

The efficacy of the law of unjust enrichment in providing a satisfactory remedy where contracts are ineffective due to common mistake or error

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1. Introduction

For decades legal scholars have struggled in an attempt to transform an amorphous set of rules - commonly known as the law of unjust enrichment - into a coherent body of law which can be applied with fairness and consistency. Although some would urge that these efforts have reached fruition, the discussion to follow will demonstrate that the law of unjust enrichment remains in its incipient stages of development. In an effort to underscore this point, special attention will focus on the question of whether the law of unjust enrichment is presently capable of providing a satisfactory remedy in cases where contracts are ineffective due to error or mistake. In so doing, the following discussion will repose substantial reliance upon the work of Peter Birks,¹ considered by many as one of the leading authorities in this area.

2. Difficulties in proving enrichment

There are several problematic areas in which it can be argued that the law of unjust enrichment does not provide an adequate remedy in situations where contracts are ineffective due to mistakes. The first concerns those cases in which the plaintiff will be unable to demonstrate that the defendant has been enriched.² According to Birks, the plaintiff claiming restitution will typically be confronted by the argument that the defendant has not been enriched through the receipt of whatever the plaintiff has given. Invoking what is often referred to as the doctrine of 'subjective devaluation,' the defendant will argue that whatever costs the plaintiff may have incurred - and whatever the value of the benefit as viewed from the plaintiff's perspective - the performance has little or no value from the defendant's perspective. Therefore, the argument follows,

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¹ Birks, P. 1989, *An Introduction to the Law of Restitution*, Clarendon Press, Oxford, 146 ('Birks').

the defendant has not been enriched and an essential element of the cause of action in restitution is lacking: no recovery should be allowed.³

According to Birks, there are two ways in which a plaintiff may overcome the doctrine of subjective devaluation. If the defendant has freely accepted a benefit with knowledge that it was not bestowed gratuitously - and having had a sufficient opportunity and knowledge of the facts to reject it - he or she is no longer in a position to argue that the performance is worthless from his or her perspective.⁴ Yet, as we shall see, the notion of free acceptance is not always a panacea for claims of subjective devaluation.

The other method for successfully overcoming subjective devaluation is what Birks calls 'incontrovertible benefit.'⁵ This, according to Birks, occurs where a performance has been received under such circumstances that no reasonable person in the defendant's position could discount its value. An 'incontrovertible benefit' consists of three species. The first, and most obvious, is when the defendant has received money. As money can easily be transformed into goods or services of the defendant's choosing, and is the yardstick by which wealth is normally measured, there is no room for an argument of subjective devaluation.⁶ The second species is when the defendant has received something other than money which has been converted into money. For example, D receives a bicycle from P and before P seeks restitution, D sells the bicycle for \$200. Although D's original receipt was other than money, it has now been converted into what Birks calls 'realisation in money.' As noted above, money is not susceptible to the claim that it is worthless from the defendant's viewpoint.⁷ The final species of 'incontrovertible benefit' is what Birks terms 'anticipation of necessary expenditure.'⁸ When the defendant receives goods or services which he or she was legally obligated or otherwise practically certain to procure on his or her own, he or she will not be heard to claim that what he or she has received was of no value.⁹ Food, clothing and medical care are classical examples of 'necessary expenditures.'

² Id at 109-114.

³ Ibid.

⁴ Id at 266-267.

⁵ Id at 116-124.

⁶ Ibid.

⁷ Ibid.

⁸ Id at 117.

⁹ Id at 117-120.

Returning to the problem of proving an enrichment in contracts rendered ineffective by mistake, suppose that the defendant has not received an incontrovertible benefit and the plaintiff must therefore rely on free acceptance to demonstrate that the defendant has been enriched. Take the example of a home owner who enters into negotiations to have a swimming pool installed on his or her land. Unbeknown to both parties, a contract was never formed due to failure to comply with the technical requirements of offer and acceptance.

When the builder has completed fifty percent of the project, a dispute arises and the builder claims restitution for his or her part performance. Although there has been a mistake of fact as to the existence of a contract which appears to be both causal and fundamental, has there been a free acceptance constituting an enrichment?

