risk, which is also fair to D – C can make an agreement with D beforehand for D to return the transfer in specified circumstances, or pay for the work. Where the parties cannot be expected to make an agreement, because they cannot communicate or because of mistake, it may be reasonable to allow C to recover for a benefit conferred without agreement, as in cases of necessitous intervention or mistaken services: see Jaffey, above n 49, 77ff.

⁸² There are a number of other types of situation that Birks addresses in terms of failure of purpose, involving both transfers of money or property to the defendant and work done for the benefit of the defendant, including where C does work for D in the course of negotiations for a contract, and where C makes a payment or does work under a valid contract, or under a void contract, with D: see generally Chapter 6. There has been much controversy over these types of case. For lack of space I shall not discuss them here. As to valid contracts, see the section above on unjust enrichment and contract.

single category of various claims that have quite different types of justification. This is bound to distort the law. It is analogous to the old implied contract fiction, which treated some claims as contractual even though they were clearly not based on the contractual principle that agreements should be observed.

Much of what is regarded as the law of unjust enrichment is concerned with claims to recover invalid transfers of money or property or its value (ie where the transfer was vitiated or unauthorised), and it was suggested above that such claims should be understood as falling within the justificatory category of property (whether the claim is in rem or in personam, and whatever other issues arise, concerning tracing, change of position etc.). This would include Birks's 'core case' of mistaken payment. Similarly, another important part of what is regarded as the law of unjust enrichment comprises claims arising from the fact that an agreement between the parties has not been carried through – for example, claims to recover a contractual payment under a valid contract or claims for a quantum meruit for work under a valid contract. It was suggested above that such claims are properly understood as falling within the justificatory category of contract. Birks's approach has obscured the possibility of analysis in terms of property law or contract law. Although this alternative approach is at odds with Birks's theory of unjust enrichment, and with his scheme of classification by formally-defined causative events, it is consistent with his more fundamental conviction of the importance of legal classification to a rational understanding of the law.