According to Birks, the answer must be that there has not; the basic rationale being that one does not freely accept parts of an entire performance as they accrue, nor does one freely accept anything less than all of what he or she has bargained for.¹⁰ Though Birks has suggested that an argument for 'limited acceptance' may prove helpful in such cases,¹¹ the rather conspicuous absence of jurisprudence to support such an argument provides little encouragement. Although the often cited case of *Planche v. Colburn*¹² yielded a result that might be explained in terms of 'limited acceptance,' the Court's opinion in *Planche* is bereft of any such theory. Even Birks suggests that *Planche* might better be explained in terms of other policy considerations. In *Planche*, the contract in question was discharged by the defendant's wilful breach rather than a mistake on the part of one or both parties. Birks suggests that the defendant's status as a breaching party may have inspired the Court to overlook any difficulties concerning the valuation of the plaintiff's part performance.¹³ For present purposes, however, it appears that a plaintiff in the position of our builder will be left without an adequate remedy in unjust enrichment.

It should be noted that, in the foregoing example, no contract ever came into existence. This factor is worthy of comment, for the topic under discussion refers to contracts which are 'ineffective' due to 'mistake' or 'error.' It is well-settled that contracts which are ineffective due to common mistake are not

¹⁰ Id at 286-287.

¹¹ Id at 232.

¹² (1831) 8 Bing 14.

¹³ Birks, fn. 1 at 232.

merely voidable, they are in fact void.¹⁴ Therefore, where restitutionary claims are predicated on mistake, there should be no practical distinction between void contracts which have met the formal requirements of offer and acceptance and negotiations which have not. In any event, the result would be the same in the former situation; the plaintiff who renders part performance cannot rely on free acceptance in order to prove an enrichment.

Before leaving the topic of the difficulties in proving an enrichment in certain cases of mistake, more must be said of Birks' notion that free acceptance can serve as a basis for enrichment (as well as an 'unjust factor'). Birks' rationale is best illustrated by his famous window cleaner scenario: a person comes to your house and begins to clean your windows without having been requested to do so. You are aware that these services are not being offered gratuitously, yet you stand idly by, even secrete yourself, in order to take advantage of the window cleaner's misplaced hope that he will be compensated.¹⁵ Birks argues that even though the window cleaner has assumed the risk of his or her own misprediction, the homeowner has now made himself or herself a party to the risk by deliberately passing up an opportunity to reject the services. This, Birks argues, estops the homeowner from asserting that the window cleaner has assumed the risk of misprediction.¹⁶

Aside from the fact that Birks' reasoning flies in the face of the cardinal rule that one cannot foist an affirmative duty upon another to reject unsolicited goods or services,¹⁷ such reasoning does not withstand analysis in contractual situations. For example, in many cases the parties become involved in

¹⁴ Atiyah, P.S. 1989, *An Introduction to the Law of Contract*, 4th edn, Oxford University Press, New York, 234-245. For an interesting discussion of the topic of mistakes and their impact upon the law of unjust enrichment, see Birks, fn. 1 at 146-173. Birks distinguishes between the mistakes which are induced by fraudulent misrepresentation and 'spontaneous mistakes' which result from negligent misrepresentation or no misrepresentation at all. In the former instances, the contracts are merely voidable rather than void. See generally Calamari, J. & Perillo, J. 1990, *Contracts*, 2nd edn, West Publishing Co., St Paul, 299-310 ('Calamari').

¹⁵ Birks, fn. 1 at 265-266.

¹⁶ *Id* at 266.

¹⁷ Mead, G., 'Free Acceptance: Some Further Considerations' (1989) 105 *LQR* 460; Calamari, fn. 14 at 64: 'Silence does not give rise to an acceptance of an offer or counteroffer ... Normally, a party cannot by the wording of his offer turn the absence of a communication into an acceptance and compel the recipient of his offer to remain silent at his peril.'

prolonged negotiations over contractual terms and a contract ultimately results. In these situations, one would be hard pressed to claim that either party has assumed the risk of their own misprediction. On the contrary, the parties have entered into what they consider to be a legally binding contract in order to ensure performance, or compensation for the lack thereof, by the other party.

Although Birks devotes considerable attention to his theory of free acceptance, his discussion is conspicuously devoid of authority to support the proposition that it can be used as either an unjust factor or a basis for enrichment. Birks argues that notwithstanding this absence of authority, there are innumerable cases¹⁸ whose results can only be explained in terms of free acceptance.¹⁹ Though Birks may be correct, plaintiffs who are forced to rely on free acceptance in making out a *prima facie* case in unjust enrichment will face formidable opposition - even under Birks' best case scenario where there has been complete performance. In short, the difficulties in demonstrating an enrichment will, in many cases, prevent the law of unjust enrichment from affording a satisfactory remedy where contracts are ineffective as a result of mistake or error.

Mistakes induced by misrepresentation: can rescission solve the enrichment dilemma?

In contracts which are voidable as a result of misrepresentation, the plaintiff retains the option of pursuing an *in personam* claim in restitution for the value received by the defendant²⁰ subject, of course, to the difficulties that may arise in proving enrichment. On the other hand, where the mistake is induced by misrepresentation, the contract is treated as voidable rather than void.²¹ This means that the defendant has acquired title which is voidable if the plaintiff elects to exercise his or her right to rescind the contract.²² The effect of rescission is to invalidate the contract *ab initio* and re-vest in the plaintiff title

¹⁸ See, for example, *Ramsden v. Dyson* (1866) LR 1 HL 83. But see *Angelopoulos and Sabatino* [1995] 65 SASR 1; *Brenner v. First Artists' Management Ltd* [1993] 2 VR 221. These cases, decided subsequent to Birks' 1989 treatise, held that free acceptance can constitute an enrichment as well as an unjust factor in the law of unjust enrichment.

¹⁹ Birks, fn. 1 at 277-279.

²⁰ *Id* at 172-173.

²¹ *Id* at 171.

²² *Ibid*.

to the *res* held by the defendant.²³ In situations where the plaintiff cannot prove an enrichment or simply prefers a return of the *res*, rescission is indicated. However, as one might expect, there are limitations on the use of rescission to effect restitutionary claims *in rem*; namely, the plaintiff must be able to make counter-restitution and rescission will not be allowed if the rights of innocent third parties would be prejudiced.²⁴

With regard to the latter limitation, the sale of the *res* to an innocent third party will bar the plaintiff from rescinding.²⁵ Since the defendant has only voidable title and the third party's title necessarily depends on the defendant's title, allowing the plaintiff to rescind would prejudice the third party by disgorging him or her of the *res* and revesting title in the plaintiff.²⁶ Although an exception is made to allow rescission where the defendant has received money and transferred it to an innocent third party who gave value in exchange (here, the third party's receipt is protected from the effects of rescission on the theory that where only money is involved, even if traceable, the third party's title does not depend on the defendant's title),²⁷ situations will arise where the intervention of a third party will deprive the plaintiff of a remedy in unjust enrichment. Though the plaintiff may have an available remedy in deceit or negligence, this serves well to illustrate that the law of unjust enrichment has serious limitations in providing an adequate remedy where contracts are ineffective due to mistake or error.

The same can be said of the former limitation on the right of rescission - the requirement that the plaintiff make counter-restitution. When counter-restitution is made *in specie*, the plaintiff has satisfied this condition even if the benefit has declined in value, so long as the depreciation cannot be attributed to fault on the part of the plaintiff.²⁸ Moreover, unless the plaintiff was at fault, he or she need not compensate the defendant for the amount of the depreciation.²⁹

²³ Ibid.

²⁴ Id at 171-172.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Id at 172-173.

²⁸ Id at 416-417.

²⁹ Ibid.

But what of the situations where counter-restitution cannot be affected *in specie*? In cases where the plaintiff has consumed all or part of what he or she has received from the defendant, it is apparent that there can only be counter-restitution in the form of money or some other substitute.³⁰ Yet subject to a few exceptions, the traditional common law approach has been to disallow counter-restitution in substitute form.³¹ Although one of these exceptions has been in granting the remedy of rescission, even here the courts will allow counter-restitution in the form of a money substitute only if it can be achieved in a just and practical manner.³² As one might expect, the law is quite unsettled on the question of what is just and practical in any given set of facts. In the final analysis, the plaintiff will be left without a remedy in rescission in many situations where he or she cannot effect counter-restitution *in specie*.

Even where the plaintiff pursues an *in personam* claim in unjust enrichment, he will be confronted with the same requirement of making counter-restitution and all its attendant difficulties.³³ Thus, the general reluctance of courts to place a monetary value on incomplete performances³⁴ will prevent the law of unjust enrichment from affording an adequate remedy in certain cases where contracts are ineffective due to mistake or error.

One final comment on the defence of failure to make counter-restitution. If the plaintiff has received nothing from the defendant, then of course the defence will not be available; there is simply no counter-restitution to be made.³⁵ In addition, the defence is unavailable to the defendant if the benefit was one that he 'ought not to have conferred or ought to have conferred without exacting any charge or other recompense ...'.³⁶ This pertains to benefits conferred in consideration of illegal conduct or benefits conferred as the *quid pro quo* for benefits which the defendant had no legal right to exact a price for.³⁷

³⁰ Id at 417; *Goss v. Chilcott* [1996] 2 All ER 180.

³¹ Birks, fn. 1 at 417-424.

³² Id at 421-423.

³³ Id at 415-416.

³⁴ Id at 244-245.

³⁵ Id at 415.

³⁶ Ibid.

³⁷ Id at 423-424.

When enrichment can be demonstrated, how will its value be measured?

When the enrichment is in the form of money, problems of valuation will not arise. On the other hand, where the enrichment consists of goods or services, a myriad of difficulties and policy considerations come into focus. For example, take the situation that arises when the plaintiff renders complete performance under a building contract which is unenforceable for lack of compliance with statutory formalities. Assume that, as in *Pavey & Matthews Ltd v. Paul*,³⁸ performance by the builder will not remove the contract from the purview of the statute. Assume also that the builder has not received any portion of the contract price for his or her performance.

This appears to be a simple case of free acceptance or, if you prefer, a combination of total failure of consideration (unjust factor) and free acceptance (enrichment). In fact, this is a case where mistake could also be used as an unjust factor in making out a *prima facie* case of restitution; specifically, there is a mistake of fact as to the existence of an enforceable contract.³⁹ Moreover, there can be no doubt that the enrichment has been 'at the expense'⁴⁰ of the plaintiff by virtue of 'subtraction.'⁴¹ Assume further that since the inception of the unenforceable contract, the market value of the completed structure has risen substantially.

Assuming that the builder is successful in persuading the court that allowing restitution will not defeat the policy objectives sought to be achieved by the statutory formalities,⁴² what should be the measure of his recovery? There are two likely possibilities: the builder may recover the current fair market value, or he or she may be confined to the contract price.⁴³

There is certainly a case to be made that the defendant's liability should be limited to the price he bargained for under the contract. This amounts to a subjective approach in which valuation is to be measured from the perspective

³⁸ (1987) 162 CLR 221.

³⁹ Birks, fn. 1 at 151-152.

⁴⁰ Id at 132-133.

⁴¹ Ibid.

⁴² See *Pavey & Matthews*, fn. 38.

⁴³ Arrowsmith, S., 'Ineffective transactions, unjust enrichment and problems of policy' (1989) 9 *Legal Studies*, 307-322 ('Arrowsmith').

of the recipient - what the performance is worth to him or her. When viewed from this perspective, the value of the plaintiff's performance can easily be measured in terms of what the defendant was willing to pay under the contract.⁴⁴ There is much practicality in this approach, particularly in light of the fact that the plaintiff attached a similar value to the performance when he or she agreed to perform at the contract price.

On the other hand, a cogent argument exists that such an approach leaves the defendant with a windfall. By limiting the plaintiff's recovery to the contract ceiling, the defendant is actually getting the benefit of a bargain he or she made under an unenforceable contract. Equally troubling is the possibility that the market value may have fallen substantially since the inception of the contract. If the plaintiff is allowed to recover the contract price, the defendant is made to suffer the consequences of a bad bargain under an unenforceable contract. Unless the market has remained stagnant, the parties will reap the benefits and losses of an unenforceable bargain. Theoretically, it is only in contract law that the risks of bargaining are allocated in this manner. Thus, in cases where enforceable contracts are breached, the aggrieved party is generally entitled to expectation damages that will place him or her in the position he or she would have enjoyed had the contract been fully performed; that is, he or she is entitled to the benefit of his or her bargain.

But here, there is no enforceable contract. If that is so, then why should the measure of restitution be governed by the terms of the contract? Perhaps this is simply a convenient method of valuation. After all, the agreed upon price is convincing evidence of the value that each of the parties ascribed to the performance.⁴⁵ This raises the fundamental question of what the goal of the law of unjust enrichment is or ought to be. If the goal is to restore, as near as possible, the *status quo ante*, then it is difficult to reconcile this goal with an approach that measures valuation from the viewpoint of the recipient. This can be seen in the example above. If the market price has risen, the defendant will be in a better position - and the plaintiff in a worse position - than prior to the formation of the contract. It appears more consonant with restoration of the *status quo ante* to measure recovery through an objective standard based on current market value. This will extract from the recipient no more than the actual worth of what he or she has received and, at the same time, allow

⁴⁴ Ibid.

compensation to the plaintiff commensurate with the present value of his or her performance. Although this approach will undoubtedly cause hardships, it avoids the practice of transforming restitution into a mirror image of the risks allocated under an unenforceable contract.

Arrowsmith would argue in favour of a more flexible approach in which valuation in ineffective transactions would be influenced by the factors giving rise to the ineffectiveness.⁴⁵ This seemingly benign approach is laden with difficulties, not the least of which is that it smacks of a comparative fault approach to valuation. In nearly all transactions which are ineffective as a result of mistake or error, one or both parties are at fault. If the law of unjust enrichment is designed to restore the *status quo ante*, then why should the relative fault of the parties bring about winners and losers through the process of valuation on a sliding scale? In addition, applying a comparative fault approach to valuation would grossly exacerbate the complexities of the law of unjust enrichment, as though there were not enough already. For example, would the courts apply principles of negligence and gross negligence? If the parties are equally negligent, should valuation be done on an objective or subjective basis? If one party is guilty of negligence and the other guilty of fraud, how would this affect valuation?

Although none of the aforementioned approaches is entirely satisfactory, I favour the objective approach because it appears to comport best with what I have always understood to be the veritable goal of restitution: that of restoring the *status quo ante*.⁴⁶ I might add that an objective approach may provide an incentive for the parties to exercise greater care in protecting themselves from the consequences of ineffective transactions. The fact remains, however, that none of these methods of valuation has been universally accepted by the courts.⁴⁷ To the extent that subjective valuation leads to results which are inconsistent with the restoration of the *status quo ante*, the law of unjust enrichment fails to provide an adequate remedy in cases where contracts are ineffective due to mistake or error.

⁴⁵ Ibid.

⁴⁶ Burrows, A.S., 'Contract, tort and restitution - a satisfactory division or not?' (1983) 99 *LQR* 217 at 217-239 ('Burrows'); Birks, fn. 1 at 10, 11, 15.

⁴⁷ Arrowsmith, fn. 43.

Cases where an incapax has been enriched

Another problematic area is that of contracts which are ineffective because one of the parties lacked the authority or capacity to contract. Contracts entered into by minors, the mentally disabled, and corporations acting *ultra vires* fall under this rubric.

Although the law of unjust enrichment is quite unsettled insofar as transactions of this type are concerned,⁴⁸ it appears to be the general rule that an incapax who can establish a *prima facie* case of unjust enrichment can recover against the other party.⁴⁹ If it is the incapax who has received the benefit, the general rule is that he or she is liable in restitution for those enrichments which are 'necessities'; that is, 'those things which the defendant, given his means and position, could be expected to acquire as a matter of course quite apart from his incapacity.'⁵⁰ On the other hand, where the incapax has received a non-necessary benefit, the prevailing view seems to be that he will not be liable in restitution. According to Birks, recovery in restitution should be disallowed in these situations for the very same reasons why the contracts are unenforceable; there is a lack of legal capacity to request or accept the benefit and, hence, there is no basis to show a benefit.⁵¹ Birks distinguishes these situations from those in which the incapax is liable for 'necessaries.' In the latter situations, the 'necessaries' constitute 'incontrovertible benefits'⁵² as 'anticipated necessary expenditures.'⁵³

Arrowsmith takes issue with Birks' reasoning and argues in favour of restitutionary claims against an incapax irrespective of whether the benefit received can be characterised as a 'necessary'.⁵⁴ According to Arrowsmith, Birks' distinction between anticipated necessary expenditures and other forms of enrichment is highly fictional.⁵⁵ She argues that the better and more realistic approach is to determine the issue of enrichment by the same standards that

⁴⁸ Birks, fn. 1 at 432.

⁴⁹ Arrowsmith, fn. 43.

⁵⁰ Birks, fn. 1 at 433.

⁵¹ Arrowsmith, fn. 43.

⁵² Birks, fn. 1 at 116.

⁵³ *Id* at 117.

⁵⁴ Arrowsmith, fn. 43.

⁵⁵ *Ibid*.

would be applicable in ordinary transactions.⁵⁶ If money has been received or goods or services freely accepted, the fact of enrichment should be conceded and attention should then focus on the issue of whether restitution should be permitted as a matter of public policy.⁵⁷

Addressing herself to this issue, Arrowsmith enunciates several policy considerations which counsel in favour of permitting recovery. First, she argues that there is a stronger public policy in reversing unjust enrichment than in enforcing contracts. Therefore, she argues, Birks is incorrect in his assertion that the same underlying reasons which make *ultra vires* contracts unenforceable should militate against recovery in restitution.⁵⁸ While Arrowsmith cites no authority to support her basic premise, some support can be found in the fact that restitution is available in many cases where contracts are unenforceable. Some examples are cases involving illegal contracts where the parties are not 'in pari delicto',⁵⁹ contracts void or voidable as a result of mistake, contracts which are unenforceable for failure to comply with statutory formalities,⁶⁰ and even contracts which are ineffective due to lack of capacity.

Arrowsmith finds further fault with Birks' position that the same reasons which make *ultra vires* contracts unenforceable should also prohibit recovery in restitution. Arrowsmith asserts that the major policy consideration underlying contract enforcement is economic; namely, the 'efficient breach' doctrine which stands for the proposition that performance should be directed to where it is most valued. Therefore, breaches that are undertaken for economic gain are to be encouraged so long as the aggrieved party is compensated in a manner that will ensure that he receives the benefit of his bargain.⁶¹ Therefore, when the failure to perform contractual duties is attributable to some other factor such as an *ultra vires* act, the 'efficient breach' rationale disappears and thus, there is no longer a need for enforcement. In the law of unjust enrichment, however, the 'efficient breach' doctrine is not a relevant consideration. Therefore, while

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Birks, fn. 1 at 424.

⁵⁹ Ibid.

⁶⁰ Id at 425.

⁶¹ Id at 426.

an *ultra vires* act may be a justification for the non-enforcement of a contract, it is not a justification for denying recovery in restitution.⁶²

Finally, Arrowsmith correctly points out that the notion of *ultra vires* does not protect public authorities or private corporations from tort liability. This represents a policy judgment that the interest in preserving funds for the benefit of the public at large or corporate shareholders is subordinate to the interest of compensating the victims of tortious acts.⁶³ Therefore, it is argued, the interest of reversing unjust enrichment should also be paramount to the interest in preservation of funds for the benefit of the public or corporate shareholders.

In evaluating the arguments set forth by Birks and Arrowsmith and the general rule that restitutionary claims against an incapax are disallowed except in the case of 'necessaries,' the question of whether the law of unjust enrichment provides a satisfactory remedy is largely in the eyes of the beholder. I agree with Arrowsmith that Birks' distinction between anticipated necessary expenditures and other enrichments is too artificial and tenuous to support the present state of the law. I also agree that the better and more sincere approach is to apply the normal tests for enrichment and then decide, as a matter of policy, whether recovery should be permitted. Finally, I agree with Arrowsmith's conclusion that the laws of contract and unjust enrichment are not analogous in terms of the legal consequences of *ultra vires* acts. In terms of the ultimate policy considerations, I can find no compelling reason to limit restitutionary claims to 'necessaries' in cases where contracts are ineffective as a result of incapacity. Where minors are concerned, it is absurd to hide behind the fiction that even though a benefit has been requested, accepted, or even used or consumed, it cannot be an enrichment unless it falls within the heading of 'necessaries.' In modern society, there are no debtors' prisons. If a *prima facie* case of unjust enrichment can be made out against a minor, he may well have the financial means to satisfy a judgment. If he does not, the loss will then fall on the other party. While minors need protection from themselves and unscrupulous adults with whom they contract, it is often the unscrupulous minor who has induced the adult to contract through misrepresentation. Therefore, the policies underpinning the law of unjust enrichment and the protection of minors are not well served by an inflexible rule that bars

⁶² See *Pavey & Matthews*, fn. 38.

⁶³ Arrowsmith, fn. 43.

restitution in practically all cases where a minor has contracted. One solution might be to lower the age of contractual capacity to a more realistic level. Another might be to allow the courts to deal with this issue on a case by case basis.

Where public authorities and private corporations are concerned, their fiduciary responsibilities vis-a-vis the public and shareholders respectively cannot be discounted. Yet in discharging these responsibilities, they must exercise due care in avoiding precisely the types of *ultra vires* acts which lead to ineffective contracts and restitutionary claims. Though I have already expressed grave reservations over adopting a comparative fault approach in the law of unjust enrichment, it is difficult to argue with the fact that in cases such as these, the fiduciary party is in a better position to know, indeed it has a duty to know, whether its actions are *ultra vires*. Further, as a matter of policy, it seems more equitable to place the risk of loss on the party who is best able to spread the risk. Though this argument is inapplicable in situations where equally well-capitalised corporations contract with one another, it has considerable force in situations where a private consumer or small business contracts with a public authority or major corporation. Finally, I agree with Arrowsmith that in any case, the interest in reversing unjust enrichment is stronger than the interest in preserving funds for the benefit of the public at large or the shareholders of corporations. It follows, therefore, that this is yet another area where the law of unjust enrichment does not provide an adequate remedy when a contract is ineffective due to error or mistake.

Illegality

In contract law, illegal contracts are void and unenforceable.⁶⁴ If any of the contractual duties are illegal, then the entire contract is considered illegal. Moreover, even if the contractual duties are legal on their face, the entire contract will be treated as illegal if both parties contemplated that there would be illegality in its performance.⁶⁵ If the contractual duties are facially legal and one party, unbeknown to the other, commits an illegal act during performance, the law will allow only the innocent party to enforce the contract.⁶⁶

⁶⁴ Ibid.

⁶⁵ Birks, fn. 1 at 300-301.

⁶⁶ Atiyah, fn. 14 at 356-370.

In cases where contracts are unenforceable due to illegality, the law of unjust enrichment follows a similar but not identical pattern. Even if the entire contract is illegal, it is possible that one of the parties may be mistaken as to the facts giving rise to the illegality. It is also possible that the other party may have fraudulently induced him or her into believing that the contract was legal.

In cases such as these the law will not consider the parties to be '*in pari delicto*'; that is, the law will not look upon them as equally culpable.⁶⁷ The same is true of a party who is aware of the illegality but openly repents before the illegal plan has reached fruition.⁶⁸

When the parties are *in pari delicto*, neither party is permitted to recover in unjust enrichment.⁶⁹ In these situations, the courts have adopted the position that when the parties are both culpable, the defendant will be in the stronger position.⁷⁰ The policy of denying recovery to one who is culpable serves two important objectives. First, it prevents a disgraceful party from invoking the power of the courts to compel the other party to perform an illegal act.⁷¹ Second, it serves as a deterrent to illegal activity in two ways: first, by denying the plaintiff recovery, he or she is forced to incur the risk that the party with whom he or she has contracted may refuse to perform and retain a windfall; second, the defendant will have less of an incentive to perform the illegal act if he is aware that the law will allow him or her to retain the benefit regardless of whether he performs.⁷² Here, it is difficult to argue with either the policy or its objectives. In that sense, the law of unjust enrichment does provide an adequate remedy for an ineffective transaction - none.

When the parties are not *in pari delicto*, the innocent party may recover in unjust enrichment, assuming, of course, that he is able to make out a *prima facie* case. This result is consonant with the aforementioned policy objectives and thus, here too the law of unjust enrichment provides an adequate remedy.

A difficult situation arises, however, where the contract is not itself illegal, but one of the parties violates the law in performing their contractual obligations.⁷³

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Birks, fn. 1 at 300-301.

⁷⁰ Id at 301-303.

⁷¹ Id at 299-302.

⁷² Ibid.

⁷³ Ibid.

Until recently, the prevailing view was to deny recovery to the guilty party or at least deny it with respect to that portion of his performance that was tainted by the illegality.⁷⁴ The modern trend, however, is to adopt a more flexible approach which takes into account the type of illegality involved, the policies sought to be achieved by the law in question, and the penal sanctions that are to be imposed on the violator.⁷⁵ If the illegality does not involve moral turpitude and the sanctions to be imposed are commensurate to the seriousness of the plaintiff's misdeeds, the trend is to allow recovery unless doing so would undermine the underlying policy objectives of the statute in question.⁷⁶

The law of unjust enrichment involves a continual balancing of competing interests which arise in various contexts. In my opinion, the foregoing approach strikes a reasonable balance between the need to sanction and deter illegality and the interest in reversing unjust enrichment. Since the defendant is not a party to the plaintiff's illegality and does not contemplate illegality in his own performance, allowing recovery against him could not be used as a lever to compel the performance of any illegal contractual duties. Similarly, since the defendant has no illegal obligations to perform, according him immunity from restitution and a windfall benefit will not provide an incentive to refrain from violating the law. And if the plaintiff's misdeeds are of the *malum prohibitum* species, it may be an overstatement to claim that he is a disgraceful plaintiff who should not receive assistance from the courts. Indeed, a denial of recovery may act as a deterrent in some cases, but one must bear in mind that while ignorance of the law is not a defence, it is often a reality - especially in a modern society laden with *malum prohibitum* regulations. Given this reality, the denial of restitution may have little or no deterrent effect in many cases. When one factors in the sanctions to be imposed, it appears that, on balance, a denial of recovery in unjust enrichment would be Draconian. It must be emphasised that the trend toward a more flexible approach is just that, a trend. To the extent that courts reject this approach and adhere to the old hard line, the law of unjust enrichment will not afford an adequate remedy in ineffective transactions of this type.

3. Conclusion

It is my hope that the foregoing has highlighted some of the key areas in which the law of unjust enrichment does not afford an adequate remedy where

⁷⁴ Ibid.

⁷⁵ See *Jamieson v. Watts Trustees*, 1950 SC 265.

contracts prove to be ineffective as a result of mistake or error. As the law of unjust enrichment progresses through its incipient stages and a more clear and consistent body of law begins to emerge, I am hopeful that many of these gaps will be filled. Indeed, at various points in this discussion, I have taken the liberty of offering what is at least a framework for the resolution of some of these difficulties.

⁷⁶ Ibid.

